

P.C.
GMU-6-2

Judgment
17, 1966

No. 50 of 1964

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

IN THE MATTER of KUALA LUMPUR HIGH COURT ORIGINATING MOTIONS Nos. 2 and 3 of 1959

B E T W E E N:

RASIAH MUNUSAMY (Applicant) Appellant

- and -

10 THE PUBLIC SERVICES COMMISSION (Respondent) Respondent

C A S E FOR THE RESPONDENT

RECORD

1. This is an Appeal from the Order of the Federal Court of Malaysia dated the 21st February 1964 dismissing the Appeal of the Appellant against the Order of Ong J. made in the High Court at Kuala Lumpur on the 3rd May 1960 dismissing the applications made by consolidated Motions by the Appellant for -

P.206

P.162

Pp. 39, 40

20 (1) an order of Certiorari quashing a decision made by the Respondent terminating with effect from the 23rd May 1958 the appointment of the Appellant as an Assistant Passport Officer in the External Affairs Service and reverting him to his previous post of Immigration Officer; and

30 (2) an Order (in the nature of Mandamus) pursuant to Section 44 of the Specific Relief (Malay States) Ordinance, 1950 requiring the Respondent to reinstate the Appellant as such Assistant Passport Officer aforesaid.

2. The issue in the present Appeal is whether

RECORD

the Respondent terminated the Appellant's said appointment and reverted him to his previous post of Immigration Officer under circumstances amounting to dismissal or reduction in rank for the purposes of Clause (2) of Article 135 of the Constitution of the Federation of Malaya. It is common ground that the Appellant was not given an opportunity to be heard before he was required to revert to his previous post.

3. The provisions of the Constitution of the Federation of Malaya which are material to this Appeal are set out in Appendix 'A' hereto. 10

Pp. 145-152
Pp. 184-9

4. The facts of the case are set out in the judgments of Ong J. and Thomson L.P. and are summarised in paragraphs 5 to 20 of this Case.

Pp.59, 60

5. On the 7th March and the 19th February 1957 advertisements appeared in the Federal Government Gazette and in the "Malay Mail" newspaper respectively (Exhibits R.M.1 and 2) inviting applications for posts of Assistant Passport Officer for service in Federation of Malaya Government Oversea Missions. Applicants were to be selected from three categories in the following order of preference mentioned in the said advertisements: 20

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INSTITUTE OF ADVANCED
LEGAL STUDIES
24 APR 1967
25 RUSSELL SQUARE(ii)
LONDON, W.C.1.

"(i) Serving Assistant Passport Officers and serving Junior Assistant Passport Officers in the Immigration Department who have had not less than 5 years service and possess School Certificate.

All serving Government Officers who have had 5 years service and who possess School Certificate. 30

(iii) Persons not in Government Service who have School Certificate with a credit in English, and who have attained the age of 22 but have not attained the age of 30."

6. The said advertisements set out the terms of the appointment and concluded by directing applications to be submitted to "the Secretary, Public Services Commission (Designate)". At the date of the said advertisements and until the 31st August 1957 (hereinafter called "Merdeka Day") the Public Service Commission (Designate) consisted of a body of persons nominated by the then Government of the Federation of 40

10 Malaya whom it was intended should constitute the Public Services Commission pursuant to Article 139 of the Federal Constitution when that Constitution came into operation on Merdeka Day. At all material times prior to Merdeka Day the functions of the Public Services Commission (Designate) were to deal in an advisory capacity with applications for Federal Government appointments and other matters but the appointments were actually made by the Chief Secretary to whom the powers of the High Commissioner in that behalf had been delegated.

20 7. Prior to Merdeka Day the powers of the High Commissioner to make Federal Government appointments were contained in and regulated by the Federation of Malaya Agreement, 1948 and Instructions dated the 26th January 1948 passed to the High Commissioner under the Royal Sign Manual and Signet. The provisions of the said Agreement and of the said Instructions which are material to this Appeal are set out in Appendix 'B' hereto. After Merdeka Day the relevant powers passed to the Respondent under the Federal Constitution.

30 8. On the 21st February 1957 the Appellant who was a serving Government office with more than 5 years service as an Immigration Officer submitted, through the head of his department, a letter of application (Exhibit R.M.7) for the post of Assistant Passport Officer advertised in the said advertisement in the "Malay Mail". In the said letter he asserted inter alia as follows : P.87

"I have passed my School Certificate and have been in Government Service for the past seven years". At this time the Appellant only held a "Leaving Certificate" dated the 14th December 1949 (Exhibit R.M.3) and signed by the Principal of the Methodist Boys' School, Kuala Lumpur which states inter alia: P.61

"Standard at time of leaving: School Certificate Class (Camb).

40 Reason for leaving: Graduated"

In December 1949 the Appellant had taken the Cambridge Overseas School Certificate Examination and had failed in all the nine subjects for which he sat. P.76 1.9 P.116.1.2

RECORD

- P.75 1.8 9. On or about the 16th May 1957 the Appellant appeared before an interview board consisting of three members of the Public Services Commission (Designate). He produced some documents when before the Board but although Ong J. concluded that there could be no doubt but that the Leaving Certificate was produced it will be contended on behalf of the Respondent that such a conclusion is not supported by the evidence given in subsequent criminal proceedings by Mr. Singaram who was a member of the board or by any evidence before Ong J. and that Thomson L.P. rightly came to the conclusion that it was not clear what happened at the interview. Barakbah C.J. did not deal with this point. 10
- P.146 1.40
- Pp.75-6
P.186 1.7
- P.87 10. The Appellant's said letter of application (Exhibit R.M.7) was not expressed to be accompanied by the Leaving Certificate. Mr. Bigley, the Comptroller of Immigration, who passed the Appellant's application on to the Secretary of the Public Services Commission, said under cross-examination in subsequent criminal proceedings that he had never seen the Leaving Certificate (which was Exhibit P. 7 in the criminal proceedings) before. In the same criminal proceedings the evidence of the Investigating Officer, Assistant Superintendent Mahmood bin Haji Nassir was that on the 15th January 1958 he had received the Leaving Certificate from the Appellant. A letter dated the 6th January 1959 (Exhibit R.M.25) from the Appellant's lawyer to the Respondent and the reply thereto dated the 22nd January 1959 (Exhibit R.M.26) indicate that at the conclusion of the criminal proceedings the Leaving Certificate was handed over to the Respondent. 20
- P.72 1.4
- P.63
- P.71
- P.124 30
- P.125
- P.89 11. Following the said interview the Appellant received a letter dated the 21st August 1957 (Exhibit R.M.8) from the Deputy Chief Secretary offering him the appointment for which he had applied and stating inter alia:- 40

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LEGAL STUDIES
24 APR 1967
25 RUSSELL SQUARE
LONDON, W.C.1.

I am directed to inform you that you have been selected for appointment as an assistant Passport Officer in the External Affairs Service. The date of appointment will be the date of your embarkation for your overseas post and the appointment will

extend for a period of 3 years in the first instance.

.....

4. You will be required to serve a probationary period of one year from the date of your appointment and subject to your work and conduct being satisfactory you will be eligible for confirmation in your appointment at the end of this period.

.....

10 6. I am to enquire if you accept appointment on the Terms and Conditions stated above."

12. The Appellant accepted the said offer of appointment and on the 25th August 1957 he left for Karachi to take up the post of Assistant Passport Officer in the Office of the High Commissioner for the Federation of Malaya in Pakistan. On Merdeka Day the Federal Constitution came into operation and the Respondent Commission came into being.

13. In or about October 1957 police investigations were made which resulted in the Appellant being recalled from Karachi by a letter dated the 30th November 1957 (Exhibit R.M.30) from the Permanent Secretary to the Ministry of External Affairs. On the 23rd and 27th January 1958 the Appellant was tried in the Sessions Court at Kuala Lumpur on the following charge:- P.71, 1.10 P.131 P.67

30 "That you on or about the 16th May 1957 at Kuala Lumpur, in the State of Selangor, gave to a Public Servant namely Mr. Singaram, a permanent member of the Public Services Commission, an information namely, that you have passed the School Certificate examination in 1949, which information you knew to be false intending thereby to cause the said public servant to do a thing which such public servant ought not to have done if the true state of facts respecting such information was known to him to wit to recommend you for the appointment of Assistant Passport Officer in the Government Oversea Missions, and you did thereby commit an offence punishable under 40 Section 182 of the Penal Code."

RECORD

P.77 1.20

14. At the conclusion of the evidence for the prosecution the Appellant did not give evidence but his counsel submitted that there was no case to answer and this submission was upheld by the learned President of the Sessions Court who acquitted and discharged the Appellant on the grounds inter alia that Mr. Singaram was not a public servant for the purposes of Section 182 of the Penal Code. The acquittal of the Appellant was affirmed on the 1st May 1958 by the High Court (Smith J.) on appeal by the Public Prosecutor against the decision of the learned President who had made no decisions of fact regarding the sources of the information upon which the interview board had acted in recommending the appointment of the Appellant but had observed in his written Grounds of Judgment as follows :-

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P.78 1.10

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"2. The facts as presented by the prosecution would appear to be as follows:-

.....

(d) The defendant was interviewed by the interviewing board on 16.5.57.

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(e) The members of the Board were Raja Haji Ahmad, the Chairman, Mr. Singaram and a Mr. Hooker.

(f) In the course of the interview Mr. Singaram took brief notes. Incidentally as these notes were not dated they were not conclusive proof that the interview took place on 16.5.57.

The interviewing board interviewed candidates on 16th, 17th and 18th May. Furthermore the notes were not clear from what sources certain information concerning the defendant had been obtained.

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.....

P.91

15. After the acquittal of the Appellant but while the appeal of the Public Prosecutor was pending the Controller of Immigration by a letter (Exhibit R.M.9) dated the 10th February 1958 interdicted the Appellant from duty on half monthly emoluments with effect from the 24th January 1958.

16. On the 23rd May 1958 the Secretary to the Respondent Commission (hereinafter called "the Secretary") sent a letter (Exhibit R.M.10) to the Appellant in the following terms:-

RECORD

P.92

"Probationary Appointments as Assistant
Passport Officer, External Affairs Service"

10 1. I am directed to refer to Chief Secretary's Office letter under reference C.S.O. 58/28 dated the 21st August, 1957 notifying you of your selection for the above mentioned post and also to your acceptance of the appointment.

20 2. I am to say that it has come to the knowledge of this Commission that you have not passed the School Certificate required as claimed by you and that you are therefore under-qualified for the appointment. After due consideration of the circumstances and of the necessity to maintain the standards of the External Affairs Service and in fairness to other properly qualified candidates and appointees, it has been decided to terminate your appointment as Assistant Passport Officer, External Affairs service on probation, with effect from the date of this letter.

3. You will revert to your former post in the Immigration Department on the terms and conditions under which you were serving before appointment to the External Affairs Service".

30 17. There followed what Thomson L.P. described in his judgment as "a lengthy and acrimonious war of letters" between the Appellant's then lawyer and the Secretary.

P.189 1.27

40 18. In a letter (Exhibit R.M.11) dated the 28th May 1958 the Appellant's then lawyer contended that the Respondent was acting contrary to Regulation 44 of the Public Officers (Conduct and Discipline) Regulations, 1956 by taking disciplinary action against the Appellant on the same charge as that upon which he had been already acquitted in a Court of law. On the 7th June 1958 the Secretary replied (Exhibit R.M.12) denying this allegation and contending that the Appellant's appointment on probation had been terminated ... "not on the grounds of the charge in the Court case but on the grounds that Mr. Munusamy is not eligible for

P.93

P.95

RECORD

confirmation in the appointment because he has not passed the Senior Cambridge School Certificate, the standard which was demanded of the candidates by the Scheme of Service and obtained from the other successful candidates." The provisions of Regulation 44 of the Public Officers (Conduct and Discipline) Regulations, 1956 are set out in Appendix 'C' hereto.

P.97 19. The Appellant's then lawyer thereupon raised further arguments in his letter (Exhibit R.M.13) dated the 12th June 1958 to the effect inter alia that (a) the Appellant's work and conduct had been satisfactory, (b) according to the relevant Scheme of Service there could not be any period of probation for the Appellant's appointment, (c) if there had been a mistake by the appointing authority in appointing the Appellant it was a unilateral mistake which did not make the appointment voidable and (d) there had been no compliance with Article 135 (2) of the Federal Constitution. 10

P.102 In his reply (Exhibit R.M.15) dated the 6th August 1958 the Secretary indicated that no contention that the contract with the Appellant was voidable for mistake was being made by Government but asserted that Government had the right to terminate the contract during the period of probation. He stated that no question of the quality of the Appellant's work or conduct arose and disputed that Article 135(2) of the Federal Constitution applied. To this the Appellant's then lawyer retorted inter alia in his letter (Exhibit R.M.16) that the said letter of appointment (Exhibit R.M.8) dated the 21st August 1957 contained the terms of a written contract under which Government had no right to terminate the contract during the period of probation unless the Appellant's work or conduct were unsatisfactory. 20

P.103, 5 P.89 30

P.115 20. The issues were further contested in subsequent correspondence and on the 13th November 1958 the Secretary sought to recapitulate the position in his letter of that date (Exhibit R.M.21) by making the following amongst other contentions:- 40

"(1) Mr. Munusamy does not possess the "School Certificate" as required by Government and of which the meaning is well known to all in Malaya. In fact he

failed the Cambridge Overseas School Certificate Examination in December 1949 in all the nine subjects for which he sat.

RECORD

(2) Mr. Munusamy has in three applications for other posts claimed to have passed the "School Certificate" (the capital letters, his, are to be noted).

10 (3) Mr. Munusamy on 12th January, 1958 signed a departmental document recording particulars for his record of service which states that he had "Passed School Certificate (Senior Cambridge)".

(4) Government has the contractual right of any employer to terminate services at any time in accordance with the normal conditions of service applicable to the appointment.

20 (5) A serving Government officer is subject to General Orders, one of which, General Order A 25 (d) gives expression to Government's right to terminate probation, if necessary, without reason assigned.

(6) Mr. Munusamy was appointed as Assistant Passport Officer on probation. He was subject to the overriding provisions of General Orders and Government's right as an employer.

30 (7) It is the practice where a probationary officer's qualifications have later been found not to be such as are required and as he claimed, that the officer's appointment has been terminated. This is not only reasonable but Government's duty in the interests of the taxpayer and the public, to maintain the public service at a proper standard, and in the interests of other serving officers who are properly qualified, and in fairness to other candidates not considered for selection because they were underqualified.

(8) Common Regulation 13 states a right reserved at the time to Government. This right was not exercised in the competition at which Mr. Munusamy was interviewed.

40 (9) Admission to a Scheme of Service on probation does not entitle that officer to retention in that Scheme for obvious reasons. Otherwise probation would have no meaning.

RECORD

(10)

(11) Mr. Munusamy was not "dismissed" or "reduced in rank" both of which are disciplinary punishments. Article 135(2) of the Constitution does not therefore apply to his case.

....."

- P.1 21. On the 27th February 1959 the Appellant applied to the High Court at Kuala Lumpur by way of Notice of Motion to which the Respondent was made respondent for leave to apply out of time if necessary for an Order of Certiorari quashing the said decision made by the Respondent (and conveyed to the Appellant in the said letter (Exhibit R.M.10) from the Secretary dated the 23rd May 1958) terminating with effect from the 23rd May 1958 the appointment of the Appellant as an Assistant Passport Officer in the External Affairs Service and reverting him to his previous post of Immigration Officer, and also quashing the subsequent decision of the Respondent (conveyed to the Appellant's then Solicitor in the said letter (Exhibit R.M.21) from the Secretary dated the 13th November and in a letter (Exhibit R.M.23) dated the 12th December 1958 respectively) not to vary the said initial decision of the Respondent. 10
- P.92
- P.115
- P.122
- P.3 22. The said application was duly supported by a formal Statement dated the 27th February 1959 and signed by the Appellant and his Solicitor and by an Affidavit (hereinafter referred to as "the first Affidavit") affirmed on the same date by the Appellant setting out the grounds upon which the said relief was claimed and also stating that the said application for an Order of Certiorari would be made together with an application under Sections 44 and 45 of the Specific Relief (Malay States) Ordinance, 1950 for an order requiring the Respondent to reinstate the Appellant as an Assistant Passport Officer in the External Affairs Service of the Government of the Federation of Malaya. The provisions of Sections 44 and 45 of the said Ordinance as modified on the 13th November 1958 pursuant to Clause (4) of Article 162 of the Federal Constitution by the Federal Constitution (Modification of Laws) (Ordinances & Proclamations) Order, 1958 (L.N. 332/1958) are set out in Appendix 'D' hereto. 30
- P.15
- P.32
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23. On the 20th March 1959 Mohamed Ismail bin Abdul Latiff the Secretary to the Respondent affirmed an Affidavit (which was not filed until the 20th April 1959) raising no issues of fact but contending that the Appellant's said Notice of Motion was misconceived and that the Appellant had no cause of action maintainable at law. On the 30th March 1959 the said Notice of Motion was heard by Ong J. in the High Court at Kuala Lumpur and on the same day the learned Judge, who was informed by Federal Counsel appearing on behalf of the Respondent that the Respondent did not intend to take advantage of any technical objections whether in respect of time or otherwise, made an Order granting the Appellant the relief claimed in the said Notice of Motion.

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24. Accordingly the Appellant duly made application to the High Court at Kuala Lumpur by Notice of Motion dated the 8th April 1959 for an Order of Certiorari (in the terms previously set out in the aforesaid Notice of Motion dated the 27th February 1959) and also for the consolidation of the said application with a contemporaneous application made by the Appellant by Notice of Motion for an order under Section 44 of the Specific Relief (Malay States) Ordinance, 1950 requiring the Respondent to reinstate the Appellant as an Assistant Passport Officer in the External Affairs Service of the Government of the Federation of Malaya. The evidence in support of the said application for an Order of Certiorari consisted of the said Statement signed by the Appellant and by his Solicitor dated the 27th February 1959 and the said Affidavit affirmed by the Appellant on the same date. The evidence in support of the said application for an order under Section 44 of the Specific Relief (Malay States) Ordinance, 1950 consisted of an Affidavit affirmed by the Appellant on the 7th April 1959 in the same terms as his said Affidavit affirmed on the 27th February 1959 save that at the conclusion of each of the said Affidavits appropriate relief was claimed.

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25. The alleged grounds for the said relief set out in the said Statement and in the said Affidavits of the Appellant were substantially those which had been put forward by the Appellant's Solicitor in the course of the said correspondent with the Secretary referred to in paragraphs 18, 19 and 20 of this Case.

RECORD

- P.18, 1.36 26. As regards the sources of information concerning the Appellant which were available to the said interviewing board upon the occasion when he was interviewed in May 1957, the Appellant did not commit himself to disclosing in his said Affidavits whether or not he had presented his School Leaving Certificate to the board but merely deposed in paragraph II B (6) of the first affidavit as follows :-
- "There was interview by an interview Board and I was interviewed in May, 1957". 10
- P.23, 1.27 27. However after pointing out in paragraph III A (6) (a) of the first Affidavit that the said advertisements for his appointment did not mention the Senior Cambridge Certificate as a qualification for intending applicants unlike other advertisements in the same and other Gazettes he deposed in paragraph III A (6) (b) that there had been no statement or evidence by the then High Commissioner, the appointing authority before Merdeka Day, as to the reasons why the Appellant was appointed an Assistant Passport Officer, or as to whether he considered the Appellant's certificate a School Certificate or not within the meaning of the said advertisements inviting applications for the post of Assistant Passport Officer. 20
- P.23, 1.40
- P.71, 1.10 28. On the latter question of fact it will be contended on behalf of the Respondent that there was no evidence before Ong J. or the Federal Court that the Appellant's School Leaving Certificate ever left his possession prior to the 15th January 1958 when (according to the evidence of A.S.P. Mahmood bin Haji Nassir in the said criminal proceedings) he was relieved of it by the police. Accordingly it will be the Respondent's further contention that there was no evidence before either Ong J. or the Federal Court to support the submissions by the Appellant in paragraph III (A) (6) (d) of the first Affidavit as to the possible reasons for the appointment of the Appellant by the appointing authority. All the said submissions merely presuppose that the appointing authority did see the Appellant's School Leaving Certificate and as mentioned in paragraph 10 of this Case such evidence as appears upon the record is to the contrary effect. 30
- P.24, 1.22 40
29. The Appellant's applications were heard by Ong J. in the High Court at Kuala Lumpur on the

21st and 22nd July 1959. On the 21st July 1959 the learned Judge ordered by Consent that the applications be consolidated and on the 3rd May 1960 he delivered a reserved judgment dismissing both applications and made an order to that effect with no order as to costs.

Pp. 145-161
P. 163

10 30. In his judgment Ong J., after setting out the facts first considered the question of Certiorari and after mentioning that the Appellant argued that Certiorari should go against the Respondent on the ground that Article 135(2) of the Federal Constitution had not been complied with when the Appellant's probationary appointment was terminated he set out Article 135 (1) and (2) and remarked that Clause (3) of Article 135 was not relevant to these proceedings. On behalf of the Respondent it will be contended that Clause (3) is material in these proceedings because the occurrence in that provision of the words "dismissed or reduced in rank or suffer any other disciplinary measure" indicate that the words "dismissed or reduced in rank" when they occur in Article 135 are intended to apply only to dismissal or reduction in rank when effected as a disciplinary measure.

P. 152 1.2

P. 152 1.26

20 31. After holding that any action by the Respondent in contravention of Article 135 must be constitutionally invalid so that Certiorari would have to issue against the Respondent in the event of such a contravention Ong J. observed:-

P. 135 1.27

P. 156 1.1

30 "The essential point for consideration, therefore, is whether, in effect, the decision of the respondents, terminating the applicant's appointment as Assistant Passport Officer on probation and reverting him to his former post in the Immigration Department, involved his dismissal from the probationary post, or a reduction in his rank".

40 32. On the question of dismissal the learned Judge was unable to accept the contention of Counsel for the Appellant that the Court must (in the light of Article 144(1) of the Federal Constitution and of Section 39 of the Interpretation and General Clauses Ordinance, 1948 applied for the interpretation of the Federal Constitution pursuant to Article 160(1) of that Constitution) hold the termination

P. 156 1.35

RECORD

P.156 1.38 of a probationary appointment as tantamount to dismissal. He referred with approval to a decision of the Indian Supreme Court on the interpretation of Article 311 of the Indian Constitution which he regarded as corresponding to Article 135 of the Federal Constitution and made the following observation:-

"In Shyam Lal v. State of Uttar Pradesh and Another AIR (1954) S.C. 369, 374 Das, J., in the course of his judgment, said:

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"Removal, like dismissal, no doubt brings about a termination of service, but every termination of service does not amount to dismissal or removal Our recent decision in Satis Chandra Anand v. The Union of India AIR (1955) S.C. 250 fully supports the conclusion that Article 311 does not apply to all cases of termination of service".

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P.157 1.3 33. Ong J. mentioned that the Indian Supreme Court in Shyam Lal's Case had to consider whether compulsory retirement amounted to dismissal or removal from service and he then observed as follows :-

"In their view, removal or dismissal involved "the levelling of some imputation or charge against the officer which may conceivably be controverted or explained by the officer"; another distinguishing characteristic of dismissal or removal is that it is a punishment, imposed on an officer as a penalty, involving loss of benefit already earned; and, as both these elements were absent in the action taken by way of compulsory retirement, the Court held that compulsory retirement, as termination of service, did not amount to dismissal or removal, and consequently Article 311 had no application.

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Although Indian authorities have no binding force, they are entitled to great weight, and I would, with respect, adopt the test applied by Das J., with whose judgment Mukherjea, Bhagwati,

Jagannadhadas and Venkatrana Ayyar JJ agreed. In the present case no imputations of any sort whatsoever were made against the applicant, and the termination of his probationary appointment was professedly an administrative measure dictated by public interest, and not ordered as a penalty or disciplinary action. The applicant's Counsel raised no argument on this point, and, although it was submitted that the respondents had terminated the applicant's appointment "without cause or justification in law", there was never any suggestion that the respondents did not come to their decision in good faith, or that the reason which they gave inadequate. The indisputable fact is that he never possessed the School Certificate, and was therefore under-qualified for the appointment, and the respondents, having discovered their error, albeit a little late, took necessary action to rectify the matter. I am accordingly of opinion that the termination of the applicant's appointment in those circumstances does not amount to a dismissal to which the provisions of Article 135(2) would apply."

34. Before leaving the question of dismissal Ong J. remarked that he found it impossible to overlook the fact that the Appellant then remained in the continued service of the Government and that there had been no hiatus in his service. He could not be still in the Government Service if he had been dismissed. No question of dismissal could therefore arise.

P.158 1.4

35. The learned Judge then dealt with what he considered to be the more difficult question of reduction in rank. He first expressed the view that "reduced in rank" meant reduced in substantive rank and not the reversion of an officer holding a post merely on probation to his original substantive rank and distinguished the decision of an Indian Court in Gopi Kishore Prasad v. State of Bihar AIR (1955) Patna 372 as having been based on special Civil Service rules.

P.158 1.14

40 He then cited a group of Indian decisions on Article 311(2) of the Indian Constitution namely M.V. Vichoray v. The State of Madhya Pradesh AIR (1952) Nag. 288; Rabindra Nath Das v. General Manager, Eastern Railway & Others 59 C.W.N. 859; Keda Nath Agarwal v. The State of Ajmeer AIR (1954) Ajm. 22 and Laxminarayan Chironjilal Bhargava v. Union of India AIR (1956) Nag. 113 and observed as follows :-

Pp.158-160

P.160 1.36

RECORD

"In interpreting what is "reduction in rank" under Article 135(2) of our Constitution, and in deciding whether the applicant's reversion to his original substantive post amounts to a reduction in rank, I would respectfully adopt the reasons given in the cases above referred to. The proper test to apply, when one has to find the dividing line between actions which do, and those which do not, come within the purview of Article 135 (2), is whether such actions are penal in character or otherwise. In the instant case I am clearly of opinion that the applicant's reversion was merely the logical result of the respondents' holding that he was under-qualified for confirmation in the probationary appointment, and not action taken by way of penalising him. It therefore does not amount to "reduction in rank", and the provisions of Article 135(2) have no application.

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The application for an order of certiorari is accordingly dismissed. Dismissal of the other motion follows, as a matter of course."

36. On behalf of the Respondent it will be contended that in interpreting the meaning of "dismissed or reduced in rank" in Article 135(2) of the Federal Constitution Ong J. rightly attached great weight to the Indian decisions cited by him (other than Laxminarayan's Case (supra) which was partially over-ruled by the Supreme Court of India in Parshotam Lal Dhingra v. Union of India (1958) SCR 828) and that he rightly concluded that the proper test to apply when ascertaining the dividing line between actions which do, and those which do not, come within the purview of Article 135(2) is whether such actions are penal in character or otherwise.

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37. The Appellant duly appealed against the whole of the said judgment of Ong J. on eleven grounds set out in his Amended Memorandum of Appeal. The said appeal was heard by the Court of Appeal of the Federation of Malaya (Thomson C.J.Syed Sheh Barakbah J.A. and Neal J.) at Kuala Lumpur on the 22nd and 23rd August and the 10th and 11th September 1963. Judgment was reserved.

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Pp.166-169
Pp.172-183

38. On Malaysia Day (16th September 1963) various constitutional changes took place, the Federation was enlarged and became known as Malaysia, the Federal Constitution which became known as the Constitution of Malaysia was substantially amended pursuant to the provisions of the Malaysia Act (No. 26 of 1963) and the effect of Sections 87 and 88 of the said Act and of Articles 121(2), 122 and 122B of the Constitution of Malaysia was
10 that the said Judges were duly appointed to constitute the Federal Court of Malaysia with jurisdiction to continue and conclude the said proceedings which were pending in the Court of Appeal of the Federation of Malaya on Malaysia Day.

39. On the 29th December 1963 Neal J. ceased to be a Judge. On the 21st February 1964 before the Federal Court of Malaysia (Thomson L.P. and Syed Sheh Barakbah C.J., Malaya) the Appellant and the
20 Respondent by their respective Counsel consented to judgment being given pursuant to Section 16 of the Courts Ordinance, 1948 by the remaining two Judges of the Court in the absence of Neal J. The remaining two Judges were divided in their opinion and accordingly, pursuant to Section 16(2) of the said Ordinance the Federal Court made an order dismissing the appeal from the decision of Ong J.

P.205 1.19

P.207

40. In his Judgment Thomson L.P. set out the facts of the case and pointed out that it was
30 unnecessary to discuss at length whether or not the Appellant had been a member of the general public service because the Respondent had purported to deal with him as such and must be estopped from denying his status. Alternatively if he was not a member of the general public service the Respondent had no power to deal with him in any way so that his purported dismissal would have been a nullity.

P.190, 1.40

41. The only question to be decided was whether
40 the Appellant had been "dismissed or reduced in rank" within the meaning of Article 135(2) of the Federal Constitution. The learned Lord President did not consider it very important whether what was done to the Appellant amounted to "dismissal" or "reduction in rank". The distinction was in his view irrelevant to the question as to

P.191, 1.25

RECORD

whether or not the Appellant's treatment came within the scope of Article 135(2). However the learned Lord President was not persuaded that the Appellant's treatment did not amount to dismissal by virtue of the fact that thereafter he reverted to his former employment as an Assistant Immigration Officer.

P.192-193

42. Proceeding on the basis that the Appellant was dismissed Thomson L.P. adverted to the view Ong J., following the decisions of the Indian Courts on Article 311 of the Indian Constitution, that Article 135(2) only applies in the case of dismissals inflicted in pursuance of the power to "exercise disciplinary control" given to the Respondent by Article 144 and to the application by Ong J. of the tests applied by the Supreme Court of India (in Shyam Lal v. State of Uttar Pradesh AIR (1984) S.C. 369) in determining whether a dismissal was made in the exercise of disciplinary control. The learned Lord President was not however prepared to agree that the views of the Supreme Court of India regarding the effect of Article 311(2) of the Indian Constitution were very much in point in arriving at a correct interpretation of Article 135(2) of the Federal Constitution.

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P.193, 1.34

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P.194 1.4

43. He pointed out that in the relevant Indian decisions the expression "dismissed or removed or reduced in rank" in Article 311(2) of the Indian Constitution was interpreted in the light of the terms of Rule 49 of the Civil Service (Classification, Control and Appeal) Rules, 1930 which were originally made by the Secretary of State for India under Section 96B of the Government of India Act, 1919 and which now derive their force from the All India Services Act, 1951 (Act LXI of 1951) enacted by Parliament under Article 310 of the Constitution. He set out the relevant provisions of Rule 49 which are as follows :-

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P.194, 1.20

"The following penalties may
.....be imposed.....namely.
.....(vi) removal from the Civil
Service of the Crown, which does not
disqualify from future employment, (vii)
dismissal from the Civil Service of the
Crown, which, ordinarily disqualifies from
future employment.

40

Explanation. The discharge (a) of a

person appointed on probation, during the period of probation, (b) of a person appointed otherwise than under contract to hold a temporary appointment, on the expiration of the period of the appointment, (c) of a person engaged under contract, in accordance with the terms of his contract, does not amount to removal or dismissal within the meaning of this rule."

10 44. The learned Lord President then gave the following reasons for his view that the Indian cases should be disregarded in the interpretation of Article 135(2) of the Federal Constitution:-

P.194 1.38

20 "From a consideration of the terms of that Rule the conclusion has been drawn by the Indian Courts that dismissal or removal for the purposes of Article 311(2) means dismissal or removal inflicted as a punishment under Rule 49, that neither expression includes any discharge of a person which falls within the scope of the "Explanation" to the Rule and that the distinction between the two terms in the Constitution was the same as that contained in the Rule.

30 Now, with the utmost respect, that course of reasoning, as was pointed out by Bose, J., in his dissenting judgment in the case of Dhingra (Supra), is open to the fatal criticism that it involves controlling the interpretation of a provision of the Constitution itself by reference to a piece of subsidiary legislation made under it. The only excuse for such a course, if it be an excuse, is that it was rendered necessary, as was shown in the case of Chandra (Supra), by the apparent impossibility that otherwise existed of drawing a distinction between the expressions "dismissal" and "removal". That difficulty, however, does not arise in the interpretation of our Article 40 135(2) which speaks only of dismissal. Nor is there anything in the terms of our Public Officers (Conduct and Discipline) Regulations, 1956, made under Clause 14 of the Federation of Malaya Agreement, as amended by Ordinance No. 1 of 1953, which corresponds to Rule 49 of the Indian Rules.

RECORD

For these reasons, in my view, the Indian cases should be disregarded in the interpretation of our Article 135(2) and that question should be approached as res integra. As was said by Lord Radcliffe in the case of Adegbenro v. Akintola (1963) 3 WLR 63 (at p. 73):-

"It is in the end the wording of the Constitution itself that is to be interpreted and applied, and this wording can never be overridden by the extraneous principles of other Constitutions which are not explicitly incorporated in the formulae that have been chosen as the frame of this Constitution." 10

45. Approaching the question as res integra the learned Lord President gave the following reasons for his view that the word "dismissed" occurring in Article 135(2) should not be given any qualified meaning:-

P.195 1.35

"It is to be observed that the terms of Article 135(2) are categorical: "no member of such a service as aforesaid (and that includes the general public service) "shall be dismissedwithout being given a reasonable opportunity of being heard." What is in question is employment and that being so "dismissed" is to be construed in its application to the employment of servants. Generally and considered in isolation the word "dismissal" may be used as an expression to denote any termination of employment. Used, however, in connection with the relationship of master and servant (as it is in Article 135(2) it clearly means the putting an end to the servant's service by the master. Literally it is the "sending away" of the servant and for myself I can find no grounds for placing any artificial restricted meaning on the expression as used in Article 135(2)". 20 30 40

46. On behalf of the Respondent it will be contended that the learned Lord President here fell into fundamental error in failing to give any or alternatively sufficient consideration to the fact that in Article 135(3) the words "dismissed" and "reduced in rank" are expressly limited to mean dismissed or reduced in rank

as a "disciplinary measure". It will further be contended on behalf of the Respondent that the said words should accordingly be interpreted subject to the same limitation where they occur in Article 135(2).

RECORD

10 47. Thomson L.P. observed that the Respondent was nowhere in terms given any power to dismiss anybody but that if they had such power it must be derived from Article 139(1) which conferred jurisdiction upon them in relation to inter alia members of the general public service or from Article 144(1) which empowered them to exercise disciplinary control over the members of the said service. He regarded this question as an academic one because the Respondent did not have power to effect a dismissal which did not attract the provision of Article 135(2). He commented further as follows :-

P.196 1.7

P.196 1.35

20 "Thus in the present case a dilemma again arises. Either the Public Services Commission had the power to dismiss Mr. Munusamy or they did not have that power. If they had that power they exercised it without complying with Article 135(2) and the exercise is therefore a nullity. On the other hand if they did not have that power again the purported exercise of a power they did not possess is equally a nullity."

30 48. On behalf of the Respondent it will be contended that the jurisdiction conferred upon the Respondent by Article 139(1) empowered the Respondent to effect the dismissal of the Respondent without exercising the duty of disciplinary control referred to in Article 144(1) and that as the dismissal of the Appellant was not effected as a disciplinary measure Article 135(2) has no application.

40 49. Thomson L.P. would under the circumstances have quashed the decision of the Respondent conveyed to the Appellant in the said letter (Exhibit R.M.10) dated the 23rd May 1958 but he held that there could be no question of making an order of mandamus at the stage because the Appellant's appointment as an Assistant Passport Officer was for a period of three years only and accordingly came to an end on the 24th August 1960. The learned Lord President expressed no views regarding the question whether

P.196 1.34

P.92

RECORD

the Appellant was entitled to any other remedy as against the Government which had not been joined as a party to these proceedings.

50. On behalf of the Respondent it will be contended that in holding that the Appellant's appointment as an Assistant Passport Officer was for a period of three years and that it came to an end on the 24th August 1960 Thomson L.P. overlooked the fact that the Appellant's appointment was on probation for one year expiring on the 24th August 1958 and that he has never been confirmed in that Appointment.

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P.197
P.200 1.29
P.109 1.33
P.111
P.113 1.5
P.201 1.28

51. Barakbah C.J. first considered the question whether the Appellant had been reduced in rank for the purposes of Article 135(2) and pointed out that neither of the parties had contended that the Appellant had been promoted and that this was established by the Secretary's letter (Exhibit R.M. 18) dated the 16th September 1958 and the reply thereto (Exhibit R.M.19) from the Appellant's then Solicitor dated the 18th September 1958. On the question of reduction in rank the learned Chief Justice concluded as follows:-

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"In my view as there was no promotion, the question of reduction in rank did not arise. All the respondent did was to revert him to his former position. Apart from the pleadings, the learned trial Judge had dealt fully with the question of reduction in rank and with respect I agree with him."

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52. On the question whether the termination of the Appellant's appointment on probation amounted to a dismissal the learned Chief Justice observed as follows :-

P.202 1.4

"It is not in dispute that the appointment of Assistant Passport Officer is a permanent one. Now the words that require consideration are "on probation" and "dismissal". In Parshotam Lal Dhingra v. Union of India AIR (1958) S.C. 36 at p.42 S.R. Das C.J. states:

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"An appointment to a permanent post in Government service on probation means, as in the case of a person appointed by a private employer, that the servant so

appointed is taken on trial. The period of probation may in some cases be for a fixed period, e.g. for six months or for one year or it may be expressed simply as "on probation" without any specification of any period. Such an employment on probation, under the ordinary law of master and servant, comes to an end if during or at the end of the probation the servant so appointed on trial is found unsuitable and his service is terminated by a notice."

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He then went on to say

"In short, in the case of an appointment to a permanent post in a Government service on probation, or on an officiating basis, the servant so appointed does not acquire any substantive right to the post and consequently cannot complain, any more than a private servant employed on probation or on an officiating basis can do, if his service is terminated at any time."

20

With regard to dismissal I can do no better than quote the case of Shyanlal v. State of Uttar Pradesh and another (1954) AIR S.C. 369 at p.374 in which Das J. says

"Removal, like dismissal, no doubt brings about a termination of service but every termination of services does not amount to dismissal or removal..... Our recent decision in Satischandra Anand v. Union of India (supra) fully supports the conclusion that Article 311 does not apply to all cases of termination of service."

30

53. Barakbah C.J. then stated that another characteristic of dismissal or removal is that it is a punishment imposed on an officer as a penalty and he cited the following passage from the judgment of the High Court of Nagpur in Laxminarayan Chiranjilal Bhargava v. The Union of India (1956) AIR Nagpur 113:-

"Penalty is necessarily by way of retribution or correction. Where an act is not intended to be either by way of retribution or correction, it cannot be regarded as a penalty at all. If the Departmental Promotion Committee declines to approve of the Petitioner's promotion because of some short comings which it finds in his work

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P.203 1.8

RECORD

and suggests his reversion to the substantive post, its action cannot be characterised either as by way of redistribution or of correction."

In the judgment of the learned Chief Justice, as the Appellant did not have the necessary qualification for the post of Assistant Passport Officer, namely the possession of a School Certificate, it could not be said that he had suffered a punishment by his removal on that ground. 10

54. Barakbahl J. expressed the following further grounds for his view that the Appellant had not been dismissed for the purposes of Article 135(2):-

P.203 1.26 "Munusamy was in the public service for seven years prior to his appointment as probationary passport officer. He went back to the same public service when he was found under-qualified for confirmation. There never was any hiatus in his employment in the public service. He continued in the service, where he still is today. Then where is the dismissal? In my view, a shifting from one department to another is an administrative decision to which Article 135(2) does not apply." 20

P.203 1.40 55. After concluding that there had been no dismissal or reduction in rank and saying that, as the learned trial Judge had remarked, the Indian Authorities were entitled to consideration and relevant to the present case the learned Chief Justice expressed agreement with the reasoning and finding of Ong J. and indicated that he would dismiss the appeal with no order as to costs. Finally he concluded with a citation from the judgment of the High Court of Nagpur in Laxminarayan's Case (supra) which he considered appropriate under the circumstances. 30

P.209 56. On the 1st September 1964 the Appellant was by Order of the Federal Court of Malaysia granted final leave to appeal to His Majesty the Yang di-Pertuan Agong from the said decision and Order of the Federal Court dated P.207 the 21st February 1964 and the said Appeal to His Majesty the Yang di-Pertuan Agong is accordingly referred to the Judicial Committee of Her Majesty's Privy Council for hearing pursuant to Article 131 of the Constitution 40

of Malaysia, section 87(6) of the Malaysia Act (No. 26 of 1963) and the Malaysia (Appeals to Privy Council) Orders in Council 1958 and 1963 (S.I. 1958 No. 426 and 1963 No. 2086).

57. The sole question of any substance involved in this Appeal is whether or not the Appellant was entitled to be paid the emoluments of an Assistant Passport Officer on probation during the period from the 23rd May 1958 to the 24th August 1958.

10 58. The Respondent is duly authorised by the Government of Malaysia to undertake on Government's behalf that if contrary to the contentions to be made on behalf of the Respondent herein, the Judicial Committee of Her Majesty's Privy Council advises His Majesty the Yang di-Pertuan Agong that, having regard to the admission that his conduct and service were satisfactory, the Appellant was entitled, pursuant to the terms of appointment contained in the said letter (Exhibit R.M.8) dated the 21st
20 August 1957 from the Deputy Chief Secretary, to a full year of probationary service expiring on the 24th August 1958 the Government of Malaysia will pay to the Appellant such sum as represents the amount of his loss of emoluments during the period between the 23rd May and the 24th August 1958 after taking into account the emoluments actually received by him during the said period after reverting to his original appointment in the Immigration Department.

P.89

30 59. On behalf of the Respondent it will be contended that the Appeal of the Appellant ought to be dismissed for the following among other

R E A S O N S

40 (1) BECAUSE these proceedings are misconceived in that the Appellant never held the substantive appointment of Assistant Passport Officer in the External Affairs Service. Neither an Order of Certiorari nor an order under Section 44 of the Specific Relief (Malay States) Ordinance, 1950 could have operated to "reinstate" the Appellant in a substantive appointment which he never held.

(2) BECAUSE the Appellant at all material times held the substantive post of Immigration Officer and

RECORD

his appointment as an Assistant Passport Officer was on probation only.

(3) BECAUSE the Appellant's appointment as an Assistant Passport Officer on probation was duly determined and he thereupon reverted to his substantive post as Immigration Officer.

(4) BECAUSE if, contrary to the Respondent's submissions, the Appellant was entitled to continue as Assistant Passport Officer on probation until the 24th August 1958 his remedy (if any) is against the Government of Malaysia and not against the Respondent. 10

(5) BECAUSE the Appellant's appointment as an Assistant Passport Officer on probation was made in the erroneous belief that he possessed the necessary qualifications for such an appointment and, in particular, that he had passed the School Certificate (Cambridge).

(6) BECAUSE the Appellant at the time of his said appointment had in fact failed the School Certificate (Cambridge) in all the nine subjects for which he sat and was consequently not qualified to be appointed as an Assistant Passport Officer. 20

(7) BECAUSE in the above circumstances the Respondent was fully justified in terminating the Appellant's said appointment during his probationary period.

(8) BECAUSE during the probationary period the Appellant was found unsuitable for the post of Assistant Passport Officer in that he did not possess the necessary qualifications: his appointment could therefore in no circumstances have been confirmed. 30

(9) BECAUSE Article 135(2) of the Federal Constitution only applies to dismissal or reduction in rank when effected as a disciplinary measure. That Article therefore has no application to the Appellant's case.

(10) BECAUSE the termination of the Appellant's probationary appointment was an administrative measure dictated by public interest and taken in good faith. 40

- (11) BECAUSE the judgment of Ong J. was right.
- (12) BECAUSE Thomson L.P. was wrong in his view that Article 135(2) applied to the Appellant's case.
- (13) BECAUSE the judgment of Barakbah C.J. was right.

BLEDISLOE

PHILIP CLOUGH

APPENDIX 'A'

CONSTITUTION OF THE FEDERATION OF MALAYA

PART X

PUBLIC SERVICES

10

132.(1) For the purposes of this Constitution, the public services are -

Public
Services

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- (a) the armed forces;
- (b) the judicial and legal service;
- (c) the general public service of the Federation;
- (d) the police service;
- (e) the railway service;
- (f) the joint public services mentioned in Article 133; and
- (g) the public service of each State.

30

(2) Except as otherwise expressly provided by this Constitution, the qualifications for appointment and conditions of service of persons in the public services other than those mentioned in paragraph (g) of Clause (1) may be regulated by federal law and, subject to the provisions of any such law, by the Yang di-Pertuan Agong; and the qualifications for appointment and conditions of service of persons in the public service of any State may be regulated by State law and,

RECORD

subject to the provisions of any such law, by the Ruler or Governor of that State.

.....

Restriction on dismissal and reduction in rank

135. (1) No member of any of the services mentioned in paragraphs (b) to (g) of Clause (1) of Article 132 shall be dismissed or reduced in rank by an authority subordinate to that which, at the time of the dismissal or reduction, has power to appoint a member of that service of equal rank.

(2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard. 10

(3) No member of any of the services mentioned in paragraph (c), (f) or (g) of Clause (1) of Article 132 shall, without the concurrence of the Judicial and Legal Service Commission, be dismissed or reduced in rank or suffer any other disciplinary measure for anything done or omitted by him in the exercise of a judicial function conferred on him by law. 20

Impartial treatment of federal employees.

136. All persons of whatever race in the same grade in the service of the Federation shall, subject to the terms and conditions of their employment, be treated impartially.

Public Services Commission.

139. (1) There shall be a Public Service Commission, whose jurisdiction shall, subject to Article 144, extend to all persons who are members of the services mentioned in paragraphs (c) and (f) of Clause (1) of Article 132, other than the Auditor General, or members of the public service of the State of Malacca or the State of Penang, and, to the extent provided by Clause (2), to members of the public service of any other State. 30

.....

Functions of Service Commissions.

144. (1) Subject to the provisions of any existing law and to the provisions of this Constitution, it shall be the duty of a Commission to which this Part applies to appoint, confirm, emplace on the permanent or pensionable establishment, promote, transfer and exercise disciplinary control 40

over members of the service or services to which its jurisdiction extends.

RECORD

(2) Federal law may provide for the exercise of other functions by any such Commission.

10 (3) The Yang di-Pertuan Agong may designate as special posts any post held by the head or deputy head of a department or by an officer who in his opinion is of similar status, other than posts in the judicial and legal service; and the appointment to any post so designated shall not be made in accordance with Clause (1) but shall be made by the Yang di-Pertuan Agong on the recommendation of the Commission whose jurisdiction extends to the service in which the post is held.

20 (4) The Ruler or Governor of a State may designate as special posts any posts in the public service of his State held by the head or deputy head of a department or by an officer who in his opinion is of similar status; and the appointment to any post so designated shall not be made in accordance with Clause (1) but shall be made by the Ruler or Governor on the recommendation of the Public Services Commission (or, if there is in the State of any Ruler a Commission of corresponding status and jurisdiction, on the recommendation of that Commission).

.....

30 (6) A Commission to which this Part applies may delegate to any officer in a service to which its jurisdiction extends, or to any board of such officers appointed by it, any of its functions under Clause (1) in respect of any grade of service, and that officer or board shall exercise those functions under the direction and the control of the Commission.

(7) In this Article "transfer" does not include transfer without change of rank within a department of government.

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PART XII

GENERAL AND MISCELLANEOUS

40 160.(1) The Interpretation and General Clauses Ordinance, 1948, as in force immediately before

Inter-pretation.

RECORD

Merdeka Day shall, to the extent specified in the Eleventh Schedule, apply for the interpretation of this Constitution as it applies for the interpretation of any written law within the meaning of that Ordinance, but with the substitution of references to the Yang di-Pertuan Agong for references to the High Commissioner.

.....

PART XIII

TEMPORARY AND TRANSITIONAL PROVISIONS

Transfer of officers.

176. (1) Subject to the provisions of this Constitution and any existing law, all persons serving in connection with the affairs of the Federation immediately before Merdeka Day shall continue to have the same powers and to exercise the same functions on Merdeka Day on the same terms and conditions as were applicable to them immediately before that day.

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(2) This Article does not apply to the High Commissioner or the Chief Secretary.

ELEVENTH SCHEDULE

Article 160.

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PROVISIONS OF THE INTERPRETATION AND GENERAL CLAUSES ORDINANCE, 1948 (MALAYAN UNION ORDINANCE No. 7 of 1948), APPLIED FOR INTERPRETATION OF THE CONSTITUTION

Section

Subject Matter

.....

29

Power to appoint includes power to dismiss -

Where a written law confers upon any person or authority a power to make appointments to any office or place, the power shall, unless the contrary intention appears, be construed as including a power to dismiss or suspend any person appointed and to appoint another person

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temporarily in the place of any person so suspended or in place of any sick or absent holder of such office or place:

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Provided that where the power of such person or authority to make such appointment is only exercisable upon the recommendation or subject to the approval or consent of some other person or authority, such power of dismissal shall, unless the contrary intention appears, only be exercisable upon the recommendation or subject to the approval or consent of such other person or authority.

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APPENDIX 'B'

THE FEDERATION OF MALAYA

INSTRUCTIONS passed under the Royal Sign Manual and Signet to the High Commissioner for the Federation of Malaya.

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Dated twenty-sixth January, 1948. GEORGE R.

INSTRUCTIONS TO OUR HIGH COMMISSIONER IN AND FOR THE FEDERATION OF MALAYA OR TO ANY OTHER OFFICER FOR THE TIME BEING ADMINISTERING THE GOVERNMENT THEREOF.

.....

19. Every appointment by the High Commissioner of any person to any office or employment in Our service shall, unless otherwise provided by law, be expressed to be during pleasure only.

Appointments

.....

.....

Am. O. 1/53
Public
Officers

14.(1) Subject to the provisions of this Agreement and of any law for the time being in force in the Federation and to any instructions from time to time given to him by His Majesty either under His Sign Manual and Signet or through a Secretary of State, the High Commissioner

(a) may constitute public offices and may appoint persons to such offices whose conditions of employment involve a liability to serve in more than one State or Settlement; and 10

(b) may, for cause shown to his satisfaction, dismiss or suspend from the exercise of his office any person holding any such office, or may take, in relation to any such person, such other disciplinary action as may seem to him desirable.

Added O.
1/53

(2) The High Commissioner may, by notification in the Gazette, subject to such conditions and restrictions as may be prescribed in such notification, delegate to any public officer described by name or office in such notification any power or discretion conferred upon the High Commissioner by paragraph (b) of sub-clause (1) of this clause and may, at any time by notification in the Gazette, revoke any such delegation. 20

Added O.
1/53

(3) No person who is borne on the establishment of a Malay State shall be dismissed or suspended from the exercise of his office under paragraph (b) of sub-clause (1) of this clause unless the concurrence of His Highness the Ruler of that State has first been obtained. 30

Added O.
1/53

(4) The High Commissioner in Council may make regulations for the purpose of regulating the conduct and discipline of persons holding such public offices as are referred to in paragraph (a) of sub-clause (1) of this clause and providing for the procedure to be followed where disciplinary action is taken under this 40

Clause.

APPENDIX 'C'

THE PUBLIC OFFICERS (CONDUCT AND DISCIPLINE)
REGULATIONS, 1956

L.N. 432/
1956

.....

44. An officer acquitted of a criminal charge shall not be dismissed on any charge upon which he has been acquitted but nothing in this Regulation shall prevent disciplinary action being taken against the officer on any other charges arising out of his conduct in the matter, provided they do not raise substantially the same issues as those on which he has been acquitted.

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APPENDIX 'D'

THE SPECIFIC RELIEF (MALAY STATES) ORDINANCE,
1950

PART II

SPECIFIC RELIEF

.....

CHAPTER VIII

ENFORCEMENT OF PUBLIC DUTIES

20 44. (1) A Judge may make an order requiring any specific act to be done or forborne, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or any Court subordinate to the High Court:

Power to order public servants and others to do certain specific acts.

Provided that -

(a) an application for such order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing (as the case may be) of the said specific act;

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RECORD

- (b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person or Court in his or its public character, or on such corporation in its corporate character;
- (c) in the opinion of the Judge such doing or forbearing is consonant to right and justice;
- (d) the applicant has no other specific and adequate legal remedy; and
- (e) the remedy given by the order applied for will be complete.

10

Exemptions from such power.

(2) Nothing in this section shall be deemed to authorise a Judge -

- (a) to make an order binding on the Yang di Pertuan Agong;
- (b) to make any order on any servant of any Government in the Federation, as such, merely to enforce the satisfaction of a claim upon such Government; or
- (c) to make any order which is otherwise expressly excluded by any law for the time being in force.

20

Application how made: Procedure thereon:

45. Every application under section 44 of this Ordinance must be founded on an affidavit of the person injured, stating his right in the matter in question, his demand of justice, and the denial thereof; and a Judge may, in his discretion, make the order applied for absolute in the first instance, or refuse it, or grant a rule to show cause why the order applied for should not be made.

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If, in the last case, the person, Court, or corporation complained of shows no sufficient cause, the Judge may first make an order in the alternative, either to do or forbear the act mentioned in the order, or to signify some reason to the contrary and make an answer thereto by such day as the Judge fixes in this behalf.

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No. 50 of 1964
IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

O N A P P E A L
FROM THE FEDERAL COURT OF MALAYSIA

IN THE MATTER of KUALA LUMPUR HIGH
COURT ORIGINATING MOTIONS Nos.
2 and 3 of 1959

B E T W E E N:

RASIAH MUNUSAMY (Applicant) Appellant

- and -

THE PUBLIC SERVICES COMMISSION
(Respondent) Respondent

C A S E F O R T H E R E S P O N D E N T

WRAY SMITH & CO.,
1, King's Bench Walk,
Temple, E.C.4.

Respondent's Solicitors