Wong v. Nakamura, 4 ROP Intrm. 243 (1994)

NANCY WONG and LUCIA TABELUAL,
Appellants,

v.

KUNIWO NAKAMURA, President of the Republic of Palau,
and ELECTION COMMISSION,
Appellees.

ISABELLA SUMANG and VALENTINA TMODRANG,
Appellants,

v.

REPUBLIC OF PALAU, Rep. by its President,
KUNIWO NAKAMURA,
Appellee.

CIVIL APPEAL NO. 7-94
Civil Action Nos. 1-94, 2-94

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: August 9, 1994

Counsel for Appellants: George M. Allen

Counsel for Appellees: John Hinck, AAG

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; PETER T. HOFFMAN, Associate Justice; EDWARD C. KING, Part-time Associate Justice

NGIRAKLSONG, Chief Justice:

On November 9, 1993, the citizens of Palau approved the Compact of Free Association between the Republic of Palau and the United States of America. In this appeal we are asked nonetheless to bar implementation of the Compact. For the reasons stated below we refuse to do so and affirm the trial court's dismissal of the appellants' original complaint.

⊥244 I.

Appellants' principal argument is that the Compact cannot be implemented until the Olbiil Era Kelulau votes once more to approve it. The Palau Constitution requires that any treaty or compact delegating major governmental powers, which, of course, includes the Compact of Free Association, must be approved by not less than two-thirds (⅔) of the members of each house of the Olbii1 Era Kelulau ("OEK") and by voters in a national referendum. See Palau Const. Art. II, § 3.[1]

Appellants focus exclusively on the OEK's 1986 vote to approve the Compact. They argue that this vote no longer satisfies the Compact approval provision of the Constitution because 1) a subsequent referendum on the Compact failed to attain a 75% voter ⊥245 approval; 2) an agreement subsidiary to the Compact, known as the "Guam Accords," was signed by the governments of Palau and the United States in 1989 after the OEK's 1986 vote; and 3) through a 1992 ballot initiative, voters approved an amendment to article II, section 3 of the Constitution lowering the required vote of approval on the Compact by the Palauan electorate from a 75% super-majority to a simple majority.

What appellants ignore is that the OEK approved the Compact again in 1993 by passing RPPL 4-9, the "Compact Implementation Act of 1993." By the requisite two-thirds vote, the OEK approved the "Guam Accords" and other subsidiary agreements negotiated since 1986, see RPPL 4-9, § 4; acknowledged the 1992 constitutional amendment referendum lowering the requisite vote of approval by the Palauan electorate to a simple majority, see id. at § 3(5)(b); and, in response to that referendum, called the November, 1993 plebiscite at which voters ultimately approved the Compact.[2] The OEK's stated purpose in passing the Compact Implementation Act was "to authorize the entry into force of the Compact of Free Association", and "to provide for fulfillment of all requisite steps and actions required of the Government of the Republic of Palau

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[1] Article II, section 3 originally read:

> Major governmental powers including but not limited to defense, security, or foreign affairs may be delegated by treaty, compact, or other agreement between the sovereign Republic of Palau and another sovereign nation or international organization, provided such treaty, compact or agreement shall be approved by not less than two-thirds (2/3) of the members of each house of the Olbiil Era Kelulau and by a majority of the votes cast in a nationwide referendum conducted for such purpose, provided, that any such agreement which authorizes use, testing, storage or disposal of nuclear, toxic chemical, gas or biological weapons intended for use in warfare shall require approval of not less than three-fourths (3/4) of the votes cast in such referendum.

As noted in the text, the final proviso of article II, section 3 was modified for Compact purposes by the constitutional amendment approved in 1992 so that the Compact could be approved by a simple majority of the Palauan electorate.

[2] The 1993 plebiscite was the eighth on the Compact in ten years. See RPPL 4-9, § 4. In each one, more than 50% and fewer than 75% of the electorate voted to approve the Compact.

in order for the Compact of Free Association between the Republic of Palau and the United States of America to take effect." See id. at preamble and § 2. It is clear, then, ⊥246 that in passing RPPL 4-9 the OEK satisfied the Compact approval requirement of Article II, section 3.

II.

Appellants next contend that the Compact should not be implemented because its approval was "procured by coercion." This is not a contention that appellants or others were coerced to vote for the Compact by any kind of force, violence, or intimidation. Instead, appellants' argument is that coercion somehow flows from the fact that the Compact has been repeatedly put forward for votes but, until now, has never been passed by the legally required percentage of voters. Appellants also argue that the United States economically coerced Palau into agreeing to the Compact.

Before the trial court, in opposition to the government's motion for summary judgment, appellants failed to produce any evidence that a single voter had voted for the Compact as a result of this alleged coercion. The trial court noted that appellants' counsel "freely and forthrightly conceded at oral argument [on the government's summary judgment motion] that he did not believe that plaintiffs' claim in this regard could be proven." *Wong v. Nakamura* , Civil Action No. 1-94, Slip Op. at 12 (Tr. Div. March 25, 1994). Indeed, no evidence was presented in opposition to the motion for summary judgment suggesting any coercion had occurred. Since no factual issue was created for trial, summary judgment was properly granted. See ROP R. Civ. Pro. Rule 55(e).

⊥247 III.

Appellants' third claim relates to whether the May 6, 1993 letter from U.S. Secretary of State Warren Christopher constitutes a "favorable response" to suggested Compact modifications. As brief background, RPPL 3-76, the 1992 Act which set the date for the vote on the initiative to lower the voting requirement for approval of the Compact, stipulated that a plebiscite on the Compact could not be called until Palau received a "favorable response" from the United States on certain requested modifications to the Compact. See RPPL 3-76 § 11(1).

In May, 1993, when proposing enabling legislation for a plebiscite on the Compact, President Kuniwo Nakamura informed the OEK that he had received a letter from United States Secretary of State Warren Christopher which he considered to be a "favorable response" to Palau's request for Compact modifications. [3] In RPPL 4-9 the OEK concurred with President Nakamura's determination regarding whether Secretary Christopher's letter was a "favorable response." See RPPL 4-9 § 3(7) and § 5(1). Appellants now claim that Secretary of State

[3] In his letter, Secretary Christopher said he was providing "assurances regarding the United States Government's intentions with respect to implementation of certain provisions of the Compact." He then affirmed various commitments and obligations the United States has undertaken in the areas of military land use rights, funding for federal programs, communications, civil aviation, the construction of the Babeldaob road, and the nuclear provisions of the Compact.

Christopher's letter did not constitute a "favorable response" and that therefore the vote on the Compact was invalid.

⊥248 Appellants conceded below that the "favorable response" issue presents a non-justiciable political question. Here on appeal they do little more than repeat their earlier unsupported argument that it is important to include private citizens in the foreign relations decision-making process. We agree with their earlier concession, with the trial court, and with the two other courts which have addressed this precise issue, that the question of whether Secretary Christopher's letter constitutes a "favorable response" is a non-justiciable "political question." See *Fritz v. Palau*, Civil Action No. 481-93 (Tr. Div. Nov. 2, 1993); *Fritz v. United States*, Civil Action No. 93-24 (D.N.M.I. Feb. 25, 1994).

IV.

Appellants' final argument is that the Compact's eminent domain clauses "violate the fundamental rights of Palau to have a safe and protected environment." As with their other arguments, appellants do not elaborate on or explain this claim, nor do they support it with authority. We have previously held that the Compact's eminent domain clauses are not unconstitutional on their face and that "the question of whether any particular proposed action of the government would be constitutional is not ripe for decision." *Gibbons v. Salii*, 1 ROP Intrm. 333, 356 (1986). Appellants have offered us no good reason to doubt the propriety of that holding.

⊥249 V.

For all the foregoing reasons, the trial court's granting of the defendants' motion to dismiss and for summary judgment is AFFIRMED.