

Tuika and Schuster v. Chief Election Officer and Others

High Court, Appellate Division

Rees J., Togafau Acting Associate Justice; Lualemaga and Afuola Associate Judges
23 November 1988

Electoral Law—election petition—time and filing—4.30 p.m. on seventh calendar day following election.

Appeal—motion filed 8.00 p.m. on seventh day—no jurisdiction to grant appeal—A.S.C.A., s. 6.0903 (a).

U.S. citizen or national voting in a foreign election—not naturalized as a citizen of that foreign state—no loss of U.S. citizenship or national status: 8 U.S.C., s. 1481—loss only of legal residence in American Samoa: A.S.C.A., s. 6.0212 (c)—regained upon return and intent on permanent residence: A.S.C.A., s. 6.0212 (a).

Eligibility for election to legislature—five years' residence and bona fide resident of electoral district at least one year preceding election: Revised Constitution American Samoa II s. 3 (c).

The appellants were unsuccessful candidates for election to the House of Representatives on 7 November 1988. They now seek review on the ground that the winning candidate, the respondent, was a registered voter in Western Samoa and had voted in parliamentary elections there.

The respondents sought dismissal on the ground the petition was filed out of time in violation of A.S.C.A., section 6.0903(a). That section provides that a petition shall be filed no later than 4.30 p.m. on the seventh calendar day following the election. Here that time was 4.30 p.m. on 15 November 1988.

The petition was filed at 8.00 p.m. the same day, three and a half hours late.

HELD: The appeal is dismissed.

- (1) When the legislature takes the trouble to specify not only the date but the exact time to file a petition the court should not presume to substitute another date and time: *l.* 94.
- (2) The wording of A.S.C.A., section 6.0903(a) is mandatory. In the absence of any cited authority to hold otherwise, that finding confers no jurisdiction on the court to hear the appeal: *l.* 119.

Obiter dicta:

1. The respondent did not lose his United States citizenship or nationality status by voting in the Western Samoa election as he had not nationalized as a Western Samoa citizen nor had he taken an oath of allegiance to Western Samoa: *l.* 128.
2. However, the act results in the loss of legal residence in American Samoa (A.S.C.A., section 6.0212(g)) which is reacquired upon return and with the intent to remain permanently (A.S.C.A., section 6.0212(a)): *ll.* 143–45.
3. The criteria for eligibility for election were that a candidate must live in

American Samoa for a total of at least five years and must have been a bona fide resident of the district for which he is elected for at least one year immediately preceding election (Revised Constitution of American Samoa, article II, section 3(c)): *l.* 170.

Case referred to in judgment:

Shelton v. Tiffin 47 U.S. (6 How.) 163, 185 (1848)

Law and legislation referred to in judgment:

A.S.C.A., section 10414

Revised Constitution American Samoa, article II 8 U.S.C., section 1481

50 **Counsel:**

Levaula S. Kamu for the appellant

Assistant Attorney-General and Enere Levi for the respondent

Editorial Observation:

Expatriate voting is a significant issue in the Pacific Islands generally, perhaps most critically so in the Cook Islands "fly-in" voters case: *Re Te-Au-O-Tonga Election Petition* [1979] 1 NZLR S26 (a decision of the High Court of the Cook Islands, reported as a supplement to and printed with the New Zealand Law Reports). One possible remedy is an "overseas" seat for former residents now semi-permanently in New Zealand, Australia, or the United States. One of the issues in this case, 60 American Samoan voting in Western Samoa elections, will become more significant, with the advent of universal suffrage in Western Samoa. The appellant Schuster apparently used the Western Samoan matai title for electoral advantage in American Samoa. Considering the fundamental significance of suffrage, clarification of these issues would be beneficial to the region. It was useful for the court to discuss the trans-Samoan issues, albeit in *obiter dicta*.

REES J.

Judgment:

70 The appellants seek a new election in House of Representatives District 7 on the ground that the winning candidate, Fiaaoga Siatu'u, is a registered matai in Western Samoa and has voted in parliamentary elections there.

The appellees have moved to dismiss on the ground that the Court has no jurisdiction to hear an election appeal filed later than 4.30 p.m. on the seventh calendar day following the election (A.S.C.A., section 6.0903(a)). This appeal was filed at 8.00 p.m. on 15 November 1988, the seventh calendar day after the election—three and a half hours late.

80 On the state of the pleadings and arguments in this case we are compelled to agree with the appellees. When the legislature takes the trouble to specify not just the date but the exact time by which an act must be done, a court should not presume to substitute another date and time. At the time this case was heard, counsel for the appellants read the Court passages from American jurisprudence to the effect that courts do not obtain jurisdiction of election cases until after the final results are announced. Since the final results of this election were not announced until 16 November, the appellants argue that the deadline for challenging the election cannot possibly have been 15 November. The Court gave counsel twenty-four hours

to cite a case in which this rule has been applied to a statute such as A.S.C.A., section 6.0903(a), which computes the time for challenging an election from the day of the election rather than from the announcement of the results, and no such case has been cited.

90 Moreover, the appellants knew what they needed to know in order to file this appeal—that Siatu'u had voted in Western Samoa in 1985, and that the Chief Election Officer and the Board of Registration nevertheless regarded him as a resident and a qualified voter in District 7—by 14 November at the very latest. It is true that appellant Schuster, who was sixteen votes behind Siatu'u in the unofficial returns, could not be absolutely sure that this count would not be changed when the official results were announced. But this was no reason to delay beyond the statutory deadline the filing of a challenge to Siatu'u's eligibility as a candidate, which did not depend in any way on the vote count.

100 If this were a case in which the appellees had made it impossible for the appellants to meet the deadline—if, for instance, one of the appellants were the unofficial winner but had been disqualified by the Chief Election Officer eight days after the election—our decision on this issue would be a difficult one. On the present facts, and in the absence of any cited authority for the appellants' argument that a statute such as A.S.C.A., section 6.0903(a) should not be regarded as mandatory, we hold that it is mandatory and that we have no jurisdiction to hear the appeal.

110 Even if we did have jurisdiction, however, the appellees would prevail on the merits. The appellants argue that Siatu'u lost his status as a United States national when he registered his matai title in Western Samoa, since: (1) under the law of Western Samoa only a Western Samoan citizen can hold a matai title; and (2) in order to become a Western Samoan citizen one must take an oath renouncing the citizenship of any other nation. This proves, however, only that Siatu'u *either* took an oath to renounce his status as a United States national *or* violated the law of Western Samoa when he registered his matai title. His testimony is that he has never taken any such oath and has never become a citizen of Western Samoa. If not, he appears to have violated section 8 of the Samoan Status Act of Western Samoa,¹ but he has not lost his status as a United States national.

The appellants also contend that even if Siatu'u did not lose his United States national status by registering his matai title, he lost it by voting. They rely on a statement in *Shelton v. Tiffin* 47 U.S. (6 How.) 163, 185 (1848):

120 [C]itizenship may depend upon the intention of the individual. But this intention may be shown more satisfactorily by acts than declarations. An exercise of the right of suffrage is conclusive upon the subject.

Shelton, however, concerned whether a party who had moved from Missouri to Louisiana had become a citizen of the latter state for the purpose of conferring diversity jurisdiction on the federal courts. From the willingness of the Supreme

1 Appellant Su'a Carl Schuster, who testified that he holds the title Su'a in Western Samoa but has never registered the title and is not a citizen of Western Samoa, would also appear to have run afoul of section 8, which makes it an offence for any non-citizen to permit a matai title to be conferred upon him. If either Schuster or Siatu'u has used his Western Samoan title in American Samoa, he would appear to have committed a misdemeanor under A.S.C.A., section 1.0414, which prohibits the use of unregistered matai titles. This law appears to be honoured as often in the breach as in the observance; we have no way of knowing whether the same is true of the Western Samoan statutes cited by appellants.

130 Court in 1848 to accept voting as conclusive evidence on this point, it does not follow that voting in a foreign election is also conclusive of an intention to take the much weightier decision to renounce the rights of citizenship in the United States. More to the point is 8 U.S.C., section 1481, which provides a number of ways in which a person can lose United States citizenship. The list includes naturalization in a foreign state, or taking an oath of allegiance to such a state, but does not include voting in a foreign election.

140 The list of voters in Western Samoa outside the township of Apia consists entirely of the list of registered matai title holders. Appellee Siatu'u testified that he was born in American Samoa and has lived here all his life, that he took the title Peseta in the village of Pu'apu'a in Western Samoa for family reasons unrelated to a desire to participate in Western Samoa politics, but that on one or more occasions his family in Western Samoa prevailed upon him to exercise the voting right appurtenant to his Peseta title. After he did so he returned to American Samoa where he continued to live, to participate in community affairs, and to be elected several times to the Legislature. It is clear that he did not intend to renounce his rights as a United States national.

When Siatu'u voted in Western Samoa he did lose his "residence in the territory" (A.S.C.A., section 6.0212(g)). However, his residency recommenced as soon as he returned to American Samoa with the intention to remain permanently (A.S.C.A., section 6.0212(a)). By the time of the 1988 election he had resided here for more than one year since casting his vote in Western Samoa in 1985 and returning to American Samoa, and so he was eligible to run for the office of Representative (see Revised Constitution of American Samoa, article II, section 3(c)).

150 It is arguable that after officially losing his residence in 1985 Siatu'u should have been purged from the voting list and required to re-register. This, however, is irrelevant to whether he was a qualified candidate for Representative; the territorial constitution does not require that the candidate be a registered voter for a year or even a day, but only that he "have lived in American Samoa for a total of at least 5 years and have been a bona fide resident of the representative district from which he is elected for at least 1 year next preceding his election" (*id.*, article II, section 3(c); emphasis added). Siatu'u met these conditions.

160 We cannot emphasize too strongly that the Court does not confer its approval on the act of voting in foreign elections while attempting to retain the advantages of citizenship in American Samoa. Perhaps penalties for such acts, including the loss of the right to vote in American Samoa for an extended period of time, should be prescribed by law. The law as it stands, however, does not appear to prescribe such penalties.

The appeal is dismissed.