Privy Council Appeal No. 5 of 1976

Mahan Singh s/o Mangal Singh – – – – – – *Appellant*

v.

The Government of Malaysia – – – – – *Respondent*

FROM

THE FEDERAL COURT OF MALAYSIA (APPELLATE JURISDICTION)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND JUNE 1978

Present at the Hearing:

LORD DIPLOCK
LORD EDMUND-DAVIES
LORD RUSSELL OF KILLOWEN
LORD SCARMAN
SIR GARFIELD BARWICK
[*Delivered by* LORD DIPLOCK]

This appeal is about whether the Government of Malaysia acted constitutionally in bringing to an end the employment of the appellant in the public service of the Federation. The High Court in Malaya held that it did not; the Federal Court of Malaysia, on appeal, held that it did.

The appellant's case in the form in which it was presented in those Courts included arguments of far-reaching constitutional importance as to the legal relationship between the Government of Malaysia and members of the public services and as to the constitutional validity of the Emergency (Essential Powers) Ordinances Nos. 1 and 2 of 1969 and Regulations made thereunder by the Director of Operations. The greater part of the judgments in both Courts below, involving many citations from Indian authorities, is devoted to disposing of these arguments. They were rejected by Narain Sharma J. in the High Court, and by all three members of the Federal Court (Suffian L.P., Lee Hun Hoe C.J. and Ong Hock Sim F.J.) before whom the arguments were renewed. Before their Lordships, however, none of these wider propositions was persisted in.

The only argument with which their Lordships need to deal is that on which the appellant had succeeded in the High Court. In the form in which the appeal has been presented to this Board it turns upon the answer to a relatively simple question of mixed law and fact: Was the appellant "dismissed" within the meaning of that expression as used in Article 135(2) of the Constitution?

Article 135 of the Constitution reads:—

"(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.

. . . . .

"

It is common ground (a) that at the time when the Government put an end to his employment the appellant was a member of one of the services referred to in the Article; (b) that he was given no opportunity of being heard beforehand; and (c) that there is nothing in the Emergency (Essential Powers) Ordinances nor in any Regulations made thereunder by the Director of Operations to deprive the appellant of his rights under Article 135(2) if, by what the Government did in 1970, they "dismissed" him within the meaning of that Article.

The appellant became a member of the permanent establishment of the Government of Malaysia on 1 October 1949, as clerk and Punjabi interpreter. He served as Registrar of the Sessions Court from 1 April 1961 to 30 November 1969. He was then transferred to the Office of the Special Commissioners of Income Tax. On 20 March 1970 a letter was addressed to him by the Director of Public Services. It was in the following terms:—

"I have been directed to inform you that in the exercise of the power conferred under Section 10(*d*) of the Pension Ordinance, 1951, the Government has decided to Pension you off in the Public Interest. According to Regulation 44 of the Public Officers Regulation (Conduct and Discipline) (General Order Chapter "D") 1969, your services will be terminated as soon as you have taken all the leave which you are eligible.

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

The appellant had not yet reached the age of 49. The normal retirement age is 55 and the appellant wanted to continue to be employed in Government service until then. He wrote appealing against the decision to terminate his service; but to no avail. He ceased to work in the Office of the Special Commissioners of Income Tax and his pension was dealt with in accordance with the terms of the following letter of 29 July 1970 addressed by the Director of Public Services to the Secretary of the Ministry of Justice, the department in which the appellant had been serving up to 30 November 1969:—

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

"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 Maha Mulia Seri Paduka Baginda 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 ground of his health with deduction of 10% of the pension benefit.

> 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 mention officer ".

This letter refers to an earlier letter dated 3 January 1970 from the Secretary of the Ministry of Justice to the Director of Public Services. This is a reference to a report upon the conduct and work of the appellant furnished by the Secretary of the Ministry of Justice to the Director of Public Services and referred by him to the Director of Operations, who agreed to the termination of the appellant's service under Regulation 44 of the Public Officers (Conduct and Discipline) (General Orders, Chapter D) Regulations, 1969. Privilege was claimed for this report. Its contents have never been disclosed; but it is admitted that it was obtained for the purposes of Regulation 44, and was at no time shown to the appellant.

By Article 132(2A) of the Constitution, which applies to the appellant, it is provided

> " Except as expressly provided by this Constitution, every person who is a member of any of the services mentioned in paragraphs . . . . . of Clause (1) holds office during the pleasure of the Yang di-Pertuan Agong. . . ."

So *prima facie*, the Yang di-Pertuan Agong, and during the emergency the Director of Operations under his delegated powers, can terminate the employment of any public servant without notice and at any time he pleases; but this right is subject to the express provision of the Constitution contained in Article 135(2) that a public servant may not be " dismissed " without being given a reasonable opportunity of being heard.

As was held by this Board in *Government of Malaysia v. Lionel* [1974] 1 M.L.J.3 not every public servant whose employment is terminated by the Government against his will is " dismissed " within the meaning of this Article. For dismissal to arise, the decision to terminate the employment must be connected with conduct of the servant in relation to his office which is regarded by the Government as unsatisfactory or blameworthy and the consequences of the termination must involve an element of punishment.

Lionel's Case was one in which the first part of this requirement was satisfied; his conduct was regarded as blameworthy. But the second part of the requirement, that there should be a penal element in the consequences of his dismissal, was not. He was a temporary clerk, not on the permanent establishment, but engaged on terms under which his services could be terminated on one month's notice or salary in lieu; and this was given to him. He was treated no differently from the way he would have been if his conduct had been impeccable and the Government had wished to dispense with his services because they had no longer any need for them. The need for a penal element on dismissal had earlier been referred to *obiter* by this Board in *Munusamy v. Public Services Commission* [1967] 1 M.L.J. 199.

The Constitution is by Article 4(1) the supreme law of the Federation. The meaning of " dismissed " and " dismissal " in Article 135 cannot be cut down by using the expression in some narrower sense in Regulations dealing with the conduct and discipline of members of the public service in order to differentiate between a punishment which necessarily entails forfeiture of eligibility for pension and a punishment which does not.

In the Public Officers (Conduct and Discipline) (General Orders, Chapter D) Regulations, 1968, which were in force before the emergency,

Regulation 42 enumerated " the punishments that may be meted out " by the Disciplinary Authority in order of their seriousness. The three most serious were

" (viii) reduction in rank;

(ix) termination of service;

(x) dismissal ".

Under these Regulations " termination of service " took place as the result of a recommendation of the Disciplinary Authority which could be made either in consequence of specific charges of unsatisfactory work or conduct brought against the officer under Regulation 39, or in consequence of a more general complaint by the Head of Department under Regulation 47 that the officer's work and conduct made such termination desirable in the public interest. Termination of service differed from dismissal in that it did not *ipso facto* entail forfeiture of eligibility for a pension. This was left to be dealt with under the Pensions Ordinance; but Regulation 39(*m*), which empowered the Disciplinary Authority to recommend the Government to " retire " an officer if they considered that although he did not deserve dismissal his continued service would be against the public interest, also empowered them to " recommend a reduction on the officer's eligibility (sc. for a pension) as part of the punishment ". In their Lordships' view, when an officer's service was terminated by the Government upon the recommendation of a Disciplinary Authority under either Regulation 39 or Regulation 47 of the 1968 Regulations the officer was " dismissed " within the meaning of Article 135 of the Constitution notwithstanding that the expressions " dismissal " and " dismissed " are given a narrow connotation in the Regulations. The two criteria which distinguish dismissal from the other ways in which an officer's service may be brought to an end, connection with the the officer's unsatisfactory or blameworthy conduct and the element of punishment, are both satisfied.

The 1968 Regulations were replaced in July 1969 by the Public Officers (Conduct and Discipline) (General Orders, Chapter D) Regulations, 1969, made by the Director of Operations in the exercise of powers conferred under the Emergency (Essential Powers) Ordinances No. 1 and No. 2 of 1969. In these Regulations, which were in force by the time the appellant's service was terminated, " termination of service " was deleted from the list of punishments which might be imposed by a Disciplinary Authority which, however, under the new Regulation 30(11) still retained the power, upon the hearing of specific charges of unsatisfactory work or misconduct against an officer, to recommend to the Government that the officer should be required to retire in the public interest instead of being dismissed. In their Lordships' view there is no significant difference between this and the corresponding provision in Regulation 39(*m*) of the 1968 Regulations. Termination of employment in consequence of a recommendation of a Disciplinary Authority under Regulation 30(11) constitutes " dismissal " for the purposes of Article 135(2) of the Constitution.

Regulation 44 of the 1969 Regulations, under which the Government in its letter of 31 March 1970 claimed to terminate the service of the appellant, was substituted for Regulation 47 of the 1968 Regulations but is in significantly different terms. It 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.

(2) Where the Government considers that it requires further clarification, it may cause to be communicated to the officer the complaints by reason of which the termination of his service is contemplated.

(3) 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 officer with effect from such date as the Government shall specify.

(4) Where the Disciplinary Authority has recommended to the Government that an officer should be required to retire from the public service in the public interest, the Government may so terminate the service of the said officer.

(5) In every case of such termination of service of an officer under this General Order, the question of pension shall be dealt with in accordance with the law relating to pensions."

Unlike the former Regulation 47, the grounds on which an officer may be required to retire from the public service are not confined to unsatisfactory conduct of the officer. The wording is broad enough to cover cases where the officer's retirement is desirable in the public interest for reasons which have nothing to do with his conduct in relation to his office, which may have been impeccable. On the other hand (a) the requirement in paragraph (1) for a report to be obtained " relating to the work and conduct of the officer ", (b) the reference in paragraph (2) to " the complaints by reason of which the termination of his service is contemplated ", and (c) the requirements in paragraph (3) that the Government must consider the report before reaching its decision and must have regard, among other things, to " the work and conduct of the officer ", all combine to make it clear that termination of service under Regulation 44(3) *may* be imposed by way of punishment for unsatisfactory or blameworthy conduct that has not been made the subject of specific charges under Regulation 30.

Thus, in their Lordships' view, the fact that the Government decided to terminate the appellant's service under Regulation 44, if taken by itself, is equivocal as to whether the termination satisfies the first of the two criteria of what constitutes dismissal for the purposes of Article 135 of the Constitution. The decision may have been connected with conduct of the appellant in relation to his office which was regarded by the Government as unsatisfactory or blameworthy or it may have been quite unconnected with this. No doubt the best evidence as to whether it was or was not so connected would be provided by the report of 3 January 1970; but as privilege under s.123 of the Evidence Act, 1950, has been claimed for this it is not available. Their Lordships are thus driven to relying upon such inferences as may legitimately be drawn from the facts which are available.

In their Lordships' view, if it can be shown that the consequences of the termination of the appellant's service involved an element of punishment,

thus satisfying the second criterion for dismissal within the meaning of Article 135, the inference that the first criterion was also satisfied is irresistible. It is not to be supposed that the Government would inflict on the appellant any penalty or disadvantage beyond what was necessarily involved in his ceasing to be employed in the public service, unless his conduct therein was considered by the Government to have been in some respects unsatisfactory or blameworthy.

Their Lordships therefore turn to the Pensions Ordinance, 1951, under s. 10(*d*) of which it was stated, in the letter of 31 March 1970, that the Government had decided that the appellant should be " pensioned off in the public interest." The grant of a pension under the Pensions Ordinance, 1951, is a matter of eligibility only, not of absolute right. S.5(1) says so. S.5(2) provides that where an officer has been guilty of negligence, irregularity or misconduct the Yang di-Pertuan Agong may reduce or altogether withhold the pension for which the officer would otherwise be eligible; but apart from this if a pension is granted to an eligible officer the amount of it is to be calculated in accordance with the Regulations scheduled to the Ordinance.

Their Lordships have not overlooked s.9 but this applies only where a pension cannot be granted to an officer under the other provisions of the Ordinance; and such was not the case with the appellant.

Eligibility for a pension is dealt with by s.8. To be eligible the officer must have " retired from the public service " in one or other of the circumstances listed in s.8(2) (*a*) to (*i*). Paragraphs (*a*) and (*b*) deal with the retiring age of persons in the public service of which the appellant was a member. Fifty-five years is the age of compulsory retirement but earlier retirement from fifty years onwards is permissible with the consent of the Yang di-Pertuan Agong. Paragraph (*d*) deals with retirement before normal retiring age by reason of ill-health. Paragraphs (*e*), (*f*) and(*g*) are as follows:—

> " 8(2)(*e*) on abolition of his office; or (*f*) on the termination of his employment in the public interest as provided in this Ordinance; or (*g*) on compulsory retirement for the purpose of facilitating improvement in the organisation of the department to which he belongs by which greater efficiency or economy may be effected."

S.10 provides the machinery for compulsory retirement in circumstances which make the retiring officer eligible for a pension calculated in accordance with the scheduled Regulations. It empowers the Yang di-Pertuan Agong to require an officer to retire in any of the circumstances described in paragraphs (*a*) to (*h*), which for the most part correspond with similar paragraphs in s.8(2). Paragraph (*d*) of s.10 reads:—

> " (*d*) on the termination of his employment in the public interest ".

It is this provision that is referred to in s.8(2)(*f*).

Compulsory retirement under s.10(*d*) would have made the appellant eligible for a pension at the same rate as if he had retired by reason of ill-health—subject however to the right of the Yang di-Pertuan Agong to reduce or withhold the pension under s.5(2); but only if he were satisfied that the appellant had been guilty of negligence, irregularity or misconduct. So the letter of 29 July 1970, notifying the Secretary of the Ministry of Justice that the appellant's pension was to be subject to a deduction of 10% from the amount for which he would have been eligible if he had retired by reason of ill-health, compels the conclusion that this was done in exercise of the powers conferred upon the Yang di-Pertuan Agong by s.5(2). From this it follows that the Government

must have been satisfied when they terminated his service that the appellant had been guilty of negligence, irregularity or misconduct in his office.

In their Lordships' view it is a necessary inference of fact from this that the termination of the appellant's service at a reduced rate of pension involved an element of punishment and was connected, at any rate in part, with conduct on his part in relation to his office which the Government regarded as unsatisfactory or blameworthy. The two criteria of dismissal in the relevant sense are satisfied and, in their Lordships' view, what the Government purported to do was to dismiss the appellant within the meaning of Article 135(2) of the Constitution and to do so without having given him a reasonable opportunity of being heard. This is prohibited by the Constitution and the purported termination of the appellant's service by the Government is void.

No other step has since been taken to terminate the appellant's service or to require him to retire, although he has now reached an age at which he could be compelled to do so. Accordingly he has continued to be a member of the public service of the Federation and will remain so until he is required to retire. He has continued to be entitled to draw the salary appropriate to the office that he held when his service was purportedly terminated, but is liable to account for the monies he has received purportedly by way of pension. Declarations to this effect were made by the High Court in Malaya but were set aside by the Federal Court.

Their Lordships will accordingly report to His Majesty the Yang di-Pertuan Agong their opinion that this appeal should be allowed, the order of the Federal Court set aside and the judgment of Narain Sharma J. in the High Court in Malaya restored. The respondent should pay the costs of the appeal to the Federal Court and of this appeal.

310615—4 Dd 119941 100 7/78

In the Privy Council

MAHAN SINGH S/O MANGAL SINGH

v.

THE GOVERNMENT OF MALAYSIA

DELIVERED BY
LORD DIPLOCK

Printed by HER MAJESTY'S STATIONERY OFFICE
1978