

Pohiva v. Prime Minister and Kingdom of Tonga

Supreme Court
Martin A.C.J.
11 February 1988

Crown privilege—executive privilege—whether Minister may decide conclusively to refuse disclosure of documents relevant to plaintiff's case.

Evidence—privilege—whether Minister may decide conclusively to refuse disclosure of documents relevant to plaintiff's case.

The plaintiff brought an action for wrongful dismissal (see p. 377 *infra*, for the judgment in that substantive case). In a preliminary application, the plaintiff sought judicial review of the Minister's decision to refuse to disclose: (1) his personal file held by the Education Department; (2) his personal file held by the Prime Minister's office; (3) Cabinet papers relating to the decision to dismiss him.

The Evidence Act (cap. 13) appeared to give the Minister an unreviewable absolute discretion to refuse to disclose documents "in the public interest". The Evidence Act also requires the Court to consider relevant Commonwealth judgments.

HELD:

- (1) In light of uniform Commonwealth approach (England, Canada, Australia, and New Zealand) the Minister's discretion can be reviewed.
- (2) Applying the most severe test—"a strong positive case" that the documents are likely to help preparation of the case—the documents concerned, including Cabinet papers, should all be produced to the Court.

Cases referred to in judgment:

- Air Canada v. Secretary of State for Trade* [1983] 2 A.C. 394; [1983] 2 W.L.R. 494; [1983] 1 All E.R. 910
- Burmah Oil Co. Ltd. v. Governor and Company of the Bank of England* [1980] A.C. 1090; [1979] 3 W.L.R. 722; [1979] 3 All E.R. 700
- Carey v. The Queen in right of Ontario* (1982) 39 O.R. (2d.) 273
- Conway v. Rimmer* [1968] A.C. 910; [1968] 2 W.L.R. 998; [1968] 1 All E.R. 874
- Environmental Defence Society Inc. v. South Pacific Aluminum Ltd. (No. 2)* [1981] 1 N.Z.L.R. 153
- Fletcher Timber Ltd. v. Attorney-General* [1984] 1 N.Z.L.R. 290
- Harbours Corporation of Queensland v. Vessey Chemical Pty. Ltd.* (1986) 67 A.L.R. 100
- Mannix v. The Queen in right of Alberta* (1981) 126 D.L.R. 3d. 155
- Sankey v. Whitlam* (1978) 142 C.L.R. 1
- Young v. Quin and others* (1984) 56 A.L.R. 167

Legislation referred to in judgment:

- 40 Civil Law Act, cap. 14
Evidence Act, cap. 13, sections 65, 132, 133, and 166

Counsel:

Dr. Harrison for the plaintiff
Mr. Martin for the defendants

MARTIN A.C.J. delivered the following judgment on the preliminary application: In this action the plaintiff claims damages for wrongful dismissal by the Kingdom of Tonga. He applies for an order that the defendants disclose:

1. his personal file held by the Education Department;
2. his personal file held by the Prime Minister's Office;
- 60 3. Cabinet papers relating to the decision to dismiss him.

The Kingdom of Tonga by its appropriate Minister opposes the application. This raises an important constitutional issue. To what extent may the court investigate the actions of the executive?

In any civil action each party must normally disclose to the other any document which that party holds which is relevant and admissible in the action. There are certain well-recognized exceptions, one of which is that disclosure may be denied if it is in the public interest to do so. That is the exception on which the defence relies. Section 65(f) of the Evidence Act (cap. 13) states:

65. The court may order any person summoned before it in the course of any proceeding to produce for the purpose of primary evidence any document in his possession or power, except in the following cases:

- ...
- (f) Where the person is a public officer and the document is a communication made to him in official confidence, and the Minister in control of the department concerned considers the public interests would be likely to suffer by its disclosure.

And there are similar provisions in sections 132 and 133:

- 70 132. No public officer shall be compelled to disclose communications made to him in official confidence, if the head of his department considers that the public interests would suffer by the disclosure.

133. No one shall be permitted to produce any unpublished official records relating to any affairs of state or to give any evidence derived therefrom except with the permission of the officer at the head of the department concerned who may withhold such permission if in his opinion such production or evidence would be prejudicial to the public service.

These sections appear to give the Minister or head of department an absolute right to refuse disclosure. Mr. Martin for the defence argues that the Minister's certificate, which has been lodged in respect of each category of document claimed, is conclusive.

- 80 Sections 3 and 4 of the Civil Law Act (cap. 14) require the Court to apply the law of England insofar as there is no provision in Tonga, subject to such qualifications as local circumstances render necessary. Section 166 of the Evidence Act (as amended)

requires the Court to regard the judgments of superior courts of Commonwealth territories as having persuasive authority. So I look at these sections in the light of English and Commonwealth law.

All over the Commonwealth it is recognized that the objection of a Minister to production of specified documents is *not* conclusive—in England (*Conway v. Rimmer* [1968] 1 All E.R. 874; *Burmah Oil Co. Ltd. v. Bank of England* [1979] 3 All E.R. 700); in Australia (*Sankey v. Whitlam* (1978) 142 C.L.R. 1; *Young v. Quin and Others* (1984) 56 A.L.J.R. 167; *Harbours Corporation of Queensland v. Vessey Chemical Pty. Ltd.* (1986) 67 A.L.J.R. 100); in New Zealand (*Environmental Defence Society Inc. v. South Pacific Aluminium Ltd. (No. 2)* [1981] 1 N.Z.L.R. 153; *Fletcher Timber Ltd. v. Attorney-General* (1984) 1 N.Z.L.R. 290); and in the provinces of Canada (*Mannix v. The Queen in right of Alberta* (1981) 126 D.L.R. (3rd) 155; *Carey v. The Queen in right of Ontario* (1982) 39 O.R. (2nd) 273) although federal statute in Canada does appear to give federal Ministers a discretion which cannot be challenged in the Court.

I cannot believe that the Parliament of Tonga intended to isolate itself from the majority of the Commonwealth. I do not read these sections as giving a Minister in control of the department concerned an unfettered right to withhold documents. Such a power would be open to executive abuse, as was seen in England before *Conway v. Rimmer*. The Court has inherent jurisdiction to prevent a possible abuse of executive power. That is one of the essential checks and balances in a tripartite system of government such as our Constitution provides. It is a necessary corollary of that power that the Court may look at the reasons for a ministerial objection and decide whether or not it should be upheld. In my view the Court retains that power, bearing in mind all competing interests and treating the Minister's objection with the very great respect which it merits. Without that power, it is open to the Government of the day when involved in litigation to make available whatever documents support its case, and to suppress those which do not. Justice would not be seen to be done.

Section 65(f) creates a presumption that a document should not be produced if the responsible Minister objects. That objection will be treated with sensitivity and accorded great respect. But it will not be regarded as conclusive and in a proper case the Court may order disclosure. Accordingly I hold that in this Court the Minister's certificate is not conclusive and in proper circumstance may be overruled by the Court.

The plaintiff must show that the documents he wants to see are likely to help his case. The English cases reveal a divergence of opinion as to the degree of proof required. Some judges have required as a prerequisite to an order for discovery that the plaintiff should show "a strong positive case" that the documents will help him, and that without them he will be hampered in the presentation of his case. (*Burmah Oil; Air Canada v. Secretary of State for Trade* [1983] 1 All E.R. 910). Others prefer a less stringent test.

Even applying the stringent test I find that the plaintiff has surmounted this hurdle. He was dismissed by a decision of Cabinet but no reason is pleaded and so far as I can ascertain none has ever been given. That being so, I find it very probable that his personal files and the relevant Cabinet papers will contain material helpful to his case, in that they should reveal the grounds upon which he was dismissed. This is information which he needs to know in order to present his case adequately. He is

entitled to know the case which he faces.

Accordingly I find that this is a situation where the Court may order disclosure and I must now decide whether it should so order. I must balance the two public interests: (1) that no harm must be done to the Kingdom and the public service by such disclosure; and (2) that justice should not be frustrated by the absence of documents required to achieve a full and fair trial.

140 Mr. Martin argues that the personal files should not be disclosed because they will contain personal assessments of the plaintiff. He says that people will be discouraged from making candid assessments if they know that their views may be later revealed in litigation. All I need to say about that is that I do not believe it. Senior civil servants are not, and certainly should not be, so timid. Lord Keith of Kinkel expressed a similar view in the *Burmah Oil* case (at p. 724):

150 The notion that any competent and conscientious public servant would be inhibited at all in the candour of his writings by consideration of the off-chance that they might have to be produced in litigation is in my opinion grotesque. To represent that the possibility of it might significantly impair the public service is even more so. Nowadays the state in multifarious manifestations impinges closely on the lives and activities of individual citizens. Where this has involved a citizen in litigation with the state or one of its agencies the candour argument is an utterly insubstantial ground for denying him access to relevant documents.

Some of the documents in the plaintiff's personal files must be relevant. I doubt whether there is any document in either of which it could be said that the disclosure would harm the State. I accept that normally those files would remain confidential. But that consideration carries far less weight than the needs of justice in this particular case.

Accordingly I order that the plaintiff's personal files be produced for perusal by the court. I will then decide which documents should be disclosed.

160 Cabinet papers are in a very different category. Clearly there are some Cabinet records which should remain secret. A government cannot function without a certain degree of secrecy, for example: in the formation of policy; in negotiation with other states, in fiscal and economic matters; and in certain defence and intelligence matters. But as Gibbs A.C.J. said in the *Sankey* case (Australia): "The object (of the immunity) is to ensure the proper working of government and not to protect Ministers from criticism".

170 In Tonga, Cabinet decisions range across a very wide area. At the top of the scale are the matters of high State policy such as I mentioned. It is important that the Court should not seek to investigate such matters. They are for the executive alone and the Court has no business to interfere. At the other end of the scale are decisions which in many other countries are delegated to relatively minor government officials, such as the approval and confirmation of the lowliest entrants in the civil service. Such a wide variety of functions cannot all attract the same degree of immunity.

I put the test in relation to Cabinet papers in this way: what is the possible prejudice to the executive if they are disclosed? What damage would it do to the machinery of government? The answer in the circumstances of this case must be: none at all. What is sought are the documents considered by Cabinet and the decision of Cabinet. That decision is at the very heart of this action. It relates solely

to the plaintiff as an individual. I cannot at this stage see that it would involve any important policy considerations but, if I am wrong about that, it will appear on inspection by the Court and such documents may be excluded.

Accordingly I direct that the plaintiff's personal files and all Cabinet records relating to his dismissal be produced to the Court for inspection. Following such inspection I will determine which documents should be disclosed.

I should add that, subject to the point of law on the power of the executive to dismiss at will, it is very much in the defendant's interest to disclose its reasons for dismissal. Failure to do so may lead the court to draw unfavourable conclusions which may not be justified if the full facts emerge.