Yano et al. v. Kadoi, 3 ROP Intrm. 174 (1992)

ROMAN YANO, DILUBCH RECHEBEI, VIVIANA UCHERBELAU, TUTOUD NGIRALMAU, SYLVIA TANGELBAD, IGNACIO MOREI, SALVADOR TELLAMES, TOBIAS MARBOU, VICENTE BRELL, JOHNNY YAOCH, RICARDO NGIRKELAU, SCOTT YANO, KIOSHI RENGIIL, DOUGLAS SAIWACKI, EUGENE UEHARA, MARCIANO IMEONG, LAWRENCE IERAGO, and GEORGE KEBEKOL,
Petitioners-Appellees,

v.

CONGRESSIONAL REAPPORTIONMEN COMMISSION,
represented by its Chairwoman, Christina Kadoi,
Respondent-Appellant.

CIVIL APPEAL NO. 17-92
Civil Action No. 13-92

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: September 14, 1992

Attorney for Petitioners: William L. Ridpath

Attorney for Respondent: Gerald G. Marugg III

⊥175

BEFORE: ARTHUR NGIRAKLSONG, Acting Chief Justice; ALEX R. MUNSON[1], Part-Time Associate Justice; ROBERT HEFNER[2], Part-Time Associate Justice

PER CURIAM:

Procedural History

This lawsuit commenced on January 7, 1992, with the filing of a Petition for Review and Amendment of Reapportionment Plan. All petitioners are registered voters and members of the Koror State Legislature. On January 29, 1992, the Trial Division invited the filing of amicus briefs by interested parties.

Respondent Reapportionment Commission answered on February 17, 1992.

On April 14, 1992, respondent moved to dismiss the petition, arguing that there was no

[1] The Honorable Alex R. Munson, Chief Judge, United States District Court for the Northern Marianas Islands, sitting by designation.

[2] The Honorable Robert A. Hefner, sitting by designation.

justiciable controversy because petitioners had failed to allege or show any impairment of their constitutionally protected right to vote.

A petition to intervene was filed on April 21, 1992, on behalf of all voters in the Babeldaob Senatorial District. The motion to intervene was denied on April 24, 1992, as untimely and ⊥176 not in conformance with Rule 23 of the Palau Rules of Civil Procedure.

That same day, petitioners filed their opposition to the motion to dismiss.

Respondent's motion to dismiss was denied on May 12, 1992.

Petitioners filed their trial brief June 2, 1992. One amicus brief was also filed that day, by a registered voter of Melekeok. Respondent filed its trial brief June 3, 1992. A joint pre-trial statement was filed June 4, 1992.

Trial was held on June 11, 1992. The decision granting the petition and amending the reapportionment plan was issued July 17, 1992. This appeal was timely filed by the Commission, appellant herein.

Facts

Article IX, § 4(a) of the Palau Constitution provides for the creation of a Reapportionment Commission every eight years. Not less than 180 days before the general election, the Commission is to "publish a reapportionment or redistricting plan for the Senate based on population, which shall become law upon publication." *Id.*

Section (c) of Article IX vests original jurisdiction in the Supreme Court "to review the plan and to amend it to comply with the requirements" of the Constitution, upon petition of any voter within sixty days of the plan's promulgation.

The Olbiil Era Kelulau passed Republic of Palau Public Law ⊥177 (RPPL) 3-45, which provides in part in § 8:

> Criteria of reapportionment or redistricting; exemption
>
> (a) In developing a plan based on population, the Commission shall consider the following criteria:
>
> 1. the 1990 census conducted pursuant to RPPL No. 3-23, as amended;
>
> 2. the principle that no citizen shall be denied the equal protection of the laws;
>
> 3. the expense of operating the Senate of the Olbiil Era Kelulau; and,
>
> 4. the principle that no purposeful orientation shall be given to senatorial incumbents.

(b) In addition, the Commission may consider the following criteria:

1. the propriety of single member districts; and

2. patterns of voter registration.

On December 31, 1991, the Commission published its reapportionment plan. The plan provided for thirteen senators, divided amongst three districts: District I to have five senators, representing Kayangel, Ngarchelong, Ngaraard, Ngiwal, Melekeok, Ngchesar, Airai, Ngardmau, Ngaremlengui, Ngatpang, and Aimeliik; District II to have seven senators, representing Koror; and, District III to have one senator, representing Angaur, Peleliu, Hatohobei, and Sonsorol.

The Commission, in attempting to strike the proper balance of voter representation under its mandate, proposed that there be thirteen senators. To arrive at the goal of each vote having equal weight, the Commission first divided the total population by thirteen, to arrive at a "population ideal." Next, it took the ⊥178 total number of registered voters and divided that figure by thirteen, to determine the "voter ideal." The "population ideal" and the "voter ideal" were then averaged to determine the population/voter ideal, which figure the Commission used in determining its deviations from the one person-one vote ideal. Under the Commission's plan, one senator would ideally represent 998 people.

A week after the plan was published, petitioners filed this lawsuit. They alleged that the plan violated both Article IX, § 4 of the Palau Constitution, because it was not based solely on population, and Article IV, § 5, because it denied them and the other people of Koror equal protection of the laws. They claimed to be under-represented when the entire population of Koror was considered.

Respondent replied that petitioners had no standing because they had shown no impairment of their voting rights, that the plan actually provided more representation to Koror than any other district (based on citizen population), and that the plan properly took into account voting registration patterns to help insure closer adherence to the one person-one vote principle.

The trial court agreed with petitioners that the plan as submitted violated the "plain language" of the Palau Constitution. The court relied on the language in Article IX, § 4(a) that any reapportionment plan be "based on population," and faulted the plan for giving equal weight to population and voter registration.

⊥179 Then the trial court, relying on Article IX, § 4(c), amended the plan to bring it into compliance with the Palau Constitution. After reviewing all the plans which had been submitted, and weighing the interests involved, the trial court formulated a reapportionment plan that provided for fourteen senators, rather than thirteen. In its version, based on population, the court said it gave some weight to all relevant factors, including voter registration, and kept the same three districts. The court's plan provided four senators for District I, nine for District II, and one for District III.

This appeal followed.

Issues

Appellant frames five issues on appeal:

1. Whether the trial court erred by denying appellant's motion to dismiss for failure to state a claim upon which relief can be granted;

2. Whether the trial court erred by failing to dismiss upon appellant's oral motion at trial that appellees had no standing;

3. Whether the trial court erred when it read the Article IX, § 4(a) requirement that a reapportionment plan be "based on population" to mean all residents of Palau;

4. Whether the trial court erred by not applying *Burns v. Richardson* , 384 U.S. 73, 86 S.Ct. 1286 (1966); and,

5. Whether the trial court's amended reapportionment plan itself violates Article IV, § 5 of the Palau Constitution.

⊥180 Analysis

1. Whether the trial court erred by denying appellant's motion to dismiss for failure to state a claim upon which relief can be granted.

2. Whether the trial court erred by failing to dismiss upon appellant's oral motion at trial that appellees had no standing.

The first two issues are easily addressed. In considering a Rule 12(b)(6) motion the trial court was required to construe the petition liberally in the light most favorable to petitioners and to treat as true every allegation therein. *See, e.g., Scheuer v. Rhodes* , 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).

Article IX, § 4(c) provides:
Upon the petition of any voter within sixty (60) days after the promulgation of a plan by the reapportionment commission, the Supreme Court shall have jurisdiction to review the plan and to amend it to comply with the requirements of this Constitution.

The Constitution's provision that upon the petition of <u>any</u> voter this Court has

jurisdiction, combined with petitioners' assertion that they are registered voters who are seriously under-represented in the original plan, not only stated a claim upon which relief could be granted, but also properly invoked the jurisdiction of this Court. The same language clearly gave appellees standing to challenge the plan. There was no error.

⊥181 3. Whether the trial court erred when it read the Article IX, § 4(a) requirement that a reapportionment plan be "based on population" to mean all residents of Palau.

Appellant argues that the trial court erred by interpreting the phrase "based on population" to mean almost exclusively census population. Because of the presence in Koror of large numbers of non-citizens and voters registered elsewhere, and their inclusion in the census, appellant maintains that Koror is now over-represented in the trial court's amended plan.

The parties and the court below both relied extensively on *In re Eriich, et al. v. Reapportionment Commission*, 1 ROP Intrm. 134 (Tr. Div. 1984), *aff'd in part and amended in part*, 1 ROP Intrm. 150 (App. Div. 1984). Petitioners there sought review of the 1984 Reapportionment Plan. In deciding the case on equal protection grounds, the trial court noted that the law developed in the United States [3] along two lines, depending upon whether the reapportionment plan involved dealt with the U.S. House of Representatives [4] or state legislative seats.[5] In the former, Article 1, § 2 of the U.S. Constitution requires that numerical ⊥182 representational equality be achieved as closely as is practicable. In the latter, some deviation between districts is constitutionally acceptable if the deviations are "based on legitimate considerations, incident to the effectuation of a rational state policy." *Roman v. Sincock* , 377 U.S. 695, 84 S.Ct. 1449 (1964).

Citing Palau's unique combination of culture, politics, geography, and population, the *Eriich* court drew from both lines of cases and developed this Court's test for review of a reapportionment plan under the equal protection clause of the Palau Constitution. When reviewing such a plan, this Court must first examine the existing deviations in the plan and determine if they can be reduced. Second, if the deviations can be reduced, we must consider other arguments made in favor of the existing plan by its drafters, to see if they represent legitimate national interests. Finally, we must strike a balance between the deviations from strict mathematical equality and the asserted national interests. *Eriich*, 1 ROP Intrm. at 143-144. The trial court here analyzed the 1992 Reapportionment Plan in the manner set forth in *Eriich*. There are no compelling reasons to set aside this approach, and neither party suggests that the Court do so.

It is well-established that "[w]here the language is plain and admits of no more than one meaning, the duty of interpretation does not arise[.]" *Caminetti v. United States* , 242 U.S. 470, 485-486, 37 S.Ct. 192, 194 (1917). And, "words are uniformly presumed, unless the contrary

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[3] The *Eriich* court noted that Palauan courts are not bound by decisions emanating from U.S. courts but that reference to such decisions can offer guidance. *In re Eriich*, 1 ROP Intrm. at 137, n. 3. We agree.

[4] *See, Wesberry v. Sanders*, 376 U.S. 1, 84 S.Ct. 526 (1964), and its progeny.

[5] *See, Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362 (1964) and later cases.

appears, to be used in their ordinary and usual ⊥183 sense, and with the meaning commonly attributed to them." *Id.* In reviewing the plan here, the trial court strictly interpreted the constitutional requirement that the reapportionment plan be "based on population," and faulted the Commission for giving population and voter registration equal weight. [6] The court found that the existing plan deviations could be reduced --- and were constitutionally required to be reduced --- by relying on total population figures from the census. The court carefully and concisely amended the plan to reduce the deviations and bring them closer to the one person-one vote ideal. When asked to consider countervailing "legitimate national interests," the trial court replied that no asserted interests could be used to substantially alter the constitutional mandate to base the plan on population. We agree. Because the Commission's plan was fatally flawed by the equal weight given population and voter registration and because the trial court's decision resulted in an amended plan with reduced deviations more closely approximating the one person-one vote ideal, the decision can be and is AFFIRMED. However, based on the analysis below, we conclude that "based on population" was originally assumed to mean "citizen population" and amend the trial court's decision accordingly.

⊥184 Neither the trial court nor the parties seriously questioned the intended meaning of "based on population." Appellant directed the court's attention to *Burns v. Richardson*,[7] cited above, for the proposition that neither non-residents nor aliens need be included when determining "population." The trial court in its decision stated that *Burns* "is not authority in Palau and it is factually distinguishable," but did not elaborate. While, as noted above, this Court is not bound to mechanically embrace United States case law, we are certainly free to adopt the rationale set forth therein if we find it persuasive.

It must be stressed that equal protection is here being argued in the context of the right to vote (which only a citizen possesses) as opposed to all persons' right to equal protection under the laws of the Republic of Palau. The one person-one vote principle need only encompass citizens, and not all residents of Palau.

We conclude, for the following reasons, that the Palau Constitution's requirement that reapportionment be "based on population" was intended to mean "citizen population." Article VII of the Palau Constitution provides that only citizens of Palau can vote in Palauan state and national elections. Article IV, § 5 of the Palau Constitution provides in part that:

> Every person shall be equal under the law and shall be entitled to equal protection. The government shall ⊥185 take no action to discriminate against any person on the basis of sex, race, place of origin, language, religion, or belief, social status or clan affiliation except for the preferential treatment of citizens, ...

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[6] Even though it ultimately found fault with the Commission's plan, the trial court praised the efforts of the Commission and the thoroughness with which the Commission approached its task. We agree with the trial court: the Commission admirably performed a job made extremely complex by the uniqueness of Palauan custom, geography, and politics.

[7] *See* Issue No. 4, *infra*.

Indeed, RPPL 3-45 states in § 8(a)(2) that the Commission must adhere to "the principle that no citizen shall be denied the equal protection of the laws[.]" (Emphasis added.)

There is nothing in the record before the Court to indicate that the Article IX, § 4 language "based on population" was intended to mean all population, citizen and non-citizen alike. To the contrary, such history as there is, and as cited in *Eriich* at 138-39, indicates that delegates to the Constitutional Convention in 1978 intended "population" to mean "resident population," which in turn only included citizens, since the discussion centered on population shifts in Palau as travel between the states grew easier and clan and village affiliation perhaps grew correspondingly weaker. There is nothing in *Eriich* --- and neither party has offered anything here --- to suggest that "population" was ever intended to mean other than "citizen population."

As the *Burns* Court noted:

> We start with the proposition that the Equal Protection clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured. Although total population figures were in fact the basis of comparison in that case and most of the other decided that day, our discussion carefully left open the question what population was being referred to. At several points, we discussed substantial equivalency in terms of voter population or citizen population, making no distinction between the acceptability of such test and a test ⊥186 based on total population. Indeed, in *WMCA, Inc. v. Lomenzo* , 377 U.S. 633, 84 S.Ct. 1418, 12 L.Ed.2d 568, decided that same day, we treated an apportionment based upon United States citizen population as presenting problems no different from apportionments using a total population measure. Neither in *Reynolds v. Sims* [377 U.S. 533, 84 S.Ct. 1362] nor in any other decision has this Court suggested that the states are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.

Burns v. Richardson, 384 U.S. at 92-93, 86 S.Ct. at 1296-97.

Here, however, the inclusion of non-citizens in the reapportionment plan does give us a "constitutionally founded reason to interfere." That is, the plan as drafted did deny equal protection to citizens in the context of reapportionment. In *Burns*, the state reapportionment plan relied on voter registration. The Supreme Court upheld that plan against an equal protection challenge " only because . . . it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population base." (Emphasis added.) *Id.* However, due to the small size of the electorate in Palau the presence in a district of even a few hundred non-residents can dramatically skew the "population" and result in increased political power for the citizens of that state, with no

corresponding obligation for elected officials to represent ⊥187 all the population, and not just the citizens.[8] In other words, in states with large populations, the inclusion of all residents in a reapportionment plan, even non-citizens, might have no statistically significant effect on one person-one vote representation. In Palau that would manifestly not be the case. When calculating an election district, it would be incongruous to allow Koror State to benefit from the influx of non-citizens in the form of increased representation in the national senate, while those elected from Koror would have absolutely no duty to respond to the needs and aspirations of their non-citizen "constituents."

The Reapportionment Plan became law upon its publication. Article IX, section 4(a). In reviewing the Plan, it is clear that the Commission incorporated census data compiled in the Appendices. The parties do not argue about total population figures or total voter registration figures. There is a small disagreement over the figures for the alien population, but the differences between alien population figures are not significant. By relying on the census data appearing on page 114 of Appendix B of the Plan, and holding that "population" means "citizen population," the following results obtain. Using the three-district plan recommended by the Reapportionment Commission (and retained by the trial court) and ⊥188 the fourteen senator plan created by the trial court, and relying on the figures from the census, and deducting all non-citizens from each state's population, the following citizen-to-senator ratios result: District I, 3353 citizens divided by four senators = 838:1, District II, 7768 citizens divided by nine senators = 863:1, and District III results in one senator for 862 citizens. This approach results in the closest citizen: senator ratio by far.

Finally, we note that using "citizen population" to calculate electoral districts will make the task of future Reapportionment Commissions much simpler. No longer will they be required to engage in contrived mathematical gymnastics in order to ultimately arrive back at senator: citizen representation ratios that using "citizen population" figures will have provided them from the first. Also, future Commissions will then be better able to more accurately assess and make provision for other "legitimate national interests." *Eriich, supra*.

4. Whether the trial court erred by not applying *Burns v. Richardson* , 384 U.S. 73, 86 S.Ct. 1286 (1966).

Appellant's attorney argues strongly that *Burns* is a rule of decision for Palau courts and that this Court is required to follow it by virtue of 1 Palau National Code (PNC) § 303, which provides in part:

> The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed, as generally understood and applied in the United States, ⊥189 shall be the rules of decision in the courts of the Republic in applicable cases[.]

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[8] For example, if a labor-intensive business requiring high numbers of alien workers were to open in a sparsely populated state of Palau, the addition of a significant number of ultimately transient alien workers would result in a great increase in that district's "population," for purposes of determining senate representation.

However, in citing this statute in his brief, the attorney for respondent omitted from it the phrase ". . . as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed, ..." This omission materially alters the meaning of the statute. This case does not involve "common law," as that phrase is commonly understood; rather, it involves constitutional and statutory interpretation. "Common law," as defined in Black's Law Dictionary (6 th Ed.) "comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs."

This Court is free to interpret the law as it sees fit in light of Palauan law and custom, but has as a practical matter often relied on the "well-developed" body of United States case law. *Eriich*, 1 ROP Intrm. at 137 n. 3. The trial court was not obligated to adopt the reasoning of *Burns*, but was free to do so.

5. Whether the trial court's amended reapportionment plan itself violates Article IV, § 5 of the Palau Constitution.

Appellant argued that the trial court's plan itself resulted in a denial of equal protection. In light of our analysis and ⊥190 decision above, we need not address this argument.

Conclusion

The decision of the Trial Division is AFFIRMED, but amended to reflect that the Palau Constitution's Article IX, § 4 requirement that a reapportionment plan be "based on population" is satisfied when the plan is based on "citizen population."