TRINIDAD AND TOBAGO.

Civ

IN THE COURT OF APPEAL

Civ. Appeal
No.59 of 1975.

Between

KEMRAJH HARRIKISSOON — Appellant

And

THE ATTORNEY GENERAL
OF TRINIDAD AND TOBAGO — Respondent

Coram: Sir Isaac E. Hyatali, C.J.
C.E.G. Phillips, J.A.
E.A. Rees, J.A.

March 29, 1977.

Dr. F. Ramsahoye, S.C. and R.L. Maharaj - for the appellant.
C. Bernard and I. Blackman - for the respondent.

JUDGMENT

Delivered by Sir Isaac Hyatali, C.J.:

I am of the same opinion. The Trinidad and Tobago Constitution (Amendment) Act 1968, established the Teaching Service Commission with effect from 26 September 1968 and included it as one of the Commissions to which s.102 of the 1962 Constitution (the Constitution) applied. One of the main issues raised in these proceedings concerns the interpretation and effect of s.102(4)(a) of the Constitution, which ousts the jurisdiction of the Court to enquire into the question whether the Commission has validly performed any function vested in it by or under the Constitution. It is an issue of some significance and I accordingly add some views of my own to the judgment of Rees, J.A. with which I agree.

The appellant was a Teacher I in the Ministry of Education and Culture. As such, he occupied a public office in the Teaching Service and fell under the jurisdiction of the Commission which, subject to the provisions of the Constitution, was vested

/with "power to

with "power to appoint persons to hold or act in public offices in the Teaching Service (including power to make appointments on promotion and transfer and to confirm appointments) and to remove and exercise disciplinary control over persons holding or acting in such offices . . ."

By letter dated 28 January 1975, the Commission allotted the appellant for duty at the Palo Seco Government Primary School, with effect from the date of his assumption of duty at his then current rate of salary. He was then employed at the Penal Government Primary School. By letter dated 24 February 1975, his solicitor protested against the transfer in a letter addressed to the Director of Personnel Administration, the Secretary of the Commission, claiming that it was "attempted in a manner which was at variance with the requirements of the Public Service Commission Regulations 1966"(the Regulations) which applied to him, and was in consequence "null, void and of no effect." By letter dated 27 March 1975, the Commission informed him that he was transferred to the Palo Seco Government Primary School in the exigencies of the Service and that he should report for duty there on 14 April 1975. He never did.

Instead, by a notice of motion dated 6 May 1975, he moved the High Court under s.6 of the Constitution for (a.) an order declaring that his transfer was unconstitutional, illegal, void and of no effect; (b) an order that his status quo be preserved until the hearing and determination of his motion; (c) an order declaring that he was entitled to be and remain in employment at the school from which he was transferred; and (d) such ancillary relief as the justice of the case required. The gist of his grievance was set out in paragraph 7 of his affidavit, which alleged that his transfer was made in violation of the Regulations and in particular regulation 135 thereof and that it was unconstitutional, void and of no effect for the reason that it violated the provisions of the Constitution and particularly s.2 thereof.

In support of the violation referred to, he alleged in another paragraph of his affidavit that his transfer was a punishment and was intended to be such by the Commission as a result of unfounded allegations of misconduct made against him by the Principal

/of Penal Government

of Penal Government Primary School following certain complaints which he, the appellant, had made against the Principal to the Permanent Secretary in the Ministry of Education and Culture on 10 July 1973. The said unfounded allegations, he stated, were never established at a proper hearing of them under the Regulations.

In reference to the Principal's allegations of misconduct against him he failed to state when they were made, to whom they were made and what they were about. More to the point, he omitted to state whether these allegations were made to the Commission or whether he was charged with misconduct in consequence of these allegations. Further, there was no allegation that the complaint he made against the Principal, was ever brought to the notice of the Commission.

He exhibited to his affidavit, the Commission's letter to him which stated that he was transferred in the exigencies of the Service, but he alleged without any facts to support it that no exigencies existed to warrant his purported transfer without compliance with the Regulations concerning notice and the right of a teacher to make representations to the Commission before it took a decision to transfer.

Before Cross, J. in the Court below, counsel for the respondent submitted, in limine, that the Court's jurisdiction to hear the motion was ousted by the clear words of s.102(4)(b) of the Constitution. Counsel for the appellant countered, that he was entitled to a hearing on the merits, on the ground that he had alleged facts to establish that the Commission's decision was null and void. Those facts, he contended, showed that the Commission, in making the order of transfer had violated the rule of natural justice, audi alteram partem by failing to give the appellant, as was provided for in the Regulations, three months' prior notice of that order and the opportunity of making representations for a review thereof. In the circumstances, he argued, the preclusive provisions of the Constitution had no application, since the Commission had performed a function which was not vested in it by or under the Constitution. In support of that proposition he relied on Anisminic v Foreign Compensation Commission & Anor. (1969) 1 All E.R. 208.

/The learned judge

The learned judge rejected the appellant's contentions and held (a) that in transferring the appellant, the Commission had performed a purely administrative function to which the rules of natural justice had no application; (b) that by reason of the fact that the appellant was a public officer he came within the disabilities correctly expressed by the author of de Smith's Judicial Review of Administrative Action (2nd Edn.) 162 to this effect:

> "Some individual interests which are accorded procedural protection by law in other countries fall outside the ambit of the rule /audi alteram partem/ in English law. For example, no legally enforceable requirements at all have to be observed by the Crown in relation to appointments to promotion or transfers within or dismissals from the civil service;"

and (c) the Commission's power to transfer was derived from the Constitution itself and not the Regulations and that the latter neither limited that power nor conferred any rights on the appellant. He quoted Nixon v Attorney General (1930) 1 Ch. 566, 606 in support of that conclusion. In the result, the learned judge ruled that the respondent's objection, in limine, succeeded because the appellant's motion in reality raised the question whether the Commission had validly performed a function vested in it by or under the Constitution.

Counsel for the appellant, repeated before this Court, his submissions that the Commission's order was a nullity, on the grounds alleged in the appellant's affidvait and contended that he was entitled in law to a hearing on the merits, since the learned trial judge was obliged to assume the correctness of all matters deposed to in the said affidavit. I am unable to agree with that contention. On the contrary, I am of opinion that the learned judge came to the right conclusion, but I would prefer to rest my decision on four main grounds as follows:

Firstly, the appellant founded his case on a violation of the Regulations which had no application whatever to him as Rees, J.A. has demonstrated. As the Commission never made any Regulation in pursuance of the authority conferred on it by s.102, his reliance on them was misconceived and ill-advised.

/Secondly, there were

Secondly, there were fundamental deficiencies in the case set out by the appellant in his affidavit. As I have pointed out, his allegations therein not only failed to show any nexus between the Principal's complaints against him and the Commission's decision to transfer him, but also any nexus between that decision and his complaint against the Principal to the Permanent Secretary in the Ministry of Education and Culture. These deficiencies were fatal to his motion and rendered it impossible for him to begin to show that the Commission's order of transfer was a nullity.

Thirdly, the order of transfer being clearly within the scope of the powers vested in the Commission, enjoyed a presumption of validity, which could not be successfully assailed or removed, unless it was shown beyond a reasonable doubt that the transfer did not involve the exercise of a function vested in the Commission but the exercise of a different and forbidden function. I would place this presumption on the same footing as that which applies to the constitutional validity of enactments passed by Parliament. See in this connexion Attorney General v Mootoo Civil Appeal No.2 of 1975 of 26 March 1976. The facts alleged in the appellant's affidavit, failed completely to undermine or overturn that presumption.

And fourthly, the preclusive provision of s.102(4)(b) of the Constitution is expressed in perfectly clear and simple terms. There can be no doubt about its meaning or intent. It does not therefore collide with "the fundamental rule" as it was called by McNair, J. in Francis v Yiewsley & West Drayton U.D.C. (1958) 1 Q.B. 478, or "the well known rule" as Sachs, J. described it in Commissioners of Customs & Excise v Cure & Deeley Ltd. (1962) 1 Q.B. 340, 357, "that a statute should not be construed as taking away the jurisdiction of the courts in the absence of clear and unambiguous language to that effect". For present purposes, the provision is, in my view, the same in scope, clarity and intent as that considered by the House of Lords in Smith v Elloe Rural District Council (1956) 1 All E.R. 855, in which Viscount Simonds confidently asserted his opinion of the effect of a provision so expressed, in these terms:

/"What is abundantly

> "What is abundantly clear," he said, "is that the words which are used are wide enough to cover any challenge which any aggrieved person may think fit to make."

That dictum was thought to be too widely expressed in the Anisminic case (supra) but recently in R. v Secretary of State for the Environment ex parte Ostler (1976) 3 All E.R. 90, the Court of Appeal in England stated that Smith's case (supra) was still good law.

For my part, I think that there is much to be said in favour of the view, that an ouster clause should not inhibit the Court from intervening to review and, if necessary, to quash an order by an administrative body, if it is shown to be ultra vires the enactment under which it purported to act, or to be made under an authority not conferred by such enactment, or to be tainted by fraud or like considerations.

I do not think that Viscount Simonds intended to include such cases in the expression "any challenge" but however that may be, I am firmly of opinion that a Court would be acting improperly if a perfectly clear ouster provision in the Constitution of a country which is its supreme law, is treated with little sympathy, or scant respect, or is ignored without strong and compelling reasons. Dr. Durga Das Basu in his learned monograph on the Constitution of India (1965) Vol. 1 p.338 expresses, in my view, a correct approach for the Courts when dealing with preclusive provisions and for present purposes I respectfully adopt his opinion. In reference to the provisions of the Constitution of India, which confer final power on the President or other administrative authority to decide specified questions he states;

> "Where the Constitution itself excludes such questions, the Courts lose their jurisdiction to entertain those questions altogether because they have no power to override the Constitution and the questions, accordingly, become non-justiciable.
>
> A different situation arises where a statute confers 'final' power upon some administrative authority or tribunal, because the constitutional jurisdiction of our superior Courts cannot be taken away by statutory provisions. Even the jurisdiction of the inferior courts has been saved by the judicial construction that such statutory provisions are intended to exclude the jurisdiction of

/the courts of law

> "the courts of law only where the decision of the administrative authority is intra vires, so that the courts retain their jurisdiction to determine whether the decision or order of the statutory authority is ultra vires or without jurisdiction."

With respect to the decision of this Court in the Thornhill case No.39/74 dated 27 December 1976 to which Rees, J.A. has made reference, I also, would reserve for future consideration the question whether a person is entitled to obtain redress under s.6 of the Constitution on the strength of an allegation that a Commission established under s.102 thereof has infringed in relation to him one or more of the rights and freedoms entrenched in the Constitution. For these reasons I agree that the appeal should be dismissed with costs.

Isaac E. Hyatali
Chief Justice

I agree.

Clement E. Phillips
Justice of Appeal