Privy Council Appeal No. 8 of 1978

The Attorney General of the State of Saint Christopher Nevis and Anguilla – – – – – – – *Appellant*

v.

John Joseph Reynolds – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF THE WEST INDIES ASSOCIATED STATES SUPREME COURT

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH JUNE 1979

Present at the Hearing:

LORD SALMON

LORD SIMON OF GLAISDALE

LORD FRASER OF TULLYBELTON

LORD RUSSELL OF KILLOWEN

LORD SCARMAN

[*Delivered by* LORD SALMON]

Before dealing with the important points of law raised by this appeal, it is necessary to set out the relevant facts which were established by uncontradicted and unchallenged evidence called on behalf of Mr. John Joseph Reynolds at the trial of an action which he brought against the Attorney General of the State of Saint Christopher, Nevis and Anguilla and to which reference will be made later in this judgment.

Mr. Reynolds was a member of the Leeward Islands Police Force from the 20th October 1933 to the 31st December 1959 and of the St. Christopher, Nevis and Anguilla Police Force from the 1st January 1960 until the 26th October 1964; having then reached the age limit, he retired from the Force holding the rank of Inspector of Police. Prior to his retirement he had on at least one occasion acted as Assistant Superintendent of Police and he had received the Police Efficiency Medal and the Police Long Service Medal. He was described by the Chief of Police in his Discharge Certificate as a "dependable and knowledgeable officer".

Mr. Reynolds was a happily married man with four children whose conduct and behaviour reflected "a good home upbringing". He had the reputation of being "a very decent and upright person" and a good churchman. He was also a member of the People's Action Movement, which was a political party in opposition to the party in power in 1967.

On the 30th May 1967 the Governor of the State of St. Christopher, Nevis and Anguilla (which will be referred to in this judgment as "the State") made a Proclamation declaring that a state of emergency was

in existence. On the same day he made and published the Emergency Powers Regulations, 1967. The only relevant regulation is Regulation 3(1), which reads as follows:

" 3. Detention of Persons.

(1) If the Governor is satisfied that any person has recently been concerned in acts prejudicial to the public safety, or to public order or in the preparation or instigation of such acts, or in impeding the maintenance of supplies and services essential to the life of the community and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained ".

On the 10th June 1967 Mr. Reynolds was warned by an anonymous telephone call and by certain acquaintances that he was about to be arrested and imprisoned, and he was advised by his acquaintances to return to Antigua, where he was born. Mr. Reynolds replied that he had done nothing wrongful, so he had nothing to fear and would stay where he was. On the 11th June 1967 Mr. Reynolds was arrested by the police and taken to the prison where he was detained until 10th August 1967 in most insanitary and humiliating conditions. His arrest and detention were carried out under a Detention Order signed by the Deputy Governor. It read as follows:—

" ORDER
MADE UNDER
THE EMERGENCY POWERS REGULATIONS, 1967

WHEREAS I am satisfied with respect to

JOHN REYNOLDS

that he has recently been concerned in acts prejudicial to the public safety and to public order, and that by reason thereof it is necessary to exercise control over him:

NOW, THEREFORE, in pursuance of the power conferred on me by Regulation 3 of the Emergency Powers Regulations, 1967, and all other powers thereunto enabling me, I DO HEREBY ORDER AND DIRECT that the said

JOHN REYNOLDS

be detained.

Ordered by me this 10th day of June, 1967

(sgd.) B. F. DIAS

Governor's Deputy ".

On the 16th June 1967 the following written statement (supposedly under s. 15(1)(*a*) of the Constitution which is set out later in this judgment) was delivered to Mr. Reynolds whilst he was in prison:

" That you JOHN REYNOLDS during the year 1967, both within and outside of the State, encouraged civil disobedience throughout the State, thereby endangering the peace, public safety and public order of the State ".

Early in July 1967 a Tribunal presided over by a Chairman, who later became a Supreme Court judge, inquired into the cases of a number of persons, including Mr. Reynolds, then detained in prison. This Inquiry

was held under s. 15(1)(*c*), (*d*) and (*e*) of the Constitution. The hearings lasted about two weeks. The Government was represented by Senior Crown Counsel. Mr. Reynolds and the other detainees were also legally represented. During the course of the hearings, the Chairman said to Crown Counsel, " You have not led any evidence against John Reynolds [and two other detainees]." To which Crown Counsel replied, " I have no evidence against them ". The Chairman said, " So I can make my recommendation ". Crown Counsel replied, " I will speak to the authorities ". The clear inference from those remarks was that the Chairman considered that there were no grounds for detaining Mr. Reynolds and that Crown Counsel agreed and would report accordingly to the authorities.

It was not, however, until the 10th August 1967 that Mr. Reynolds was released from detention. This happened to be on the same day as that upon which the Court of Appeal gave judgment ordering that Mr. Charles and Dr. Herbert, who had been arrested and detained at about the same time as Mr. Reynolds, should be released on the grounds that the Emergency Powers Regulations, 1967, contravened the Constitution and were therefore unlawful; and that, accordingly, the detention orders made under those regulations were invalid.

Early in February 1968 Mr. Reynolds brought an action against the State in the name of the Attorney General claiming, amongst other things, damages for false imprisonment and compensation under s. 3(6) of the Constitution on the ground that his detention had been unlawful. The defence delivered early in March 1968 alleged that Mr. Reynolds had been lawfully arrested and detained and that, in any event, his claim should be " discharged and made void " under the State's Indemnity Act No. 1 of 1968.

On the 28th May 1968 the solicitor acting for the Attorney General issued a summons praying that Mr. Reynolds' action should be stayed under the Indemnity Act of 1968. After that, nothing happened for about five years until April 1973, when the Attorney General's summons for a stay of the action was heard and dismissed by Glasgow J. After about another three years' delay, the action finally came on for hearing before Glasgow J. towards the end of July 1976.

The learned trial judge gave judgment for Mr. Reynolds, holding that he was bound to find that Mr. Reynolds' arrest and detention were unlawful because of the decisions of the Court of Appeal in *Charles v. Phillips and Sealey* (1967) 10 W.I.R. 423 and *Herbert v. Phillips and Sealey* (1967) 10 W.I.R. 435. Glasgow J. also found that the Indemnity Act, 1968, contravened the Constitution and accordingly was of no effect; and he gave judgment for Mr. Reynolds for the sum of $5,000.

The Attorney General appealed from that judgment, and Mr. Reynolds cross-appealed praying that the judgment should be varied by increasing the sum of the damages awarded. The Court of Appeal dismissed the appeal and allowed the cross-appeal increasing the damages to $18,000. The Attorney General now appeals to Her Majesty the Queen in Council from both those decisions of the Court of Appeal.

This appeal raises the three following points of law and a fourth point of mixed fact and law:

1. Were the Emergency Powers Regulations, 1967, lawful?

2. If they were, was the detention order made against Mr. Reynolds under those regulations lawful?

3. If the first two points or either of them is decided in favour of Mr. Reynolds, does his claim fail because of the Indemnity Act of 1968?

4. If Mr Reynolds' claim succeeds, ought the award of $18,000 to be reduced?

1. The first is probably the most important point to be decided, namely, whether or not the Emergency Powers Regulations, 1967, were lawful. They purport to be made by the Governor under the Leeward Islands (Emergency Powers) Order in Council 1959 and s. 17(1) of the Constitution.

S. 17(1) of the Constitution empowers the Governor to proclaim a state of emergency but it gives him no power to make any regulations. Accordingly, the only source from which the Governor could derive the power to make regulations in a state of emergency was the Order in Council of 1959.

This Order in Council had originally been made under s. 3 of the Leeward Islands Act 1956, which was repealed by the West Indies Act 1962. This latter Act however enabled the Order in Council of 1959 to be kept alive because the West Indies (Dissolution and Interim Commissioner) Order in Council 1962 was made under it. That Order in Council provided that all laws in force in each territory immediately before the dissolution of the Federation (which included the Order in Council of 1959) should remain in force. The Order in Council of 1962 also amended the Order in Council of 1959 by adding three new sub-sections to it.

The only relevant section of the Order in Council of 1959 is s. 3, sub-section (1) of which reads as follows:

> " The Administrator of a Colony to which this Order applies may, during a period of emergency in that Colony, make such laws for the Colony as appear to him to be necessary or expedient for securing the public safety, the defence of the Colony or the maintenance of public order or for maintaining supplies and services essential to the life of the community ".

In order to decide whether the Emergency Powers Regulations, 1967, and the detention order against Mr. Reynolds were lawful, it is necessary to examine the following relevant parts of the Constitution.

<u>Section 3</u>

> *Subsection (1).* No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say: — . . .

[None of the cases then recited in this subsection include regulations made by the Governor.]

> *Subsection 6.* Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that other person or from any other person or authority on whose behalf that other person was acting.

<u>Section 14</u>

> Nothing contained in or done under the authority of a law enacted by the Legislature shall be held to be inconsistent with or in contravention of section 3 or section 13 of this Constitution to the extent that the

law authorises the taking during any period of public emergency of measures that are reasonably justifiable for dealing with the situation that exists in [the State] during that period.

Section 15

Subsection (1). When a person is detained by virtue of any such law as is referred to in section 14 of this Constitution the following provisions shall apply, that is to say:—

(*a*) He shall as soon as reasonably practicable and in any case not more than seven days after the commencement of his detention be furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is detained.

. . . .

The rest of this subsection provides, amongst other things, that not more than one month after the commencement of the detention, the detainee's case shall be reviewed by an independent and impartial tribunal: and that the detainee shall be allowed to have a lawyer to represent him before the tribunal: and the tribunal may make recommendations to the authority by which the detention was ordered but that authority shall not be obliged to act on such representations.

Section 16

Subsection (1). If any person alleges that any of the provisions of sections 2 to 15 (inclusive) of this Constitution has been . . . contravened in relation to him . . . then, without prejudice to any other action with respect to the same matter which is lawfully available, that person . . . may apply to the High Court for redress . . .

Section 35 is the entrenchment section and provides, amongst other things, that the Legislature may not alter any of the provisions of the Constitution except by the votes of not less than two-thirds of all the elected members of the House of Assembly, and also provides that a Bill to alter s. 35 or Schedule 1 to the Constitution, or any of the provisions of the Constitution specified in Part I of that Schedule, shall not be submitted to the Governor for assent unless after the Bill has passed the House of Assembly it is approved on a referendum by not less than two-thirds of all the votes validly cast on that referendum.

Part I of Schedule 1 to the Constitution specifies, *inter alia,* sections 1 to 18 inclusive of the Constitution.

Section 103

Subsection (1). The existing laws shall, as from the commencement of this Constitution, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with . . . this Constitution. . . .

Subsection (2). Where any matter that falls to be prescribed or otherwise provided for under this Constitution by the Legislature or by any other authority or person is prescribed or provided for by or under an existing law . . . that prescription or provision shall, as from the commencement of this Constitution, have effect (with such modifications, adaptations, qualifications and exceptions as

may be necessary to bring it into conformity with . . . this Constitution . . .) as if it had been made under this Constitution by the Legislature or, as the case may require, by the other authority or person.

Subsection (3). The Governor may by Order made at any time before 1st September 1967 make such amendments to any existing law as may appear to him to be necessary or expedient for bringing that law into conformity with the provisions of . . . this Constitution . . . or otherwise for giving effect or enabling effect to be given to those provisions.

. . . .

Subsection (5). For the purposes of this section, the expression " existing law " means any Act, Ordinance, law, rule, regulation, order or other instrument made in pursuance of (or continuing in operation under) . . . the West Indies (Dissolution and Interim Commissioner) Order in Council 1962 and having effect as part of the law of [the State] . . . immediately before the commencement of this Constitution.

Section 108.

The Leeward Islands (Emergency Powers) Order in Council 1959 shall cease to have effect as part of the law of [the State] on 1st September 1967 or such earlier date as the Legislature may prescribe.

Their Lordships consider that s. 103(5) (*supra*) makes it plain, beyond doubt, that the Order in Council of 1959 was an " existing law " immediately before the commencement of the Constitution. The Constitution came into operation on the 27th February 1967 (see the State's Constitution Order 1967, s. 1(2)). Nor are their Lordships in any doubt that the Order in Council of 1959 continued to have effect, with the modifications and adaptations which will presently be described, until the 1st September 1967 or such earlier date as the Legislature may have prescribed. The Legislature certainly made no such prescription before 10th August 1967—the date upon which Mr. Reynolds was released.

The learned Attorney General, whose arguments were all most ably presented, contended, however, that the effect of s. 108 of the Constitution was to preserve (for the period specified) the Order in Council in full force and vigour as drafted. He submitted that, by reason of the section, the Constitution left untouched and unimpaired the provisions of the Order in Council and the powers it conferred upon the Governor. Their Lordships cannot accept this submission. The purpose of s. 108 was a limited one—to ensure that powers existed to deal with an emergency, should one arise (as, indeed, happened) before the Legislature had enacted appropriate (and constitutional) legislation for dealing with such an event. Their Lordships cannot read the section as limiting the generality of s. 103 or protecting the Order in Council from any modifications or adaptations necessary to bring it into line with the Constitution.

It seems plain that s. 108 intended to give the Legislature six months within which to pass an Act replacing the Order in Council. This gave the Legislature ample time; and they would surely have passed such an Act within the specified period. Otherwise, in a state of emergency, there would have been no law giving the Governor or any other authority the right to arrest and detain anyone, however reasonably justifiable and urgently necessary it may have been to do so. During a period of

emergency it may well be urgently necessary, in order to preserve the safety of the State, to detain certain persons immediately. If the House of Assembly were not sitting, or even if it were, it might be impossible to get the necessary Act through in time to deal effectively with the danger to the State. Until the 1st September 1967, however, but only until such date, the Order in Council of 1959, construed with such modifications, adaptations, qualifications and exceptions as were necessary to bring it into conformity with the Constitution, would be available to preserve the safety of the State if and when a period of emergency came into existence.

In *Charles v. Phillips and Sealey* and in *Herbert v. Phillips and Sealey* (*supra*) the Court of Appeal held (1) that the provisions of s. 3 of the Order in Council of 1959 were not in conformity with the Constitution and (2) that they were so much out of conformity, that it was impossible to construe them so as to bring them into conformity with the Constitution: and that, therefore, the Emergency Powers Regulations, 1967, which purported to be made under that Order in Council were invalid. Their Lordships agree with the first part of that finding but not with the second.

The law laid down by s. 3 of the Order in Council of 1959 (as it originally stood) and by s. 14 of the Constitution had the same purpose—namely, to ensure that measures could immediately be taken during a state of public emergency, to arrest and detain persons whom it was necessary to arrest and detain in order to secure public safety or public order. The difference between the two laws was that the first law gave an authority absolute discretion, and indeed the power of a dictator, to arrest and detain anyone, whilst s. 14 of the Constitution allows a law to be enacted conferring power to arrest and detain only if it was reasonably justifiable to exercise such a power. It is this very real difference which makes the Order in Council of 1959 out of tune with the Constitution. If the Court of Appeal were right in concluding that no modification or adaptation or qualification or exception could bring the Order in Council into line with the Constitution, then they would have been plainly right in holding that the Order in Council was nugatory and the Emergency Powers Regulations invalid. Their Lordships cannot, however, accept that the Constitution would have preserved the life of the Order in Council of 1959 for any period if the Order in Council could not be construed under s. 103 of the Constitution so as to bring it into conformity with the Constitution. It is inconceivable that a law which gave absolute power to arrest and detain without reasonable justification would be tolerated by a Constitution such as the present, one of the principal purposes of which is to protect fundamental rights and freedoms. Their Lordships do not consider that there is any difficulty in construing the Order in Council by modification, adaptation, qualification, or exception so as to bring it into conformity with the Constitution. As stated in the judgment of their Lordships' Board in *Minister of Home Affairs and another v. C. M. Fisher and another* (as yet unreported), a Constitution should be construed with less rigidity and more generosity than other Acts. Their Lordships are of opinion that the Order in Council should be construed, in accordance with s. 103(1) and in the light of s. 14 of the Constitution, as follows:—

> " The Governor of a State may, during a period of public emergency in that State, make such laws for securing the public safety or defence of the State or the maintenance of public order or for maintaining supplies and services essential to the life of the community, to the extent that those laws authorise the taking of measures that are reasonably justifiable for dealing with the situation that exists in the State during any such period of public emergency ".

Having regard to the view which their Lordships take about s. 103(1), it is perhaps unnecessary to express any opinion about the rather abstruse subsection (2) of s. 103 of the Constitution. Out of respect however for the arguments addressed to their Lordships' Board on this subsection, their Lordships would observe that as the Constitution preserved the life of the Order in Council of 1959 for a limited period, it seems to follow that if, during that period, a state of emergency arose, it would fall to be provided for, not by the Legislature, but by an "existing law", namely the Order in Council of 1959, and that that Order in Council, during its life after "the commencement of [the] Constitution", would have effect "with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with [the] Constitution". If this view is correct, the Order in Council would have exactly the same effect under s. 103(2) as it has under the construction which their Lordships have given it under s. 103(1) of the Constitution.

In these circumstances, the fact that the Governor did not exercise his power under s. 103(3) of the Constitution to amend the Order in Council of 1959 so as to bring it into conformity with the Constitution is irrelevant.

Since this judgment decides that the Order in Council can and should be construed so as to bring it into conformity with the Constitution, it destroys the basis upon which the Court of Appeal found that the Emergency Powers Regulations, 1967, made under that Order in Council, were invalid. It does not however necessarily follow that the Emergency Powers Regulations are therefore valid. Their validity depends upon the proper construction of the following crucial words in Regulation 3(1):

> "If the Governor is satisfied . . ."

These words can and should be given a meaning which is consistent with ss. 3 and 14 of the Constitution and with the construction which their Lordships have put upon the Order in Council under which the regulation was made. Accordingly "is satisfied", which might otherwise mean "thinks" or "believes", does mean

> "if the Governor is satisfied upon reasonable grounds that any person has recently been concerned in acts prejudicial to the public safety or to public order . . . and that by reason thereof it is reasonably justifiable and necessary to exercise control over him, he may make an order against that person directing that he be detained".

Their Lordships consider that it is impossible that a regulation made on the 30th May 1967 under an Order in Council which, on its true construction, conformed with the Constitution on that date, could be properly construed as conferring dictatorial powers on the Governor: and that is what the regulation would purport to do if the words "if the Governor is satisfied" mean "if the Governor thinks that etc". No doubt Hitler thought that the measures—even the most atrocious measures—which he took were necessary and justifiable, but no reasonable man could think any such thing.

For these reasons their Lordships consider that Regulation 3(1) of the Emegency Powers Regulations, 1967, on its true construction, does conform with the Constitution.

Several authorities have been cited in argument which are helpful but none of which is directly in point. The first is *Liversidge v. Anderson* [1942] A.C.206. It concerns the construction of the Defence (General) Regulations 1939, Regulation 18B, paragraph (1), which, so far as relevant, reads as follows:—

> "If the Secretary of State has reasonable cause to believe any person to be of hostile . . . associations . . . and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained".

The plaintiff was detained by an order made under Regulation 18B, paragraph (1), and he then brought an action for damages for false imprisonment against the Home Secretary who had made the order for his detention. The majority of the House of Lords decided that the words " If the Secretary of State has reasonable cause to believe " meant " if the Secretary of State thinks that he has reasonable cause to believe " providing he acts in good faith. Lord Atkin, in his celebrated dissenting speech, held that the words " If the Secretary of State has reasonable cause to believe " meant what they said, namely that they give only a conditional authority to the Minister to detain any person without trial, the condition being that he has reasonable cause for the belief which leads to the detention order.

The Attorney General, whilst not relying on the decision in *Liversidge v. Anderson* because it was not directly in point, did however rely on the following passage in Lord Atkin's speech at p. 237:

> ". . . if there were a certain ambiguity in the words ' has reasonable cause to believe ' the question would be conclusively settled by the fact that the original form of the regulation issued in September, 1939, gave the Secretary of State the complete discretion now contended for: ' The Secretary of State is satisfied, etc.'. But it was withdrawn and published in November, 1939, in its present form . . . What is certain is that the legislators intentionally introduced the well known safeguard by the changed form of words ".

Whilst their Lordships consider it unnecessary, for the reasons given by the Attorney General, to express any view about what Lord Reid in *Ridge v. Baldwin* [1964] A.C.40 at 73 described as:

> " the very peculiar decision of this House in *Liversidge v. Anderson* "

they do consider it necessary to deal with the passage in Lord Atkin's speech upon which the Attorney General did rely. No doubt that passage supports the argument that the words " The Secretary of State is satisfied, etc." *may* confer an absolute discretion upon the Executive. Sometimes they do, but sometimes they do not. In *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* [1977] A.C. 1014 the question arose as to whether s. 68 of the Education Act 1944 gave an absolute discretion to the Secretary of State. That section reads as follows:—

> " If the Secretary of State is satisfied . . . that any local education authority . . . have acted or are proposing to act unreasonably with respect to the exercise of any power conferred or the performance of any duty imposed by . . . this Act [upon the authority], he may, notwithstanding any enactment rendering the exercise of the power or the performance of the duty contingent upon the opinion of the authority . . ., give such directions as to the exercise of the power or the performance of the duty as appear to him to be expedient ".

The House of Lords decided that that section's opening words " if the Secretary of State is satisfied " did not confer an absolute discretion upon him, and that accordingly the Court should exercise its judgment (*a*) as to whether grounds existed which were capable of supporting the Secretary of State's decision and (*b*) as to whether he had misdirected himself on the law in arriving at his decision. The House also held that if no such grounds existed or the Secretary of State had misdirected himself, his decision, however *bona fide* it was, should be overruled (see pp. 1047, 1064–5, 1070 and 1074).

The *Tameside* case was exceptional in that the Secretary of State had to be satisfied not that the local authority had made a wrong decision in the exercise of the power conferred upon them, but that they had made a decision which no reasonable local authority could have made. The decision which the local authority made, that certain grammar schools should continue in existence and should not be turned into comprehensive schools, was a policy decision. It may have been right or wrong but it certainly was not a decision at which no reasonable local authority could have arrived. Similarly, the local authority's decision that there was plenty of time before the beginning of the next term in which to make the necessary arrangements for the grammar schools to continue in existence may have been right or wrong. It was however impossible for the Secretary of State to have been satisfied that no reasonable authority could have come to that decision on the evidence which was before them. Accordingly it followed that either the Secretary of State had misdirected himself as to the true meaning of s. 68 of the Education Act 1944 or that no reasonable Secretary of State could have been satisfied that the local authority's decision was a decision at which no reasonable local authority could have arrived.

In *Nakkuda Ali v. Jayaratne* [1951] A.C. 66 their Lordships' Board, on an appeal from the Supreme Court of Ceylon, had to consider the meaning of Regulation 62 of the Defence (Control of Textiles) Regulations, 1945, which read as follows:—

> " Where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer, the Controller may cancel the textile licence . . . issued to that dealer."

Lord Radcliffe in delivering the judgment of this Board referred to *Liversidge v. Anderson* and said:

> " Their Lordships do not adopt a similar construction of the words in reg. 62 . . . Indeed, it would be a very unfortunate thing if the decision of *Liversidge's* case came to be regarded as laying down any general rule of law as to the construction of such phrases when they appear in statutory enactments . . . After all, words such as these are commonly found when a . . . law-making authority confers powers on a minister or official. However read, they must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power. But if the question whether the condition has been satisfied is to be conclusively decided by the man who wields the power the value of the intended restraint is in effect nothing . . . Their Lordships therefore treat the words in reg. 62 . . . as imposing a condition that there must in fact exist such reasonable grounds, known to the Controller, before he can validly exercise the power of cancellation ". (pp. 76–7).

The facts and background of the *Tameside* case, the *Liversidge v. Anderson* case, the *Nakkuda Ali* case and the present case are, of course, all very different from each other. This is why their Lordships have reached their conclusion as to the true construction of Regulation 3(1) of the Emergency Powers Regulations, 1967, in reliance chiefly on the light shed by the Constitution, rather than on such light as may be thrown on that regulation by the authorities to which reference has been made.

Their Lordships have been asked by the Attorney General to express their opinion as to whether the Court of Appeal was right in considering itself to be bound by the two previous decisions of that Court in *Charles v. Phillips and Sealey* and *Herbert v. Phillips and Sealey* (*supra*) to hold that Regulation 3(1) of the Emergency Powers Regulations, 1967, was invalid. Their Lordships consider that the Court of Appeal was right

in holding itself to be so bound, although their Lordships have decided that Regulation 3(1) (*ibid.*) was valid for the reasons stated in this judgment.

Their Lordships agree with the decision in *Young v. Bristol Aeroplane Co. Ltd.* [1944] K.B. 718 that, save for three exceptions there stated but which are irrelevant to the present case, the Court of Appeal is bound by its own decisions on points of law. The Court of Appeal in England has never since 1944 departed from that decision and the House of Lords has frequently endorsed it, firstly in the *Bristol Aeroplane Co.* case itself [1946] A.C. 163 at p. 169 and most recently in *Farrell v. Alexander* [1977] A.C. 59 at pp. 92 and 105.

The opinion of their Lordships' Board and of the House of Lords on this question can however be only of persuasive authority. No doubt it would be treated with great respect but it can not be of binding authority because the point can never come before this Board or the House of Lords for decision. Indeed if a case came before either in which the Court of Appeal had refused to follow one of its own previous decisions on a point of law the appeal would have to be dismissed if the final appellate tribunal concluded that the previous decision was wrong.

The Attorney General has drawn the attention of this Board to *Australian Agricultural Co. v. Federated Engine-Drivers and Firemen's Association* (1913) 17 C.L.R. 261 and in particular to a passage in the judgment of Isaacs J. in that case. That passage reads as follows:—

> " The oath of a Justice of this Court is ' to do right to all manner of people *according to law* '. Our sworn loyalty is to the law itself, and to the organic law of the Constitution first of all. If, then, we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation. It is not, in my opinion, better that the Court should be persistently wrong than that it should be ultimately right . . .
>
> In my opinion, where the prior decision is manifestly wrong, . . . it is the paramount and sworn duty of this Court to declare the law truly ". (pp. 278–9)

Attractive as this pronouncement may sound and great as is the reputation of Isaacs J., their Lordships cannot agree that the basis upon which he rests his opinion is sound. After all, the judicial oath to which he refers is taken not only by justices of the High Court but by all judges. Accordingly, if any puisne judge sitting at first instance concluded that a judgment of the High Court, or, for that matter, of this Board, was wrong in law, he also would be bound by his oath to disregard that judgment. Their Lordships consider that if this became the accepted practice of the Courts the law would become so uncertain that no one could ever know what the law was or where he stood. This would certainly be very much contrary to the public good. So long as there is an appeal from a Court of Appeal to their Lordships' Board or to the House of Lords, the Court of Appeal should follow its own decisions on a point of law and leave it to the final appellate tribunal to correct any error in law which may have crept into any previous decision of the Court of Appeal. Neither their Lordships' Board nor the House of Lords is now bound by its own decisions, and it is for them, in the very exceptional cases in which this Board or the House of Lords has plainly erred in the past, to correct those errors—just as it is for them alone to correct the errors of the Court of Appeal.

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In the circumstances such as the present where there is an appeal from the Court of Appeal to their Lordships' Board it is, in their Lordships' view, for the reasons stated, most important in the public interest, that the Court of Appeal should be bound by its own previous decision on questions of law save for the three exceptions specified in the *Bristol Aeroplane Co.* case.

2. It is now necessary to consider the second question, whether the detention order made against Mr. Reynolds was lawful. On the construction which their Lordships put upon Regulation 3(1) of the Emergency Powers Regulations, 1967, this question must depend upon whether there existed reasonable grounds upon which the Governor could be satisfied that Mr. Reynolds had been concerned in acts prejudicial to public safety or to public order and that, by reason thereof, it was reasonably justifiable and necessary to detain him.

Neither at the Inquiry made early in July 1967 (to which reference has already been made in this judgment) nor at the trial of the present action presided over by Glasgow J. nor in the Court of Appeal was there any glimmer of a suggestion put forward by the Governor or by the Attorney General of any reason, justification or ground upon which any reasonable Governor could have been satisfied that Mr. Reynolds had been concerned in acts prejudicial to the public safety or good order. Mr. Reynolds gave evidence at the trial repeating what in effect he had said in evidence at the Inquiry, namely that he had been warned that he was about to be arrested and advised to leave the State, that he had done nothing wrong and so he was not afraid and had decided to stay where he was. No evidence was called by Crown Counsel at the Inquiry and none by the Attorney General during the trial of the action. Had there been any evidence which could have shown that Mr. Reynolds' detention was reasonably justifiable, surely it would have been called on both occasions.

S. 15(1) of the Constitution has been set out in full earlier in this judgment. It provides that anyone in Mr. Reynolds' position has to be furnished, not more than seven days after the commencement of his detention, with a statement in writing specifying "*in detail*" the grounds upon which he was detained. As already mentioned, on the sixth day after the commencement of his detention he was served with a notice supposed to be in accordance with s. 15(1) (*ibid.*). It is very short and its barren words bear repetition.

> "That you JOHN REYNOLDS during the year 1967, both within and outside of the State, encouraged civil disobedience throughout the State, thereby endangering the peace, public safety and public order of the State".

It is difficult to imagine anything more vague and ambiguous or less informative than the words of this notice. It was indeed a mockery to put it forward as specifying in detail the grounds on which Mr. Reynolds was being detained.

It seems plain to their Lordships that the irresistible inference to be drawn from this notice is that there were no grounds, far less any justifiable grounds, for detaining Mr. Reynolds. Had there been any such grounds they would surely have been set out in the notice. If they were omitted from the notice by accident, which is hardly likely, evidence on behalf of the Governor could have been called by Crown Counsel at the hearing of the Inquiry early in July 1967 or at the trial that took place about nine years later, showing that his detention was reasonably justifiable. Naturally the Governor would not have been obliged to furnish anyone with the sources of his information if he considered that it was contrary to public policy to do so. He could, however, have had evidence called on his behalf or given evidence himself to state, with full particularity,

exactly what Mr. Reynolds had done to justify his detention, and when and where and how Mr. Reynolds had done it. The fact that no grounds of any kind have been put forward on behalf of the Governor to justify him for making a detention order against Mr. Reynolds, and all the circumstances of the case, raise an irresistible presumption that no such grounds have ever existed. Accordingly their Lordships have no doubt that the detention order was invalid and that Mr. Reynolds was unlawfully detained.

3. The next question concerns the Attorney General's contention that the Indemnity Act, 1968, affords him complete protection against any such claim as the present. Ss. 3 and 5 of that Act have been set out in Peterkin J.A.'s judgment in the Court of Appeal with which the other judges sitting with him concurred. It is unnecessary to repeat these sections in this judgment. Their Lordships entirely agree with the Court of Appeal, for the reasons which they so clearly give, that

" the Indemnity Act is unconstitutional, null and void."

4. The last question that falls to be decided concerns the damages being raised to $18,000 by the Court of Appeal. Clearly the learned trial judge, who gave an excellent judgment on all the issues of law that arose, was in some doubt as to the amount of damages he should award. He said:

> " I am unable to find any similar cases decided in the region or elsewhere. They might have assisted me on the question of quantum ".

The Court of Appeal came to the unanimous conclusion that, taking everything into account, the sum of $5,000 awarded at first instance was wholly inadequate, and they raised that sum to $18,000. It is not the usual practice of their Lordships' Board to interfere with the quantum of damages assessed by the Court of Appeal in cases of this kind, save in exceptional circumstances. Their Lordships cannot find anything on the facts of the present case which could justify them in interfering with the damages of $18,000 as assessed by the Court of Appeal.

The Attorney General relied on the last few words of the judgment which revealed that the sum awarded included " a small sum as exemplary damages ". His argument was that no exemplary damages should have been awarded because compensation alone could be claimed under s. 3(6) of the Constitution. This, no doubt, would be true, but for s. 16(1) of the Constitution, which makes it plain that anyone seeking redress under the Constitution may do so " without prejudice to any other action with respect to the same matter which is lawfully available "; and in the present case, Mr. Reynolds claimed (1) damages for . . . false imprisonment and (2) compensation pursuant to the provisions of s. 3(6) of the Constitution.

The Attorney General did not dispute that if the Governor had acted unconstitutionally, the present case would fall into the first category of the cases which the House of Lords laid down as justifying an award of exemplary damages, namely, " oppressive, arbitrary or unconstitutional action by the servants of the government ": see *Rookes v. Barnard* [1964] A.C. 1129 at p. 1226. The Attorney General did however argue that the Court of Appeal had erred in not quantifying that part of the $18,000 which represented exemplary damages. The observations on this topic in *Rookes v. Barnard* at p. 1228 were confined to trials by jury. Even so, they do not suggest that if the jury gives exemplary damages it must necessarily specify the amount of those damages separately from the amount of compensatory damages which it awards. Their Lordships are satisfied that obviously that judgment does not cast any such obligation

upon a trial judge sitting alone or upon the Court of Appeal. Accordingly, their Lordships can find no grounds which could justify them in reducing the award of $18,000 damages or remitting it for re-assessment.

For these reasons, their Lordships will humbly advise Her Majesty that the appeal be dismissed with costs.

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In the Privy Council

THE ATTORNEY GENERAL OF THE STATE OF SAINT CHRISTOPHER NEVIS AND ANGUILLA

v.

JOHN JOSEPH REYNOLDS

DELIVERED BY
LORD SALMON

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