

IN THE PRIVY COUNCIL

NO. 6 OF 1978

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

B E T W E E N :

ZAINAL BIN HASHIM (Plaintiff)  
Appellant

- and -

THE GOVERNMENT OF MALAYSIA (Defendant)  
Respondent

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CASE FOR THE APPELLANT

RECORD

1. This is an appeal from the Judgment dated 21st July, 1977 of the Federal Court of Malaysia (civil jurisdiction) (Suffian L.P., Lee Hun Hoe C.F. Borneo and Wan Suleiman F.J.) allowing the Respondent's appeal from a Judgment of Abdul Hamid J. dated 21st March, 1975 (civil jurisdiction). By that Judgment Abdul Hamid J. allowed the Appellant's claim and declared that the purported dismissal of the Appellant from the Police Service was void and of no effect and the Appellant to be reinstated effective from the date of the purported date of dismissal and ordered payment of salaries and emoluments due to the Appellant from the date of his wrongful dismissal with costs. This Appeal is made pursuant to an Order of the Federal Court of Appeal dated 6th day of December, 1977 granting leave to appeal to His Majesty the Yang di-Pertuan Agong.

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2. The Appellant was appointed as a Police Constable by the Respondent on the 1st day of March, 1962 and was subsequently confirmed and was on the Permanent and Pensionable Establishment drawing at the time of dismissal monthly salary of \$230/= with annual increment of \$10/= and (b) housing and language allowance of \$35/=.

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p.3 3. The Police Officer S.W. Moreira issued a Notice of Suspension on the 20th day of December, 1971 suspending the Appellant from service without pay starting from 16th December, 1971 for reasons referred as follows:-

p.4 "In connection with the letter from the Headquarters RF/31209 dated 17th October, 1971, we have found that you have been accused of an act at the Lower Court Kajang on 16th December, 1971 under Sec. 353 of the Penal Code and have been convicted with bail amounting to \$500/= and 2 years for good conduct under Section 173A(ii) (b) of the Criminal Procedure Code." 10

p.77 On 28th December, 1971 the First Defendant, the Chief Police Officer named in the Civil Suit of this Appeal (hereinafter referred to as C.P.O.) by letter gave Notice of intention of dismissal to the Appellant directing the Appellant to appeal to the said C.P.O. and subsequently a notice of dismissal dated 20th January, 1972 was issued by the Police Officer S.W. Moreira for and on behalf of the C.P.O. back dating it with effect from 16th December, 1971 and thereafter the Appellant was directed to appeal to the Inspector General of Police against dismissal of the Appellant which appeal was rejected. 20

p.80 4. The Appellant filed Civil Suit No. 731 of 1972 against the Respondent on the 9th day of August, 1972 alleging inter alia as follows:- 30

p.82 That the Respondent has no power of dismissal over the Appellant and further the Appellant was wrongfully directed on the question of Appeal against his order of dismissal and that the alleged dismissal is wrongful ab initio contrary to the provisions of the Federal Constitution of Malaysia and by the reasons of the C.P.O.'s said repudiation or breach of the Contract of Employment the Appellant suffered loss and damage and the Appellant claims to be reinstated. 40

The Appellant averred that the Charge was defective and rules of natural justice were violated and the procedure adopted is wrong in law and contrary to natural justice.

The Appellant further contended that reasonable opportunity to defend himself was denied and he was not dismissed by proper dismissing authority.

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5. The Appellant in the premises above claimed -

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- a) A declaration that the Appellant's dismissal from the Royal Malaysian Police purported to be effective by the C.P.O. on the 16th December, 1971 was void and inoperative and of no effect and that the Appellant is still a member of the Royal Malaysian Police. p.6
- b) An Order that an account be taken of the salary and emoluments due to the Appellant from the date of such wrongful dismissal to date of reinstatement be paid.
- c) That such further or other order may be made as the justice of the case may require and costs.

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6. On the 9th day of December, 1972 the Respondent filed his defence resisting the Appellant's claim on the grounds:-

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- a) the Appellant's service is determined in accordance with the Police Ordinance Rules, Regulations, Standing Orders and General Orders.
- b) the C.P.O. was properly delegated with the power of dismissal by the Police Service Commission, and the Appellant was properly directed on the question of appeal and his dismissal was not contrary to the constitution.
- c) that proper procedure was adopted under the law in dismissing the Appellant and was not contrary to rules of natural justice and the Appellant was dismissed in accordance with the law, retrospectively, as from the 16th day of December, 1971 and the Appellant's dismissal was on the proper application of the law then in force.

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7. Briefly the main issues raised by the Appellant at the trial were as follows:-

- a) the Appellant was not given an opportunity p.17-23

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to be heard by the proper Dismissing Authority as guaranteed under Article 135(2) of the Federal Constitution of Malaysia.

p.17-23

- b) the C.P.O. did not dismiss the Appellant under direction and control of the P.F.C. and failed to act as agent of the said Commission.
- c) the purported delegation of power was not duly gazetted and the C.P.O. had no power to sub-delegate such authority to any person or persons. 10
- d) the retrospective dating of Notice of Dismissal is bad in law.
- e) Appellant was wrongly directed on the question of appeal.
- f) the fact of conviction in Court does not exempt the right to be heard under Article 135 of the Federal Constitution.
- g) whether the Director of Operations has the power to enact the 1969 General Orders contrary to the guarantees under the Constitution. 20
- h) failure to call for all the documents e.g. Records of Proceedings prior to the order of dismissal is contrary to disciplinary rules.

The Respondent resisted the aforesaid issues.

8. Abdul Hamid J. reserved Judgment and delivered the said Judgment on the 21st day of March, 1975. On the main ground of C.P.O.'s power of dismissal, he referred to Judgment of Suffian L.P. in the case of Government of Malaysia vs. Iznan bin Osman (unreported), where his Lordship held:- 30

p.29-30

"If the Commission delegate the power to appoint and dismiss a constable to a C.P.O., the C.P.O. may appoint and dismiss.

If they delegate only the power to dismiss, not power to appoint, the C.P.O. cannot dismiss, because he is subordinate to the P.F.C. and Article 135(1) says that no constable may be dismissed by an authority subordinate to the authority which, at the time of the dismissal, has power to appoint a constable." 40

On the strength of that authority Abdul Hamid J. allowed the claim of the Appellant and declared that the purported dismissal of the Appellant was void and of no effect and that the Appellant should be reinstated effective from the date of the purported date of dismissal and should be entitled to the salaries and emoluments due to him with costs.

10 9. The Respondent appealed to the Federal Court on the 27th day of March, 1975 against the decision of Abdul Hamid J. and filed Memorandum of Appeal on the 7th day of May, 1975 on the following grounds:- p.33

- a) The learned trial Judge failed to consider the provisions of Article 140(6)(b) of the Federal Constitution adequately, or at all.
- 20 b) The learned trial Judge after having held that the Police Force Commission had delegated the power of dismissal over constables to the Chief Police Officer under the Instrument of Delegation of Powers and Duties dated 18th day of August, 1971 erred in law in holding that the dismissal of the Plaintiff was in violation of Article 135(1) of the Federal Constitution and was therefore void on the ground that the Chief Police Officer, though delegated with the power to dismiss constables, had no power to appoint.
- 30 c) The learned trial Judge erred in law in not holding that the Plaintiff's dismissal from service effective from the date of his suspension (16.12.71) was valid in law having regard to the fact that the Chief Police Officer in exercising the power of dismissal over constables delegated to him by the Police Force Commission had complied strictly with the proper procedure when he dismissed the Plaintiff.

40 10. After the filing of the said Memorandum of Appeal on the 7th day of May, 1975, the Respondent by way of Notice of Motion filed on the 7th day of March, 1977, sought for leave to file and serve an Amended Memorandum of Appeal dated the 22nd day of February, 1977 for the reason that the Parliament, at its sitting in July, August, 1976, passed the Constitution (Amendment) Act, 1976 (Act A354) which, inter alia, p.36  
p.38-39

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amended Article 135(1) of the Constitution as follows:-

"And provided further that this clause shall not apply to a case where a member of any of the services mentioned in this Clause is dismissed or reduced in rank by an authority in pursuance of a power delegated to it by a Commission to which this Part applies, and this proviso shall be deemed to have been an integral part of this Clause as from Merdeka Day."

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The Constitution (Amendment) Act 1976 came into force on 27th day of August, 1976.

And for the said reason the Respondent found it necessary to amend the Memorandum of Appeal dated 7th day of May, 1975, by adding a further ground of appeal as follows:-

"By virtue of section 30 of the Constitution (Amendment) Act, 1976, the dismissal of the Plaintiff by the Chief Police Officer in pursuance of the power delegated to him by the Police Force Commission was valid and in accordance with the Constitution notwithstanding that the said Chief Police Officer had at the time of such dismissal no power to appoint a member of the said service of equal rank."

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p.40-41

11. The Appellant objected to this Notice of Motion to amend the Memorandum of Appeal on the grounds:-

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a) that the Respondent has no right in law to amend the Memorandum of Appeal and include Sec. 30 of the Constitution (Amendment) Act 1976 as a ground since the time to file the same has expired.

p.41

b) that there is no merit in this application for the simple reason this amendment which is a retrospective piece of legislation could not apply in a matter that is pendent lite and particularly when the Appellant has acquired a property interest in an award handed over by the trial Judge and to deprive him of the same is contrary to law.

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12. The Federal Court allowed the amendment to the Memorandum of Appeal ordering the inclusion of the said additional ground, and the Respondent filed the Amended Memorandum of Appeal on the 22nd day of June, 1977.

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13. The Appellant resisted the Federal Court Appeal, inter alia, on the grounds:-

p.44-50

10 That the C.P.O. did not act as an agent of the Police Force Commission and was not acting on the instructions of the Commission on reading the Notice of Dismissal para 2 of the letter the Deputy Police Officer it says -

"Considering all aspects regarding the said incident and also the content of your appeal, I hereby make an order of dismissal with effect from the 16th December, 1971."

20 The Deputy Police Officer alleges that decision was Chief Police Officer's own decision and this is supported by the Notes of Proceedings in the Appeal Record:

"The decision to dismiss was my own decision. I was not under the direction or control of any other person."

p.16 l. 20

And was also so admitted by the Respondent's Counsel at the trial:

"The dismissal was made under Cap. D.G.O. 34. It is in evidence and it is not contested that the power to decide is that of the First defendant."

p.18 l.3

30 On the basis of this undisputed evidence it was contended by the Appellant that the dismissal was void and of no effect and relying on the Judgment of the Privy Council in Government of Malaysia vs. Iznan Bin Osman - (1977) 2 M.L.J. 1(P.C.) in which it was decided as follows:-

p.44-50

40 "Their Lordships are quite unable to accept this argument, having regard to the terms of the letter of dismissal and to the absence of any indication there or in any document to which their attention was called that the C.P.O. was acting on the instructions of the Commission."

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"In the face of that letter it is not possible to hold that the C.P.O. was merely acting as the agent or on the instructions of the Commission and passing on a decision made by the Commission. This argument therefore fails and in their Lordships opinion the dismissal was therefore void."

Another issue that was taken at the hearing of the Appeal was that the amendment to Article 135(1) with retrospective effect has no bearing in this case for the reason that the Appellant has already acquired a vested right and is a case pendentii lite and in support of this argument the Appellant relied on the obiter of the Privy Council in the above-mentioned Judgment in Government of Malaysia vs. Iznan Bin Osman, where their Lordships expressed their views, as follows:-

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"Their Lordships understand that the new argument would have been based upon provisions in the Constitution (Amendment) Act 1976 which purport to take effect retrospectively and thus deprive the respondent of a vested right which has already been affirmed by the High Court and by the Federal Court in these proceedings. Thus an attempt to deprive a litigant of right of property by retrospective legislation passed pendentii lite is a step of a most unusual character."

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And it was further contended that the C.P.O. is a person and not a Board therefore he was not vested with the power of dismissal by virtue of Amending Act.

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The Federal Court only proceeded to decide on the ground of Sec. 30 of the Constitution (Amendment) Act 1976 giving retrospective effect to the said section and allowed the appeal.

p.51-56

Suffian L.P. delivered the Federal Court Judgment on the 21st day of July, 1977 and held -

That the C.P.O. was given power to dismiss a constable such as the Appellant by the Commission. This delegation was in proper form. True at the time when the C.P.O. dismissed the Appellant and at the time when the Appellant's claim was tried the C.P.O. could not have dismissed the Appellant because of Article 135(1). But section 30(1)(b) of the 1967 Interpretation Act does not apply

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where there is express provision to the contrary (it is expressed to take effect from Merdeka Day); clearly since that day the C.P.O. may lawfully dismiss a constable such as the Appellant and therefore the Appellant's dismissal was not unlawful. Further he held that C.P.O., Selangor, is both a person and an authority and therefore his dismissal of the Appellant is validated by the new proviso to Article 135(1) and continued to hold that the Government having used their power to deprive the Appellant of a right that was vested in him under the judgment appealed from, and as they are the most powerful body in the country, their Lordships did not think it unfair that the Respondent should also pay to the Appellant costs of this appeal.

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14. Against this Judgment the Appellant filed Notice of Appeal to his Majesty the Yang di-Pertuan Agong and an Order granting him Final Leave to Appeal was made on the 6th day of December, 1977.

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15. The Appellant respectfully submits that the Federal Court of Appeal was wrong in completely disregarding the obiter referred to above in the recent case - IZNAN BIN OSMAN P.C. (1977) 2 M.L.J. 1 (P.C.) where their Lordships of the Privy Council have clearly stated that an attempt to deprive a litigant of right of property by retrospective legislation passed 'pendente lite' is a step of a most unusual character.

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16. The Appellant respectfully submits that the retrospective legislation speaks only of a case of dismissal of the Appellant by the Chief Police Officer in pursuance of a power delegated to him by the Police Force Commission but in this case the Chief Police Officer quite frankly admitted he never acted in pursuance of such power of delegation, and there is ample evidence on record to this effect, in the circumstances this amendment is of no legal significance so as to justify the reversal of the decision of the trial court by the Federal Court.

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17. It is respectfully submitted that the Federal Court failed to consider that the Chief Police Officer did not act as an agent or on the instructions of the Commission in passing on a decision made by the Commission and upon the Chief Police Officer's admission that the decision was his own.

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18. The Appellant further submits that the Notice of dismissal, backdating its operative date, is contrary to the rules of the Police Regulation.

19. The Appellant respectfully submits that his rights under the Constitution cannot be denied by acting under General Orders 1969 enacted by the Director of Operations.

20. It is further respectfully submitted that a conviction in Court is not an exception granted or contemplated under the Constitution to deprive the Appellant of his right to be heard under Article 135(2) of the Federal Constitution. The said Article directs that right of hearing must be given by the Commission and not by the Court of Law.

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21. Further, the Appellant respectfully submits that the C.P.O. is not an authority but a person according to the interpretation of the Constitution and therefore the purported dismissal by the C.P.O. as a person cannot be valid and the Federal Court was wrong to hold that the C.P.O. is an authority.

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22. The Appellant respectfully submits that at all times the C.P.O. did not act under direction and control of the Police Force Commission and thereby acted contrary to the Constitutional Provisions.

23. The Appellant respectfully submits that the C.P.O. had no power to delegate any purported power delegated to him, such delegation of power to officers of inferior rank is an abuse of power and contrary to law.

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24. The Appellant respectfully submits that the C.P.O.'s failure to call for all the documents i.e. Record of Proceedings as required under disciplinary rules amounts to a fundamental breach of General Orders and dismissal arising therefrom is wrongful.

25. The Appellant respectfully submits the failure to consider the grounds abovementioned by the Federal Court has caused a grave miscarriage of justice and the Appellant submits respectfully that the Judgment of the trial Judge, Abdul Hamid J., should be restored for the following amongst other:

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R E A S O N S

RECORD

- 10
- (1) THE C.P.O. did not act as agent of the Dismissing Authority i.e. the Police Force Commission therefore the dismissal of the Appellant is wrong and not valid.
- (2) THE Court should not have reversed the trial court Judgment by giving effect to amending legislation depriving the Appellant of the right of property vested in him, by retrospective legislation passed pendent lite.
- (3) THE amending legislation ought not to apply in this instant case for the simple reason that the C.P.O. did not act in pursuance of a power delegated to it by the Commission.
- (4) FAILURE to call for records of proceedings under Sec. 34(1) of the General Orders 1969 before dismissing the Appellant amounts to fundamental breach of Disciplinary Rules.
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- (5) THE Notice of Dismissal back dating its operative date is bad in law.
- (6) CONVICTION in Court of Law is not an exception granted or contemplated under Article 135(2) of the Federal Constitution to deprive the Appellant of his right to be heard prior to dismissal, neither can the General Orders 1969 deprive the Appellant of his right to be heard.
- (7) THE C.P.O. as a person could not dismiss the Appellant.
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- An "authority" in accordance to Constitutional Interpretation refers to a Board, only such authority is vested with power of dismissal.
- (8) THE Appellant's dismissal from Police Service by the C.P.O. is an abuse of power for at all material times the C.P.O. did not act under control and direction of the Police Force Commission.
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- (9) THE C.P.O. to whom the power of dismissal is purported to be delegated by the Commission cannot sub-delegate such power to any other officer of inferior rank and dismissal proceedings initiated or action taken by any such inferior officer cannot be a valid act of dismissal.

RECORD

10. THE Federal Court ought not to have allowed the amendment to Memorandum of Appeal which was filed out of time.

G. T. RAJAN

IN THE PRIVY COUNCIL

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

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B E T W E E N :

ZAINAL BIN HASHIM (Plaintiff)  
Appellant

- and -

THE GOVERNMENT OF (Defendant)  
MALAYSIA Respondent

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CASE FOR THE APPELLANT

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