

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN :

FALEMA'I LESA Appellant

- and -

ATTORNEY-GENERAL Respondent

CASE FOR THE APPELLANT

- 10. 1. This appeal is brought from a declaratory judgment of the Court of Appeal of New Zealand dated 15 April 1981 answering the question relating to the true construction of the British Nationality and Status of Aliens (in New Zealand) Act 1928 ('the 1928 Act') asked in an originating summons taken out by the appellant and removed into the Court of Appeal by order of the High Court of New Zealand dated 10 November 1980. Record  
pp.1-2  
p.10
- 20. 2. In substance an earlier decision of the Court of Appeal is also under review in this appeal. It is Levave v. Immigration Department [1979] 2 N.Z.L.R. 74. In that case the issues to be determined by the Courts, although framed within the context of an earlier repealed statute, namely the British Nationality and Status of Aliens (in New Zealand) Act 1923 ('the 1923 Act'), were in all material respects identical with those in the case now under appeal.
- 3. The issues both in the present appeal and in Levave's case arise out of the following circumstances.
- 30. 4. Certain persons who had either been born in Western Samoa before 1 January 1949 (when on the commencement of the British Nationality and New Zealand Citizenship Act 1948 the 1928 Act was repealed) or whose fathers had been born in Western Samoa before that date were prosecuted and convicted or about to be convicted on charges that, being persons to whom the Immigration Act 1964

applies and to whom a temporary permit had been granted, remained in New Zealand contrary to s.14(5) of the Immigration Act 1964 beyond the period for which such permit had been granted. The appellant is such a person. The Immigration Act 1964 does not apply to New Zealand citizens. The appellant claims that she is a New Zealand citizen, as do all others in a like case.

10. 5. The fundamental basis of that claim is that by reason of s.14 of the 1923 Act and of s.7 of the 1928 Act persons who were born in Western Samoa as constituted and defined under New Zealand law before 1 January 1949 became on birth natural born British subjects according to New Zealand law. Those sections provide:

Application of Act to Cook Islands  
and Western Samoa

20. 14. (1) Subject to the provisions of this section, this Act shall apply to the Cook Islands and to Western Samoa in the same manner in all respects as if those territories were for all purposes part of New Zealand; and the term "New Zealand" as used in this Act shall, both in New Zealand and in the said territories respectively, be construed accordingly as including the Cook Islands and Western Samoa.
- (2) In the application of this Act to the Cook Islands and Western Samoa -
30. (a) The power to grant certificates of naturalization conferred on the Minister by section five hereof shall be vested in the Governor-General, and, in the case of a person resident in the Cook Islands, shall be exercised on the recommendation of the Minister for the Cook Islands, and, in the case of a person resident in Western Samoa, shall be exercised on the recommendation of the Minister of External Affairs:
40. (b) The oath of allegiance referred to in section five hereof shall be taken before a Judge or Commissioner of the High Court of the Cook Islands, or a Judge or Commissioner of the High Court of Western Samoa, as the case may require, and every such Judge and Commissioner is hereby respectively authorized to administer the said oath accordingly:
- (c) The powers conferred on the Minister by section eight hereof shall be vested in the Governor-General:
- (d) The powers conferred on the Governor-General in Council and the Minister by sections eleven and twelve of this Act in respect of the revocation of letters of naturalization shall be exercised only by the Governor-General in Council.

10. 7. (1) Subject to the provisions of this section, this Act shall apply to the Cook Islands and to Western Samoa in the same manner in all respects as if those territories were for all purposes part of New Zealand; and the term "New Zealand" as used in this Act shall, both in New Zealand and in the said territories respectively, be construed accordingly as including the Cook Islands and Western Samoa.
- (2) In the application of this Act to the Cook Islands and Western Samoa -
20. (a) The power to grant certificates of naturalization shall be vested in the Governor-General, and in the case of a person resident in the Cook Islands shall be exercised on the recommendation of the Minister for the Cook Islands, and in the case of a person resident in Western Samoa shall be exercised on the recommendation of the Minister of External Affairs:
- (b) The oath of allegiance shall be taken before a Judge or Commissioner of the High Court of the Cook Islands, or a Judge or Commissioner of the High Court of Western Samoa, as the case may require, and every such Judge and Commissioner is hereby respectively authorized to administer the said oath accordingly:
30. (c) The powers conferred by section five of the Imperial Act, in its application to New Zealand, shall be vested in the Governor-General:
- (d) The powers conferred by sections seven and seven A of the Imperial Act, in its application to New Zealand, shall be exercised only by the Governor-General in Council.

40. 6. In Levave's case the appellant was convicted in the Magistrate's Court at Wellington of the charge that had been brought against her under the Immigration Act 1964, her defence that she was a New Zealand citizen by virtue (inter alia) of s.14 of the 1923 Act having been rejected by the Magistrate. Her appeal to the Supreme (now High) Court was dismissed, but that Court granted leave for her to appeal to the Court of Appeal pursuant to s.144(1) of the Summary Proceedings Act 1957.

50. 7. The Court of Appeal (Cooke, Richardson, and Somers JJ.) dismissed the appeal ([1979] 2 N.Z.L.R. 74). In its judgment dated 31 August 1979 delivered by Somers J. the Court considered that it was a necessary feature of the argument of the appellant in that case that s.14(1) of the 1923 Act operated, at least for the purposes of the 1923 Act, to constitute Western Samoa an area within His Majesty's dominions and allegiance. The short answer to that submission was, in the Court's judgment, that when by s.3(1) of the 1923 Act the New Zealand Parliament incorporated into New Zealand law the provisions of s.1(1)(a) of the British Nationality and Status of Aliens Act 1914 (enacted by the United

Kingdom Parliament), it did not change the meaning of those provisions. The provisions of s.1(1)(a) were as follows:

Record

PART I.

NATURAL-BORN BRITISH SUBJECTS

1. (1) The following persons shall be deemed to be natural-born British subjects, namely:-

(a) Any person born within His Majesty's dominions and allegiance; ...

Section 3(1) of the 1923 Act provided:

10. 3. (1) The several sections forming part of the British Nationality and Status of Aliens Acts, 1914 to 1922 (Imperial), as the said several sections are set forth in the First Schedule to this Act, are hereby, save only as modified by this Act, declared to be part of the law of New Zealand, and shall, save as so modified, be read together with and be deemed to form part of this Act. The said Acts of the Parliament of the United Kingdom are hereinafter referred to as the said Acts.
20. 8. The Court considered that all accepted principles of, and aids to, construction pointed to the conclusion that s.14 of the 1923 Act was concerned with the naturalisation of aliens residing in Western Samoa and was not intended to accord the status of natural-born British subject to those born in Western Samoa after the 1923 Act came into force. The considerations leading to that conclusion were summarised by the Court under the following heads:
30. (a) The language of s.14 of the 1923 Act did not postulate that Western Samoa was within His Majesty's dominions and allegiance, but bore the natural meaning that the provision deeming a person born within His Majesty's dominions and allegiance to be a natural-born British subject was to be part of the law of Western Samoa;
40. (b) On the appellant's construction s.14 of the 1923 Act operated unevenly, because, the Cook Islands being part of His Majesty's dominions and allegiance, persons born in that territory had no need of the legislative assistance which s.14(1) was claimed to give;
- (c) In view of the relationship between New Zealand and Western Samoa up to the passing of the 1923 Act and especially in view of the obligations accepted by New Zealand under the mandate from the League of Nations it was not to be supposed that the New Zealand Parliament would intend to legislate in a

manner inconsistent with moral, if not legal, international obligations by conferring British nationality (according to New Zealand law) on persons born in Western Samoa;

10. (d) Under the 1923 Act there was no uniformity between New Zealand law and the law of other parts of the Empire as to naturalisation; but with respect to natural-born British subjects uniformity was attained in the sense that a British subject was such both in New Zealand and in England. That apparent intended correspondence would not exist if the argument of Levave or of the present appellant were correct.
20. (e) The provisions of s.14(1) of the 1923 Act were directed at the residential prerequisite for naturalisation because, without s.14(1), the provisions of the 1923 Act as to naturalisation would not apply to aliens resident in Western Samoa.

9. Consequent upon the decision of the Court of Appeal no further appeal in Levave's case was permissible, because s.144(5) of the Summary Proceedings Act 1957 provided:

The decision of the Court of Appeal on any appeal under this section shall be final; ...

30. 10. Subsequently on 21 May 1980 the present appellant commenced proceedings by way of originating summons under the Declaratory Judgments Act 1908 seeking a declaratory order as against the Attorney-General determining the question as to the construction of the 1928 Act and, in particular, of s.7 of that Act, which was in all material respects identical with s.14 of the 1923 Act. The question posed in the originating summons was:

On the true construction of the British Nationality and Status of Aliens (in New Zealand) Act 1928 did the Plaintiff on her birth in Western Samoa on 28 November 1946 become a natural born British subject?

p.2

40. 11. In view of the binding force of the judgment of the Court of Appeal in Levave's case the present appellant applied to the High Court for an order pursuant to s.7 of the Declaratory Judgments Act 1908 and to s.64 of the Judicature Act 1908 removing the originating summons into the Court of Appeal for hearing and determination. On 10 November 1980 the High Court (Davison C.J.) made an order accordingly.

pp.4-5

pp.6-9  
p.10

12. The originating summons came on for hearing in the Court of Appeal (Cooke, Richardson, and Somers JJ.) on 16 March 1981, but there was no substantive argument, as both the appellant and the Attorney-General assumed that the Court would follow its own judgment in Levave's case. In its judgment dated 15 April 1981 delivered by Cooke J. the Court of Appeal held against the argument for the appellant, applying the reasons given in Levave's case all of which appeared to be equally applicable to the present case. Record  
p.17
10. Accordingly the Court ordered that the question asked in the originating summons should be answered: No. p.17
13. On 31 August 1981 the Court of Appeal granted to the appellant final leave to appeal to Her Majesty in Council against the decision of the Court of Appeal dated 15 April 1981. p.19
14. The appellant contends that the judgment of the Court of Appeal in Levave v. Immigration Department [1979] 2 N.Z.L.R. 74 is erroneous and ought to be over-ruled; that the judgment of the Court of Appeal in the present case is also erroneous and should be reversed; and that an order should be made that the question asked in the originating summons taken out by the present appellant be answered: Yes, for the following among other
- 20.

#### REASONS

- (1) BECAUSE by virtue of
- (a) the Treaty of Peace at Versailles on 28 June 1919;
- (b) the Treaties of Peace Act 1919;
- (c) the Western Samoa Order in Council (United Kingdom) of 11 March 1920 made under the Foreign Jurisdiction Act 1890;
30. (d) the Samoa Constitution Order 1920;
- (e) the mandate dated 17 December 1920 from the Council of the League of Nations conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Dominion of New Zealand to administer German Samoa with full power of administration and legislation over the territory, subject to the mandate, as an integral portion of the Dominion of New Zealand; and
- (f) the Samoa Act 1921
40. the Territory of Western Samoa was to be treated under New Zealand law as if that Territory were part of His Majesty's dominions.

- (2) BECAUSE on the incorporation of the provisions of paragraph 1(1)(a) of Part I of the First Schedule to the British Nationality and Status of Aliens Act 1914 (United Kingdom) as part of the law of New Zealand by virtue of s. 3 of the 1923 Act and of s.6 of the 1928 Act persons born in Western Samoa were deemed under New Zealand law to have been born within His Majesty's dominions and allegiance.
10. (3) BECAUSE on their true construction and in accordance with the provisions of the Acts Interpretation Act 1924 (which at the relevant time was in force in Western Samoa) the 1928 Act (like the 1923 Act) and particularly s.7 and s.14 respectively of those Acts mean that a person who was born in Western Samoa was to be deemed both in New Zealand and in Western Samoa to have been born within His Majesty's dominions and allegiance.
20. (4) BECAUSE the interpretation given to s.14 of the 1923 Act in Levave's case and to s.7 of the 1928 Act in this case involves, contrary to accepted canons of statutory interpretation, the reading down of the explicit and comprehensive language of the sections.
- (5) BECAUSE the construction of s.7 of the 1928 Act (and of s.14 of the 1923 Act) contended for by the appellant is consistent with the legal regime instituted on the acceptance of the mandate under which Western Samoa was treated in the same manner as if it were part of His Majesty's dominions and a duty of allegiance to His Majesty was imposed on the inhabitants accordingly.
30. (6) BECAUSE on the construction applied to s.7 of the 1928 Act (and to s.14 of the 1923 Act) by the Court of Appeal the New Zealand Parliament must be taken to have intended, notwithstanding the explicit language used in those sections, that persons born in Western Samoa would be and would remain stateless, which intention is not to be presumed.
40. (7) BECAUSE s.7 of the 1928 Act (and s.14 of the 1923 Act) were not inconsistent with any legal or moral obligation binding on New Zealand; or, if so, the language of those sections is clear and unambiguous and effect should be given to them notwithstanding any such obligations.

Signed:

G.P. BARTON

G.H. ROSENBERG

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Appellant

-and-

ATTORNEY-GENERAL

Respondent

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CASE FOR THE APPELLANT

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London EC4R 2SY.

Appellants Agents