

Constitutional Reference: In re Application by Father Ioane Vito and Others

Supreme Court
Ryan C.J.
25 October 1988

Constitutional law—Constitution, arts. 4 and 15—Protocol between New Zealand and Western Samoa 1982—whether protocol is null and void by art. 15 of Constitution—whether New Zealand’s Citizenship (Western Samoa) Act 1982 contravenes obligations of Western Samoa under international conventions.

10 Facts:

This application by Samoa applicants arose out of the consequences to the Privy Council’s decision in *Lesa v. Attorney-General of New Zealand* [1982] 1 N.Z.L.R. 165. By virtue of the British Nationality and States of Aliens Act 1948 (N.Z.) it was held that the appellant was a natural-born British subject. The consequence was that upon the coming into force of the 1948 Act all such persons were recognized by the courts as New Zealand citizens. It has been estimated that some 100,00 Western Samoans out of a total population of 160,000 were so affected. On 21 August 1982, a protocol dealing with the effects of the decision had been signed by the two countries. On 14 September 1982 the New Zealand Parliament passed the
20 Citizenship (Western Samoa) Act 1982 which gave effect to the protocol in New Zealand, and nullified the effect of the decision, except for Miss Lesa herself and a very limited class of persons.

The petitioners in August 1983 lodged an application before Phillips C. J. claiming that the protocol was null and void. However, a decision had not been given which caused “much distress to the Samoan Community”. The petitioners alleged that the protocol contravened their rights under article 15 of the Constitution.

The respondent argued, on the other hand, that the only practical application of the protocol is section 7 of the 1982 New Zealand Act which implements article II of the protocol. Furthermore, the signing of the protocol was not a condition precedent
30 to the enactment of the New Zealand legislation.

HELD:

- (1) The protocol may have been signed with unseemly haste by both countries but there is nothing in the document which in any way infringes the Constitution. It has been argued that it was unwise, imprudent, and ill-considered, but it was not in any way unconstitutional. The protocol did not create domestic law in Samoa. To do that it would have required justiciable domestic legislation: page 441, line 282. *Blackburn v. Attorney-General*. [1971] 1 W.L.R. 1037; [1971] 2 All E.R. 1380 C.A.
- (2) While the petitioners argued on the higher moral ground, it cannot be said
40 that the Government of Western Samoa in signing and ratifying the protocol of 21 August 1982 was acting contrary to the provisions of article 15 or any

other provision of the Constitution of The Independent State of Western Samoa, and accordingly the declaration sought by the petitioners must be rejected: page 441, line 286.

Editorial Observation:

The judgment usefully sets out the protocol, otherwise not easily available. The *Lesa* judgment of the Privy Council is an application of the rule in *Calvin's case* (1608) 7 Co. Rep. 12: 77 E.R. 377, that a person born within Her Majesty's dominions did, by virtue of such birth, owe natural allegiance. The Samoa Act 1921 (N.Z.) was an assertion of New Zealand sovereignty over Western Samoa, under a League of Nations mandate; New Zealand executive powers were recognized in *Tagoloa v. Police* [1927] N.Z.L.R. 883 and *In re Tamasese, a Prisoner* [1929] N.Z.L.R. 209.

See also J. McManamy, "*Lesa v. Attorney-General—The Story behind the Judgment*" [1982] N.Z.L.J. 272 and J. K. McLay "The Western Samoa Bill—Background and Explanation" [1982] N.Z.L.J. 353.

Other cases referred to in judgment:

Blackburn v. Attorney-General [1971] 1 W.L.R. 1037; [1971] 2 All E.R. 1380 (C.A.)
Koowarta v. Bjelke-Petersen and Others [1982] 56 A.L.J.R. 625 High Court of Australia

Lesa v. Attorney-General of New Zealand [1982] 1 N.Z.L.R. 165

Legislation referred to in judgment:

Constitution of the Independent State of Western Samoa
Citizenship (Western Samoa) Act 1982

Other sources referred to in judgment:

R. G. Glover, "The Western Samoa Bill—Background and Unanswered Questions" [1982] N.Z.L.J. 355

J. F. Northey, "Casenote" [1982] N. Z. Recent Law 345

Protocol To the Treaty of Friendship Between The Government of Western Samoa and The Government of New Zealand

Counsel:

H. T. Retzlaff for the petitioners

A. Garneau for the respondent

RYAN J.

Judgment:

This application for a declaration that the protocol entered into between Western Samoa and New Zealand on 21 August 1982 is null and void was heard by Phillips C.J. in August 1983. A decision has never been given—a cause of much distress to the Samoan community. The issue before the Court is one of law—the facts are not in dispute. The parties have consented in writing to my giving a decision based on documentation, which includes written submissions, presently on the court file.

The dispute between the parties has its genesis in the decision of the Privy Council in *Lesa v. Attorney-General of New Zealand* [1982] 1 N.Z.L.R. 165. The essence of that decision was that the Privy Council held that the appellant was, by virtue of the British Nationality and Status of Aliens (New Zealand) Act 1928, a

natural-born British subject. By extension the decision meant that all persons born in Western Samoa after 1928 and before the British Nationality and New Zealand Citizenship Act 1948 (N.Z.) came into force, were natural-born British subjects. The consequence was that upon the coming into force of the 1948 Act all such persons were recognized by the courts as New Zealand citizens. It has been estimated that
90 some 100,000 Western Samoans out of a total population of 160,000 were so affected (speech by the Hon. J. K. McLay, Minister of Justice for New Zealand 27/9/82).

The decision of the Privy Council was announced on 19 July 1982 and its reasons were given on 28 July 1982. The authorities of both Western Samoa and New Zealand moved with paralysing speed, in an area more noted for leisurely and extensive discussion and cogitation, and by 21 August 1982, twenty-four days after the Privy Council reasoning had been made public, a protocol dealing with the effects of the decision had been signed by the two countries. That protocol was to the Treaty of Friendship signed by Western Samoa and New Zealand on 1 August 1962.

100 Within a month of the signing of the protocol, on 14 September, the New Zealand Parliament had passed into law the Citizenship (Western Samoa) Act 1982 which gave effect to the protocol in New Zealand and nullified the effect of the decision, except for Miss Lesa herself and a very limited class of persons. The protocol had been ratified the day before, 13 September 1982, by an exchange of instruments of ratification.

It is important to set out the protocol so that no one can be under any misapprehension as to precisely what it says.

Protocol to The Treaty of Friendship Between The Government of Western Samoa and The Government of New Zealand

110 The Government of Western Samoa and the Government of New Zealand, Reaffirming that their relations are founded upon sovereign equality and continue to be governed by a spirit of close relationship,
Recognising that the special relationship between Western Samoa and New Zealand requires that issues affecting the two countries and their citizens should be resolved on a cooperative basis,
Having considered the circumstances under which citizens of Western Samoa could appropriately acquire citizenship of New Zealand,
Noting that, in accordance with international law and practice, it is for each country to determine under its own law who are its citizens,
120 Recognising that a country normally grants citizenship only to those individuals having a close and effective link with it,
Recognising further that the ties of history, friendship and law between Western Samoa and New Zealand are such as to give the citizens of Western Samoa a claim to special treatment under the New Zealand law governing citizenship,
Have agreed as follows:

Article I

At the request of either, the two Governments shall consult on any issue relating to the operation of their respective laws governing citizenship and immigration.

Article II

The Government of New Zealand shall:

130 (a) grant to all citizens of Western Samoa in New Zealand on the date of entry

into force of this Protocol the right to become New Zealand citizens immediately upon application;

- (b) grant to those citizens of Western Samoa who travel to New Zealand after the entry into force of this Protocol and who, pursuant to the policy and practice implemented by New Zealand prior to 19 July 1982, would have been granted permanent residence status either on arrival in New Zealand or subsequently, the additional right to become New Zealand citizens immediately upon application after acquisition of permanent residence status.

Article III

For the purpose of this Protocol the term 'New Zealand' shall not include the Cook Islands, Niue or Tokelau.

Article IV

This Protocol shall be read with, and form an integral part of, the Treaty of Friendship between the Government of Western Samoa and the Government of New Zealand done at Apia on 1 August 1962.

Article V

This Protocol shall be subject to ratification. It shall enter into force on the date of the exchange of instruments of ratification.

In Witness Whereof the representative of the Government of Western Samoa and the representative of the Government of New Zealand, duly authorised for the purpose, have signed this agreement.

Done at Apia this 21st day of August 1982 in four originals, two being in the Samoan language, and two in the English language, the texts of both languages being equally authentic.

(sgd) Tofilau Eti Alesana
For the Government of
Western Samoa

(sgd) J. McLay
For the Government of
New Zealand

The petitioners allege that the Protocol "is unconstitutional and furthermore discriminating against the Petitioners in contravention of their constitutional rights".

The petitioners' argument is that the protocol actively encouraged the New Zealand authorities to pass the 1982 Act and that had the protocol not been signed and ratified the New Zealand Government would not have passed the legislation because of the "possible embarrassment and international abhorrence that would have been directed towards New Zealand if it had proceeded to the Act of 1982 without the Protocol and form the moral basis of it".

Notwithstanding the protocol, there has been no shortage of criticism of the New Zealand legislation and I need mention only the articles written by Professor J. F. Northey and Mr. R. G. Glover in [1982] N.Z. Recent Law 345 and [1982] N.Z.L.J. 344, respectively. Mr. Glover, in his article at page 357, sets out in succinct form the overall effect of the Act, and says that it is threefold:

The overall effect of the new Act is three-fold. First, it bestows New Zealand

citizenship as a right upon those Western Samoans who were within the parameters of Falema'i Lesa's case and were present in New Zealand when the Act came into force. In other words, it serves to confirm the Privy Council's decision for those people. Secondly, the Act bestows New Zealand citizenship upon all other Western Samoans who were in New Zealand when it came into force, even though they would not have obtained this from the Court's decision. Thirdly, it removes the New Zealand citizenship of those Western Samoans who were outside New Zealand at the relevant time and who acquired citizenship by virtue of the Privy Council's judgment.

He goes on to say that the solution to the dilemma in which the Privy Council decision placed New Zealand was unnecessarily arbitrary and discriminatory. He continues:

The inconsistencies in the Act lie rather in the way in which it selects those Western Samoans who are to have New Zealand citizenship and those who are not. It does not seem equitable that Western Samoans to whom the judgment did not apply should automatically get New Zealand citizenship on the basis only that they were in New Zealand at the right time, when those to whom the judgment did apply are to be denied the same right merely by virtue of their absence.

That criticism is quite moderate in relation to some of the other allegations concerning racism and the like which have been levelled at the legislation. It is not, however, the function of this Court to criticize in any way the New Zealand legislation, but it is helpful in reaching a conclusion on the petitioners' claim to be aware of some of the criticism of others.

The petitioners, in their argument presented to the Court, deal at length with the Universal Declaration of Human Rights and various decisions in other commonwealth countries dealing with legislation which diminishes or removes citizenship rights, but it is important to bear in mind in this case that the legislation complained of is not legislation enacted in Western Samoa but in another sovereign state which this Court is powerless to deal with. Had the legislation been passed in Western Samoa then I have no doubt but that the Court would have struck it down as being unconstitutional. The principal argument mounted by the petitioners is based upon article 15 of the Constitution which reads as follows:

15. Freedom from discriminatory legislation

- (1) All persons are equal before the law and entitled to equal protection under the law.
- (2) Except as expressly authorised under the provisions of this Constitution, no law and no executive or administrative action of the State shall, either expressly or in its practical application, subject any person or persons to any disability or restriction or confer on any person or persons any privilege or advantage on grounds only of descent, sex, language, religion, political or other opinion, social origin, place of birth, family status, or any of them.
- (3) Nothing in this Article shall—
 - (a) Prevent the prescription of qualifications for the service of Western Samoa or the service of a body corporate directly established under the law; or

- 220 (b) Prevent the making of any provision for the protection or advancement of women or children or of any socially or educationally retarded class of persons.
- (4) Nothing in this Article shall affect the operation of any existing law or the maintenance by the State of any executive or administrative practice being observed on Independence Day;

Provided that the State shall direct its policy towards the progressive removal of any disability or restriction which has been imposed on any of the grounds referred to in clause (2) and of any privilege or advantage which has been conferred on any of those grounds.

230 The essential portions of the article which the petitioners cite as being contravened by the protocol seem to be sub-article (1) "all persons are equal before the law and entitled to equal protection under the law" and sub-article (2) "... no executive or administrative action of the State shall, ... in its practical application subject any person or persons to any disability or restriction ... grounds only of descent ... or ... place of birth". The petitioners say that the protocol discriminates against the petitioners by conferring an unfair privilege and advantage to certain Samoans, and by this advantage the petitioners are discriminated against. It is argued that the simultaneous ratification of the protocol with the enactment of the 1982 N.Z. legislation (allowing for time-zone differences) is a principal link between the two and establishes beyond doubt that the Act and the protocol are inexorably linked and that the Act is the practical application of the protocol. That is a powerful argument. The Attorney-General in reply says that the only practical application of the protocol is section 7 of the 1982 Act which implements article II of the protocol, and says that section 6 which deprives certain persons of New Zealand citizenship was not part of the protocol and presumably by implication was not in the contemplation of the Samoan executive branch of Government when it signed and ratified the protocol, and accordingly is quite outside any "practical application" of the protocol. The protocol itself is fundamentally a recitation of the special relationship which exists between the two countries and obliges only one country, New Zealand, to take any steps in relation to the protocol (other than ratification). The New Zealand Government was required to do certain things under article II. 240 The Samoan Government was a signatory to the protocol merely to acknowledge that stipulation. The New Zealand legislation which followed consisted of an Act of Parliament five pages in length, containing eleven sections, only two of which, sections 2 and 7, are in any way part of the protocol. To that extent, therefore, the New Zealand legislation went far beyond the document signed by the two nations.

250 The Attorney-General submits quite correctly that the signing of the protocol was not a condition precedent to the enactment of the New Zealand legislation. The New Zealand Government was obviously concerned at the practical application of the *Lesá* decision and had a simple remedy for nullifying its effects, viz. by passing the sort of legislation which it did. It did not need any approval from the Samoan authorities to do that. It clearly thought that it would be diplomatic to engage in discussions with the Samoan Government and despatched the New Zealand Attorney-General and the Deputy Leader of the Opposition (the present New Zealand Prime Minister, Mr. David Lange) to Samoa for talks. No doubt the signing of the protocol prevented a certain loss of face for New Zealand in enacting the legislation which it did in the face of article 3 of the International Convention on the 260

270 Elimination of All Forms of Racial Discrimination. In *Koowarta v. Bjelke-Peterson and Others* [1982] 56 A.L.J.R. 625 the High Court of Australia held that the Universal Declaration of Human Rights must be treated as customary international law. The New Zealand legislation appears to be contrary to both conventions, but that is of little comfort to the petitioners. The New Zealand legislation did create new law in that country but in that country alone. It is not, in my view, legislation of which New Zealand can be proud. It clearly discriminates on the ground of race against persons who were declared by the highest New Zealand Court to be citizens of New Zealand; any argument to the contrary has a hollow ring and I have little doubt that had New Zealand had a constitution with a provision in it similar to article 15 of the Samoan Constitution then the legislation would have been struck down. Having said
280 that, however, it is quite clear that New Zealand did not require any legislation of any sort in Samoa to assist or perfect its legislation. The protocol was certainly signed with almost unseemly haste by both countries but there is in my opinion nothing in the document which in any way infringes the Constitution. It has been argued that it was unwise, imprudent, and ill-considered—I make no judgment on those arguments—but unconstitutional? No. The protocol did not create domestic law in Samoa. To do that it would have required domestic legislation capable of being justiciable in the courts (*Blackburn v. Attorney-General* [1971] 2 All E.R. 1380 C.A.).

290 While the petitioners therefore may well occupy the higher moral ground, it cannot be said that the Government of Western Samoa in signing and ratifying the protocol of 21 August 1982 was acting contrary to the provisions of article 15 or any other provision of the Constitution of the Independent State of Western Samoa, and accordingly the declaration sought by the petitioners must be rejected.

I will hear counsel on the question of costs if agreement cannot be reached.

Reported by F.T.