

Falema'I Lesa - - - - - *Appellant*

v.

Attorney-General - - - - - *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL OF THE 19TH JULY 1982,
DELIVERED THE 28TH JULY 1982

Present at the Hearing :

LORD DIPLOCK

LORD ELWYN-JONES

LORD KEITH OF KINKEL

LORD BRANDON OF OAKBROOK

SIR JOHN MEGAW

[*Delivered by* LORD DIPLOCK]

The appellant was born in Western Samoa on a date between the coming into force of the British Nationality and Status of Aliens (in New Zealand) Act, 1928, ("the Act of 1928") and its repeal and replacement by the British Nationality and New Zealand Citizenship Act, 1948. She claims that on the true construction of the Act of 1928 by virtue of her birth in Western Samoa during that period she became, so far as New Zealand law is concerned, a natural-born British subject and she seeks in the instant appeal a declaration to that effect. If she be right on the construction of the Act of ~~1928~~ the consequence would be that upon the coming into force of the Act of 1928 she became under section 16(3) of that Act a New Zealand citizen, and under section 13 of the Citizenship Act, 1977, has continued to be one ever since.

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The importance to the appellant of establishing her New Zealand citizenship is that it frees her from all restraints upon her continued stay in New Zealand that are imposed on immigrants by the Immigration Act, 1964. The appellant in the instant case is an "overstayer", as was the appellant in *Levave v. Immigration Department* [1979] 2 NZLR 74. On arrival in New Zealand she had been granted a permit to stay for a limited period and had remained in New Zealand after that period had expired—an offence under section 14(5) of the Immigration Act, 1964, for which she is currently being prosecuted. *Levave v. Immigration Department* came before the Court of Appeal upon an appeal in a similar prosecution before a magistrate's court, on which the decision of the

Court of Appeal is final; no further appeal lies to Her Majesty in Council. It was in order to enable such further appeal to be brought that the proceedings in the instant case have taken the form of an originating summons seeking a declaration as to the construction of the Act of 1928.

The decision of the Court of Appeal in the *Levave* case turned on the construction not of the Act of 1928 but of its predecessor, the British Nationality and Status of Aliens (in New Zealand) Act, 1923 ("the Act of 1923"). The wording of the provision in that Act principally relied on by the appellant in the *Levave* case, section 14(1), was identical to the wording of the corresponding section, section 7(1) of the Act of 1928 that is principally relied on by the appellant in the instant case, which reads as follows:—

"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."

There are however substantial differences between other provisions of the two Acts which form the contexts in which those two identically worded subsections fall respectively to be construed. Unfortunately, in the instant case, because it was common ground between the parties that the decision of the Court of Appeal in the *Levave* case was decisive of the instant case in that Court, no substantive argument based upon the terms of the Act of 1928, looked at as a whole, was advanced by either party in the courts below; and, doubly unfortunately, this resulted in there not having been brought to the attention of the Court of Appeal a formidable argument, which makes the Court of Appeal's reasoning in the *Levave* case more difficult to sustain when it is sought to apply it to the construction of the Act of 1928 instead of to the construction of the Act of 1923. This argument, of which the appellant's written case to this Board gave no forewarning, emerged for the first time in the closing stages of the appellant's counsel's opening speech. A less powerful variant of that argument would have been available on the construction of the Act of 1923, but it had not been advanced in the Court of Appeal by the appellant in the *Levave* case.

Their Lordships will accordingly go straight to the Act of 1928 and first consider its construction independently of the Act of 1923 which it repealed.

The long title of the Act of 1928 reads as follows:—

"AN ACT to adopt Part II of the British Nationality and Status of Aliens Act, 1914 (Imperial), to make certain Provisions relating to British Nationality and the Status of Aliens in New Zealand, and also to make Special Provisions with respect to the Naturalization of Persons resident in Western Samoa."

So part of its purport and object is to provide a way for persons resident in Western Samoa to become British subjects by naturalization.

Section 2 defines the "Imperial Act" as the British Nationality and Status of Aliens Act, 1914; and section 3 provides

"Part II of the Imperial Act (the said Part being set out in the First Schedule hereto) is hereby adopted."

The First Schedule sets out in its entirety Part II of the Imperial Act which bears the heading "Naturalization of Aliens". Those sections set out in the First Schedule that are most directly relevant to the question of construction that their Lordships have to answer are the following:

"2.(1) The Secretary of State may grant a certificate of naturalization to an alien who makes an application for the purpose, and satisfies the Secretary of State—

- (a) That he has either resided in His Majesty's dominions for a period of not less than five years in the manner required by this section, or been in the service of the Crown for not less than five years within the last eight years before the application; and
- (b) That he is of good character and has an adequate knowledge of the English language; and
- (c) That he intends if his application is granted either to reside in His Majesty's dominions or to enter or continue in the service of the Crown.

(2) The residence required by this section is residence in the United Kingdom for not less than one year immediately preceding the application, and previous residence, either in the United Kingdom or in some other part of His Majesty's dominions, for a period of four years within the last eight years before the application.

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7(2). Without prejudice to the foregoing provisions the Secretary of State shall by order revoke a certificate of naturalization granted by him in any case in which he is satisfied that the person to whom the certificate was granted either—

(a)

- (b) Has within five years of the date of the grant of the certificate been sentenced by any Court in His Majesty's dominions to imprisonment for a term of not less than twelve months, or to a term of penal servitude, or to a fine of not less than one hundred pounds;
or

(c)

- (d) Has since the date of the grant of certificate been for a period of not less than seven years ordinarily resident out of His Majesty's dominions, and has not maintained substantial connection with His Majesty's dominions;
or

(e)

8.(1) The Government of any British Possession shall have the same power to grant a certificate of naturalization as the Secretary of State has under this Act, and the provisions of this Act as to the grant and revocation of such a certificate shall apply accordingly, with the substitution of the Government of the Possession for the Secretary of State, and the Possession for the United Kingdom, and of a High Court or superior Court of the Possession for the High Court, and with the omission of any reference to the approval of the Lord Chancellor, and also, in a Possession where any language is recognized

as on an equality with the English language, with the substitution of the English language or that language for the English language:

.....

(2) Any certificate of naturalization granted under this section shall have the same effect as a certificate of naturalization granted by the Secretary of State under this Act.

9.(1) This Part of this Act shall not, nor shall any certificate of naturalization granted thereunder, have effect within any of the Dominions specified in the First Schedule to this Act, unless the Legislature of that Dominion adopts this Part of this Act.

(2) Where the Legislature of any such Dominion has adopted this Part of this Act, the Government of the Dominion shall have the like powers to make regulations with respect to certificates of naturalization and to oaths of allegiance as are conferred by this Act on the Secretary of State.

(3) The Legislature of any such Dominion which adopts this Part of this Act may provide how and by what Department of the Government the powers conferred by this Part of this Act on the Government of a British Possession are to be exercised.

(4)”

These were provisions contained in an Act of the United Kingdom Parliament to which the United Kingdom Interpretation Act, 1889, applied. So far as is relevant, the definition in the Interpretation Act 1889 of the expression “British Possession” which appears in sections 8 and 9 of the First Schedule to the Act of 1928 was “any part of Her Majesty’s dominions exclusive of the United Kingdom”.

It follows that unless, during the period between the coming into effect of the Act of 1928 and its repeal by the Act of 1948, Western Samoa was to be treated, for the purposes of the Act of 1928, as part of His Majesty’s dominions, the combined effect of section 8(1) and 2(1) and (2) of the Imperial Act set out in the First Schedule of the Act of 1928 would have been that past residence in Western Samoa could not enable a person to acquire the necessary qualification for naturalization under section 2(1)(a) and (2). Nor would an intention of future residence in Western Samoa satisfy the requirements of section 2(1)(c); on the contrary, seven years’ residence in Western Samoa after naturalization would render a person’s certificate of naturalization liable to revocation under section 7(2)(d). The adoption of Part II of the Imperial Act would, therefore, not be sufficient of itself to effect the object expressed in the long title of the Act of 1928 “to make Special Provisions with respect to the Naturalization of Persons resident in Western Samoa”, unless the effect of section 7(1) was to require Western Samoa to be treated as being “in His Majesty’s dominions” for the purposes of the provisions contained in the First Schedule.

Section 6 of the Act of 1928 which, although expressed more succinctly, is substantially to the same effect as section 3 of the Act of 1923, reads as follows:—

“6. The several provisions of the Imperial Acts set forth in the Second Schedule to this Act, in so far as the said provisions are capable of application in New Zealand, are hereby declared to be part of the law of New Zealand.”

The provisions of the Imperial Acts set out in the Second Schedule which are directly relevant to the instant appeal are in Part I of the Imperial Act of 1914 under the heading "Natural-born British Subjects". They are:—

" 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; and
- (b) Any person born out of His Majesty's dominions whose father was, at the time of that person's birth, a British subject, and who fulfils any of the following conditions, that is to say, if either—
 - (i) His father was born within His Majesty's allegiance; or
 - (ii) His father was a person to whom a certificate of naturalization had been granted; or
 - (iii) His father had become a British subject by reason of any annexation of territory; or
 - (iv) His father was at the time of that person's birth in the service of the Crown; or
 - (v) His birth was registered at a British consulate within one year or in special circumstances, with the consent of the Secretary of State, two years after its occurrence, or, in the case of a person born on or after the first day of January, nineteen hundred and fifteen, who would have been a British subject if born before that date, within twelve months after the first day of August, nineteen hundred and twenty-two; and
- (c) Any person born on board a British ship, whether in foreign territorial waters or not:

Provided that the child of a British subject, whether that child was born before or after the passing of this Act, shall be deemed to have been born within His Majesty's allegiance if born in a place where by treaty, capitulation, grant, usage, sufferance, or other lawful means, His Majesty exercises jurisdiction over British subjects: "

In the instant case the appellant's claim to have been a natural-born British subject at the time of the passing of the Act of 1948, and therefore to have then become a citizen of New Zealand, is based on the proposition that the effect of section 7(1) of the Act of 1928 is to require Western Samoa to be treated as "within His Majesty's Dominions and allegiance" for the purposes of the provisions of section 1 of the Imperial Act contained in the Second Schedule to the Act of 1928. So it is section 7 that is crucial to her claim to be a natural-born British subject in New Zealand law despite the fact that she would not be deemed a natural-born British subject under the Imperial Act itself.

For convenience of reference their Lordships set section 7 out here in full although this involves repetition of subsection (1) which has already been cited in this opinion:—

" 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 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—

- (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:
- (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."

Subsection (1) is in two parts separated by a semi-colon. The second part after the semi-colon is merely an interpretation provision giving to the expression "New Zealand", wherever it appears in the Act of 1928, a more extended meaning than it would otherwise bear by virtue of section 4 of the Acts Interpretation Act 1924, viz. "the Dominion of New Zealand, comprising all islands and territories within the limits thereof for the time being other than the Cook Islands".

The first part of subsection (1), however appears to state emphatically and unequivocally that the whole of the Act, subject only to such modifications as are contained in section 7 itself, i.e. in subsection (2), are to apply both 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. The reference to their being "part of New Zealand" echoes, in the case of the Cook Islands, the Order in Council of 1901, referred to in the preamble to the Cook Islands Act, 1915, under which it was ordered that the Cook Islands "should form part of New Zealand"; and, in the case of Western Samoa, Article 2 of the League of Nations Mandate for German Samoa scheduled to the Samoa Act, 1921, which provided:

"The Mandatory shall have full power of administration and legislation over the Territory, subject to the present mandate, as an integral portion of the Dominion of New Zealand, and may apply the laws of the Dominion of New Zealand to the Territory, subject to such local modifications as circumstances may require.

The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the Territory subject to the present mandate."

Since in 1928 New Zealand formed part of His Majesty's dominions and was within His Majesty's allegiance, if the Act is to apply to Western Samoa "in the same manner in all respects" as if that geographical area

were "for all purposes part of New Zealand", the unambiguous meaning of section 7(1) would appear to be that Western Samoa as well as New Zealand proper and the Cook Islands must be treated as part of His Majesty's dominions and within His Majesty's allegiance, in every case where the status of any person in New Zealand either as a natural-born British subject or as an alien eligible for naturalization as a British subject depends upon his, or his father's, having been born in Western Samoa or, in the case of eligibility for naturalization, upon his having resided there.

It is, in their Lordships' view, impossible to read down section 7(1) of the Act of 1928, as confined to the naturalization of aliens residing in the Cook Islands and Western Samoa, as the Court of Appeal felt able to do with the corresponding section 14(1) of the Act of 1923 in the *Levave* case. Section 7(2)(a) plainly contemplates that residence in Western Samoa during the year immediately preceding an application shall constitute the residence required to qualify for naturalization under section 2(1)(a) and (2) of the Imperial Act set out in the First Schedule as applicable in New Zealand with the modifications for which section 8(1) of the Imperial Act provides. But under section 2(1)(a) of the Imperial Act the required residence must have been "in His Majesty's dominions" and, under section 2(2) as modified by section 8(1), the residence for not less than one year immediately preceding the application must be in a part of His Majesty's dominions exclusive of the United Kingdom. So if section 7(1) and (2) had any effect at all in New Zealand law to enable aliens resident in Western Samoa to be naturalized as British subjects, which was one of the objects stated in the long title to the Act, section 7(1) must have had the effect of requiring the territory of Western Samoa to be included in the description "His Majesty's dominions" wherever that expression is used in the provisions of the Imperial Act set out in the First Schedule to the Act of 1928, and also included in the description "British Possession" in section 8(1) of the Imperial Act.

If this be so, and it seems to their Lordships to be inescapable, it would seem also to follow from the emphatic generality of section 7(1)—"in the same manner in all respects" and "for all purposes part of New Zealand"—that the section requires that the territory of Western Samoa is to be treated as included in the description "His Majesty's Dominions and allegiance" in the definition of persons who shall be deemed to be natural-born British subjects in section 1 of the Imperial Act set out in the Second Schedule and declared to be part of the law of New Zealand by section 6 of the Act of 1928. The only distinction between this description and the corresponding description of territory in Part II of the Imperial Act, birth within which confers the status of a natural-born British subject, is the addition of the words "and allegiance". But it is horn book law, or at any rate well-established as long ago as *Calvin's Case* (1608) 7 Co. Rep. 1a that a person born within His Majesty's dominions did by virtue of his birth there of itself owe natural allegiance to His Majesty, unless he was born there either (a) as a child to the diplomatic representative of a foreign state or, to use the older terminology, a "public minister" of a foreign state, who at common law (which in this respect followed the law of nations) owed no allegiance, even local, to the sovereign to whom he was accredited (*Magdalena Steam Navigation Co. v. Martin* (1859) 2 El. & El. 94); or (b) was born as a child of a member of an invading force of an enemy power or of an alien in an enemy-occupied part of His Majesty's dominions.

The reasons why in sub-paragraph (i) of paragraph (b) of section 1(1), which deals with British subjects by descent, the reference to the father of a person claiming to be a natural-born British subject, refers only to the

father's having been born "within His Majesty's allegiance" and omits any reference to his having been born within His Majesty's dominions, are to be found mainly in the first proviso which refers to foreign territories in which the Crown exercised jurisdiction over British subjects under the Foreign Jurisdiction Act 1890 although such territories did not form part of His Majesty's dominions. Most other British subjects born in foreign territory but yet within His Majesty's allegiance, such as children born to British diplomats in the foreign state to which they were accredited and children born to male members of British Forces on foreign soil, would be covered by sub-paragraph (b)(iv) of section 1(1) of the Imperial Act but the heir to the throne and the children of the sovereign if born abroad would be born within His Majesty's allegiance but not within his dominions and sub-paragraph (b)(i) caters for them also.

Their Lordships therefore cannot see how any principle of construction would justify them in holding on the one hand that section 7(1) required Western Samoa to be treated in the same way as if it were part of New Zealand in the respect that New Zealand was "in His Majesty's dominions" for the purposes of the provision of Part II of the Imperial Act declared to be adopted by section 3 of the Act of 1928 (as it must be if the declared object of the Act of making provision for the naturalization of persons resident in Western Samoa is not to be utterly defeated), yet would justify them on the other hand in holding that section 7(1) did *not* require Western Samoa to be treated as if it were part of New Zealand in the respect that New Zealand was within "His Majesty's Dominions and allegiance" or "within His Majesty's allegiance" for the purpose of section 1(1) of the Imperial Act declared by section 6 of the Act of 1928 to be part of the law of New Zealand.

In their Lordships' view, there is no escaping that section 7(1) of the Act of 1928 means what it so emphatically and unequivocally says: a person born or resident in Western Samoa is to be treated in the same manner in all respects for all the purposes of the Act of 1928 as if he had been born or resident in New Zealand proper.

Their Lordships now turn to a consideration of the reasoning of the Court of Appeal in the *Levave* case. They emphasise that what fell to be construed in that case was the Act of 1923. Its terms presented less formidable obstacles to construing section 14(1) of that Act as confined to the naturalization of aliens residing in the Cook Islands and Western Samoa than the obstacles which in their Lordships' view prevent a similar limited construction being given to section 7 of the Act of 1928. The Act of 1923 declared to be part of the law of New Zealand those provisions of the Imperial Act that were subsequently set out in Schedule 2 of the Act of 1928, including, in particular, section 1 of The Imperial Act defining natural-born British subjects, but it did not adopt Part II of the Imperial Act. Instead, by sections 4 to 12, the Act of 1923 provided for its own system of local naturalization. The relevant qualification for local naturalization was dealt with by sections 4 and 5. It was residence "within New Zealand" and thus, by the extended definition of New Zealand for which the second part of section 14(1) provided, included residence in the Cook Islands or Western Samoa. The only reference to "His Majesty's dominions" in the naturalization provisions occurred in section 5(1)(c) which required the minister to be satisfied that the applicant for naturalization intended "to continue to reside in His Majesty's dominions, or to enter, or continue in, the service of the Crown".

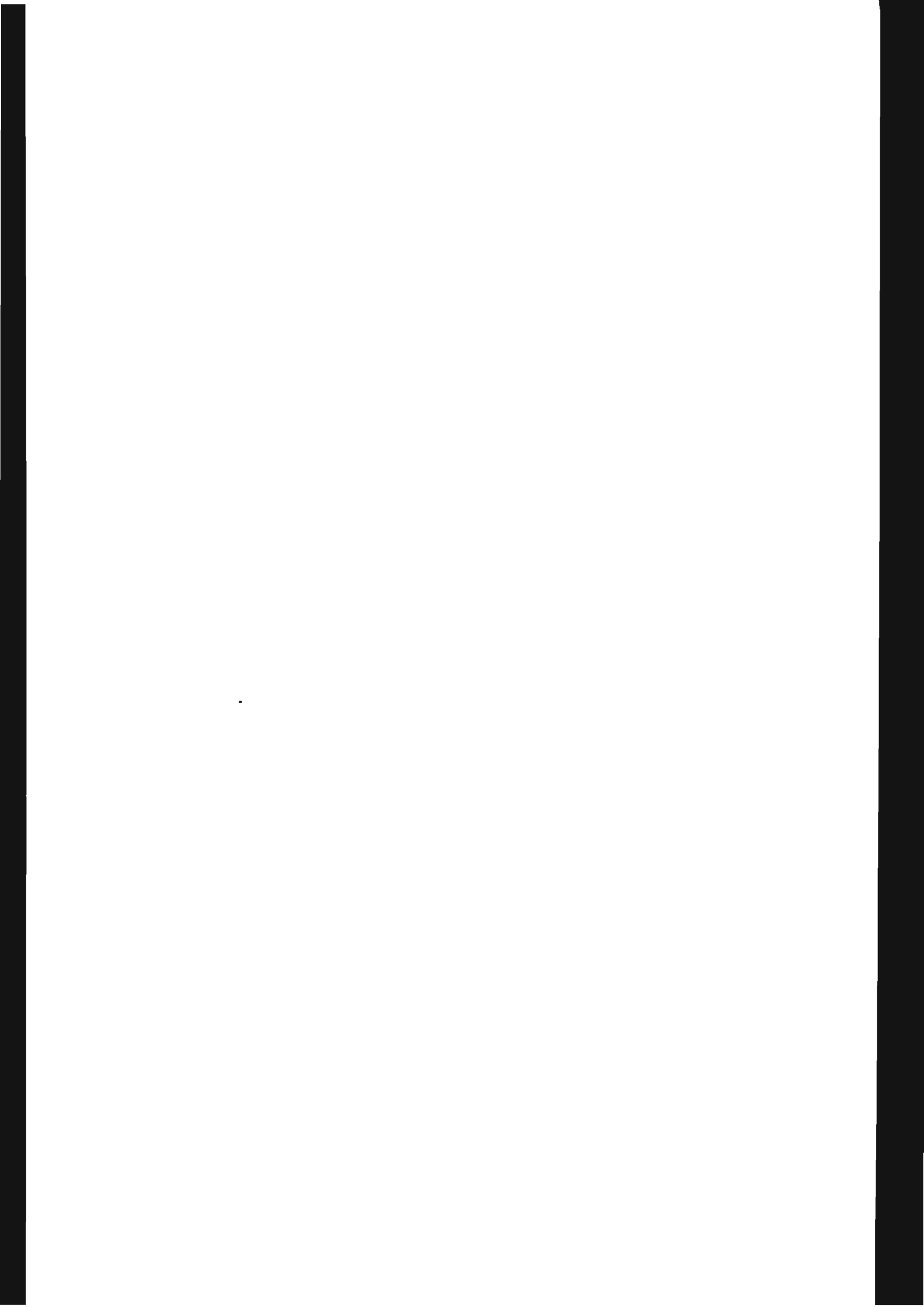
This provision does not appear to have been drawn to the attention of the Court of Appeal in the *Levave* case. If it had been one does not

know how it would have affected that court's decision. It is necessarily implicit in the reference to "continue to reside" that residence in Western Samoa which qualified the applicant for the grant of a certificate of naturalization was treated by the draftsman as residence in His Majesty's dominions. Furthermore, if it were right that the first part of section 14(1) did not have the effect of requiring Western Samoa to be treated as part of New Zealand and therefore within His Majesty's dominions, at any rate for the purposes of section 5(1)(c) of the Act of 1923, sections 4 and 5 would have the result that aliens resident in Western Samoa could not obtain naturalization, if they intended to go on residing there but could only obtain it if they wanted to emigrate from Western Samoa to New Zealand proper or to the Cook Islands. This result can hardly have been that intended by the New Zealand Parliament; and because the Court of Appeal were not referred to section 5(1)(c), it is not what the Court of Appeal regarded as being the effect of section 14(1) on the naturalization provisions of the Act.

In referring to the language of the first part of section 14(1) of the Act of 1923, the Court of Appeal in the *Levave* case omitted what in their Lordships' view are the important words, "in the same manner in all respects". If effect is given to these words it is not in their Lordships' view possible to say that the only natural meaning of the first part of the subsection is that natural-born British subjects born within His Majesty's dominions and allegiance are to be treated as natural-born British subjects under the law of the Cook Islands and the law of Western Samoa. It is not suggested how such a limited provision could affect the status of such persons in either territory. Nor, in their Lordships' view, is any ground for failing to give to section 14(1) what would otherwise be its plain meaning provided by the fact that the subsection would have greater consequences in Western Samoa since the Cook Islands were already part of His Majesty's dominions and so long as they remained so persons born there would be deemed to be natural-born British subjects without the assistance of section 14(1).

The strongest argument relied on in the *Levave* case in favour of giving to the Act of 1923 a construction that did not involve treating as a British national in New Zealand persons born in Western Samoa after the passing of the Act is to be found in the resolutions of the Council of the League of Nations resolved upon in 1923 shortly before the Act was passed. They are set out in the judgment. Their meaning is not expressed with crystal clarity, but it would be right to say that they deprecate the automatic bestowal of the nationality of the Mandatory Power upon inhabitants of the Mandatory territory; though there would appear to be some inconsistency here with the provision in Article 2 of the terms of the Mandate that Western Samoa was to be governed as an "integral portion of the Dominion of New Zealand". The Act of 1923 spoke for the future; it did not on any view of its construction bestow New Zealand nationality upon any native inhabitants of Samoa born before the passing of the Act; they retained whatever nationality, if any, they had previously possessed. Despite the fact that the resolutions did not impose upon the Government of New Zealand any obligation binding upon it in international law, their Lordships agree with the Court of Appeal that the resolutions would be relevant in resolving any ambiguity in the meaning of the language which is common to section 14(1) of the Act of 1923 and section 7(1) of the Act of 1928. They are, however, unable, for the reasons already stated, to discern any ambiguity or lack of clarity in that language in its application to section 1 of the Imperial Act adopted as part of the law of New Zealand by both the Act of 1923 and the Act of 1928.

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be allowed, and the question asked in the originating summons should be answered Yes. The respondent must pay the appellant's costs of this appeal. As the point on which the appellant has succeeded was not taken in the Court of Appeal each party should bear their own costs in that court.



In the Privy Council

FALEMA'I LESA

v.

ATTORNEY-GENERAL

DELIVERED BY
LORD DIPLOCK