

Fotofili v Siale

Privy Council
App. 142/87

20 July, 3 August 1987

Constitution - privilege - scope of courts enquiring
Parliament - privilege - courts enquiry - constitutionality

This important case concerning the issue of Parliamentary rights and privileges, and the ability of the Supreme Court to enquire into a decision of the Assembly is reported in full, and without headnote, as an appendix to the Moala & ors v Minister of Police (No.3) judgment reported above. It has not been officially reported in Tonga thus far, and the intention is to remedy that omission. It can be found reported at (1987) S.P.L.R. 339. Sufficient extracts of principle from the judgment are set out in the Moala headnote at numbers 9 and 10 for present purposes.

Cases considered : British Railways v Pickin [1974] 1 All ER 609
Stockdale v Hansard (1839) 9 Ad & El 1
Bradlaugh v Gossett (1884) 12 QBD 271
Roberts v Hopwood [1925] AC 578

Statutes considered : Constitution
Sales Tax Act 1986
Legislative Assembly Act s.17
Bill of Rights 1689
Civil Law Act

Counsel for appellants : Mr D. Tupou & Mr C Edwards
Counsel for respondent : Mr Niu

Judgment

This is an appeal and cross appeal against the judgment of Martin J delivered on the 9th January 1987 in a case concerning the important issue of Parliamentary rights and privileges.

On the 23rd October 1986 Ipeni Siale, described as "a Tongan subject by birth and a substantial citizen resident in the Kingdom of Tonga" issued proceedings out of the Supreme Court, purportedly on his own behalf "and on behalf of all Tongan subjects", against the Hon. Kalaniuvalu Fotofili, then Speaker of the Legislative Assembly, Noble Malupo, Chairman of the Committee of the House, seven named Nobles (being representatives of the Nobles in the Assembly), five Cabinet Ministers, two Governors and nine people representatives. Only three members of the Assembly were excluded from the action.

The crux of Siale's claim against them was that each had knowingly and unlawfully received payments by way of parliamentary allowances for their services as members of the Assembly to which they were not entitled. He sought the following orders:-

1. A declaration that the Hon. Fotofili as Speaker had knowingly and unlawfully signed payment vouchers whereby members of the Assembly had been paid in excess of their proper entitlements.
2. A declaration that the Hon. James Cecil Cocker as Minister of Finance (the 12th Appellant) had unlawfully paid such excess sums out of Treasury.
3. A declaration that each of the 25 Defendants had knowingly and unlawfully received sums in excess of their entitlement.
4. An order for repayment to Treasury of the excess by each Defendant.

The Defendants filed Statements of Defence challenging the jurisdiction of the Supreme Court to adjudicate on the issue, and moved for an order that the action be struck out on that ground, it being argued that the issue of the alleged unlawful payments was a matter protected by Parliamentary privilege not open to review by the Court.

After reviewing the law in other jurisdictions Martin J considered the state of the law in Tonga and concluded that it was for the Assembly and the Assembly alone to decide what remuneration and allowance its members should receive, and that its decision in that regard was part and parcel of the "internal proceedings" of the House and not reviewable by the Courts.

However, Martin J did not regard that conclusion as justification for striking out the proceedings, and for this reason: it was pleaded in the Statement of Claim that the Assembly altered the rates for salary and allowances for members as presented by the Minister of Finance in the Annual Estimates for the year ending 30th June 1987. Martin J concluded that it was open to the Court to enquire whether there had indeed been a prior decision of the Assembly fixing the rates for salary and allowances for the relevant period, and whether what was actually paid to the members conformed with that decision. He did however conclude that no action would lie against the Speaker for signing the payment vouchers, or against the Minister of Finance for making payment out of Treasury and struck out the passages in the Statement of Claim bearing on those issues.

The specific grounds of appeal will be referred to later but in essence the Appellants challenged Martin J's conclusion that the Court could enquire into whether there had been a decision of the Assembly and whether the payments conformed; while the Respondent on his cross appeal argued that the reasonableness of the decision itself was open to

review. There was a further ground of cross appeal relating to the striking out of the separate causes of action against the Speaker and the Minister of Finance but this was abandoned, Mr Niu accepting that their reinstatement would serve no good purpose.

At the commencement of the appeal hearing Mr Edwards sought leave to introduce a further ground of appeal, namely, that the Respondent was not, as he claimed, a Tongan subject but a citizen of the United States. It is not clear what was hoped to be gained by raising that issue for there is no restriction on non-Tongans issuing proceedings (Article 4 of the Constitution) although different considerations may apply in a proceeding such as the instant one, but in any event leave was refused with leave reserved to raise the issue in the Supreme Court should the case proceed.

The background to the disputed payments is that the Sales Tax Act 1986 came into force on the 1st July 1985 and the Assembly resolved that it should be explained to the general public by members holding 'fono' meetings in their electoral districts. These took place between the 21st July and 1st August 1986.

The authority relied on for the payments is s.17 of the Legislative Assembly Act (Cap 4) which reads:-

"17. When the Assembly has been convoked the Premier shall make all arrangements as to the arrival and departure of the members of the Legislative Assembly and the Assembly shall have the power to make such provision as it thinks fit for the members during the session."

It is, as Martin J said, "a very wide power". The extent of the "provision" is left in the absolute discretion of the Assembly, with no guidance as to how it should be exercised.

The grounds of appeal and cross appeal can be dealt with more expeditiously if the rights and privileges of the Assembly and its supremacy are considered in a general way in the first instance; the more particularly as what we have to say in this appeal is relevant to one which follows.

The starting point is the Bill of Rights 1689 after the "revolution" against the claimed powers of James I. The omniscience of Parliament, at least in the United Kingdom, was established by the Bill.

In British Railways Board and another v Pickin [1974] 1 All ER 609, Lord Reid said at p. 614:-

"I must make it plain that there has been no attempt to question the general supremacy of Parliament. In earlier times many learned lawyers seem to have believed that an Act of Parliament could be disregarded insofar as it was contrary to the law of God or the law of nature or natural justice but since the supremacy of Parliament was finally demonstrated by the revolution of 1688 any such idea has become obsolete."

Article 9 of the Bill of Rights reads:-

"That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament"

It follows that in England the validity of an Act of Parliament is not open to challenge on the ground that its passage through the house was attended by any irregularity. The same is not true in Tonga where there is a written Constitution. If, on a true construction of the Constitution some event or circumstance is made a condition of the authentic expression of the will of the legislature, or otherwise of the validity of a supposed law, it follows that the question whether the event or circumstance has been met is examinable

in the Court, notwithstanding that the question may involve internal proceedings of the Assembly.

Again, a statutory provision can be examined and struck down if it is contrary to an express provision of the Constitution although its passage through the house was not attended by any irregularity.

The position is then that the Assembly of Tonga, and indeed any parliamentary body based on a written Constitution, does not have the privilege of supremacy over the Courts enjoyed in the United Kingdom.

140 Apart from the question of supremacy there are other privileges and immunities which must be available to a legislative body, which are incidental to its existence and status, or necessary for the reasonable and proper exercise of the functions vested in it.

In the United Kingdom the common law recognises the Parliamentary privileges of freedom of speech in debate and freedom from arrest while the House is in session and these privileges are embodied in Article 73 of the Constitution of Tonga. One of the most important privileges available to Parliament in the United Kingdom is the exclusive right to determine the regularity of its own internal proceedings. There is ample authority for the proposition that when a matter is a "proceeding" of the House beginning and
150 terminating within its own walls it is outside the jurisdiction of the Courts (see Stockdale v Hansard (1839) 9 Ad & El 1; and Bradlaugh v Gossett (1884) 12 Q.B.D. 271).

In the Pickin case ([1974] 1 All E.R. 609) Lord Morris said at p.619:-

"The conclusion which I have reached results, in my view, not only from a settled and sustained line of authority which I see no reason to question and which should I think be endorsed but also from the view that any other conclusion would be constitutionally undesirable and impracticable. It must surely be for Parliament to lay down the procedures which are to be followed before a bill can become an Act. It must be for Parliament to decide whether its decreed procedures have in fact been followed. It must be for Parliament to lay down and to construe its standing orders and further to decide whether
160 they have been obeyed; it must be for Parliament to decide whether in any particular case to dispense with compliance with such orders. It must be for Parliament to decide whether it is satisfied that an Act should be passed in the form and with the wording set out in the Act. It must be for Parliament to decide what documentary material or testimony it requires and the extent to which Parliamentary privilege should attach. It would be impracticable and undesirable for the High Court of Justice to embark on an enquiry concerning the effect or the effectiveness of the internal procedures in the High Court of Parliament or an enquiry whether in any particular case those procedures were
170 effectively followed".

What then is the position in Tonga? The Constitution itself is silent on the role the Courts might play in inquiry into proceedings in the Assembly and simply provides in Article 62 that "The Assembly shall make its own rules of procedure for conduct of its meetings."

A Court in Tonga faced with a plea that it should inquire into the internal proceedings of the Assembly will obtain no help from any Act or Ordinance in force in Tonga in determining its jurisdiction so to do. In such a delicate constitutional situation
180 the Court would look for a clear mandate to proceed. We are of the firm opinion that in

that situation the Civil Law Act (Cap. 14) must be called in aid. That Act provides in short that in the absence of relevant provision under any Act or Ordinance of the Kingdom, the common law of England shall be applied.

It follows that in determining its jurisdiction to inquire into internal proceedings of the Assembly it must apply the English common law regarding the privilege of parliament to determine the regularity of its own proceedings, provided of course the Assembly has not acted contrary to the provisions of the Constitution in the course of those proceedings, for in such a case the Court is given jurisdiction by Article 90 of the Constitution, which reads, so far as is relevant -

"The Supreme Court shall have jurisdiction in all cases in law and equity arising under the Constitution and laws of the Kingdom"

We conclude then that there is no jurisdiction in the Court to inquire into the validity of the Assembly's internal proceedings where there has been no breach of the Constitution.

Turning now to the present case, it is convenient to deal with the cross appeal first. Martin J did in fact correctly apply the English common law pursuant to the Civil Law Act, and determined that whatever the House had decided in its collective capacity regarding the payment of allowances came within the Assembly's "internal proceedings" which the Court had no power to investigate.

Mr Niu's first submission was that the Learned Judge erred in applying the provisions of the Civil Law Act because there was no common law in England to the effect that Parliament had unlimited power to determine its own allowances. The submission misconceives the issue. In Tonga there is express power in the Assembly to fix its own allowances, and the real question was whether the court could inquire into the decision process. It is at that point that the common law of England is brought to bear. For reasons already stated the submission must be rejected.

Mr Niu's next submission was that as the Assembly's discretion to fix allowances was unfettered, it was open to the Court to enquire whether the allowances fixed were "reasonable", applying such cases as *Roberts v Hopwood* [1925] A.C. 578. That case, and others cited by Mr Niu, relate to remuneration payable to officers and employees of local government and can have no relation to a supreme authority under the Constitution. The notion of the Courts enquiring into the "reasonableness" of Parliament's decisions does not warrant serious consideration. It was for the Assembly to determine its allowances, and only self restraint, influenced by fair mindedness and expediency are available to prevent abuse of its privilege not to have its decision investigated.

Mr Niu next relied on Article 90 of the Constitution as giving jurisdiction to the Supreme Court to investigate. The substance of that Article has been set out earlier in this judgment. If, in the process of making its decision concerning allowances the Assembly had breached a provision of the Constitution then we agree that the Court would have jurisdiction, but that is not the case here.

Mr Niu's final point was that indeed the Assembly had breached the Constitution, and in particular Article 78, which deals with the passing of estimates of expenditure for the public service. It provides inter alia that Ministers shall be "guided" by the estimates. Mr Niu's point was that in the Tongan version the wording is such that Ministers "must act in accordance" with the estimates, the inference Mr Niu would have us adopt being that once the estimates are fixed there can be no deviation from them in the way of excess expenditure. Such an interpretation is not in accord with long established custom, and in

any event the English interpretation prevails.

Turning now to the Appellants' submissions. Martin J held that while he could not inquire into the Assembly's decision regarding allowances, he could inquire into whether a decision had in fact been made and whether the allowances paid were in accordance with the decision.

At this point we must part company from Martin J.

This is the Learned Judge's reasoning for his decision on this aspect of the case:-

"The court is entitled to ascertain, as a fact, whether there has been a collective decision of the House on this issue, and if so, what it is. It cannot question that decision. But it can look at that decision as it would a statute. It must accept the decision as a binding authority. Starting from there, the Court can investigate whether the allowances in fact paid to each member were calculated correctly in accordance with that decision. The actions of individual members in claiming and receiving their allowances have nothing to do with the basic function of the house. They are not "internal proceedings". In the words of Stephen J in *Bradlaugh v Gossett*, these are "rights to be exercised out of and independently of the House". Accordingly these matters are open to investigation by the Court. They are not the subject of parliamentary privilege."

It is not disputed, and indeed the Respondent alleges as much in his Statement of Claim, that the Speaker of the Assembly signed the vouchers authorising the payments to members and the Minister of Finance, who was himself a recipient of an allowance, (as was the Speaker) paid the allowances from Treasury.

The only inference open on those accepted facts, and the fact that the allowances were paid only to Fono meeting attenders, is that the payments made to members were made pursuant to a decision of the Assembly, which Martin J rightly accepted was not open to review by the Court. Further, the Trial Judge held that he had no jurisdiction to investigate the acts of the Speaker or the Minister of Finance but such an investigation would necessarily result if the Court embarked on an inquiry as to whether a decision was in fact made by the Assembly. When one considers that the vouchers authorising payment were signed by the Speaker, who is traditionally the guardian of the privileges of the House, and the interpreter of the House's rules and procedure the inquiry Martin J proposed would inevitably have amounted to an inquiry into the internal proceedings of the House.

What we have already said concerning the facts and law in this case cover the grounds of appeal of the Appellants and it is unnecessary to refer to them in detail. Counsel on their behalf referred to the common law principle that internal proceedings of the House cannot be inquired into an submitted that what Martin J had proposed amounted to such an inquiry. We agree. Lord Morris said it all in this passage, earlier cited, from the *Pickin* case:-

"It would be impracticable and undesirable for the High Court of Justice to embark on an inquiry concerning the effect or the effectiveness of the internal procedures in the High Court of Parliament or an inquiry whether in any particular case those procedures were effectively followed".

We therefore allow the Appellants' appeal and dismiss the Respondent's cross appeal and order that the substantive proceedings be struck out. As for costs, there was

some suggestion made on behalf of the Appellants that the action was frivolous, vexatious and an abuse of the Court process. We do not agree. The issues raised were of importance and the Respondent was entitled to his day in Court. We make no order for cost.