Edwards v Kingdom of Tonga

Court of Appeal
Ward CJ, Martin & Burchett JJ.
Appeal in Civil Case No.907/93

15 April, 30 June 1994 (& costs 12 August, 10 October 1994)

Constitution - nationality - Tongan subject.
Constitution - Cl.20 - retrospective legislation.
Nationality - Tonga subject.
Costs - solicitor acting for himself.

The appellant had applied for a declaration that he was a Tongan subject. His claim failed in the Supreme Court but succeeded in the Court of Appeal where it was,

Held:

1. A person's nationality is determined at the date of birth.
2. Clause 20 of the Constitution creates a guarantee against the passing of laws that deprive people of their rights retrospectively.
3. The appellant's nationality was governed by the state of the law when he was born.
4. The Constitution at that time distinguished between foreigners and "native born subjects of Tonga."
5. That provision in the Constitution was to be viewed not only in the context of the particular provision within the Constitution itself; but also viewed in the wider context in which the whole Constitution is set.
6. That wider context includes the adoption of many common law institutions and concepts (and including the jurisprudential framework of Tongan laws and legal institutions being a common law framework).
7. The common law test was a person by virtue of his birth in a state owed allegiance to that state unless born to a diplomat or to a member of an invading force of an enemy power or an alien in an enemy occupied part of the state.
8. Both the appellant and his father, having been born in Tonga, owed natural allegiance to the sovereign of Tonga and each was therefore a Tongan for the purpose of nationality.
9. That accorded with the meaning the expression "native born subjects of Tonga" must have had when used in the Constitution, as it stood at the relevant

times.

10 Declaration accordingly that the appellant is a Tongan subject within the meaning of s 2 (a) Nationality Act.

11 (in a separate ruling on costs by Ward CJ) the costs (being reasonable costs) of a Solicitor who conducts his own case is of the same entitlement as if a Solicitor had been employed.

Cases referred to: Calvin's case (1609) 7 Co. Rep.1
Joyce v D.P.P. [1946] AC 347
Lesa v Attorney General of New Zealand [1983] 2 AC 20
Societe Anonyme Pecheries Ostendaises v Merchants Marine Insurance Co. [1928] 1 KB 750
Smith v Buller (1875) LR 19 Eq 473
London Scottish Benefit Soc. v Chorley (1884) 139 QBD 872

Statutes referred to: Constitution, Cl. 11, Cl.20, Cl.29
Nationality Act, s.2(a)
Civil Law Act, s.3, s.4

Rules referred to: Supreme Court Rules, O.29 r.4

Appellant in person
Counsel for Respondent: Solicitor General

Judgment

Mr Edwards appeals against the decision on 25th March 1993 of Dalgety J who dismissed his application for a declaration that he is a Tongan subject within the meaning of section 2(a) of the Nationality Act (Cap 59).

The relevant part of that Act states:

"2. The following perons shall be deemed to be Tongan subjects-

(a) Any person born in Tonga whose father is a Tongan."

Mr Edwards was born in Tonga on 11th January 1934. He was the legitimate son of Charles Edwin Edwards and Ruby Vavae. There is no dispute that his mother was "a Tongan". It is argued for the Kingdom of Tonga that his father was not.

Mr Edwards' father was born in Tonga on 15th November 1902. His parents were Charles Edwards and Maria Jane Edwards. They were not Tongan, but had come to live and trade in the Kingdom.

Mr Edwards' birth was registered with the Western Pacific High Commission under an English provision - the Pacific Order in Council 1893. This does not determine his nationality, which has to be determined by the internal law of the contry. Within Tonga, it is irrelevant what view other states may take of Mr Edwards' status.

At the time of Mr Edwards' birth there was no Nationality Act. The following year Act No.11 of 1935 came into effect. It is entitled "**An Act to determine who shall be deemed to be Tongan subjects**". Section 2 states:

"2. The following persons shall be deemed to be Tongan subjects:

(a) any person born in Tonga of Tongan parentage..."

The Tongan text "ha taha kuo fanau'i 'i Tonga 'e ha ongo matu'a Tonga ..." makes it clear that both parents must be Tongan.

If Mr Edwards qualifies under section 2(a), the Act would have deemed him to be a Tongan as from 1935. But a person's nationality is determined at the date of birth, and if he already held Tongan nationality under the previous law the Act could not take it away. There is by clause 20 of the Constitution a guarantee against the passing of laws that deprive people of their rights retrospectively. It is therefore necessary to examine the state of the law when Mr Edwards was born.

Extensive research by the learned judge and by counsel failed to find any provision in a Tongan statute in which "a Tongan" is defined, either in 1934 when Mr Edwards was born or in 1902 when his father was born. Some guidance appears in clause 32 of the Constitution in the 1903 edition of the Laws of Tonga (which was in force when Mr Edwards' father was born), and in clause 29 of the Constitution in the 1928 edition (which was in force when Mr Edwards was born), each of which draws a distinction between a "foreigner" and "native-born [or native born] subjects of Tonga".

The Solicitor-General argued that Mr Edwards' father was British, so that he himself cannot be a Tongan. He disclaims any intention to make the test one of racial purity, but this is what his argument comes down to. If a person who is half foreign cannot qualify, where is the line to be drawn - at one quarter, one eighth, one sixteenth, one thirty second, one sixty fourth, or beyond? The only logical answer is to draw no line at all, so that no person with a foreigner in his direct male line of descent can be a Tongan. It is not a satisfactory test, either on ethical or practical grounds. The ethical objection is self

evident, and is emphasized in Tonga by the noble words from St Paul's Athenian sermon (Acts 17:26) which are placed at the forefront of the Constitution, in clause 1 : "God ... has made all men of one blood". The practical objection is the impossibility of determining the degree to which a person belongs to a particular race.

So the answer must be found in the true meaning of the Constitution, as it stood at the date of Mr Edwards' birth. Who were "native born subjects of Tonga"?

The Constitution, like other documents, must be read in the light of its context. That does not mean only the context of a particular provision within the Constitution itself. It means also the wider context in which the whole Constitution is set. That wider context includes the adoption of many common law institutions and concepts. It is a truism to say that the jurisprudential framework of Tongan laws and legal institutions is a common law framework,as is illustrated by the terms of sections 3 and 4 of the much later Civil Law Act (Cap 25):

> "3. Subject to the provisions of this Act,the Court shall apply the common law of England and the rules of equity, together with statutes of general application in force in England.
>
> 4. The common law of England, the rules of equity and the statutes of general application referred to in section 3 shall be applied by the Court -
>
> (a) only so far as no other provision has been, or may hereafter be, made by or under any Act or Ordinance in force in the Kingdom; and
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> (b) only so far as the circumstances of the Kingdom and of its inhabitants permit and subject to such qualifications as local circumstances render necessary".

When, therefore, the Constitution of Tonga uses, without definition, the expression "native born subjects of Tonga", it is natural to seek enlightenment, as to the meaning of the expression, in the common law. This is not in order to apply the Civil Law Act directly to the interpretation of the Constitution, but in order to understand the meaning in the Constitution itself, as it stood at the relevant time, of the expression "native born subjects of Tonga". Before doing so, however, it is worth noting that the primary meaning of the expression "native-born", according to the Shorter Oxford English Dictionary, 3rd ed (1980), is "Belonging to a particular place or country by birth" (emphases added).

In Sir William Holdsworth's History of English Law, volume 9, page 75, the learned author says, after a discussion of the very earliest precedents, going back to feudal times:

> "It could be laid down that all persons born on English soil, no matter what their parentage, owed allegiance to, and were therefore subjects of the king".

Again, at pages 80-81, after referring to exceptional cases, such as children born of alien enemies in hostile occupation of English soil, he says:

> "But generally, any one born in England was an English subject".

And at page 83:

> "The first and most important effect of the decision in Calvin's Case [(1609) 7 Co. Rep.1] was the fact that it made a general rule for the acquisition of the status of a natural-born subject, which was applicable to all persons born within the king's dominions. This was a result of great importance when, in the eighteenth century, these dominions began to expand. It gave a uniform status to all person born within these dominions ..."

What had thus been established beyond argument by the beginning of the seventeenth century, when Calvin's Case was decided, was restated in the eighteenth century in Blackstone's famous Commentaries on the Laws of England. In volume 1, chapter 10, it is stated:

> "The first and most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the Crown of England, that is, within the ligeance, or as it is generally called, the allegiance of the King; and aliens, such as are born out of it."

To bring the matter down to the beginning of the twentieth century, and as it happens to the very year of the birth of Mr Edwards' father, there is an article on citizenship and allegiance in (1902) 18 LQR 49, which is signed by a great name in the modern law, John W. Salmond. In that article (at 52-53), five "titles [by which] a man become[s] a British subject" are identified as

> "(1) Birth within the dominions of the Crown; (2) Descent from British subjects; (3) Continued residence in a territory after it has been conquered or otherwise acquired by the Crown; (4) The marriage of an alien woman to a British subject; (5) Naturalization, that is to say, an agreement by which an alien is received into the permanent allegiance of the Crown."

Salmond continues:

> "The first of these titles, namely, birth in British dominions, is by far the most important. Apart from certain statutory modifications of the older common law, a man's blood and descent are irrelevant in this matter. He may be by blood a Frenchman or a Chinaman, but if he first saw the light on British soil he is a British subject. ... The rule is not a mere peculiarity of English law. Until limited or abrogated by modern legislation it was the common law of all feudal Europe. It was received in France until the Code Napoleon. 'Les citoyens, les vrais et naturels Francais,' says Pothier, 'sont ceux qui sont nes dans l etendue de la domination francaise.' (Traite des Personnes et des Choses, S 43.) To this day by the law of Spain all persons are Spanish subjects who are born in Spanish territory."

Later in this century, in a well known case involving a prominent Nazi propagandist who was tried for high treason after World War II, as a British passport holder, the same view of the law was taken. The case is Joyce v Director of Public Prosecutions [1946] AC 347, where Lord Jowitt L.C., who cited Calvin's Case and treated the subject's allegiance as the reciprocal of the Crown's protection, said (at 366):

> "The natural-born subject owes allegiance from his birth ... ... The natural-born subject cannot at common law at any time cast it off."

These propositions are accepted by the text writers. In Weis on Nationality and Statelessness in International Law (1956) at page 4 it is stated:

> "In English the term 'subject' is used as a synonym for national. It stresses the quality of the individual as being subject to the Sovereign and is typical of the feudal concept of nationality prevailing in Anglo-Saxon law, which regards nationality as a territorially determined relationship between subject and Sovereign by which the subject is tied to his Sovereign (liege lord), the King in person, by the bound of allegiance."

The learned author refers to the "jus soli" as prevailing in common law countries.

He says (at page 5) that nationality and citizenship are regarded as synonymous in United States law. Similarly, in Parry on Nationality and Citizenship Laws of The Commonwealth and The Republic of Ireland (1957), at page 151, reference is made to the rule of the common law as one which "embodied the principle of the jus soli - of the attribution of nationality on the basis of place of birth irrespective of parentage or race." It is interesting to note that Parry sets out, at page 363 et seq., the Tongan Nationality Act 1935, but without any additional commentary. In a more recent work, Australian Citizenship Law by Michael Pryles (1981), at page 14, it is stated:

> "At common law a person's political status, which would today be termed his nationality, was based on allegiance to the monarch. Persons were either subjects of the Crown or aliens. The most important category of British subjects were natural-born subjects, that is, persons who were subjects by virtue of their birth within the King's dominions. For the common law accepted as the general basis of allegiance that of the jus soli (the place of birth) rather than the jus sanguinis (the allegiance of the parents)."

The nationality is inextricably linked with allegiance, is also evidenced by the fact that the first act required of a newly naturalised person is to swear an oath of allegiance to his new country. In the leading modern case in this area of the law, the test is set out by Lord Diplock in Lesa v Attorney General of New Zealand [1983] 2 AC 20 at 30-31; [1982] 1 NZLR 165 at 175:

> "... it is hornbook law, or at any rate well-established as long ago as Calvin's Case (1608) 7 Co. Rep.1; 77 ER 377 that a person born with-in His Majesty's dominions did by virtue of his birth there of itself owe natural allegiance to His Majety, unless he was born there either (a) as a child to the diplomatic representative 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 ...; 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."

Neither Mr Edwards nor his father fell into one of the excepted categories. Applying Lord Diplock's test, both Mr Edwards and his father, having been born in Tonga, owed natural allegiance to the sovereign of Tonga and each was therefore a Tongan for the purpose of nationality. This accords with the meaning the expression "native born subjects of Tonga" must have had when it was used in the Constitution, as it stood at the relevant times, both by virtue of the ordinary meaning of the words used, to be found inthe dictionary, and by virtue of the common law context in which the Constitution is set.

It follows that Mr Edwards is entitled to the declaration he seeks as to his nationality. He also sought an order declaring the true intent and meaning of section 2(a) of the Nationality Act. This action concerns the status of Mr Edwards alone, and we do not think it appropriate or necessary to add my further comment or order.

The appeal is allowed; there will be a declaration that Mr Edwards is a Tongan subject within the meaning of section 2(a) of the Nationality Act. He is entitled to his costs here and below, to be taxed if not agreed.

Ruling on Costs (Ward CJ)

This was an action by the plaintiff, William Clive Edwards, for a declaration that he is a Tonga subject. His claim failed in the Supreme Court but he was successful in the

Court of Appeal. The declaration was made and he was awarded his costs on appeal and in the Court below.

Mr Edwards is a lawyer and he conducted his own case. He has submitted a bill of costs totalling $22,146.50 and application has been made for taxation.

Mr Edwards has agreed that some figures must be reduced because of an error arising from his appointment as Senior Counsel. Preparation of the case started in 1993 and the matter was completed in the Supreme Court in March 1994. He was made Senior Counsel in February 1994. From that date, he is entitled to charge at the higher rate in any new case but, where he has received instructions as counsel and the case has continued after his appointment as Senior Counsel, he may only charge at the rate applicable when he was first instructed.

That means the lower rate applies for the Supreme Court proceedings. The appeal wa lodged in March 1994 and may be charged at the higher rate.

The Solicitor General for the respondents seeks substantial reduction on a number of grounds.

The basis on which costs are taxed is set out in Order 2 29 rule 4(1).

> "There shall be allowed all such costs, charges and expenses as are reasonably necessary or proper for the attainment of justice or the maintaining or defending the rights of any party."

That is substantially similar to the English RSC Order 62 rule 28(2) prior to 1986. When our Rules were drafted in 1990, the intention was clearly to apply that rule rather than the more recent rule in England. Thus the intention of our O 29 r 4(1) is that the basis of taxation should be "party and party" rather than the standard basis now adopted in England. Recent authorities in England, therefore, are of limited value. Even cases prior to 1986 should be treated with care because of significant differences betweeen the wording of O 29 of our Rules and O62 of the English RSC.

The use of the phrase "reasonably necessary or proper" means that a cost may be justified either as being reasonably necessary when it was incurred or that it was reasonably proper to incur it even though it may not in the event have been necesary. The test of reasonableness applies in both cases; Societe Anonyme Pecheries Ostendaises v Merchants Marine Insurance Co [1928] 1 KB 750.

The principles of party and party taxation have been settled for a long time. In Smith v Buller (1875) LR 19 Eq 473. Malins VC explained at 475:

> "It is of great importance to litigants who are unsuccessful that they should not be oppressed by having to pay an excessive amount of costs. The costs chargeable under a taxation between party and party are all that are necessary to enable the adverse party to conduct the litigation and no more. Any charges merely for conducting litigation more conveniently may be called luxuries and must be paid by the party incurring them."

The plaintiff is a practicing lawyer and the question arises what right has he, as a successful litigant in person to claim his costs on the basis of his professional charges?

It is well settled that a solicitor who conducts his own case and obtains judgment is entitled to the same costs as if he had employed a solicitor except in respect of items which the fact of his acting renders unnecessary. That statement comes from the headnote to London Scottish Benefit Society v Chorley, Crawford and Chester (1884) 13 QBD 872

and at 875 Brett MR explains the type of items that may be rendered unnecessary.

"It is true, however, to say that the costs of a solicitor appearing in person must be taxed differently from those of an ordinary litigant appearing by a solicitor. The unsuccessful adversary of a solicitor appearing in person cannot be charged for the solicitor consulting himself or instructing himself or attending upon himself."

The major objections by the defendant to the bill are four fold:

1. Before litigation was even contemplated, Mr. Edwards entered into discussion with the Government with a view to having the law changed or at least having himself declared a Tongan.

Mr Taumoepeau suggests they are nothing to do with the actual cost of the litigation and and, even if they were, some are in the category of instructions and are excluded under the Smith v Buller rule.

I agree with him. Items 1 - 6 all relate to matters prior to the start of litigation and are disallowed. In item 9, reference is made to instructing Mr. Paasi. That must be excluded. It is impossible to know how much of the 3 1/2 hours claimed relates to such instruction. I shall tax off half an hour leaving 3 hours. I have applied the same reasoning in taxing item 24.

2. When a lawyer is instructed to conduct litigation, it may be assumed he knows the relevant law. No one practising in the law would be so bold as to claim he knows all the law and it has been suggested the real expertise of a lawyer is knowing where to look up the law rather than knowing the law itself.

Cases may always arise where a particular aspect of the law is so rarely used or so esoteric that no lawyer could reasonably be expected to be familiar with it and costs of time spent researching it may be allowed on taxation, but, it general, the time spent on legal research in preparation for the case should not be allowed.

Item 7 refers to 50 hours research. Much of the research described amounts to no more than reference to standard text books. I accept some of the laws may not have been generally familiar and needed to be located and I shall allow 8 hours for that.

Items 18 and 26 are of a similar nature and are disallowed. Item 30 seeks payment of 25 hours for researching old Tongan law volumes. It mentions he was assisted by two locally qualified lawyers but it is all charged at the rate for counsel. That should have been broken down. However, I acknowledge researching the old laws is a special circumstance but certainly does not justify 25 hours. I shall allow 5 hours.

3. The costs of the appeal are claimed in some cases for work already done for the Supreme Court hearing.

Item 35 claims 10 hours for preparation of a synopsis of arguments for the Supreme Court and Item 44 claims 5 hours for the preparation of the synopsis for the appeal. No attempt has been made to explain the new cost. I am willing to allow 3 hours for the appeal synopsis to cover possible novel features.

Returning to Item 35, the full entry in the bill reads:

"Preparing and drafting synopsis of arguments and synopsis of submissions, proofreading, making corrections ready for final typing and checking case laws and texts are in order after final typing. "All is claimed at the rate for counsel. I cannot accept all those matters were necessarily done by counsel. Where there are different rates involved, they should be broken down carefully. I shall allow 6 hours for this item at counsel's rate. The same principle applies in Item 22.

4. Everything on the bill is charged at the rate for counsel yet many of the items
380 are really the work of clerks and should not be charged at the full rate. Mr Edwards concedes that is the case and I have adjusted a number of items on that basis and will allow them at $35 per hour.

The final adjustments are marked in the bill attached hereto and no further reference is needed.