ATTORNEY-GENERAL v THIXTON (1967) ZR 10 (CA)

COURT 20 OF APPEAL

BLAGDEN CJ, DOYLE JA AND EVANS J

10th JANUARY 1967

Flynote and Headnote

[1] **Constitutional law - Accrual of rights - Fundamental rights accrue** 25 **automatically.**

Some rights, in order to become "accrued" or "acquired" for the purposes of section 14 (3) (c) of the Interpretation and General Provisions Ordinance, require some incident or event to occur; others, especially those fundamental to the liberty of the subject, accrue 30automatically by the expiry of some period of qualification.

[2] **Constitutional law - Accrual of rights - Right not to be declared a prohibited immigrant accrues automatically.**

The right not to be declared a prohibited immigrant under section 13 (1) (e) of the Immigration Act is an "accrued" right within 35 section 14 (3) (c) of the Interpretation and General Provisions Ordinance, and the repeal of section 13 (1) (e) did not take away that right from persons to whom it had already accrued.

[3] **Statutes - Interpretation of statutes - Application of the Interpretation and General Provisions Ordinance - Amending legislation.** 40

If the Legislature intends that the Interpretation and General Provisions Ordinance should not apply to amending legislation, section 2 (1) of that ordinance requires that the intention be manifest from the wording of the statute.

1967 ZR p11

BLAGDEN CJ

[4] **Statutes - Interpretation of statutes - Construction of statutes which encroach on the rights of the subject - Strict construction.**

Statutes which encroach on the ordinary rights of the subject must be construed strictly; such rights will only be taken away if the intention to do so appears expressly stated in the statute. 5

[5] **Constitutional law - Reciprocal rights provision in the Constitution - Does not import into Zambia the Immigration Law of the United Kingdom.**

Section 10 (1) of the Constitution does not confer on a citizen of the United Kingdom the same right of immunity from expulsion from 10 Zambia as a Zambian citizen has from expulsion from the United Kingdom.

[6] **Constitutional law - Accrual of rights - Action or event is necessary for a right to accrue**.

Where a general right is given by a statute to a class of persons, 15 whatever the nature of the right it does not constitute a right which is "acquired" or "accrued" for the purpose of section 14 (3) (c) of the Interpretation and General Provisions Ordinance; some further action must be taken or event occur which fixes the right on the particular person concerned. 20

Cases cited:

(1) *Ranger v Greenfield and Wood* NNO 1963 R & N 127.

(2) *Abbot v Minister of Lands* [1895] AC 425.

(3) *Hamilton Gell v White* [1922] 2 KB 422.

(4) *Director of Public Works v Ho Po Sang* [1961] AC 901; [1961] 2 All 25 ER 721.

(5) *Lewis v Hughes* [1916] 1 KB 831.

(6) *Coates v Diment* [1951] 1 All ER 890.

(7) *Duke of Devonshire v O'Connor* (1890) 24 QB D. 468.

(8) *R v Ettridge* [1909] 2 KB 24. 30

(9) *Garydale Estate and Investment Co.* (Ply) *Ltd v Johannesburg Western Rent Board* 1957 (3) SA 473; on appeal, 1958 (1) SA 466.

Statutes construed:

(1) Immigration Act, 1954 (Federal Act No. 37 of 1954), as. 5 (1) (a), 13 (1) (e)

(2) Interpretation and General Provisions Ordinance (1965, Cap. 1), ss. 2 (1), 14 (3) (c).

(3) House of Commons Disqualification Act, 1957 (England, 5 & 6 Eliz. 2 c. 20), s. 14 (2).

Skinner Q C, Att. - Gen., and Gray, State Advocate, for the appellant: 40

Richmond Smith, Q C, and Foster, for the respondent:

Judgment

Blagden CJ: This is an appeal by the Attorney-General against a decision of Mr Justice Whelan in the High Court, Ndola, whereby he

1967 ZR p12

BLAGDEN CJ

declared that the respondent, John Stanley Thixton, could not legally be detained or restricted in Zambia or removed therefrom pursuant to any order purporting to be issued under and by virtue of the Immigration Act 1954. There was also an order for costs against the State.

At 5 12.30 p.m.. on the 27th October, 1966, the respondent was personally served by an immigration officer with a notice purporting to be signed by or on behalf of the Minister of

Home Affairs deeming him, in the exercise of the Minister's power in that behalf under section 5 (1) (a) of the Immigration Act, 1954, to be an undesirable inhabitant of the Republic of 10 Zambia on account of his standard or habits of life. He was informed that he had to leave Zambia forthwith, but at the same time he was also served with a temporary permit to remain in the Republic for the purpose of making arrangements to leave.

It subsequently transpired that these two documents were invalid 15 and on 1st November, 1966, the respondent was served with a further notice deeming him a prohibited immigrant for the same reasons, together with a Form of Notice to Prohibit Immigrant under Regulation 18 (1) of the Immigration Regulations, 1960.

It is not disputed that the respondent is a British subject and Commonwealth 20 citizen by virtue of the British Nationality Act, 1948, section 12 (1) (a), and the holder of a British passport. It is also not in dispute that his statutory domicile is in Zambia and that he has been resident in this territory for a period of 11 years.

The respondent had no wish to leave Zambia and desired to challenge 25 the authority of the deportation proceedings. He sought legal advice. Various steps were taken with which this appeal is not concerned, culminating in the respondent's making application by originating notice of motion to the High Court for, in substance, two declarations: first, that any document or documents issued in respect of him purporting to have 30 the effect of revoking his permission to stay in Zambia or to restrict his movements, or to detain him therein, were illegal void and contrary to the Constitution; secondly, that he could not legally be detained or restricted in Zambia or removed therefrom pursuant to these documents or any others purporting to be issued under and by virtue of the Immigration 35 Act.

I propose to take the two issues raised by the application for these declarations in the order in which they were dealt with in the court below and before us on appeal - that is to say, first, the issue relating to the relevant provisions of the Immigration Act, 1954, and then the issue 40 regarding the relevant provisions of the Constitution.

The Immigration Act, 1954, was originally an enactment of the Federation of Rhodesia and Nyasaland, applicable to Northern Rhodesia when it was passed and preserved in its application to Northern Rhodesia, when the Federation was dissolved, by section 2 of the Federation of 45 Rhodesia and Nyasaland (Dissolution) Order - in - Council, 1963 (G.N. 24/64/173). It was subsequently made applicable to Zambia, upon the

attainment of independence, by section 2 of the Zambia Independence Act, 1964, and the Republic of Zambia (Modifications and Adaptations) (General) Order, 1964 (G.N. 497/64/1967).

The sections of the Immigration Act with which this appeal is concerned are sections 5 and 13. Section 5 sets out the persons who "are 5 prohibited immigrants" and section 13 sets out the persons who "shall not be prohibited immigrants for the purposes of this Act". Construing these

two sections together, as they must be, I entertain no doubt that if a person can bring himself under section 13 as a non-prohibited immigrant, then he cannot be, nor can he be declared to be, a prohibited immigrant under section 5.

Section 5 (1) (a) of the Immigration Act, as amended - the provision under which the respondent here was served with a notice declaring him to be a prohibited immigrant - is in the following terms:

"5. (1) Subject to the provisions of this Act, the following persons 15 are prohibited immigrants and their entry into or presence within Northern Rhodesia is unlawful:

(b) any person deemed by the Minister or class of persons deemed by the Governor on economic grounds, or on account of standard or habits of life to be undesirable inhabitants or to 20 be unsuited to the requirements of Northern Rhodesia ;".

By the Republic of Zambia (Modifications and Adaptations) (General) Order, 1964, the expressions "Northern Rhodesia" and "Governor" are to be construed as meaning, respectively, "Zambia" and "The President".

The respondent's case under these provisions of the Immigrant Act 25 can be stated quite simply. He claims that he is a person who is not and cannot be a prohibited immigrant.

Up till the 15th January, 1965, section 13 (1) (e) of the Immigration Act read:

"13 (1). The following persons or classes of persons shall not be 30 prohibited immigrants for the purposes of this Act -

(e) any person domiciled in Northern Rhodesia who -

(i) is a citizen of Southern Rhodesia or of United Kingdom and Colonies; and

(ii) is not such a person as is described in paragraph (i) ; of subsection (1) of Section 5."
: 35

The respondent is a citizen of the United Kingdom, he was statutorily domiciled in Northern Rhodesia, is so domiciled in Zambia, and he is not and was not a person described in section 5 (1) (i) of the Act. For nearly eight years, up to the 15th of January, 1965, the respondent was thus 40 clearly a non-prohibited immigrant. But on that date the Immigration (Amendment) Act, 1964 (Act 12/65/95), came into force and amended section 13 (1) of the Act "by the deletion of paragraph (e)".

The intention of the Legislature in so doing must clearly have been to revoke the non-prohibited immigrant status of United Kingdom citi - 45

zens domiciled in the territory, or, at any rate, to preclude any such persons who had not already got that status from subsequently acquiring it.

How did it affect the respondent's position? The respondent's case is 5 that it did not affect him at all. He claims that his right of being a non-prohibited immigrant, which he held under the Immigration Act before its amendment in 1965, was an entrenched right. It was entrenched, he submits, by the provisions of section 14 (3) (c) of the Interpretation and General Provisions Ordinance, 1964. That subsection and paragraph provide that:

"(3) where a written law repeals in whole or in part any other written law the repeal shall not -

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred, under any written law so repealed;".

The 15 application of this provision is governed by section 2 (1) of the same Ordinance, which provides that:

"2 (1). The provisions of this Ordinance shall apply to every written law passed or made before or after the commencement, unless a contrary intention appears in this Ordinance, or in the written law 20 concerned."

The respondent claims that under section 13 (1) (e) of the Immigration Act before it was repealed he acquired or there accrued to him the right and privilege of non-prohibited immigrant status; and that that right was saved to him, upon the repeal of the paragraph, by the provisions of the 25 Interpretation and General Provisions Ordinance which I have just quoted.

A rather similar situation arose in the case of *Ranger v Greerfield & Wood* [1], a decision which, may I say at the outset, is not binding upon us, but which naturally constitutes very persuasive authority. In that case 30 the applicant, Dr Ranger, had been declared a prohibited immigrant, but laid the same claim to an entrenched right of non-prohibited immigrant status under section 13 (1) (e) of the Immigration Act. The class of non-prohibited immigrant created by section 13 (1) (e) in its original form comprised persons who were domiciled in the Federation. But in 1959 this 35 provision was amended, and to enjoy non-prohibited immigrant status under its terms, it became necessary, in addition to being domiciled in the Federation, to be a citizen of Rhodesia and Nyasaland. Dr Ranger satisfied the domicile but not the citizenship test. However, he had already become domiciled in the Federation before the Act was amended in 1959 40 and in consequence he had already enjoyed the status of a non-prohibited immigrant before that amendment took effect. He argued that by reason of the provisions of section 12 (1) (c) of the Federal Interpretation Act of 1954 - which are in similar terms to those of section 14 (1) (c) of the Interpretation and General Provisions Ordinance here - his right to be a 45 non-prohibited immigrant had been saved.

1967 ZR p15

BLAGDEN CJ

This contention was rejected by the Federal Supreme Court. Quenet and Forbes, F.J.J., rejected it on the ground that although the applicant's non-prohibited immigrant status might be regarded as a right it was not a right which Dr Ranger had "acquired" or which had "accrued" to him by virtue of the Immigration Act. Conroy, CJ, held that by reason of 5 various steps which Dr

Ranger had taken, including his long period of residence in the Federation, he had acquired the right of being a non prohibited immigrant, but he went on to hold - and in this Forbes, F.J., specifically agreed with him - that that right had been taken away when section 13 (1) (e) of the Act was amended, and that it was not saved by 10 section 12 (1) (c) of the Interpretation Act, 1954.

[1] [2] In the instant case it is clear that the resolution of this issue, as to whether or not the respondent can be said to have retained his right of being a non-prohibited immigrant, requires answers to be found to two questions. First, did the respondent acquire or did there accrue to him a 15 right of being a non-prohibited immigrant under section 13 (1) (e) of the Immigration Act? Secondly, if the answer to the first question is yes, did the repeal of paragraph (e) of section 13 (1) take that right away from him, or was it saved by the operation of section 14 (3) (c) of the Interpretation and General Provisions Ordinance. 20

In my view, the answer to the first question lies in seeing whether section 13 (1) (e) of the Act conferred on the respondent a right which he had not got or which he would not otherwise have had.

As has been pointed out in argument, at common law the respondent would enjoy a right of immunity from deportation or expulsion, to which 25 may be equated the right of being a non-prohibited immigrant. When the respondent arrived in Northern Rhodesia in 1955, however, that right was taken away from him by statute or, if not actually taken away from him it was at any rate not available to him by reason of the provisions of section 5 of the Immigration Act. He could at that time and for two years 30 thereafter, be deported, and he did not over that period enjoy non-prohibited immigrant status.

But, sometime in 1957, after the respondent had been resident in Northern Rhodesia for two years, he did acquire a statutory domicile in the Federation under the provisions of section 3 of the Immigration Act; 35 and at the same time he became vested with non-prohibited immigrant status by reason of the provisions of section 13 (1) (e), as they stood at that time.

Would not that vesting process amount to an accrual of a right to him under the Ordinance? The matter does not seem to have been argued 40 out in this way in *Ranger*'s case [1]. If it had been, Quenet and Forbes, F.J.J., might conceivably have come to the same conclusion as did Conroy, C. J., on this question.

I have had the advantage of reading the judgment which my brother, Doyle, JA, is about to deliver, in which he differs on the question of 45 whether a right accrued to the respondent in the instant case. We are in

1967 ZR p16

BLAGDEN CJ

agreement that in *Ranger's* case [1] section 13 (1) (e) of the Immigration Act did confer a right. But was it a right accrued within the meaning if section 12 (1) (e) of the Federal Interpretation Act, or was it merely a right to be taken advantage of?

This 5 distinction was the subject of examination in the cases of *Abbott v Minister of Lands* [2], *Hamilton Gell v White* [3] and Director of Public *Works v Ho Po Sang* [4]. I would agree that these cases do establish the proposition that for the type of rights with which they were concerned, where a general right is given to a class of persons, it does not 10 constitute a right acquired or accrued for the purpose of the Interpretation Act and there is still some further incident which is required to fix the right on the individual concerned. In other words, there is still something to be done or something to happen to convert the right from a right *in posse* to a right *in esse.* But it seems to me that these cases are 15 distinguishable from the instant case.

In deciding whether a right accrues or is acquired one must have regard not only to the process of accrual and acquisition but also to the nature of the right in question. Some rights, in order to become accrued or acquired, undoubtedly require some incident, that is, some action to be 20 taken - not necessarily by the claimant - or some event to occur. But other rights by their very nature may accrue or become acquired automatically by the expiry of some period of qualification. In this class would fall rights of status such as citizenship, franchise and the like. In the instant case the right of non-prohibited immigrant status, the right of immunity from 25 expulsion or deportation, is such a right.

When conditions are imposed for the acquisition or accrual of these rights, then it seems to me that upon the discharge of these conditions - whether that discharge is effected by some overt act or merely by staying in a particular place for a particular time - then acquisition or accrual must take place.

This is the more so, as here, when the rights in question are fundamental to the liberty of the subject. In such a case it does not seem to me it makes much difference whether the subject acquires those rights as an individual or as a member of a class - the rights are still rights and they 35 are still acquired or accrued.

Certainly, when fundamental rights of liberty are concerned, the Courts should be slow to to place an interpretation on the relevant provisions which would have the effect of denying those rights to the subject.

In *Abbott* [2], *Hamilton Gell* [3] and *Ho Po Sang* [4] rights of a somewhat 40 different class were being considered. They were statutory rights, but they were not fundamental rights affecting the liberty of the subject. In *Abbott* [2] the right in question was the right of a landowner to make additional conditional purchases of adjoining land; in *Hamilton Gell* [3] it was the right of a tenant of an agricultural holding to compensation upon being 45 given notice to quit that holding by his landlord; in *Ho Po Sang* [4] it was

the right of a tenant of a Crown lease to obtain vacant possession of the leased premises from sub-tenants for rebuilding purposes - very different rights from the right in issue in the instant case.

In my view when the respondent had lived in this territory for two years there accrued to him a right of non-prohibited immigrant status. 5 There was nothing further he had to do or could do to enjoy that status, and no further event was necessary to secure him this right. It had accrued to him, and it was his. It was not merely a right *in posse,* but a right *in esse.*

[3] It is therefore now necessary to answer the second question based 10 on this issue, namely, did the repeal of paragraph (e) of section 13 (1) of the Immigration Act take away that right, or was it saved by the operation of section 14 (3) (c) of the Interpretation and General Provisions Ordinance? I have already cited the wording of this provision and also that of section 2 (1] of the same Ordinance, but I would like to repeat the latter. 15 It reads:

"2 (1). The provisions of this Ordinance shall apply to every written law passed or made before or after the commencement, unless a contrary intention appears in this Ordinance or in the written law concerned. "

The plain meaning of this provision, so far as the application of section 14 (3) (c) is concerned, is that the respondent's rights under the original section 13 (1) (e) of the Immigration Act are to be saved unless "a contrary intention appears" either in the Interpretation and General Provisions Ordinance itself, or "in the written law concerned - that is, 25 the Immigration (Amendment) Act, 1964, as read with the Immigration Act. A contrary intention certainly does not appear in the Interpretation and General Provisions Ordinance. Does it appear in the Immigration (Amendment) Act, 1964, reading that Act with the Immigration Act? The long title of the amending Act reads - "An Act to amend section *thirteen* 30 of the Immigration Act." Section 1 enacts that it shall be read as one with the Immigration Act. Section 2 is the amending provision, and the relevant wording is:

"2. Section *thirteen* of the principal Act is hereby amended in subsection (1) - 35

(i) by the deletion of paragraph (e) ;".

Paragraph (e) is thus repealed *simpliciter*. Clearly, no one can qualify for the right of being a non-prohibited immigrant on the grounds that he is a United Kingdom citizen domiciled in Zambia any longer. But nothing is said about those persons who already have that qualification; and if 40 nothing is said about them, how can it be held that any intention appears which is contrary to the application of the Interpretation and General Provisions Ordinance - in particular, the saving provisions of section 14 (3) (c)?

1967 ZR p18

BLAGDEN CJ

The equivalent provision in English law to section 14 (3) (c) of the Interpretation and General Provisions Ordinance is section 38 (2) (c) of the Interpretation Act, 1889. The wording of the English subsection is very similar. It reads: 5

"(2) Where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not -

(c) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed;".

It 10 is to be observed that the words "unless the contrary intention appears" occur in the body of section 38 (2) of the English Act, whereas in the Interpretation and General Provisions Ordinance (with one minor modification) they are included in a section of general application. The effect of them, however, will be the same in each case.

I 15 have been at some pains to discover an authority where these words have been construed or where at any rate some indication has been given as to what and how much must appear in a statute to constitute a contrary intention. But most of the cases on the construction of section 38 (2) (c) of the Interpretation Act, 1889, have been concerned with 20 determining what is an "acquired" or "accrued" right.

I fully accept that a contrary intention may appear without its being actually expressed. If the Legislature had intended that a contrary intention was to be expressed it would have said so, as did the Legislature of Ceylon in section 6 (3) of the Ceylon Interpretation Ordinance of 1900; 25 and, as an example of the actual expression of a contrary intention, see the House of Commons Disqualification Act, 1957, which, by section 14 (2), specifically excludes the operation of section 38 (2) of the Interpretation Act, 1889, in certain named circumstances.

But although the contrary intention does not have to be expressed, 30 it still does have to appear. It may appear from the whole tenor of the relevant legislation or it may appear from actual provisions. But to "appear" means something more than just to "appear likely". There must be some form of manifestation in the statute of the contrary intention; and, primarily, to see whether a contrary intention appears or not, one 35 must look for it in the actual words in the repealing statute which effect the repeal in question. In the case of *Lewis v Hughes* [5] the question arose as to whether "a contrary intention" appeared in section 18 of the Finance (No. 2) Act of 1915, which repealed section 2 of the Finance Act, 1912. The repealing words in section 18 were: 40

"Section *two* of the Finance Act 1912 . . . shall cease to have effect and is hereby repealed, without prejudice to the validity of any payments made in pursuance of that section before the passing of this Act."

The repealing language here is forceful and from the expressed saving of 45 the payments already made it might have been argued on the principle of *inclusio unius est exclusio alterius,* that no other rights were saved, yet the

1967 ZR p19

BLAGDEN CJ

Court of Appeal held that the words used did not show an intention to take away rights already accrued under section 2 of the Act of 1912, and that therefore as no "contrary intention" appeared in that section, section 38 of the Interpretation Act, 1889, applied and preserved those rights. This case was followed in the more recent decision of *Coates v Diment* [6]. 5

In the instant case, as I have already related, the repeal of paragraph (e) of section 13 (1) of the immigration Act, 1954, is effected by section 2 (i) of the amending Act *simpliciter*. To repeat the relevant wording, it is:

"2. Section *thirteen* of the principal Act is hereby amended in subsection (1) - 10

(i) by the deletion of paragraph (e)."

I do not think it would be right to read into those very simple words an intention contrary to that expressed in the Interpretation and General Provisions Ordinance that any accrued right under the deleted paragraph should be saved. 15

I am aware of the fact that in *Ranger*'s case, Conroy, CJ, came to a different conclusion and Forbes, F. J., expressed his agreement with that conclusion. *Ranger*'s case was concerned with the amendment to paragraph (e), introduced by section 2 of the Immigration Amendment Act, 1959, whereby paragraph (e) was repealed but replaced in amended form. 20 As I have already related, the broad effect of that amendment was that whereas formerly any person domiciled in the Federation had the right of non-prohibited immigrant status, after that amendment, domicile alone was not sufficient: there had to be, in addition, citizenship of Rhodesia and Nyasaland. Conroy, CJ, said at page 142A: 25

"Applying the ordinary meaning to the language used, I do not think that the legislature intended to preserve the protection previously granted by the section. A new protection was being substituted for the old protection, and no person could in future avail himself of the old." 30

He quoted the relevant words of the amended paragraph (e) and continued at pages 142C and D:

"Those words convey to me that it was the intention of the legislature, when enacting the amending legislation, to vary the list of persons entitled to the protection of the section. That protection 35 must be as from time to time enacted . . . I think that the only reasonable interpretation to be put upon the new legislation was that the legislature intended to take away the protection hitherto attaching to domicile by itself. Accordingly, the provisions of s. 12 of the Interpretation Act do not apply, as they are ousted by the 40 intention and object of the Immigration Amendment Act, 1959."

[4] I agree, on this line of reasoning, that in the instant case it may have been the intention of the legislature to deprive all United Kingdom citizens domiciled in Zambia - both those already so domiciled and those who might later become so - of their right of non-prohibited status. But 45 has the legislature given expression to that intention by the words it has

used in the amending statute, as read with the present statute? Does the intention of taking away the accrued rights of United Kingdom citizens domiciled in Zambia - an intention contrary to the

saving of those rights by the machinery of the Interpretation and General Provisions Ordinance 5 - sufficiently appear?

It is a near thing, but I do not think it can be said, with that degree of certainty which is necessary when construing a statute strictly - as this statute must be construed - that it does so appear. The statute here must be construed strictly, because, as it is expressed in Halsbury's *Statutes,* 10 2nd ed., vol. 24 at 169:

"It is a well settled rule of law that statutes which encroach on the ordinary rights of the subject, whether as to person or property, must be construed strictly (*Brightman & Co., Ltd v Tate*, [1919] 1 KB 463, per McCardie J; 42 Digest 701, 1172a), and existing 15 rights are not destroyed by a statute unless there be express words or the plainest implication to that effect (*Henshall v Porter*, [1923] 2 KB ;193, at p. 197, per McCardie J.) . . .";

and in a later passage on the same page:

"An exception which protects existing rights will be given the 20 largest and most liberal construction (*Finch v Birmingham Canal Navigation Co.* (1826) 5 B. & C. 820)."

I think that upon the fair and proper construction of the relevant provisions here it cannot be said that an intention contrary to the saving of the respondent's right of being a non-prohibited immigrant sufficiently 25 appears, and in consequence that right is preserved to him, and I would hold that the appeal fails on this ground.

[5] I come now to the second issue in this case, namely, the contention successfully put forward in the court below by the respondent that, as a result of the reciprocity of rights and privileges provided between 30 Zambian citizens in the United Kingdom and United Kingdom citizens in Zambia, by section 10 of the Constitution, the respondent enjoys the right and privilege of non-prohibited immigrant status.

Section 9 of the Constitution provides that the citizens and subjects of certain countries shall have the status of Commonwealth citizens. 35 Subsection (3) prescribes the countries to which section 9 applies and one of them is the United Kingdom.

Section 10 (1) of the Constitution provides that -

"A citizen of any Country to which section 9 of this Constitution applies and a citizen of any other country which the Minister may 40 for the time being specify by notice published in the *Gazette* shall enjoy the same rights and privileges (being rights and privileges that, under this constitution or any other law in force in Zambia are enjoyed by citizens of Zambia other than rights and privileges under section 61 or 66 (1) of this Constitution) as a Citizen of Zambia 45 enjoys under the Constitution of the country concerned or under any other law in force in that country."

1967 ZR p21

BLAGDEN CJ

The words "being rights and privileges that, under this Constitution or any other law in force in Zambia, are enjoyed by citizens of Zambia other than rights and privileges under section 61 or 66 (1) of this Constitution;" are in brackets. There is no particular significance in this. As Lord Esher, M.R, put it in Duke of *Devonshire and Others v O' Connor* [7]: 5

". . . in an Act of Parliament; there are no such things as brackets any more than there are such things as stops."

The respondent's case under this section can be expressed in three stages. First, he is a citizen of the United Kingdom, a country to which section 9 and, consequently, 10 (1) applies. Therefore he is entitled to 10 enjoy the same rights and privileges as a citizen of Zambia enjoys in the United Kingdom under the British Constitution, or under any other law in force in the United Kingdom.

Secondly, inasmuch as Part II of the United Kingdom Commonwealth Immigration Act, 1962, confers upon citizens of Zambia ordinarily 15 resident in the United Kingdom a qualified immunity from deportation from the United Kingdom, the respondent must enjoy the same immunity from deportation from Zambia. The qualified immunity from deportation which the Zambian citizen enjoys in United Kingdom is an immunity from deportation during the first five years of his residence there, provided 20 he is not convicted of any offence punishable with imprisonment and recommended, in consequence thereof, for deportation; and a complete immunity from deportation after he has resided there for five years.

Thirdly, the respondent has not been convicted of any offence punishable with imprisonment in Zambia, and, furthermore, he has been 25 resident in Northern Rhodesia and Zambia for more than five years.

Consequently, he enjoys absolute immunity from deportation from Zambia.

The facts in regard to the respondent's citizenship, his crime - free record, and his period of residence in Northern Rhodesia and Zambia, 30 are not in dispute. The question for resolution is the interpretation which has to be put upon the provisions of section 10 (1). This subsection clearly introduces a measure of reciprocity between the rights of Commonwealth citizens in Zambia and those of Zambian citizens in the United Kingdom. But how far does that reciprocity extend?

For 35 the respondent it has been contended that it is only necessary to look at whatever rights a Zambian citizen enjoys in the United Kingdom and that this will determine the rights that a Commonwealth citizen must enjoy in Zambia. For the State it was argued that such an interpretation was far too wide and would lead to ridiculous results. In particular, it 40 would undermine the sovereign independence of the State, and that could never have been the intention of the Legislature which framed the Constitution since, as is clear from the long title of the Zambia Independence Act, 1964, section 1 of that Act, section 3 of the Zambia Independence Order, and section 1 of the Constitution itself, the whole intention was to 45 constitute a sovereign independent Republic within the Commonwealth.

BLAGDEN CJ

To adopt the construction put upon section 10 (1), contended for on behalf of the respondent, would mean that it would be possible for England and other Commonwealth countries to legislate for their own citizens resident in Zambia by the simple expedient of introducing legislation in 5 their own countries covering the rights and privileges of Zambian citizens in those countries, whereas the reverse process - legislation in Zambia for Commonwealth citizens there - would not necessarily produce any reciprocal results for the benefit of Zambian citizens resident in a Commonwealth country. The Attorney-General argued that such a result would 10 be so manifestly contrary to the intention of the Legislature that section 10 (1) could not be so construed. He carried his argument to the extent of submitting that certain words of this subsection should be suppressed in order to give the proper meaning to it. But before taking such extreme steps he did argue that the words "a citizen of any country to which 15 section 9 of the Constitution applies and a citizen of any other country which the Minister may for the time being specify by notice in the *Gazette* shall enjoy the same rights and privileges . . ." should be read as meaning that before any such rights and privileges could be enjoyed the Minister must make his specification whether the countries concerned were countries 20 to which section 9 applied, or others. I have, however, no hesitation in rejecting this construction. I am quite satisfied from the plain grammatical meaning of the phrases used that it is only in respect of countries other than those to which section 9 applies that any specification by the Minister is required.

With 25 regard to the Attorney-General's argument that to avoid giving a meaning to the subsection contrary to the whole tenor of the Constitution it may be necessary to suppress certain words, I think I need say no more than that I do not think such drastic surgery is at all necessary. I think the meaning of section 10 (1) can be derived from a careful study of 30 all the words which are used, and in particular of the words, which I have already cited, which appear in brackets. The basic structure of section 10 10 (1) is seen in the following words:

"A citizen of any country to which section 9 of this Constitution applies . . . shall enjoy the same rights and privileges . . . as a 35 citizen of Zambia enjoys under the Constitution of the country concerned or under any other law in force in that country."

If those words stood alone without further qualification then there would be considerable substance in the argument put forward on behalf of the respondent that the section creates a straightforward *pro tanto* reciprocity 40 of rights between Zambian citizens in the United Kingdom and Commonwealth citizens in Zambia.

But these words do not stand alone. They are qualified by the words in brackets. These words qualify and modify the rights and privileges which a United Kingdom citizen may enjoy in Zambia. If, now, we 45 re-read what I have described as the basic structure of the subsection, together with the words in brackets so far as they are relevant to the instant case, we get this:

"A citizen of any country to which section 9 of this Constitution applies . . . shall enjoy the same rights and privileges (being rights

and privileges that, under this Constitution or any other law in force in Zambia, are enjoyed by citizens of Zambia . . .) as a citizen of Zambia enjoys under the Constitution of the country concerned or under any other law in force in that country."

It seems to me to be abundantly clear that, in determining what rights 5 and privileges are to be enjoyed by virtue of the provisions of section 10 (1), it is necessary first to look at the rights and privileges which are enjoyed by the Zambian citizen in Zambia. That is the starting point of the whole process.

The first question to ask, then is - what right or privilege does a 10 Zambian citizen enjoy in Zambia in regard to immunity from deportation or as a non-prohibited immigrant? The answer is, he enjoys an absolute one, and he enjoys it under section 24 of the Constitution by virtue of his Zambian citizenship. He does not have to qualify for it in any way; it is his absolute right. 15

Now, to move to the next step in the process: does a Zambian citizen enjoy the same right in the United Kingdom? The short answer is that he does not. If he chooses to reside in the United Kingdom he enjoys a qualified right for the first five years of his residence there-namely, a right not to be deported provided he is not convicted of any criminal 20 offence punishable with imprisonment in respect of which he is recommended for deportation. After he has been resident in the United Kingdom for a period of five years, that right crystallises into an absolute right in the sense that he can no longer be deported. But it is a right which he has acquired through the provisions of a special English statute by way of 25 residence, and not constitutionally nor by virtue of his Zambian citizenship. It is not, therefore, in my view, the same right of immunity from expulsion or deportation, or of non-prohibited immigrant status, which he enjoys in Zambia.

I do not, therefore, concur with the learned trial judge's judgment 30 on this issue, which, in effect, equates the two rights as being the same rights but in the one case more, and in the other case less, extensively enjoyed. In my view they are essentially different rights; and because the Zambian citizen in the United Kingdom does not enjoy the same right of immunity from deportation and of non-prohibited immigrant status, as 35 the Zambian citizen does in Zambia, there can be no reciprocity under section 10 (1) whereby the United Kingdom citizen resident in Zambia can claim absolute immunity from deportation from Zambia. On this ground therefore, I have come to the conclusion that the learned trial judge was in error and that on this issue the argument for the State succeeds. I 40 have, however, already held that the appeal should be dismissed on the grounds of the respondent's continued protection from deportation under the Immigration Act: in the final result, therefore, I would dismiss this appeal.

Judgment

[5] Doyle JA: I shall deal first with the points raised in relation to section 10 (1) of the Constitution which section reads as follows:

"10 (1) A citizen of any country to which section 9 of this Constitution applies and a citizen of any other country which the Minister

may for time being specify by notice published in the *Gazette* shall enjoy the same rights and privileges (being rights and privileges that, under this Constitution or any other law in force in Zambia, are enjoyed by citizens of Zambia other than rights and privileges 5 under section 61 or 66 (1) of this Constitution) as a citizen of Zambia enjoys under the Constitution of the country concerned or under any other law in force in that country."

The section appears to me on its face to have a clear meaning. It states that any right or privilege enjoyed in Zambia by a Zambian citizen 10 under the laws of Zambia, including the Constitution, shall also be enjoyed in Zambia by a citizen of a Commonwealth country if a citizen of Zambia enjoys that same right or privilege in that Commonwealth country. The section also makes provision for the extension of similar benefits to citizens of other countries specified by the Minister.

The 15 right or privilege in issue is the right or privilege of immunity from expulsion from Zambia and the Commonwealth country concerned is the United Kingdom. It is immaterial whether it is properly called a right or properly called a privilege and for short I will use the term right. By virtue of section 24 of the Constitution an absolute immunity from 20 expulsion from Zambia is enjoyed by a Zambian citizen. Under Part II of the Commonwealth Immigrants Act, 1962, a Zambian citizen, with certain exceptions which are not relevant here, may be deported from the United Kingdom if he is convicted of an offence punishable by imprisonment and the court recommends that he be deported. Under section 7 of 25 that Act a recommendation for deportation may not be made in respect of a Zambian citizen who, on the date of his conviction, is ordinarily resident in the United Kingdom and has been continuously so resident for a period of at least five years ending with that date. Where these conditions are fulfilled a Zambian citizen has an absolute and unqualified 30 immunity from deportation. It is not necessarily a permanent immunity as it would cease if the Zambian citizen ceased to be ordinarily resident in the United Kingdom.

The learned trial judge in dealing with section 10 held that it provided for a reciprocal exchange of rights. He also held that the rights exchanged 35 did not have to be identical and that the limiting words in brackets in section 10 "are not strictly definitive of the rights and privileges which shall be enjoyed by a citizen of any country to which this section applies but are merely indicative of the type of rights which may be enjoyed."

He then considered the relative positions in Zambia and the United 40 Kingdom in the following passage:

"This being so it is necessary to determine whether the Zambian citizen in Zambia enjoys such a right. By virtue of section 24 of the Constitution, he does, and it is an absolute right. It is then necessary to determine whether the Zambian citizen in the United Kingdom enjoys a right to immunity from expulsion from the United Kingdom. He does, but, by virtue of Part II of the

Commonwealth Immigrants Act, 1962, it is a limited right. Both enjoy the same right but in the case of one of them, the Zambian citizen

1967 ZR p25

DOYLE JA

in the United Kingdom, that right is limited, and by the operation of section 10 the United Kingdom citizen in Zambia shall enjoy the right to the same extent as it is enjoyed by the Zambian citizen in the United Kingdom. Section 10 of the Constitution in effect provides for an exchange of the right of immunity from 5 expulsion between Zambian citizens in the United Kingdom and the United Kingdom citizens in Zambia where there is an identity of rights and to the extent that they are identical. The fact that the Zambian citizen in Zambia enjoys this particular right absolutely does not make it a different right. As I have said, it is the same 10 right more extensively enjoyed. This being so section 10 of the Constitution protects the applicant from the operation of the *proviso* contained in section 24 (3) (v) of the Constitution that is to say legislation imposing restrictions on his freedom of movement (which phrase means, by virtue of section 24 (1), *inter alia*, 15 immunity from expulsion from Zambia) to the same extent as the Zambian citizen in the United Kingdom is protected under the Commonwealth Immigrants Act, 1962."

The learned trial judge has found therefore that the right of immunity in the respective countries is of the same kind, but that a United 20 Kingdom citizen only enjoys in Zambia a right of immunity qualified in the same manner as the right of immunity of a Zambian citizen is qualified in the United Kingdom.

There is no provision in the law of Zambia for deportation of a United Kingdom citizen upon the recommendation of a court after 25 conviction of an offence punishable with imprisonment. If a citizen of the United Kingdom were to enjoy in Zambia a right of immunity qualified as in the United Kingdom in respect of a Zambian citizen, it would be necessary to import into Zambia the provisions of the Commonwealth Immigrants Act, 1962, *mutatis mutandis*. The same would apply in 30 relation to the laws of other Commonwealth countries. It is hardly necessary to expound at length on the difficulties which would arise from such a wholesale importation of non - Zambian law, which importation would not only be in relation to immunity from expulsion but could also arise in relation to many other rights and privileges. 35

Deportation of one's own citizens is no doubt difficult in practice as it depends on obtaining the consent of some other State to receive them but it is not impossible. If it were, there would have been no necessity to include the safeguard in section 24 of the Constitution. Let me suppose therefore, that section 24 had included some provision on specified terms 40 for the deportation of Zambian citizens but that in the United Kingdom, as would have been the case under the law existing prior to 1962, a Zambian citizen enjoyed in the United Kingdom an absolute immunity from deportation. Then on the construction given to the section by the learned trial judge a United Kingdom citizen in Zambia would enjoy an absolute 45 immunity, i.e. a greater right than that enjoyed in Zambia by a Zambian citizen. Such a result seems to me to be absurd. It is not the fact in the instant case; but it is not impossible that there are some rights or privileges

which, under the laws of the United Kingdom or a Commonwealth country, are greater than the rights or privileges of the same kind enjoyed by a Zambian citizen in Zambia. The position therefore could arise.

The difficulties and absurdity to which I have referred arise by reason 5 of the construction placed by the learned trial judge upon the words in brackets in section 10. He has construed these words widely to mean not the same rights as those previously referred to in the section but rights of the same kind. Unless there is no alternative I see no reason to adopt a construction which leads to such difficulties. In my view it is a more 10 natural construction of the words that they be read to refer to the same rights as are already referred to in the section. Such a construction also avoids the difficulties and possible absurdity which I have mentioned. I agree with the learned trial judge that the right is not required to be identical in the sense that it must equate in every particular, however 15 minor, but it must be substantially the same and it is not in my opinion sufficient that it is merely of the same kind.

The question therefore in this case is whether the right is the same in the sense I have indicated. In my opinion the answer is "no". I do not consider that a right is the same if it deals with the same subject in a 20 substantially different way. A right qualified in the United Kingdom as in this case is not substantially the same as an unqualified right.

Mr Richmond Smith has further argued that as the respondent has lived in Zambia for more than five years and has therefore fulfilled the conditions which in the United Kingdom would have provided a Zambian 25 citizen with absolute immunity (though as I have already pointed out not necessarily permanent immunity), therefore he, in his personal capacity is entitled to absolute immunity in Zambia. I do not agree with this. I consider that section 10 refers to the rights enjoyed by Zambian citizens generally. The right enjoyed generally is only a qualified right which may 30 under certain conditions be turned into an absolute right. That an individual Zambian citizen may fulfil the required conditions does not make the right substantially the same as a general right of absolute immunity.

On my view of the *prima facie* construction of section 10 the Attorney-General would succeed on this part of the appeal. The learned Attorney-General 35 has, however, further submitted that the *prima facie* meaning of the section is not the true one, but that the section should be read as if the words "which the Minister may for the time being specify by notice in the *Gazette*" qualify both Commonwealth and other countries or, alternatively, should be read as if certain words were omitted in order to 40 arrive at the same result. To do the former involves a departure from grammatical construction and makes tautological a number of words. To do the latter is an even more drastic departure from the ordinary meaning. Assuming for the purpose of this argument that the court has the wide constructional discretion referred to in *R v Ettridge* [8], which I think is 45 the high point in the cases cited by the Attorney-General on this aspect, it is clear that any such construction could only be adopted where it was necessary to give effect to the intention

and meaning of the enactment read as a whole. The Attorney-General has submitted that the necessity

exists in this case because the object of the Zambia Independence Act, 1964, and the Zambia Independence Order, 1964, was to constitute a sovereign state. He argued that section 10 read in its ordinary meaning derogated from the sovereignty of Zambia, first, because it meant that Commonwealth states could by legislation regulate the rights and 5 privileges of their citizens in Zambia and so removed the right of Zambia to regulate such rights and privileges and, secondly, because the initiative for making reciprocal arrangements would be lost to Zambia and would always rest with other states. The learned Attorney-General admitted that even if his construction were accepted, the Minister could not specify 10 which rights or privileges were to be reciprocal but could only specify a country which then had a choice.

In a reference to sovereignty in O'Connell, *International Law,* vol. 1 page 319, O'Connell has this to say, "The failure of generations of political scientists and lawyers to define 'sovereignty' with precision has made this 15 term the least exact of any in the literature of international law." In one sense no state is absolutely sovereign. It exists in a community of states and has its obligations to those states and their citizens. I do not think that there is anything to be gained by exhaustively considering the nature of sovereignty in its various aspects. It seems to me that what is to be 20 considered in the present case is whether section 10 materially derogates from the status of Zambia as, in the terms of the long title to the Zambia Independence Act, 1964, an independent republic within the Commonwealth.

Section 10 in short means that Zambia holds out to Commonwealth 25 and specified other countries an offer in these terms. If you give to Zambian citizens in your country certain rights and privileges which in Zambia are enjoyed by those citizens, Zambia will also allow your citizens in Zambia, to enjoy those rights and privileges. There does not appear to me to be any loss of initiative here. Zambia has in fact taken the initiative 30 in making the offer. Neither does it seem to me a material derogation from sovereignty in the sense I have indicated to hold out an offer, even in general terms, which is directed to enabling Zambian citizens abroad to enjoy the same rights and privileges which they enjoy in Zambia. There is no question of a Commonwealth country altering the rights and 35 privileges enjoyed by Zambian citizens in Zambia or altering the laws of Zambia. It is those countries, which, if they wish to take advantage of the offer, will have to bring their laws into conformity with those of Zambia and not vice versa. It may be that, as the Attorney-General has pointed out, this exchange of equal rights and privileges may rebound to the 40 advantage of citizens of certain countries to an unforeseen extent by reason of the particular circumstances of those countries and so have an unexpected and perhaps unfavourable result. That may happen in any bargain but it does not in my opinion cause section 10 to be a material derogation from the sovereignty of Zambia. 45

Even if the learned Attorney-General's suggested construction is accepted, it does not fully meet his point, as there remains on his argument

a derogation from sovereignty in that the Minister cannot control states in their acceptance of all or only parts of the offer of reciprocal rights and privileges.

Furthermore, as the intention of the Zambia Independence Act, 1964, 5 is to create an independent republic within the Commonwealth, it does not seem strange that special provision is made in respect of Commonwealth citizens and states. If, contrary to my opinion, there is a material derogation from sovereignty, it seems to me to be intentional.

I do not therefore consider that it is necessary to go behind what 10 appears to me to be the ordinary meaning of section 10.

[2] [6] I turn now to the other branch of this appeal, the result of which depends on the answers to two questions:

(i) did a right of immunity from expulsion accrue to the respondent under the Immigration Act, 1954; and 15

(ii) if so, was that right saved by section 14 of the Interpretation and General Provisions Ordinance.

Ranger v Greenfield and Wood [1] and the South African cases cited decided that, where a statute imposed a disability upon some person leaving other persons in their existing position, no right under the statute 20 accrued to the latter. That, if I may respectfully say so, appears to me both good law and sense. However, in *Garydale Estate and Investment Co. (Pty) Ltd v Johannesburg Western Rent Board and Another* [9], Hiemstra, J, may have gone further. He said:

"The words 'rights and privileges . . . acquired under any law' in 25 section 13 (2) (c) mean rights and privileges conferred by statute which are not ordinarily enjoyed under the common law. Clearly the curtailment of the rights of others is not the granting of a right to one whose common law rights are merely left undisturbed."

And later in the judgment: 30

"The fact that section 33 (1) (e) of the Rents Act of 1950 bettered the applicant's position in comparison with his position under/the previous Rents Act makes no difference. The starting point to decide whether an act bestows a privilege not ordinarily enjoyed must be the common law."

On 35 appeal to the Transvaal Provincial Division reported at 1958 (1) SA 466 (T), the appellate court dealt with the matter in somewhat different words:

"The section by itself did not confer anything on the Company; it actually left the Company with exactly the same rights and 40 privileges as if the Rents Act had not been passed. Whatever

rights or privileges the Company had were acquired by or accrued to it by virtue of the common law and other laws of the land and not under section 33 (1) (e)."

Ranger's case [1] was decided under the Immigration Act, 1954 - the 45 Act with which we are now concerned and to which I will refer as the Act.

1967 ZR p29

DOYLE JA

It is on all fours with the present case and it is agreed by the respondent that if it was correctly decided, the appellant must succeed on this branch of the appeal.

Ranger entered the Federation in February, 1957, when section 13 (1) (e), omitting irrelevant words, read as follows: 5

"The following persons or classes of persons shall not be prohibited immigrants . . .

(e) any person domiciled in the Federation . . ."

After two years residence Ranger had acquired a statutory domicile in the Federation. Subsequently the Immigration Amendment Act, 1959, 10 repealed paragraph (e) and, again omitting irrelevant words, substituted the following:

"(e) any person domiciled in the Federation who . . .

(i) is a citizen of Rhodesia and Nyasaland."

Ranger was not such a citizen and on 11th January, 1963, he was notified 15 that he had been deemed a prohibited immigrant under the provisions of section 5 (1) (b) of the Act. He moved the Federal Supreme Court for a rule declaring null and void the notice deeming him a prohibited immigrant on, *inter alia*, the ground that he had acquired domicile under the Act before it was amended and that the amending Act did not take away 20 the right which he had enjoyed under its original provisions by reason of such domicile. The Federal Supreme Court granted a rule *nisi*. On the application to make it absolute Quenet and Forbes, F.J.J., held that the exemption under section 13 (1) (e) of the Act, as originally enacted, did not confer any new right and therefore could not be a right acquired or 25 accrued under the Act.

Quenet, F.J., held that, if there were such a right, Rangier was only one of a class and had taken no steps to make the right available to him. Conroy, CJ, on the other hand, held that Ranger had, in obtaining employment in the University, obtaining a residence permit, travelling 30 from England to the Federation and changing his domicile by residing for a number of years in the Federation with the intention of permanently residing there, taken steps under the Act to take advantage of it and so had acquired a right, or at least that a right had accrued to him, under the Act. He also held, however, that the right had not been saved by 35 section 12 of the Federal Interpretation Act. Forbes, F.J., without deciding the point, assumed for the purpose of argument that Ranger had taken steps under the Act to avail himself of it, but he agreed that the right was not saved by the Interpretation Act. The rule was discharged.

The respondents have argued that *Ranger*'s case was wrongly decided 40 and that a right had accrued to him under the Act.

In dealing, with the question whether a right was acquired or accrued, Quenet, F.J., adopted the second dictum of Hiemstra, J, which I have quoted above and went on to say:

"There is nothing I know of in the common law which places a 45 person such as the applicant under the disability of being a pro -

1967 ZR p30

DOYLE JA

hibited immigrant. By exempting him from a disability not imposed by the common law, the Act added nothing to his common law rights. I would, on that basis alone, say that the fact the appellant is not a prohibited person does not constitute a right or 5 privilege within the meaning of section 12 (1) or (2) of the Interpretation Act."

Forbes, F.J., dealt with this point in the following passage:

"Accepting in the instant case, that the applicant took active steps towards acquiring domicile in the Federation, and that by virtue 10 of the two year restriction in s. 3 of the Act, the domicile acquired was a domicile under the Act, yet it does not appear to me that the exemption from being or being deemed to be a prohibited immigrant which was then conferred by s. 13 (1) (e) of the Act as originally enacted was a right acquired or accrued under the Act. 15 Apart from statute there is no liability on a person in the Federation to be or be deemed to be a prohibited immigrant, and thereby liable to removal from the Federation. The Act, however, imposes such a liability; but it exempts from that liability certain classes of persons. The exemption does not confer any new right on those 20 classes of persons, but merely saves them from the application of a new statutory liability. The right which is saved to them is not a right arising under the Act, but is a right which existed prior to the enactment of the Act. It cannot therefore, in my view, be a right acquired or accrued under the provision repealed, that is to 25 say, under s. 13 (1) (e) of the Act as originally enacted."

It seems to me that Quenet, F.J.'s, approach to the question was erroneous. Common law rights have been encroached upon by statute on numerous occasions. It seems to me to be a very artificial method of ascertaining whether a right can be granted by a statute to go back to 30 common law and to disregard the fact that the common law right may have ceased to exist before the enactment of the statute and in some cases may not have existed for many years.

Again I think that Forbes, F.J., fell into error when he held that the exemption only saved persons from the application of a new statutory 35 liability and that such liability did not arise in the *Ranger* case. Section 5 of the Act took away Ranger's immunity. For two years he was without protection. After the lapse of that period section 13 (1) (e) operated to make him immune from the provisions of section 5. Clearly in so far as it related to persons who, prior to the enactment of the Act, had already 40 resided for the two years which constituted the statutory domicile, section 13 (1) (e) was only an exemption from the application of a new statutory

liability. The liability never touched those persons. In the case of Ranger, however, section 13 (1) (e) seems to me to have had a more positive action. It restored the immunity taken away by section 5 and 45 so gave him a right which he did not have immediately before the section operated in his respect. In these circumstances it appears to me that the Act did confer a right on Ranger.

1967 ZR p31

DOYLE JA

I am satisfied, therefore, that section 13 (1) (e) did confer a right on Ranger certainly as a member of a class; but was it a right which accrued or was acquired within the meaning of the Federal Interpretation Act, 1954. The Oxford English Dictionary defines "acquired", *inter alia*, as:

"1. to gain, obtain as one's own, to gain the ownership of (by one's 5 exertions or qualities);

2. to receive or get as one's own (without reference to the manner . . ."

"It defines "accrue", *inter alia*, as "to come . . . as an accession or 10 advantage".

If the words were unqualified it would seem to me that as a matter of ordinary English a right accrued and was acquired by Ranger.

The word * have, however, been considered by high authority in relation to provisions similar to those of the Federal Interpretation Act, 1954. 15 In *Abbot v Minister of Lands* [2] the Judicial Committee of the Privy Council held:

"It may be as Winleyer, J, observes, that the power to take advantage of an enactment may without impropriety be termed a 'right'. But the question is whether it is a 'right accrued' within 20 the meaning of the enactment which has to be construed.

Their Lordships think not, and they are confirmed in this opinion by the fact that the words relied on are found in conjunction with the words 'obligations incurred or imposed'. They think that the mere right (assuming it to be properly so called) existing 25 in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a 'right accrued' within the meaning of the enactment."

In this case there did remain something to be done by the tenant in order to take advantage of the right provided by the relevant statute. 30

Abbott's case was distinguished in *Hamilton Gell v White* [3] and decided by a very strong English Court of Appeal; Bankes, Scrutton and Atkin, L.JJ. In this case it was held that action by a landlord caused a right to be acquired or to accrue without any action on the part of the tenant. 35

Bankes, LJ, at 428 had this to say:

"This is not like the case which was cited to us in argument where the tenants right depended upon some act of his own. Here it depends on the act of the landlord - namely, the giving of a notice to quit in view of a sale - in which event the section itself confers 40 a right to compensation subject to the tenant complying with the conditions therein specified, and as far as it was possible to comply with them down to the time when the section was repealed he did in fact comply with them."

1967 ZR p32

DOYLE JA

Scrutton, LJ, at 430 said:

"But it is not suggested by the appellant that his right to compensation was acquired by his giving notice of intention to claim it; what gave him the right was the fact that of the landlord having 5 given a notice to quit in view of sale"

and Atkin, LJ, at 431, referring to section 38 of the English Interpretation Act, 1889, said:

"It is obvious that that provision was not intended to preserve 10 the abstract rights conferred by the repealed Act, such for instance as the right of compensation for disturbance conferred upon tenants generally under the Act of 1908. . . . It only applies to the specific rights given to an individual upon the happening of one or other of the events specified in the statute. Here the necessary 15 event has happened, because the landlord has, in view of a sale of the property, given the tenant notice to quit. Under those circumstances the tenant has 'acquired a right', which would 'accrue' when he has quitted his holding, to receive compensation."

His Lordship then cited with approval the latter part of the passage from Abbott's case, earlier referred to in this judgment.

In the *Director of Public Works and Another v Ho Po Sang* [4] the 20 Judicial Committee of the Privy Council approved of Hamilton Gell in the following passage:

"In that case, the landlord of an agricultural holding gave his tenant notice to quit; he gave it because he wished to sell. The 25 tenant then became entitled to compensation on the terms and subject to the conditions of s. 11 of the Agricultural Holdings Act, 1908. The tenant duly complied with one condition. He duly gave notice of his intention to claim compensation. Another condition was that he should make his claim within three months of quitting. 30 But, before the time for him to quit arrived, s. 11 was repealed. He did, nevertheless, make his claim within three months of quitting. It was held that his claim could proceed, and that he could recover compensation under s. 11. He had an accrued right which resulted from the fact of the landlord having given a notice to quit in view 35 of a sale. The conditions imposed by s. 11 were conditions not of the acquisition of the right but of its enforcement."

This clearly shows that it is not necessary that action should be taken by the recipient of the right himself.

The effect of these cases seems to me to be that where a general right is given by statute to a class, it does not constitute a right acquired or 40 accrued for the purpose of the Interpretation Act; but that, some further action must be taken or an event must occur which fixes the right on the particular person concerned.

In *Ranger*'s case [1] was there any such act or event? Conroy, CJ, has held that there was by reason of the actions taken by Ranger to 45 acquire domicile. It seems to me somewhat unreal to consider that acts such as travelling to the Federation, obtaining a job, etc., were acts

intended to avail of the right provided in the Immigration Act, 1954. They were ordinary incidents of living and working. I do not think that they were such acts, but if they were, I agree with the view of Quenet, F.J., that these actions only related to Ranger's falling within an exempted class. It is of course true that having fallen into that class there was no 5 further action which could be taken by Ranger to appropriate the right. He could only assert his right when steps were taken to expel him. It may seem hard that such circumstances prevent the saving of a right, but I see no way around the established interpretation of the relevant section. I do not agree that the meaning of that section changes with the nature 10 of the rights under consideration. I am constrained by authority to hold that no right accrued to Ranger within the meaning of section 12 of the Interpretation Act, 1954.

The position is the same in the instant case. It follows that in my view this appeal should be allowed. I had considered the last point raised 15 - namely, if a right did accrue, was it saved by the Interpretation and General Provisions Ordinance. In the circumstances any remarks of mine on this point should merely be *obiter* and, as they would not affect the result of this appeal, I refrain from expressing an opinion.

I would allow this appeal, but before leaving it I would like to express 20 my indebtedness to counsel on both sides for a most interesting and stimulating argument.

* "word" should read "words"

Judgment

[2] [5] Evans J: I agree with the learned President's judgment dealing with the grounds of appeal numbered 1, 2 and 3 (a), and I have nothing to add to it, but I respectfully disagree concerning ground number 25 3 (b).

I have no doubt that section 10 (1) of the Constitution is intended to provide for a degree of reciprocity between the rights and privileges of Zambian citizens in countries to which section 9 of the Constitution applies and the rights and privileges in Zambia of citizens of

those 30 countries. Because this case concerns the rights of a citizen of the United Kingdom, I confine myself to its citizens in this judgment.

The proper construction of subsection (1) of section 10 primarily depends upon the meaning of the words in brackets, and in particular the words "being rights". The words are not "being the same rights", or even 35 "being the rights". I therefore think that the learned President errs in his judgment where, in disagreeing with the learned trial judge on this issue, he does so for the stated reason that the Zambian citizen's right not to be deported from the United Kingdom is not "the same right of immunity from expulsion or deportation, or of non-prohibited immigrant 40 status, which he enjoys in Zambia." The subsection does not say that those rights have to be the same.

I feel that the learned Judge of Appeal's construction stems from what I think is an erroneous statement at the beginning of his judgment of the effect of subsection (1), when he says: 45

1967 ZR p34

EVANS J

"It states that any right or privilege enjoyed in Zambia by a Zambian citizen under the laws of Zambia, including the Constitution, shall also be enjoyed in Zambia by a citizen of a Commonwealth country if a citizen of Zambia enjoys that same right or 5 privilege in that Commonwealth country."

In my view, that is not the effect of the subsection, having regard to the words in brackets, and I think the learned Judge of Appeal has, by transposing the constituent clauses of the subsection, changed its meaning.

I consider that the words in brackets are in the nature of a *proviso* 10 and are included in the subsection for two reasons:

(1) to indicate the types of rights concerned, and

(2) to prevent a citizen of the United Kingdom claiming in Zambia any rights over and above those enjoyed in Zambia by a Zambian citizen.

I 15 disagree with the learned Attorney-General's submission that, for a citizen of the United Kingdom to enjoy a right here, it must be identical not only with the right enjoyed by a Zambian citizen in the United Kingdom but also with the right enjoyed by a Zambian citizen in Zambia, but in any event I consider that the rights in the instant case are the 20 same, so long as the Zambian citizen does not by certain criminal activity divest himself of his rights in the United Kingdom, and that they become identical after he has resided there for five years. Putting the issue in the form of a proposition, section 10 (1) states that the rights and privileges to be enjoyed by a United Kingdom citizen in Zambia shall be the same 25 as those enjoyed by a Zambian citizen in the United Kingdom. A Zambian citizen enjoys in the United Kingdom the right not to be deported unless he commits a crime punishable by imprisonment during his first five years of ordinary residence there. Accordingly, the United Kingdom citizen enjoys the same right in Zambia. However, the bracketed words in section 3010 (1) subject the proposition to a *proviso*, namely, that the rights and privileges are also enjoyed by the Zambian citizen in

Zambia. Does he enjoy the right not to be deported from Zambia unless he commits a crime during his first five years of residence? The answer is "yes" - he enjoys not only this right but the more extensive right not to be deported at all.

Bearing 35 in mind what I consider to be the intended reciprocity and the favoured treatment of United Kingdom and other Commonwealth citizens under section 10, I cannot accept a suggested construction by which a United Kingdom citizen living in Zambia would have no protection whatsoever against expulsion therefrom merely because a Zambian 40 citizen's right is less extensive in the United Kingdom than it is in Zambia (where one would expect it to be absolute, as indeed it is), and less extensive in the sense that it is presently circumscribed in what I would term a non-onerous manner by the Commonwealth Immigrants Act, 1962, which was in force when the Constitution was effected.

The 45 construction put upon section 10 (1) of the Constitution by the learned trial judge accords much more with the intended reciprocity than the learned Attorney-General's construction, which would result in no

reciprocity except when the Zambian citizen's rights in the United Kingdom are identical with his rights in Zambia.

For these reasons and for the learned trial judge's reasons, which I respectfully approve, cannot state in better terms and need not reiterate here, I agree with his construction of section 10 (1) of the Constitution. 5 This construction entails the application in Zambia of the relevant provisions of the Commonwealth Immigrants Act, 1962, *mutatis mutandis*, because the law of Zambia contains no similar provisions, and I conclude that this is intended by section 10, and that subsection (2) thereof was enacted to facilitate proof of the said provisions. 10

I would dismiss this appeal.

Appeal dismissed