

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA (APPELLATE JURISDICTION)

B E T W E E N :

MAHAN SINGH SON OF MANGAL SINGH Appellant
(Plaintiff)

- and -

THE GOVERNMENT OF MALAYSIA Respondents
(Defendants)

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CASE FOR THE APPELLANTS

RECORD

1. This is an Appeal by leave of the Federal Court of Malaysia (Appellate Jurisdiction) from a Judgment and an Order of that Court dated May 3rd 1975 allowing an Appeal from a Judgment of Mr. Justice Narain Sharma delivered on May 3rd 1974 and the Order made by the Learned Judge following that Judgment. By that Order the Learned Judge had declared that the Plaintiff still continued in the service of the Defendants and that purported termination of that service by the Defendants was null and void. The Learned Judge had further declared that the Plaintiff was entitled to all arrears of salary as from the date of purported termination.

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pp. 83-128
pp.128, 129
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2. The facts

In March 1970, the Plaintiff was not yet 49 and he was the sole supporter of 9 children. The eldest of his children was studying law in England, and his wife had been ill for a long period of time. He had been in the Government service for 23 years and was on the pensionable establishment. So far as he knew he had always acted honestly and properly and to the satisfaction of his superiors. In the normal course of events he could expect to remain with the Government for a further 6 years until he reached the age of 55 when he would retire and receive a pension and superannuation benefits. From April 1961 until the end of

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November 1969, the Plaintiff had been the Registrar of the Sessions Court, and since December 1st 1969 he had been attached as a Clerk to the Office of the Special Commissioners of Income Tax at Kuala Lumpur.

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3. But on March 31st 1970 the Plaintiff received a letter from the Director of Public Services of Malaysia. The letter was dated March 20th and an English translation of it reads :-

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"JPA. SULIT N P/7046/SJ.13/13
Public Service Commission,
Malaysia,
Rumah Persekutuan,
Jalan Sultan Hishamuddin,
Kuala Lumpur

20th March 1970
(Promotion and Discipline Section)

Sir,

I have been directed to inform you that in the exercise of the power conferred under section 10(d) of the Pensions Ordinance 1951, the Government has decided to pension you off in the Public Interest. According to Regulation 44 of the Public Officers Regulations (Conduct and Discipline) (General Orders, Cap "D") 1969 your service will be terminated as soon as you have taken all the leave for which you are eligible.

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Your eligibility for pension will be worked out according to the Pensions Ordinance, 1951.

Yours obediently,
(Sgd.) (Tan Sri Syed Zahiruddin
b. Syed Hassan)
Director of Public Services
Malaysia.

Enche Mahan Singh,
Office of the Special Commissioner,
Income Tax,
Kuala Lumpur."

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pp.85-87
pp.138,139

4. Four days later he wrote a letter by way of appeal to the Director of Public Services :-

"(Confidential)
Mahan Singh,
Setiausaha,
Pejabat Pesuruhjaya Khas
Chukai Pendapatan,
Bangunan Sharikat Polis.

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3rd April 1970

The Chief Registrar,
High Courts Registry
The Law Courts
Kuala Lumpur.

RECORD

Through:

Chairman,
Special Commissioners Income Tax
Kuala Lumpur

Sir,

10 I have the honour to forward herewith
a copy of the letter JPA. Sulit NP/7046/SJ.13/13
dated 20th March 1970 from the Director of
Public Services, Malaysia, which was received
on 31st March 1970 for your views. I shall
be grateful if you will forward my grounds
of appeal to the Director of Public Services,
Malaysia:

- 20 (a) I was taken by surprise in receiving
this letter. I do not know at all that
something was going on behind my back.
I was not given any opportunity to
explain and to clear myself from any
allegation against me.
- (b) I have been in the Government Service
for 23 years honestly and diligently,
even up to this very moment my annual
confidential reports from various
Presidents of the Sessions Court can
be referred to.
- 30 (c) I have 9 children (4 by my first wife
who had passes (sic) away) and 5 by my
present wife. In February last year
my eldest son left for United Kingdom
to study law and I am the sole supporter
of all my children, who are still
schooling in various schools in Ipoh.
- (d) I wish to state also that I am unlucky
as my present wife is sickly and had
been attending the mental clinic since
40 1962.
- (e) As far as I can remember I have not
committed any offence and offended
anybody during my service. During my
term of office as Registrar, Sessions
Court, I performed my duty straight
forward and impartial. I believe that
a certain person held a grudge against
me and starting making false report.
- 50 (f) I will be attaining the age of 49 in
June 1970. I intend to bring up my
family properly. I have just reached
the maximum salary of my appointment.

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(g) I was thinking that when I am old my financial problem will be lessened. I came to my position as it is now by working hard and diligently. On receiving this letter asking me to retire make all my plans shattered away.

On the ground stated above I appeal to you to reconsider and to allow me to carry on working until such time when my eldest son returns from United Kingdom after being qualified in his law study. He is depending solely on me and after that I will voluntarily retire. At present it is difficult for me to get loan from my relative or friends.

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Thank you
I have the honour to be,
Sir,
Yours obediently,

Sgd. Mahan Singh."

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5. The subsequent events are summarised in the Judgment of Lord President Suffian in the Federal Court:

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"There was no change in the decision of Government".

A few months later the Secretary, Minister of Justice, received a letter A20 29th July 1970 from the Director of Public Services, informing him that the Yang di-Pertuan Agong had approved the grant of pension benefits to the Plaintiff but subject to a deduction of 10% as if he had retired on the ground of his health. A translation of that letter reads as follows

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"JPA Sulit. 7046/SJ/13/20

29th July 1970

The Secretary,
Ministry of Justice,
Kuala Lumpur

Sir,

Pensioned off in the Public Interest
Enche Mahan Singh, Senior Registrar,
Sessions Court.

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I am directed to refer to your letter KK/Sulit/0.169/20 dated 3rd January 1970 about the above subject and to inform you that Duli Yang di-Pertuan Agong has graciously approved the pension benefits be granted to Enche Mahan Singh, Senior Registrar, Sessions Court of which he is eligible to receive as if he is to be pensioned off on the grounds of his health with deduction

of 10% of the pension benefit.

RECORD

According to the decision of para.1 above you may now take action and arrange for the payment of the pension benefit to the above-mentioned officer.

Yours obediently,

(Sgd.)(Mohd. Affendy bin Hanafiah) for Director of Public Services, Malaysia."

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On 29th December 1971, the Plaintiff brought a suit in the High Court at Ipoh against the Government.

6. At the trial evidence was given by the Plaintiff that he had not committed any breach of any of the Regulations which governed his conduct in service and that prior to the letter dated March 20th he had received a letter dated March 2nd 1970 from the Public Service Commission which approved an increase in his salary. The Defendants never informed the Plaintiff of the reasons underlying his dismissal.

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7. There was also an admission of facts at the trial which was agreed by the parties :-

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p.8

"(1) A report dated 3.1.1970 relating to the particulars of the conduct and work of the Plaintiff was obtained of the Director of Public Services Department from the Secretary to the Ministry of Justice for purposes of Regulation 44 of the Public Officers (Conduct & Discipline) (General Orders, Chapter D) Regulations, 1969.

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(2) The said report is privileged under section 123 of the Evidence Act.

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(3) The Secretary to the Ministry of Justice was the Head of the Department in which the Plaintiff had served immediately prior to his transfer to the Department of Special Commissioners of Income Tax.

(4) As on 20.3.70 the Head of Department of the Plaintiff was the Chairman of the Special Commissioners of Income Tax.

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(5) The above report dated 3.1.70 was referred to the Director of

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National Operations Council who agreed to the termination of services of the Plaintiff under said Regulation 44.

(6) The powers of Yang di-Pertuan Agong under section 10(d) of the Pensions Ordinance, 1951 have not, by any Gazette Notification, have been delegated to any other officer of the Government up to now.

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(7) A copy of the said report was not supplied to the Plaintiff and he did not know the contents thereof."

8. Regulation 44(1) of the Essential (General Orders, Chapter D) Regulations 1969 reads as follows :-

"44. (1) Notwithstanding these General Orders, where it is represented to or is found by the Government that it is desirable that any officer should be required to retire from the public service in the public interest or on grounds which cannot suitably be dealt with by the procedure laid down in these General Orders, the Government may call for a full report from the Head of Department in which the officer is serving. The said Report shall contain particulars relating to the work and conduct of the officer and the comments, if any, of the Head of Department."

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The report referred to in Admission No.1, on the basis of which the decision to dismiss the Plaintiff was taken, was therefore a report containing particulars of ".....the work and conduct of the officer....." and "....the comments, if any, ..." of the Secretary to the Minister of Justice.

9. The Statutes and Regulations

Prior to July 17th 1969 the relevant Regulations governing the conduct of Public Officers were the Public Offices (Conduct and Discipline) (General Orders Chapter D) Regulations 1968 (the "1968 Regulations") made under Article 132(2) of the Federal Constitution by the Yang di-Pertuan Agong.

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The 1968 Regulations came into effect on 22nd May 1968. Prior to this date the relevant Regulations were the Public Officers (Conduct and Discipline) Regulations 1956 (the "1956 Regulations"). The 1956 Regulations were made by the High Commissioner in Council prior to the enactment of the present Federal Constitution of Malaysia.

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10. In the 1956 Regulations, compulsory

retirement was dealt with under Regulation 45 which required the Disciplinary Authority, when considering requiring a pensionable officer to retire, to give ".....the officer an opportunity of submitting a reply to the complaints by reason of which his retirement is contemplated...." (Regulation 45(a)).

10 11. In the Constitution of Malaysia there are specific provisions dealing with the Public Services. The relevant Articles are Article 132(2A) and Article 135(2) and Article 136. Article 132(2A) provides for public officers such as the Plaintiff to hold office" during the pleasure of Yang di-Pertuan Agong." Article 135(2) provides:

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

20 Article 136 provides :

"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."

This Article should be read together with Article 8(1) which provides :

30 "All persons are equal before the law and entitled to the equal protection of the law."

These are all entrenched provisions of the Constitution.

40 The Constitution therefore provides for a measure of natural justice to be accorded to public officers, even though such officers only hold office at pleasure. The Plaintiff contends that there is nothing inconsistent between, on the one hand, holding office only at pleasure, but, on the other, being entitled to be heard in his own defence: Malloch v. Aberdeen Corporation [1971] 1 WLR 1594-1599 (per Lord Wilberforce); Professor S.A. De Smith-Judicial Review of Administrative Action (3rd Edition: 1973) 200-203 Professor H.W.R. Wade - Administrative Law (3rd Edition 1971) 205-207.

50 12. Similarly, the 1968 Regulations make provision for an officer to be heard in his own defence when the Government contemplates taking disciplinary action against him. The Regulations which are particularly significant are Regulations 42 and 47. Regulation 42 provides :

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"For the purpose of awarding disciplinary punishments to officers, the Disciplinary Authority shall take into consideration the stages of disciplinary lapses committed besides the gravity of the offence. The punishments that may be meted out are enumerated below in the order of their seriousness:

- (i) warning;
 - (ii) reprimand;
 - (iii) fine;
 - (iv) forfeiture of salary;
 - (v) withholding of increment;
 - (vi) stoppage of increment;
 - (vii) deferment of increment;
 - (viii) reduction in rank;
 - (ix) termination of service;
 - (x) dismissal."
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Regulation 47 provides :-

- "(a) Any officer may have his services terminated on grounds of unsatisfactory work and conduct which may not be dealt with by specific charges under the foregoing General Orders provided that he has been given a reasonable opportunity of being heard. 20

- (b) Where a Head of Department considers that an officer's service should be terminated in the public interest, he shall submit to the appropriate Disciplinary Authority, a full report against the officer. The Disciplinary Authority shall request the officer to show cause why his services should not be terminated and when it is satisfied, having regard to the officer's age and past services, his future usefulness and other circumstances of the case, that it is desirable in the public interest so to do, it may submit its recommendation to the Government for consideration and approval. 30 40

- (c) In every case of such termination of service the question of eligibility for retiring benefits will be dealt with by the Government in accordance with the provisions of the Pensions Ordinance, 1951." 50

The Plaintiff's case is therefore that (putting on one side the Essential (General Orders, Chapter D) Regulations, 1969, (the "1969 Regulations") which came into force under emergency legislation on July 17th 1969) he would have had a right to be heard before his services were

terminated by the Government in the circumstances of this case. One of the issues in this Appeal is whether the 1969 Regulations were effective so as to take away this right to be heard.

10 13. The Emergency (Essential Powers) Ordinance No. 1 of 1969 was made by the Yang di-Pertuan Agong on May 15th 1969 under Article 150(2) of the Constitution, which confers on the Yang di-Pertuan Agong power in certain circumstances during a state of emergency to promulgate ordinances having the force of law. Section 2(1) of this Ordinance provides as follows :

20 "2 (1) Subject to the provisions of this section, the Yang di-Pertuan Agong may make any regulations whatsoever (in this Ordinance referred to as "Essential Regulations") which he considers desirable or expedient for securing the public safety, the defence of Malaysia, the maintenance of public order and of supplies and services essential to the life of the community."

30 On the next day the Yang di-Pertuan Agong made Emergency (Essential Powers) Ordinance No.2. Section 2(1) of that Ordinance delegated to the Director of Operations ".....all powers and authorities conferred on the Yang di-Pertuan Agong by any written law..."

Section 8 of Ordinance No. 2 provided:

40 "For the purpose of this Ordinance, the Director of Operations may make essential regulations under section 2 of the Emergency (Essential Powers) Ordinance No.1 1969 for any or all of the purposes set out in that section."

The 1969 Regulations were made by the Director of Operations of Malaysia under section 2 of Ordinance No.2 of 1969. They are discussed in detail below.

14. The Arguments of the Plaintiff

50 The Plaintiff puts his case in three alternative ways. The first way is that the facts of the termination of his services fell within Part II of the 1969 Regulations and especially Regulations 27 and 30. Regulation 27 reiterates Article 135(2) of the Constitution. Regulation 30(1) provides:

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"Where it is represented to, or is found by, the appropriate Disciplinary Authority or the Director General of Public Service that an officer is guilty of unsatisfactory work or misconduct and such work or misconduct, in the opinion of the Disciplinary Authority, merits dismissal or reduction in rank, the following provisions shall apply."

The relevant Disciplinary Authority for the Plaintiff was the Public Services Commission. Regulation 30(2) of the 1969 Regulations reads:- 10

"The Disciplinary Authority shall after considering all the available information in its possession that there is a prima facie case for dismissal or reduction in rank, cause to be sent to the officer a statement in writing, prepared, if necessary, with the aid of the Legal Department, of the ground or grounds on which it is proposed to dismiss the officer or reduce him in rank and shall call upon him to state in writing a period of not less than fourteen days a representation containing grounds upon which he relies to exculpate himself." 20

The Plaintiff contends that the Disciplinary Authority in his case did form the opinion (on the basis of the report dated 3.1.70 obtained from the Head of Department in which the Plaintiff formerly served) that prima facie the Plaintiff had been guilty of unsatisfactory work or misconduct and that such unsatisfactory work or misconduct merited dismissal or reduction in rank. Regulation 30(1) provides for the provision of Regulation 30 to apply to any case where two requirements are satisfied: 30

- (i) The officer has been guilty of unsatisfactory work or misconduct;
- and (ii) Such unsatisfactory work or misconduct could merit dismissal in the opinion of the Authority. 40

There is no requirement in the Regulation that for its provisions to apply the Authority must have decided upon (or contemplated) dismissing the officer concerned. It therefore follows that under Regulation 30(2) the Authority was under a duty to give the Plaintiff a hearing and since this was not done the purported "dismissal" or "termination" was void. 50

15. Alternatively, it is said that the circumstances of this case amounted to a "dismissal" and that therefore this is a case of a "dismissal" effected otherwise than in

accordance with the procedure laid down by Regulation 30 and was therefore void.

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16. The Learned Judge accepted the argument that the Plaintiff's service was terminated in circumstances amounting to a dismissal and he further held that the fact that the Plaintiff was granted a pension could not turn a "dismissal" into a simple "termination" of service. The Learned Judge therefore held that the purported dismissal was void for non-compliance with Regulation 30 of the 1969 Regulations.

p.65

p.77

17. In reaching his conclusion on the meaning of dismissal in the Regulations and Article 135(2) of the Constitution the Learned Judge (rightly in the contention of the Plaintiff) relied upon a number of Indian Authorities on the meaning of "dismissal" as used in Article 311 of the Indian Constitution, which corresponds to Article 135(2) of the Malaysian Constitution (although the wording is not precisely identical). The most important of these Authorities are three decisions of the Supreme Court of India.

(i) Parshotam Lal Dhingra v. Union of India A.I.R. 1958, S.C.36

(ii) Moti Ram Deka v. North East Frontier Railway A.I.R. 1964, S.C. 600

and (iii) Mankad v. State of Gujarat A.I.R. 1970, S.C. 143.

The principle in Dhingra's case was accepted in Munusamy v. Public Services Commission 1967 1 M.L.J. 199, a decision of this Committee on an Appeal from the Federal Court (Appellate Jurisdiction) of Malaysia.

18. The Federal Court disagreed with the Learned Judge on the grounds that a termination of employment was different from "dismissal", and the circumstances of the present case did not amount to "dismissal". In reaching this conclusion the Court heavily relied upon the decision of this Committee in Government of Malaysia v. Lionel 1974 1 M.L.J. 3. Unlike the present case, Lionel's case did not concern an officer appointed to the pensionable establishment. Lionel was a non-pensionable officer (a temporary clerk) who held office under the 1956 Regulations. Regulation 36 of those Regulations provided :-

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110-111
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"Notwithstanding anything in Regulations 32, 33 and 34 the Government may dispense with the services of any officer or employee not on the pensionable establishment by giving due notice in accordance with the terms of his appointment. In the case of monthly paid officers, who have served one year or more in a temporary capacity or are on the permanent non-pensionable establishment, the period of his notice will normally be three months but Government reserves the right to terminate the appointment of an officer not on the pensionable establishment by payment of one month's emoluments in lieu of notice without assigning any reason."

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Lionel had been given due notice in accordance with the terms of his appointment and this Committee decided that the particular circumstances of that case did not amount to dismissal within Article 135(2) of the Constitution. The Plaintiff therefore contends that the Learned Judge was right in holding that Lionel's case is not directly relevant to the present case (in particular to whether the facts of the present case amounted to a "dismissal" within Regulation 30 of the 1969 Regulations) and that the Federal Court was wrong to rely upon Lionel's case in reaching the conclusion that there had not been a "dismissal".

pp.57, 58

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pp.63, 64

19. The Learned Trial Judge also found as a fact that a stigma would attach to the Plaintiff by virtue of the so-called termination of his service and that for this reason it ought to be viewed as in substance a disciplinary measure amounting to dismissal. However, the Federal Court reversed the Learned Judge on this matter. Lord President Suffian disagreed with the Judge on the basis that the mere order for compulsory retirement without more did not necessarily carry with it a stigma nor did the letters from the Defendants dated March 20th 1970 and July 29th 1970.

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p. 109

Lee Hun Hoe, Chief Justice of Borneo, held that since the Plaintiff (being a Malayan public servant) had no legal "right" to his position, therefore termination of services could not in law amount to dismissal. This seems also to have been the view of Ong Hock Sim, Federal Judge. So far as this is a matter of fact, the Plaintiff contends that his removal was in substance a disciplinary measure arising from dissatisfaction with his work or conduct and that the Learned Judge's finding was correct.

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pp.124,125

20. The Plaintiff also relies on the facts that

he suffered a reduction of 10% in his pension, and that the letter purporting to terminate his services was written from the Promotion and Discipline Section of the Public Services Commission, in support of his contention that he was dismissed and that his dismissal was a disciplinary measure.

10 21. The Plaintiff's second argument is that he has been "dismissed" under Article 135(2) of the Constitution without being given a reasonable opportunity of being heard. In support of this contention the Plaintiff relies upon the same arguments as have been advanced in support of the contention that there was a "dismissal" within Regulation 30 of the 1969 Regulations.

20 22. The Plaintiff's third argument is that the "termination" of the Plaintiff's services was effected without compliance with Regulation 47(b) of the 1968 Regulations in that the Plaintiff was not given a hearing.

30 23. The 1968 Regulations were "suspended" by section 2 of the 1969 Regulations which were made by the Director of Operations acting under ordinance No.2 of 1969. The Plaintiff contends that the 1969 Regulations were ultra vires and void because Ordinance No.2 of 1969 could not sub-delegate to the Director of Operations legislative powers conferred by the Constitution upon His Majesty Yang di-Pertuan Agong personally. "Delegatus non potest delegare".

40 24. The principle relied upon is that general legislative powers which have been conferred upon a delegate cannot in turn (without express or necessarily implied provision to the contrary) be delegated. The principle is accepted by Halsbury (4th Edition) Volume 1, paragraph 32 and is supported by authority. In King Emperor v. Bencari Lal Sarma 1945 A.C. 14 the question arose as to the validity of Ordinance No.II of 1942 promulgated by the Governor-General of India under section 72 of the Government of India Act 1935 read with the India and Burma (Emergency Provisions) Act 1940. This Committee upheld the validity of the Ordinance upon the grounds that the Ordinance did not purport to sub-delegate legislative powers. The Ordinance merely constituted conditional legislation i.e. subject to being brought into force once particular conditions had been fulfilled. However, Viscount Simon L.C. in delivering the Advice of the Committee said at p.24 :

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"It is undoubtedly true that the Governor-General, acting under section 72 of Schedule IX must discharge the duty of legislation there cast on him, and cannot transfer it to other authorities."

25. The Supreme Court of Canada has applied the principle to section 61 of the Immigration Act R.S.C. 1952. Section 16 reads :-

"The Governor in Council may make regulations for carrying into effect the purposes and provisions of this Act, and, without restricting the generality of the foregoing may make regulations respecting..." 10

The Supreme Court held ultra vires certain regulations purportedly made under that section whereby the Governor General sought to sub-delegate his legislative power. The principle has also been applied by the Supreme Court of New Zealand sitting in Banco: Geraghty v. Porter (1917) 36 NZLR 554. See also de Smith The Judicial Review of Administrative Action (3rd Edition 1973) pp.263-272 (especially p.264) and the authorities there cited. 20

26. The Defendants' Answers

The Defendants' answers to these arguments are :-

(i) There was no "dismissal" within Regulation 30 of the 1969 Regulations or Article 135 (2) of the Constitution. This point has already been dealt with. 30

(ii) The Plaintiff's services were terminated under section 10(d) of the Pensions Ordinance 1951, or alternatively under Regulation 44 of the 1969 Regulations.

27. As for the Pensions Ordinance 1951, this conferred a power upon the Yang di-Pertuan Agong to terminate services "in the public interest." The Plaintiff meets the argument based on this section in three ways. 40

28. Firstly, section 10(d) could not authorise acts in breach of Article 135(2) of the Constitution.

p.90

29. Secondly, the power under section 10(d) was exerciseable only by the Yang di-Pertuan Agong himself and not by others such as the Director of Public Services, who wrote the letter dated March 20th 1970. It was admitted by the Defendants that in fact the Yang di-Pertuan Agong had not delegated his power under section 10(d). The inference to be drawn from the letters 50

of March 20th 1970 and July 29th 1970 is that it was not the Yang di-Pertuan Agong himself who purported to terminate the Plaintiff's position but the Government. In the Federal Court, Lord President Suffian held that it was also the decision of the Yang di-Pertuan Agong otherwise the Plaintiff would not have received any pension. However it is contended that the decision of the Yang di-Pertuan Agong to give the Plaintiff a pension could not retrospectively change a purported termination under Regulation 44 into a termination by the Yang di-Pertuan Agong himself under section 10(d) of the Pensions Ordinance.

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If necessary the Plaintiff will rely upon the principle that the delegate of the legislature cannot retrospectively validate sub-delegated legislation (or an act purportedly done thereunder) which would otherwise be ultra vires and void: Halsbury (4th Edition) Volume 1, paragraph 32; Blackpool Corporation v. Locker 1948 1 K.B. 349. Moreover, the Yang di-Pertuan Agong has only decided whether to give the Plaintiff a pension, which is a decision quite different from the decision actually to terminate the Plaintiff's services in the public interest.

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30. Thirdly, section 10(d) could not be used even by the Yang di-Pertuan Agong himself in order to justify a "dismissal" which would otherwise not be justifiable - i.e. a "dismissal" in breach of the provisions of Natural Justice laid down in Regulation 30 of the 1969 Regulations or alternatively in Regulation 39 of the 1968 Regulations. Section 10(d) of the Pensions Ordinance 1951 is limited to "termination" of services in the public interest.

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31. This leaves Regulation 44 of the 1969 Regulations. To this argument the Plaintiff has six replies. The first reply is that Regulation 44 is ultra vires and void, as is the remainder of the 1969 Regulations, for the reasons set out in paragraph 23 to 25 of this Case - namely that the Yang di-Pertuan Agong was not authorised himself to delegate the legislative powers conferred upon him by Article 150(2) of the Constitution to a sub-delegate.

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32. The second reply is that Regulation 44(1) of the 1969 Regulations requires as a condition precedent to the application of Regulation 44 "....a full report from the

Head of Department in which the officer is serving." The report in this case was in fact obtained from the Head of the Department in which the Plaintiff had ceased to serve on December 1st 1969. This meant that the Defendants in deciding whether to exercise their powers under Regulation 44 in relation to the Plaintiff could not tell from the report how useful the Plaintiff was to his current Department, although the Government was required by Regulation 44(3) to take into account the usefulness of the officer to the public services. The actual procedure used by the Defendants therefore did not comply with the procedure required by the express words of the Regulation. 10

p. 106

33. The Defendants rely upon Regulation 44 (and indeed the 1969 Regulations as a whole) as ousting a right to be heard which would otherwise exist under the Constitution and the 1968 Regulations. As such in principle it is submitted that this Committee should approach the construction of the Regulation with caution. However, in the Federal Court, Lord President Suffian (on this point the other members of the Court agreed with him) read further words into the Regulation. The Learned Lord President held that the Regulation should be held to mean "....is or was serving...." The Plaintiff contends that the Federal Court were wrong to enlarge the meaning of Regulation 44 so as to allow a procedure other than that laid down expressly by the Regulation. 20 30

34. The third reply is that if possible Regulation 44 ought to be read as being consistent with Article 135(2) of the Constitution. Accordingly it is submitted that on its true construction Regulation 44 does not allow the Defendants to "dismiss" an officer, otherwise than under Regulation 30 procedure, simply by calling such "dismissal" termination (as in the Government letters to the Plaintiff dated March 20th and July 29th 1970). In other words the Plaintiff contends that the Regulation does not authorise disciplinary procedure: this is supported by the fact that Regulation 36 of the 1969 Regulations does not include termination of service as a possible punishment. 40

35. The fourth reply is that insofar as Regulation 44 is inconsistent with Articles 8 135(2) and 136 of the Constitution these articles must prevail. This reply is based upon similar reasoning to that supporting the submission that all of the 1969 Regulations are ultra vires, i.e. that His Majesty the Yang di-Pertuan Agong could not sub-delegate his legislative powers. 50

36. It is said by the Defendants that Regulation

44 overrides the Constitution itself because of the effect of section 2(4) of Ordinance No. 1 and section 8 of Ordinance No.2 Article 150(6) of the Constitution reads :-

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"Subject to Clause (6a) no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution."

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This therefore validates ordinances passed under Article 150(2) notwithstanding that such ordinances are inconsistent with the Constitution.

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Article 150(2) confers power upon the Yang di-Pertuan Agong to promulgate ordinances having the force of law. The Plaintiff contends that insofar as laws are to be made under Article 150(2) which overrides the Constitution these must be made by His Majesty the Yang di-Pertuan Agong himself. Were it not for Article 150(6) Article 135(2) would prevail. Article 4(1) provides :-

"This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

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Article 150(6) contains an exceptional power ancillary to the power contained in Article 150(2). It is entrusted by the legislature to the Yang di-Pertuan Agong himself. Even if (contrary to the argument in paragraphs 23 to 25 of this Case) the Yang di-Pertuan Agong is entitled to sub-delegate his powers under Article 150(2) nevertheless it is submitted that he cannot sub-delegate power to override the Constitution itself conferred by Article 150(6).

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37. This reply is based partly upon the authorities outlined in paragraphs 23 to 25 of this Case. In addition the Plaintiff relies upon the Delegation of Powers Ordinance 1956 (the "1956 Ordinance") and Article 159 of the Constitution. The 1956

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Ordinance was enacted prior to the Constitution. This Ordinance only expressly empowered the High Commissioner (subsequently amended to the Yang di-Pertuan Agong) to delegate in the case of "...any written law". (See section 3). By section 2 of the Ordinance "written law" did not include the Federation of Malaya Agreement 1948 (subsequently amended to read "Federal Constitution").

This Ordinance does not expressly prohibit delegation of powers conferred by the Constitution but it is significant as being the law in force in Malaysia at the present day and at the time that the Constitution itself was enacted. Accordingly, insofar as delegation was to be permitted under the Constitution it is to be expected that it would be covered expressly in the Constitution. There are express provisions allowing delegation under the Constitution (e.g. under Article 144(6) and Article 157) but significantly there is no express provision enabling delegation under Article 150(2) or Article 150(6). 10 20

38. Further, Article 159(3) of the Constitution reads :-

"A Bill for making any amendment to the Constitution (other than an amendment excepted from the provisions of this Clause) shall not be passed in either House of Parliament unless it has been supported on Second and Third Readings by the votes of not less than two-thirds of the total number of members of that House." 30

This has the effect of entrenching the Constitution so that it can only be amended upon two-thirds majorities on Second and Third Readings in each House of Parliament. This Article makes it clear how exceptional is the power defined in Article 150(6) and conferred upon the Yang di-Pertuan Agong himself. The Article recognises that in an Emergency there might have to be power to suspend parts of the Constitution but at the same time it entrusts such power to the Yang di-Pertuan Agong himself. This trust, in the submission of the Plaintiff, is not itself capable of sub-delegation. 40

pp.65-77

39. The Learned Judge dealt at length with the arguments advanced by the Plaintiff on delegation. He held that section 2(1) of Ordinance No.2 of 1969 did not make any law, it merely recited a fact, namely that the Yang di-Pertuan Agong had relinquished all executive power and authority conferred him under the Constitution. Nevertheless the Learned Judge held that the legal effect of an Emergency was to constitute 50

10 the Yang di-Pertuan Agong as the Supreme legislative power. The Judge seems to have held that there was therefore not a "sub-delegation" but merely a "delegation" and that therefore Regulation 44 was valid and effective even if inconsistent with the Constitution. It is submitted that the Learned Judge misconceived the nature of the power conferred by Article 150(2). It is a power conferred by the Constitution and is therefore a power under the Constitution: the limits of it are to be found in the Constitution itself and in particular in the words of Article 150(2) and 150(6).

20 40. In the Federal Court, Lord President Suffian did not find it necessary to decide the point. He reached this conclusion on the basis that there had been no "dismissal" within Article 135(2) of the Constitution, and that therefore there was no inconsistency between Regulation 44 and Article 135(2). p.101 p.105

Ong Hock Sim F.J. reached the same conclusion as Lord President Suffian. However, Lee Hun Hoe C.J. of Borneo considered this matter at length.

30 The Learned Chief Justice held that Article 150(6) itself conferred power upon the Yang di-Pertuan Agong to make an Ordinance conferring upon himself the power to delegate the power of making legislation which could override the Constitution. The Plaintiff contends that the Learned Chief Justice was wrong in this holding for the reasons already given.

In the submission of the Plaintiff, Article 150(6) should not be read as allowing unlimited amendment to the power of the Yang di-Pertuan Agong under Article 150 by the Yang di-Pertuan Agong himself.

40 41. The fifth reply is upon the basis that (contrary to the argument in paragraph 33 of this Case) Regulation 44 does authorise "termination" in circumstances where the Government is acting in essentially a disciplinary role. The Plaintiff contends that if the Government is contemplating acting under Regulation 44 then in the event of there being complaints against an officer the Government is under a duty to consider acting under Regulation 44(2) so as to give the officer concerned an opportunity to reply to the complaints. The Plaintiff contends that the power to give a hearing (in Regulation 44(2)) carries with it the duty to consider exercising it. This contention in 50

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the submission of the Plaintiff is supported by the decision of the House of Lords in Padfield v. Minister of Agriculture 1968 A.C. 997. The Plaintiff further contends that the Defendants failed to consider exercising this power. This is to be inferred from the fact that the Government have so far still disclosed no reasons for their actions and have at no stage sought to justify their conduct in refusing the Plaintiff an opportunity to be heard. Moreover in the letter of March 20th 1970 p.135 reliance was placed by the Defendants on Section 10(d) of the Pensions Ordinance 1951 as enabling the Defendants to terminate the service of the Plaintiff, and Regulation 44 was only referred to in connection with the Plaintiff's right to take leave. Section 10(d) does not require the Yang di-Pertuan Agong to consider giving the Officer concerned the opportunity of being heard and accordingly it is to be inferred that the Defendants failed to consider exercising this power.

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42. The Sixth reply is that the letter of termination dated March 20th, 1970 does not on the face of it show that the Government had considered the requirements of Regulation 44(3) and that it was "satisfied" that the service of the Plaintiff should be terminated. Regulation 44(3) provides :

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"If after considering the report or (in the case of the Government having communicated to the officer as in paragraph (2) after giving the officer an opportunity of submitting a reply to the complaints the Government is satisfied that having regard to the conditions of the services, the usefulness of the officer thereto the work and conduct of the officer and all the other circumstances of the case, it is desirable in the public interest so to do, the Government may terminate the service of the office with effect from such date as the Government shall specify."

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The Plaintiff contends that the inference to be drawn from the facts of this case is that the Defendants failed to satisfy themselves that it was desirable in the public interest to terminate the service of the Plaintiff or to have regard to the requirements of Regulation 44(3).

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43. Further, the Plaintiff having given evidence of good conduct (paragraphs 4 and 6 of this case) it was for the Defendants to show that they had acted within the terms of Regulation 44(3) and they have failed to do so.

The Appellant respectfully submits that the Order of the Federal Court was wrong and should be set aside and that the Learned Judge was correct and that Judgment should therefore be entered for the Appellant for the following amongst other

R E A S O N S

- 10 1. BECAUSE the Learned Judge rightly held that the facts of the case disclosed what was in substance a disciplinary measure resulting in dismissal of the Plaintiff and the Federal Court erred in reversing the Learned Judge on this matter.
- 20 2. BECAUSE the Learned Judge rightly held that under Regulation 30 of the 1969 Regulations and Article 135(2) of the Constitution, the Defendant ought to have given the Plaintiff a reasonable opportunity of being heard before dismissing him or taking disciplinary action against him and the Federal Court were wrong in reversing the Learned Judge on this matter.
- 30 3. BECAUSE the Federal Court were wrong in holding that the Plaintiff's services had been lawfully terminated under section 10(d) of the Pensions Ordinance 1951.
- 40 4. BECAUSE the facts of the case fell within the disciplinary procedure laid down by the 1968 Regulations which was not followed, and these Regulations were not validly suspended by the 1969 Regulations.
- 50 5. BECAUSE the Learned Judge and the Federal Court were wrong in holding that the Yang di-Pertuan Agong could delegate any of the legislative powers conferred upon His Majesty by Article 150(2) of the Federal Constitution and that therefore the 1969 Regulations were not ultra vires and void.
6. BECAUSE the Federal Court were wrong in holding that the Report required under Regulation 44(1) of the 1969 Regulations could be from the Head of a Department in which the Plaintiff had served previously.

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7. BECAUSE the Learned Trial Judge was right in holding that Regulation 44 of the 1969 Regulations could not be used for disciplinary measures resulting in dismissal and the Federal Court were wrong to reverse the Learned Judge on this matter.
8. BECAUSE the Learned Judge and the Federal Court were wrong in holding that the Yang di-Pertuan Agong had power under the Constitution of Malaysia to authorise delegates of His Majesty to make laws overriding the Constitution and in particular so as to authorise the Director of Operations to make Regulation 44 such that in law it overrode Article 135(2) of the Constitution. 10
9. BECAUSE the Federal Court were wrong in holding that on the facts the Defendants had not acted in breach of their duty to consider whether to give the Plaintiff a hearing under Regulation 44(2). 20
10. BECAUSE the Federal Court were wrong in holding that the Defendants had "... satisfied..." themselves that it was desirable to terminate the Plaintiff's service in the public interest and that the Defendants had had regard to the requirements of Regulation 44(3) of the 1969 Regulations. 30

STEWART BOYD

STEVEN GEE

IN THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF
MALAYSIA (APPELLATE JURISDICTION)

B E T W E E N :

MAHAN SINGH SON OF
MANGAL SINGH

Appellant
(Plaintiff)

- and -

THE GOVERNMENT OF
MALAYSIA

Respondents
(Defendants)

CASE FOR THE APPELLANTS

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