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4/1963

IN THE PRIVY COUNCIL

No. 50 of 1963

ON APPEAL FROM
THE SUPREME COURT OF CEYLON

B E T W E E N:

SIDNEY GODFREY DE ZOYSA
(Petitioner) Appellant

- and -

1. THE PUBLIC SERVICE COMMISSION
2. SIR HERBERT ERIC JANSZ
3. JOSEPH NALLIAH ARUMUGAM
4. GEORGE REGINALD DE SILVA
(deceased)
5. GINIGE CYRIL THAINE ARTHUR DE
SILVA Respondents
6. HECTOR SENARATH RAJAKARUNA
BANDA KOBBEKADUWA
substituted in place of the
4th Respondent (deceased)
Substituted-Respondent

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
17 JUN 1964
25 RUSSELL SQUARE
LONDON, W.C.1.

74071

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CASE FOR THE RESPONDENTS

Record

pp.184-192.

1. This is an appeal by the Petitioner-Appellant (hereinafter called "the Petitioner") from a judgment of the Supreme Court of Ceylon (H.N.G. Fernando, J.), dated the 15th November 1960, refusing an application by the Petitioner for the grant and issue of Mandates in the nature of Writs of Certiorari and Mandamus in terms of Section 42 of the Courts Ordinance (Cap. 6) of the Revised Legislative Enactments of Ceylon.

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2. The question which arises on this appeal is whether under the present Constitution of Ceylon members of the Public Service hold office during pleasure, as expressly provided by Section 57 of the Ceylon (Constitution) Order in Council 1946, or whether that section is in any way qualified by any other provision in the said Order in Council, or has in any way been modified, amended or repealed by any subsequent legislative enactment.

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p.5, 1.9.
p.165, 1.1.

3. The proceedings in Ceylon were commenced by Petition dated the 31st May 1960, supported by an affidavit of the Petitioner of the same date, whereby the Petitioner prayed that the Supreme Court should

p.13, 1.19.

(a) grant and issue a Mandate in the nature of a Writ of Certiorari quashing an order dated the 27th November 1959 whereby the Petitioner had been retired from the Public Service with effect from the 1st March 1960;

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p.13, 1.22.

(b) grant and issue a Mandate in the nature of a Writ of Mandamus compelling, commanding and directing the Respondents and each and every one of them to do their duty, to recognise that the Petitioner was and is an officer of the Ceylon Police, not to hinder or impede the Petitioner from serving or continuing to serve as an officer of the Ceylon Police as aforesaid in accordance with the law, rules and regulations appertaining to the service of police officers;

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p.13, 1.29.

(c) award the Petitioner the costs of the suit and such other and further relief as their Lordships might deem meet.

4. The First Respondent cited by the said Petition was the "Public Service Commission". This is a body set up under Section 58(1) of the Ceylon (Constitution) Order in Council 1946 and having vested in them under Section 60 of that Order in Council "the appointment, transfer, dismissal and disciplinary control of public officers." It is not, however, incorporated as a legal entity and, as doubt was felt as to whether in these circumstances it could be a party to legal proceedings, no appearance was entered for the Public Service Commission as such.

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p.180, 1.11.

5. The second, third and fourth Respondents cited by the said Petition, namely Sir Herbert Eric Jansz (Chairman), Joseph Nalliah Arumugam and George Reginald de Silva, were the then members of the Public Service Commission. Before the case came up for hearing George Reginald de Silva had died and the sixth substituted Respondent, Hector Senarath Rajakaruna Banda Kobbekaduwa, was appointed a member in his place. After the hearing in the

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Supreme Court but before the delivery of judgment on the 15th November 1959 the term of office of Sir Herbert Eric Jansz, the second Respondent, expired and the fifth Respondent, Ginige Cyril Thaine Arthur de Silva, was appointed in his place as a member and Chairman of the Commission.

6. The grounds upon which the Petitioner based his application were:-

- 10 (a) that Rule 61 of the Public Service Commission Rules had not been complied with before the impugned order for retirement had been made; p.9, 11.4-46.
- (b) that natural justice had not been complied with in making the impugned order for retirement without affording the Petitioner an opportunity of being heard in his defence; p.12,11.16-20.
- 20 (c) that the age of optional retirement for police officers was 55 and that there was no jurisdiction, right or power to make the impugned order for retirement before the Petitioner had attained that age; p.8, 1.19.
p.9,11.4-22.
- (d) that the order was made mala fide, without grounds or on irrelevant and extraneous considerations or at the instance of the Minister of Justice or other politicians. p.12,11.21-27.

30 7. The proceedings opened in the Supreme Court by Counsel for the Respondents taking certain preliminary objections, in particular attacking on a number of grounds the bona fides of the Petitioner in presenting the Petition and challenging the validity of the supporting affidavit on the ground of hearsay. In answering these objections Mr. H.V. Perera, Q.C. leading Counsel for the Petitioner stated in terms that he was not supporting the application on grounds (c) and (d) above, and that the only grounds on which he proposed to rely were those stated in paragraphs 23 (c) and 25 of the Petition - i.e., grounds (a) and (b) above. He

40 conceded that his application would fail if he was unable to satisfy the Court that in making any order for retirement the Public Service Commission was exercising judicial or quasi-judicial functions and was therefore bound to give the public officer concerned an opportunity of being heard. He also

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stated that the application for a Mandamus was purely ancillary to the application for Certiorari and that if the latter failed, the former must fail with it. In the light of these concessions the learned Judge, H.N.G. Fernando, J., did not deal expressly with the preliminary objections taken by the Respondents but proceeded to hear the matter on the basis of grounds (a) and (b) above. In his judgment he recorded that:-

p.185,11.33-40.

"In the affidavit attached to his petition, the petitioner states his belief that the Public Service Commission in making the order of retirement acceded to the requests or wishes of politicians including the then Minister of Justice, and sets out a history of events which according to him prompted the desire for his removal from service. It is fortunately unnecessary to enter into a consideration of these allegations of fact, for eminent counsel appearing for the petitioner has conceded that the allegations are not relevant to the decision of the questions of law arising upon the petition".

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8. On this basis the only facts relevant to this appeal would seem to be:-

p.166,11.3-21.
p.167, 1.38.

(a) that the Petitioner was a public officer, born on the 15th January 1909;

p.167, 1.39.
p.168, 1.8.

(b) that at the time when he completed the age of 50 on the 15th January 1959 he was in the Ceylon Police Force, holding the rank of Deputy Inspector General of Police;

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p.167, 1.40.
p.52.

(c) that prior to that date, namely by letter dated the 5th November 1958 signed by the Permanent Secretary to the Ministry of Defence and External Affairs, the Petitioner was informed that he was granted extension of service for one year with effect from the 15th January 1959, subject to, inter alia, the Gazette Notification regarding retirement of Police Officers appearing on page 516 of Gazette No. 10790 of 29th April 1955;

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p.168, 1.3.
p.53.

(d) that by letter signed by the Assistant Secretary to the Ministry of Justice dated the 20th October 1959 the Petitioner was informed

that he was granted a similar extension for one year, subject to the same Gazette notification, with effect from the 15th January 1960;

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- 10 (e) that, by letter dated the 27th November 1959 signed by the Secretary to the Public Service Commission, the Petitioner was informed, as was the fact, that the Public Service Commission had ordered that he be retired from the Public Service with effect from the 1st March 1960; p.166, 1.16.
p.15, 1.7.
- 20 (f) that, by letter dated the 27th November 1959 signed by the Permanent Secretary to the Ministry of Justice and addressed to the Inspector General of Police, authority was given to place the Petitioner on leave with immediate effect under the provisions of Financial Regulations 1457(v), the leave however to be on full pay, and that, by indorsement on the said letter by the Inspector General of Police on the same day, the Petitioner was informed that he was placed on leave in terms of the said letter from that day; p.166, 1.23.
p.16.
- (g) that, notwithstanding appeals by the Petitioner against the order of the Public Service Commission of the 27th November 1959, the said order was not rescinded or varied; p.166, 1.40.
p.167, 1.8.
p.167, 11.1-7
and 2
- 30 (h) that on the 20th January 1960 the Petitioner was appointed to the post of Permanent Secretary to the Minister of Internal Security and was still holding that post when the present proceedings were instituted. p.27, 1.35.

9. The legislation relevant to these facts is as follows:-

- 40 (a) By the Public and Judicial Officers (Retirement) Ordinance (Chapter 253 of the Revised Legislative Enactments of Ceylon as later amended) power was given to the Governor (later the Governor-General) to make rules regulating the compulsory retirement of public officers and also prescribing an earlier age at which the Governor might, subject to such conditions as to notice and otherwise as might be prescribed, require public officers to retire from the public service.

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This Ordinance is for convenience set out as Appendix "A" to this Case.

(b) By rules made under the above Ordinance the age for compulsory retirement of every public or judicial officer was fixed, subject to certain provisos, at sixty years, and there was further a provision which, at the date of the institution of the present proceedings, read as follows:-

"2. (1) The competent authority may require any public or judicial officer to retire upon his completing the age of fifty-five years or at any time thereafter: 10

Provided however that any officer of any class or description specified in Column I hereunder may be required to retire at any time after the completion of the age or the period of service, as the case may be, specified in the corresponding entry in Column II 20

I	II
(i)	
(ii)	
(iii) Officers of the Police Department	Fifty years of age
* * * * *	* * * * *

5. In these rules "competent authority" in relation to the retirement of any officer means the authority competent to make appointments to the office held by the officer." 30

These rules are set out at pages 49-50 of the Record but the vital matter, namely the addition in Rule 2(1) of head (iii) to the proviso made by Government Gazette No. 10790 of the 29th April 1955, Part I, p.516, is not there recorded.

(c) By the Ceylon (Constitution) Order in

10 Council 1946 (as later amended) and the Ceylon Independence Order in Council 1947 made under the Ceylon Independence Act 1947 provision was made in Part VII of the 1946 Order in Council (as later amended) for the Public Service. In particular it was provided by Section 57 that tenure of office in the Public Service was during pleasure. Provision was also made for the establishment of the Public Service Commission (Section 58) and for the appointment of a Secretary to that body (Section 59) and for the vesting in the Public Service Commission of "the appointment, transfer, dismissal, and disciplinary control of public officers" (Section 60) and for the delegation by the Public Service Commission of any of its said powers to any public officer (Section 61).

These provisions are for convenience set out as Appendix "B" to this Case.

20 10. On behalf of the Petitioner reliance has throughout been placed upon rules made by the Public Service Commission on the basis that these have the same force of law as legislative enactments. The Record contains the portions relied on by the Petitioner but the significance of these cannot be appreciated without reference to the heading and preamble to the rules and the provisions of Rule 1. These are as follows:-

30 "INSTRUCTIONS ISSUED BY THE PUBLIC
SERVICE COMMISSION

The following instructions issued by the Public Service Commission are hereby published for general information.

By the direction of the Public Service Commission.

E.G. Goonewardene

Secretary
Public Service Commission

40 Office of the Public Service Commission
P.O. Box No. 500
Colombo August 21, 1956

Record

Instructions issued by the Public Service Commission regulating the Appointment, Transfer, Dismissal and Disciplinary Control of Public Officers

1. The following instructions, to be cited as the Public Service Commission Rules, are issued as administrative directions under which, inter alia, the delegations made by the Public Service Commission by Order under Section 61 of the Ceylon (Constitution and Independence) Orders in Council 1946 and 1947 and published in the Ceylon Government Gazette Extraordinary No. 9829 of February 5, 1948 and any delegations to be published thereafter, should be exercised. These Rules which are intended for the guidance of public officers are liable to amendment, generally or in particular cases, at the discretion of the Commission. Nothing contained herein shall affect the right of the Commission to exercise all powers that are incidental or ancillary to the discharge of its functions." 10 20

The Respondents will also refer to Rules 2, 3, 4 and 5 which, though not directly relevant are strongly indicative of the administrative and instructional character of the Rules.

11. In his Judgment in the Supreme Court Fernando, J. said:-

p.186,11.1-28.

"The principal grounds of the application to quash the order of retirement, as they were stated in the arguments of the petitioner's counsel, are I trust adequately summarised thus:- 30

(a) A body empowered to make an order, even though the order be administrative and not judicial or quasi-judicial, is bound to comply with any enactment, having the force of law, which regulates the procedure to be followed in the making of that order. In the event of non-compliance with such an enactment this Court is entitled in appropriate circumstances to quash the order by Writ of Certiorari. Where such an enactment provides that a person likely to be affected or prejudiced by a proposed order will have an 40

opportunity to make his representations, the failure to afford him such an opportunity is an appropriate ground for quashing the order.

10 (b) The Public Service Commission Rules, issued by direction of the Commission on August 21, 1956, prescribe the procedure to be followed before the Commission will make an order of retirement under the Retirement Rules. The relevant procedural provisions are set out in Rules 60-62 of the Public Service Commission Rules. These Rules have the force of law. If they do not, then alternatively, Rules 62 and 63 of a set of Rules published in the Gazette of September 22nd 1947 which are to a similar effect are still in operation, having the force of law in that they were made by the Governor by virtue of powers conferred by section 20 87 of the Ceylon Constitution Order-in-Council, 1946. Admittedly, the impugned order of retirement was not preceded by the steps envisaged in these Rules, and the principle stated at (a) above therefore applies."

12. The decision of Fernando, J. in the Supreme Court of Ceylon was that the Public Service Commission Rules did not have the force of law but were only directions and instructions which public officers were required to follow under pain of disciplinary action. His approach was to examine the matter historically starting with the Public Service Regulations of 1931 and proceeding to the transitional provisions contained in the Ceylon (Constitution) Order in Council 1946. He found support for his conclusion in the decision of the Privy Council in three Indian cases, namely Venkata Rao v. Secretary of State (1937) A.I.R. (P.C.) 31; Rangachari v. Secretary of State (1937) A.I.R. (P.C.) 27; High Commissioner for India v. Lall (1948) A.I.R. (P.C.) 121. The learned Judge then concluded:-

30 p.191, 1.47.
p.187, 1.4.
p.188, 1.1.
p.189, 1.20
to p.191,
40 1.13.

"Having reached this conclusion, it is scarcely necessary to consider the more general proposition that, if an officer holding office during pleasure is compulsorily retired

p.192, 11.1-11.

without regard to the principle of natural justice that he be first heard on his own behalf, this Court is entitled to quash the order of retirement. I do not agree that natural justice would require such a hearing before an officer is retired under the Retirement Rules. But even if I did so agree, the decision in Venkata Rao's case, where there had been a flagrant breach of a rule which ideally embodied the same principle, confirms me in the opinion that the proposition is untenable. Nor is it necessary for me to rely on the decision of Gratiaen, J., in Wijesundera v. Public Service Commission, 55 N.L.R. 94. 10

The Respondents will respectfully support the judgment of the Supreme Court both in its reasoning and in its conclusion.

13. The Respondents will further submit that each of the following propositions is valid and provides an answer to the Petitioner's claims, namely:- 20

(a) the employment of the Petitioner was, by virtue of Section 57 of the Ceylon (Constitution) Order in Council 1946, during pleasure, and was thus liable to be terminated at any moment for any reason, whether good or bad, or for no reason at all;

(b) the Public Service Commission being the "competent authority" for the purpose of the Rules made under the Public and Judicial Officers (Retirement) Ordinance (Chapter 253 of the Revised Legislative Enactments of Ceylon) was entitled, for any reason or for none, to require the Petitioner to retire at any time after he had completed the age of fifty years; 30

(c) the "rules" contained in Section III - Retirements - of the Public Service Commission Rules were applicable only where there had been a delegation of its powers by the Public Service Commission pursuant to Section 61 of the Ceylon (Constitution) Order in Council 1946. There was here no question of delegation; and even if there had been, this would not have precluded the Public Service Commission from itself exercising the powers conferred on it by Section 60 of the said Order 40

in Council, the said powers being expressly reserved by Rule 1 of the Public Service Commission Rules;

10 (d) in exercising its functions whether under the Ceylon (Constitution) Order in Council 1946 or under the Public and Judicial Officers (Retirement) Ordinance the Public Service Commission was acting in an administrative, not a judicial or quasi-judicial capacity, and was not therefore affected by any legal rules as to the requirements of natural justice, nor is it amenable to the process of Certiorari or Mandamus;

(e) there is no requirement of natural justice that a person who has reached the age at which he may lawfully be required to retire should be heard before the power to retire him is exercised.

20 14. The Respondents respectfully submit that the decision of the Supreme Court, dated the 15th November 1960, should be upheld and this appeal dismissed for the following amongst other

R E A S O N S

1. BECAUSE the Judgment of the Supreme Court was right for the reasons stated therein.
2. BECAUSE the propositions set out in paragraph 13 hereof or one or more of them afford a valid answer to the Petitioner's claim.

STEPHEN CHAPMAN

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DICK TAVERNE

APPENDIX "A"PUBLIC AND JUDICIAL OFFICERS
RETIREMENT

AN ORDINANCE TO PROVIDE FOR THE COMPULSORY RETIREMENT OF PUBLIC OFFICERS AND JUDICIAL OFFICERS.

(12th August, 1910.)

1. This Ordinance may be cited as the Public and Judicial Officers (Retirement) Ordinance.

2. (1) The Governor-General may make, and when made may revoke, vary, or amend, rules regulating the age at which, the reasons for which, and the conditions subject to which, public or judicial officers shall be required to retire from the public or judicial service. 10

(2) In particular and without prejudice to the generality of the power conferred by the preceding subsection, such rules may -

(a) prescribe the age at which the retirement of public or judicial officers or of any particular class of public or judicial officers shall be compulsory; 20

(b) provide, in such cases and subject to such conditions as may be prescribed, for the extension of the employment of public or judicial officers beyond the age prescribed by rule for compulsory retirement, and for the exemption of any particular class of public or judicial officers from the operation of any rule relating to the compulsory retirement of public or judicial officers; 30

(c) prescribe an age earlier than the age at which retirement from the public or judicial service is compulsory at which the authority competent to make the respective appointments may, subject to such conditions as to notice and otherwise as may be prescribed, require public

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or judicial officers to retire from the public or judicial service.

3. In this Ordinance, "judicial officer" and "public officer" have the same meaning as in the Ceylon (Constitution) Order in Council, 1946.

Interpretation.

APPENDIX "B"THE CEYLON GOVERNMENT
MANUAL OF PROCEDUREPART VIITHE PUBLIC SERVICE

Tenure of Office in the Public Service. 57. Save as otherwise provided in this Order, every person holding office under the Crown in respect of the Government of the Island shall hold office during His Majesty's pleasure.

The Public Service Commission. 58. (1) There shall be a Public Service Commission which shall consist of three persons, appointed by the Governor-General, one at least of whom shall be a person who has not, at any time during the period of five years immediately preceding, held any public office or judicial office. The Governor-General shall nominate one of the members of the Commission to be the Chairman. 10

(2) No person shall be appointed as, or shall remain, a member of the Public Service Commission if he is a Senator or a Member of Parliament. 20

(3) Every person who, immediately before his appointment as a member of the Public Service Commission, is a public officer shall, when such appointment takes effect, cease to hold any paid office previously held by him as a servant of the Crown in respect of the Government of the Island, and shall accordingly cease to be a public officer for the purposes of this Order; and he shall be ineligible for further appointment as a public officer: 30

Provided that any such person shall, until he ceases to be a member of the Public Service Commission or, while continuing to be such a member, attains the age at which he would, if he were a public officer, be required to retire be deemed to hold a pensionable office in the service of the Crown in respect of the Government of the Island

for the purposes of any written law relating to the grant of pensions, gratuities or other allowances in respect of such service.

(4) Subject to the provisions of subsection (6) of this Section, every person who is appointed to be a member of the Public Service Commission shall, unless he earlier resigns his office or is removed therefrom, hold office for a period of five years from the date of his appointment and shall be eligible for re-appointment.

10 (5) The Governor-General may for cause assigned remove any member of the Public Service Commission from his office.

(6) The Governor-General may grant leave from his duties to any member of the Public Service Commission, and may appoint a person qualified to be a member of the Public Service Commission to be a temporary member for the period of such leave.

20 (7) A member of the Public Service Commission may be paid such salary as may be determined by Parliament. The salary payable to any such member shall be charged on the Consolidated Fund and shall not be diminished during his term of office.

(8) For the purposes of Chapter IX of the Penal Code, a member of the Public Service Commission shall be deemed to be a public servant.

59. There shall be a Secretary to the Public Service Commission who shall be appointed by the Commission.

Secretary to the Public Service Commission.

30 60. (1) The appointment, transfer, dismissal and disciplinary control of public officers is hereby vested in the Public Service Commission:

Appointments in the Public Service.

Provided that appointments and transfers to the office of Attorney-General shall be made by the Governor-General.

(2) In subsection (1) of this Section the expression "transfer" means a transfer involving an increase of salary.

61. The Public Service Commission may, by

Order published in the Government Gazette, delegate to any public officer, subject to such conditions as may be specified in the Order, any of the powers vested in the Commission by subsection (1) of Section 60. Any person dissatisfied with any decision made by any public officer under any power delegated as aforesaid may appeal therefrom to the Commission and the decision of the Commission on such appeal shall be final.

No. 50 of 1961

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME
COURT OF CEYLON

B E T W E E N :

SIDNEY GODFREY DE ZOYSA
(Petitioner) Appellant

- and -

THE PUBLIC SERVICE COMMISSION
and Others
Respondents

CASE FOR THE RESPONDENTS

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6, Westminster Palace Gardens,
London, S.W.1.

Solicitors for the Respondents.