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JUDICIAL COMMITTEE OF THE
IN THE PRIVY COUNCIL

No. 28 of 1967

ON APPEAL FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN:

M. N. GUHA MAJUMDAR

Appellant
(Plaintiff)

- and -

THE ATTORNEY-GENERAL OF SARAWAK

Respondent
(Defendant)

CASE FOR THE APPELLANT

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
- 9 MAR 1970
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LONDON, W.C.1.

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10

CASE FOR THE APPELLANT

Record

1. This is an appeal from a Judgment and Order of the Federal Court of Malaysia, dated, respectively, the 9th September, 1966, and the 18th October, 1966, dismissing the Appellant's appeal, and allowing the Respondent's cross-appeal, from a Judgment and Order of the High Court of Sarawak dated the 10th September, 1965, whereby, in an action instituted by the Appellant against the Respondent praying for, (1) a declaration that the Appellant has always
20 been a member of Her Majesty's Overseas Civil Service with effect from the 1st December, 1958, (2) a declaration that he is eligible for designation as a "designated officer" within the meaning of that phrase as defined in the Schedule to the Overseas Service Ordinance (No. 15 of 1961) and (3) a declaration that it would be unlawful to refuse him benefits, such as inducement pay, payable to a member of Her Majesty's Overseas Civil Service, it was held that the Appellant was entitled to a declaration that he is eligible for designation as a "designated officer" (as prayed for in (2)
30 above) but not to a declaration as to his membership of Her Majesty's Overseas Civil Service (as prayed for in (1) above) since that fact had, subsequent to the institution of these proceedings, been conceded by the Respondent, nor to a declaration as to the Appellant's right to receive
- pp.105-115
pp.116-117
pp.57-77
p.78

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inducement pay (as prayed for in (3) above).

In allowing the cross-appeal the Federal Court held that the Appellant was not entitled to the said declaration as to his eligibility for designation as a "designated officer" which had been granted to him by the High Court.

2. The main point for determination on this appeal is whether or not, in the circumstances of this case and on the evidence before the Courts below, the Appellant's right to the three declarations he prayed for was established.

3. The facts are as follows :-

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pp. 57-58

The Appellant is now a Medical Officer in Sarawak possessing the qualifications of M. B. , B. S. , D. P. H. , D. I. H. (Eng.) and D. T. M. & H. (Eng.). Having qualified as a doctor in India he held various medical appointments in India - among them one in the Indian Army from which he retired with the rank of Captain - before deciding to obtain further medical qualifications in England after a course of post-graduate medical studies and, if possible, to settle down and practise his profession in this country. As indicated above he obtained the further qualifications he sought. Subsequently, in furtherance of his desire to reside permanently in this country, he applied for, and was appointed to, a position on the medical staff of the General Hospital, Rochford, Essex, where, at the material time, he occupied the position of Senior House Officer. While serving in this office his attention was drawn to an advertisement in the British Medical Journal announcing the need for a Medical Officer to serve in Sarawak.

p. 17, ll. 13-14

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pp. 57-58

As indicated above he obtained the further qualifications he sought. Subsequently, in furtherance of his desire to reside permanently in this country, he applied for, and was appointed to, a position on the medical staff of the General Hospital, Rochford, Essex, where, at the material time, he occupied the position of Senior House Officer. While serving in this office his attention was drawn to an advertisement in the British Medical Journal announcing the need for a Medical Officer to serve in Sarawak.

Ex. B, pp. 1271128

4. The said advertisement (Ex. "B") was as follows :-

30

, "HER MAJESTY'S OVERSEAS CIVIL SERVICE SARAWAK

Medical Officer

required in Sarawak for general medical duties. Candidates must possess medical qualifications registerable in United Kingdom. Appointment on permanent basis with pension (non-contributory) at age 55, or a short-term contract with gratuity

(taxable) assessed at the rate of 12½% of salary including expatriation pay for each completed period of one month payable on completion of satisfactory service. Candidates from the National Health Service may retain their superannuation rights (up to six years) and receive a gratuity (taxable) of 20% of the aggregate of their salary at the end of their engagement. Basic salary scale ranges from \$870 to \$1,420 a month i. e. £1,218 to £1,988 a year, .

10 starting salary determined according to qualifications and experience. In addition expatriation pay (pensionable) is payable varying from £252 to £336 a year, education allowance of £140 a year for up to two children between ages of 15 and 17 educated outside Sarawak, and a child allowance of 7½% of basic salary (maximum of £140 a year) for married officers with dependent children under age 18. Partially furnished quarters provided

20 at low rental. Free passages provided in both directions for officer, wife and up to three children under 18 years of age. Income tax at low local rates. Tour service 30 to 36 months. Local leave permitted and generous home leave granted. Application forms from Director of Recruitment, Colonial Office, London, S. W. 1. "

5. On the 29th June, 1958, the Appellant applied for the position advertised. His answers to questions in the Application Form (Ex. "A") gave, inter alia, the following particulars :-

Ex. A. pp.
120-127

30 "1. Name in full Guha Majumder, Manindra Nath.
"Date of birth - 1st January, 1926. Age: 32 years.
"Place of birth - India.
"Present address - c/o General Hospital, Rochford
Essex.
"Permanent address (if
different from above) c/o K. C. Bose, 7, Central
Jadavpur,
Road, /Calcutta 32, India.

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"2. Whether single, married or widowed - Married.

"Wife's maiden name - Ruby Bose.

"Nationality at birth and place of birth - Indian. India.

"Number of children - One daughter, aged 3 years.

.....

"5. Type of appointment desired - Medical Officer in Sarawak in Her Majesty's Overseas Civil Service for public Health or general medical duties.

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.....

"6. About when would you be available to go overseas (if selected) About middle of May, 1958.

.....

"12. Civil employment or occupation up to the present time - Junior House Physician, medical in R. G. Kar Medical College, Calcutta: May 1949 - Nov. 1949. Senior House Physician, Medicine, in the same hospital as above: Nov. 1949 - May 1950. Served with the India Army Medical Corps (See Section 13): May 1950 - Aug. 1955. Post-Graduate Medical Studies: Oct. 1955 - Feb. 1957.

20

30

At present serving as Senior
House Officer, General
Hospital, Rochford, Essex:
Mar. - up to date 1957.

"13. Navy Army or Air Force
Service, if any

(i) Give rank held and
Service number and
any decorations,
mentions etc.

10

obtained - Medical Officer, with the rank
of Captain in the Army Medical
Corps, Indian Army."

6. On the 20th March, 1958, the Colonial Office, with
reference to the Appellant's application, wrote (Ex. E. 1.)
to the Appellant inviting him to attend at the Colonial
Office on the 21st April, 1958, for an interview with the
Medical Appointments Committee.

Ex. E. 1.,
p. 129

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On the 29th March, 1958, the Appellant, in a letter to
the Colonial Office (Ex. E. 2.) said that he would accept the
position on a permanent basis with pension (Non-
contributory), and asked all future communications on the
subject to be directed to an address in Calcutta which was
that of his father-in-law. It is important to note, that, at
this stage, the Appellant (who, following the partition of
India in 1947, was a refugee from Pakistan) had no
permanent address of his own in the new India and had no
other residence in any part of the world but that in
England from which he had applied.

Ex. E. 2.,
p. 130

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On the 2nd May, 1958, the Colonial Office informed
the Appellant (Ex. E. 3.) that he had been provisionally
selected for appointment as Medical Officer, Sarawak, and
that a formal offer of appointment would follow.

Ex. E. 3.,
p. 131

7. The formal offer was contained in a letter written by
the Colonial Office to the Appellant (Ex. E. 5.), dated the
12th June, 1958, which was as follows :-

Ex. E. 5.,
pp. 132-133

"I am directed by Mr. Secretary Lennox-Boyd to say
that he has pleasure in offering you appointment on

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probation for three years as a Medical Officer in Sarawak on the conditions set out in this letter and in the enclosed Memorandum.

"2. The salary scale of the appointment is at the rate of \$870 a month for the first year; \$930 a month for the second year, rising by annual increments of \$30 a month to \$1050 a month; then \$1085 a month rising by annual increments of \$35 a month to \$1260 a month; then \$1300 a month rising by annual increments of \$40 a month to \$1420 a month. There is an efficiency bar at \$1260 a month.

10

"3. In view of your professional experience and qualifications you would enter the salary scale at \$1155 a month. This would not, of course, result in any reduction in the period of probation which has to be served. In addition to basic salary, allowances are payable at the rates shown in the Memorandum.

"4. If you are prepared to accept the appointment on these conditions you should inform the United Kingdom High Commissioner in Calcutta, through whom this offer is being sent, in order that arrangements may be made for you to be medically examined.

20

"5. Your services are required as soon as possible in the territory and, in the event of your selection being confirmed, you should arrange your own passage to Sarawak and those of your family if you wish them to accompany you, travelling by air by the most direct route. Your passage entitlement is that of first class air passages. You should then notify the United Kingdom High Commissioner in order that he may make arrangements to meet the cost of the passages He will also issue to you an outfit allowance of £60 (sixty pounds sterling) as a means of assistance towards the purchase of essential tropical kit.

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"6. Your appointment would take effect from the date of your embarkation for the journey to Sarawak and you may expect to receive a formal letter of appointment from the Governor of Sarawak on your arrival in the territory.

"7. [Vaccination]

"8. If you are not prepared to accept this offer of

appointment, would you be good enough to return the enclosure to this letter to the United Kingdom High Commissioner in New Delhi."

8. The said Memorandum (Ex. E. 5A.), enclosed with the formal offer of appointment, contained several "Conditions of Service in Sarawak" of which the following are now relevant :-

Ex. E. 5A.,
pp. 134-138

"3. Allowances

(i) Educational Allowance

(ii) Child Allowance

10 (iii) Outfit Allowance. An allowance of £60 is payable to officers on first appointment as a means of assistance towards the purchase of essential tropical kit. p. 135, ll. 1-5

"4. General conditions of service

p. 135,
ll. 6-14

An officer is subject to the General Orders of the Government in which he is serving, and to the Colonial Regulations for the time being in force in so far as the same are applicable. A copy of the current edition of the Colonial Regulations (Part I) is attached. The officer will be required to serve anywhere in Sarawak or in the State of Brunei.

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.....

"7. Widows' and Orphans' Pensions

p. 135, l. 40
to p. 136,
l. 4

In accordance with the provisions of the Sarawak Widows' and Orphans' Pensions Legislation, male officers under the age of 54 and whether married or single are required to contribute to the Sarawak Widows' and Orphans' Pensions Fund. The rate of contribution is 5% of salary plus inducement pay, subject to a maximum of \$50 a month."

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9. The said letter containing the formal offer together with the said Memorandum was forwarded to the Appellant by the United Kingdom High Commissioner in Calcutta, together with a covering letter, (Supp. Ex. A.), dated the

Supp. Ex. A.
p. 156

Record

1st October, 1958, in which the Appellant was requested to "forward" his reply "through" the High Commissioner's office.

Supp. Ex. B.,
p. 157

The Appellant, in a letter, dated the 10th October, 1958, written from the Calcutta address of his father-in-law, (Supp. Ex. B.), accepted the offer under the terms and conditions set out in the said letter of the Colonial Office, dated the 12th June, 1958, and in the enclosed Memorandum (See paragraphs 7 and 8 hereof).

Ex. E. 9.,
p. 139

10. On the 6th December, 1958, the Chief Secretary, Sarawak, wrote to the Appellant (Ex. E. 9.) informing him of his appointment as Medical Officer in Sarawak in the following terms :-

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"I am directed to inform you that His Excellency The Governor has been pleased to appoint you to be a Medical Officer in Sarawak in Her Majesty's Overseas Civil Service with effect from the 1st December, 1958, on the conditions embodied in the Secretary of State's letter to you dated 12th June, 1958.

"2. The appointment is on the permanent and pensionable establishment and the salary of the post is in Division II, Scale A \$870: 930 X 30 - 1050 X 35 - 1260/Bar/1300 X 40 - 1420 a month. Child allowance is payable at the rates laid down in Secretariat Circular No. 10/1956; vacation leave, local leave, leave passages, travelling allowances and other privileges will be granted in accordance with the Sarawak General Orders.

20

"3. You will enter the salary scale at \$1,155 a month, and your incremental date would be 4th December.

"4. I have to request that if you accept the appointment you send an undertaking to this office in the form attached hereto together with a declaration of secrecy in accordance with G. O. 570."

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Ex. E. 10.,
p. 140

By his letter in reply, dated the 11th December 1958, (Ex. E. 10.), the Appellant accepted his appointment as Medical Officer in Sarawak subject to rules and regulations of Her Majesty's Overseas Civil Service then in force and to any alterations or amendments thereto which

might be made from time to time.

10 11. The Appellant's service as Medical Officer in Sarawak and as a member of Her Majesty's Overseas Civil Service continued without incident until about August 1961 when, following enquiries, he became aware that the salary he had been receiving did not include any sum as inducement (or expatriate) pay, a benefit granted to all other members of the Service. Surprised and aggrieved he sought to obtain satisfaction by petitioning the Governor in Council. In his petition, dated the 16th September, 1961, he set out several grounds upon which he prayed for the grant to him of inducement pay with retrospective effect from the date of his appointment in Her Majesty's Overseas Civil Service. pp. 152-154 p. 152, ll. 11-13

20 12. The Appellant's petition was submitted by the Governor of Sarawak to the Secretary of State for the Colonies with comments to which the Appellant had no chance whatever to reply. He was informed of the said comments or "remarks" for the first time when in a letter dated the 31st January, 1962, addressed to him, the Chief Secretary said :- pp. 154-155

"On the 2nd October 1961, the Director of Medical Services was requested to inform you that your petition, on the question of your eligibility for Inducement Pay, was being submitted to the Secretary of State.

"2. A communication was subsequently sent to the Secretary of State enclosing your petition together with the following remarks by this Government, -

- 30 "(a) In your application form for appointment dated 19.1.1958 submitted to the Director of Recruitment, Oversea Service Division, Colonial Office, you clearly stated that your permanent address was in India.
- "(b) Because of this, and because Sarawak General Order 192 which excluded India for the purpose of Inducement Pay had been in force since August, 1957, the clause about Inducement Pay was excluded

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in your terms and conditions of service. This exclusion had not been challenged until the date of your petition, a period of nearly three years afterwards.

"(c) It appeared from your application form mentioned above, that you were a resident in India from 1934 until you went for higher studies in England in 1955, and that the only period you resided in England was between 1955 and 1958.

10

"3. The Secretary of State has now replied saying that he has given careful consideration to your petition but agrees that your claim to receive Inducement Pay cannot be admitted. He adds that in reaching this decision, he has been influenced not only by the points made by this Government, but by the fact that you applied for, and received, the refund of all your contributions to the National Health Service Superannuation Scheme in April, 1958; a step unlikely to be taken by a person merely proceeding on holiday to another country and proposing to resume work in the National Health Service at its conclusion.

20

"4. In view of the foregoing, I regret that your claim to receive Inducement Pay cannot be approved."

13. Aggrieved by the turn of events and deprived of all departmental and other similar remedies, the Appellant had no other course open to him than to institute this action against the present Respondent in the High Court of Sarawak.

pp. 2-6

In his Statement of Claim, dated the 27th August, 1963, the Appellant (hereinafter also referred to as "the Plaintiff") set out the facts as hereinbefore recited and prayed for the relief (the three declarations) as stated in paragraph 1 hereof.

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pp. 6-12

In his Defence, dated the 2nd December, 1963, the Defendant (present Respondent) denied the Plaintiff's right to receive Inducement Pay. He contended inter alia that the Plaintiff was "at all material times habitually

p. 8, ll. 5-10

resident in India" and that, therefore, he did not satisfy the requirements of General Order 192 (see infra.)

14. Sarawak Government General Orders, paragraph 192 (herein referred to as "General Order 192") as amended from the 1st August, 1957, reads as follows :

"192 - (i) An officer in Division I, II or III shall be eligible for inducement pay if - p.71

10 "(a) on the occasion of his first appointment he was habitually resident in a country other than Borneo, Burma, Ceylon, China, the Federation of Malaya, Hong Kong, India, Indonesia, Pakistan, the Phillipines, Siam or Singapore and

"(b) he has his principal family and social ties and general background in any such country, and

"(c) his appointment to the Sarawak Civil Service represents a material degree of dislocation and disturbance in connection with the resulting change in his residence or place of work.

20 Provided that an officer, who on the first occasion of his appointment had his permanent home in an overseas country but was resident in a country other than an overseas country solely for temporary purposes or for the purposes of his profession or calling shall be deemed to have been recruited from an overseas country."

30 "(ii) If at any time any question arises whether any officer or class of officers is eligible for inducement pay, the decision of the Governor-in-Council shall be final." p.112, ll. 5-9

15. In his Reply, dated the 9th December, 1963, the Plaintiff said, inter alia, that at all material times he had no knowledge of the said General Order 192 and that he could not have had access to its contents until after he had been appointed and had signed the necessary declaration of secrecy. pp.12-15 p.13, ll. 17-24

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16. Oral and documentary evidence in support of their respective cases was produced by both sides at the trial.
- pp.16-22 Giving evidence in support of his case, the Plaintiff said,
p. 17, ll.10-21 inter alia, in examination-in-chief, that after he had finished his post-graduate studies in England he joined the Rochford Hospital, Essex, under the National Health Service; that he was a refugee from Pakistan and had intended to make England his home; and that following the partition of India into India and Pakistan, he had had no address or home or property of his own in either country and that this was the reason why, in his application form, he had given his father-in-law's address in Calcutta. 10
Continuing he said :-
- p. 17, ll. 21-27 "I left Rochford Hospital as I was almost certain of getting the appointment in Sarawak, as that was the impression I got during the interview, If I had not been selected for appointment in Sarawak I would go back to England to continue my service after visiting my wife's family in India".
- With reference to the said letter of the Colonial Office, 20
dated the 12th June, 1958, and its enclosure, the said Memorandum, the Plaintiff said :-
- p. 17, l. 39 to
p. 18, l. 5 "When I received the letter and enclosure I believed I was getting inducement pay. I thought inducement pay was included because the salary scale starts at \$930 - while I got \$1,155. I got the impression because of para. 5 of the Colonial Office Appointments in Her Majesty's Overseas Civil Service, Part II. I though my salary was inclusive of inducement pay. 30
- p. 18, ll.6-9 "I did go through the Memorandum attached to the formal letter. The Memorandum did not say that I would not be receiving inducement pay
- p. 18, ll. 29-41 "I got to know that I did not actually receive inducement pay in 1961, about August, when I had to apply for my leave which was due in 1962. I came to know that induced officers are supposed

to go on leave after 3 years whereas in my case it was mentioned as 4 years. So I made further inquiry why that was so. Then I came to know that I was not receiving inducement pay.

"Then in September 1961 I petitioned to the Governor-in-Council about non-payment of inducement pay. It is admitted that the petition was not successful."

10 In cross-examination, the Plaintiff said that he based his case on "the advertisement, the letter and the Memorandum"; that General Order 192, of which he knew nothing, did not apply to him. Continuing he said :- p. 21, ll. 10-13

"I am saying that I was habitually resident in England. I intended to stay in England. I wanted to make the United Kingdom my home. I intend ultimately to return to the U. K. " p. 21, ll. 33-35

17. Giving evidence for the defence, John Alexander Williams, State Establishment Officer, Sarawak, said that the Plaintiff did not receive inducement pay "simply because he was recruited after General Order 192 was amended to include India". He said also that there was no connection between membership of Her Majesty's Overseas Civil Service and inducement pay which was a matter for the discretion of the territory concerned. pp. 23-25
20 p. 24, ll. 39-42
p. 24, ll. 28-32

18. In his Judgment, dated the 10th September, 1965, the learned Trial Judge (Lee Hun Hoe J.) having referred to the facts, to the formal offer of the appointment made to the Plaintiff by the Colonial Office, on the 12th June, 1958 (see paragraphs 7 and 8 hereof) and to the Defendant's former refusal to recognise the Plaintiff as a member of Her Majesty's Overseas Civil Service, said :- pp. 57-77
30

"I am happy to note that, since the filing of the Statement of Claim and as a result of correspondence between the parties, Defendant has now conceded that Plaintiff is a member of H. M. O. C. S. as from the 1st December 1958, and p. 62, l. 39 to p. 63, l. 4

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accordingly has become an 'entitled officer'. Since this admission a certain sum of money was paid into Plaintiff's bank as compensation and Defendant wrote to Plaintiff a letter, dated the 15th January, 1964, informing him that his enrolment as member of H. M. O. C. S. had been treated as having effect for purposes of the Compensation and Retiring Benefits Order-in-Council, 1963, on the operative date, namely, the 30th August, 1963, i.e. before the event of Malaysia.

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p. 63, ll. 5-13

"First I would like to say that in the light of the evidence as far as membership in H. M. O. C. S. is concerned Plaintiff had been shabbily treated by the Colonial administration.

p.

"It is a sad spectacle for the administration to inform a civil servant at the time of his appointment that he was a member of H. M. O. C. S. and to turn round years later to say that he was not such a member.

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p. 63, ll. 14-16

"On the other hand I find it hard to believe that until August, 1961, Plaintiff was under the impression that his salary included inducement pay."

19. The learned Trial Judge then set out the following statement of agreed facts :-

pp. 63-64

"1. The Defendant concedes that the Plaintiff has been a member of Her Majesty's Overseas Civil Service since 1st December, 1958. That is to say, the Defendant does not oppose the Plaintiff's claim contained in paragraph 1 of the Statement of Claim for a declaration of the Court to this effect.

30

"2. The Defendant admits that the appointment of the Plaintiff as a Medical Officer in Sarawak in Her Majesty's Overseas Civil Service was published in the British Medical Journal and also in the London Gazette.

"3. The Defendant further admits that since December 1958 all members of Her Majesty's Overseas Civil Service on the permanent and pensionable establishment of the Government of Sarawak have been in receipt of inducement (or expatriation) pay EXCEPT the Plaintiff.

10 "4. The Defendant also admits that the Plaintiff is an 'entitled officer' for the purposes of the Compensation and Retiring Benefits Order-in-Council, 1963.

"5. It has further been admitted by the Defendant that in the current Sarawak Government Staff List the Plaintiff is shown as an induced officer."

20. On the ground that the Appellant's membership of Her Majesty's Overseas Civil Service had been conceded by the Defendant, the learned Trial Judge declined to grant to the Plaintiff the declaration he prayed for on the subject; for, in the opinion of the learned Judge, the point had become academic. p.66, ll. 1-10

In the Appellant's respectful submission the learned Judge was, in the circumstances of this case, in error in his said refusal. For the relief in question (the granting of which was not opposed by the Defendant) was closely linked as the learned Judge himself said with the other declarations sought by the Plaintiff and, in any event, the refusal could well have the effect of depriving the Plaintiff of material advantages to which he was, or might become, lawfully entitled. p.68, ll. 1-2

30 21. On the second declaration prayed for by the Plaintiff - his eligibility for designation as a "designated officer" - the learned Trial Judge said :-

"Defendant suggested that the term "expatriate officer" should be interpreted in accordance with the provisions of paragraph 192 of the Sarawak Government General Orders. I do not agree that that term should be given such a narrow interpretation. The term 'expatriate officer' to my mind simply means an officer recruited from a p.66, ll. 13-25

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country outside Sarawak (now perhaps Malaysia). In fact paragraph (1) of the latest edition of the Sarawak Government General Orders defines 'expatriate officer' to mean an officer recruited from a country outside Borneo. At any rate Defendant did not seriously dispute that Plaintiff is an 'expatriate officer'.

pp. 66-69 The learned Judge then set out his reasons in detail which supported his view that the Plaintiff was eligible for designation as a "designated officer" and was therefore entitled to the second declaration he prayed for. Concluding on this subject he said :-

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p. 69, l. 33
to p. 70, l. 6

"The refusal to accord him" [the Plaintiff] "this designation" ["expatriate officer"] "was because the Colonial administration originally strenuously denied that Plaintiff was a member of H. M. O. C. S. despite convincing evidence to indicate otherwise. Had the Colonial administration taken the trouble in the earlier stage to seek legal advice inconvenience of this nature would not have been caused and Plaintiff would have been relieved of much anxiety . . . In my opinion the Secretary of State was badly advised by the Colonial administration. I am satisfied that Plaintiff is an 'expatriate officer'. It has now been conceded and is therefore clear as a pikestaff that Plaintiff is a member of H. M. O. C. S. Further, he was selected for appointment by or with the approval of the Secretary of State. In my judgment, having regard to the above, Plaintiff is surely eligible for designation as a 'designated officer' according to the true construction of the said Ordinance. Therefore I hold that Plaintiff is entitled to the second declaration."

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Plaintiff's right to "inducement (or "expatriate") pay" - the learned Trial Judge, for reasons that he gave, expressed the view (which, it is respectfully submitted, was not justified by the evidence) that the Plaintiff was "resident" in India when the offer of the appointment was made and accepted. He said :-

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"As I understand the term 'resident' I would say his residence was in India . . . He was therefore caught by a technicality which disentitled him to 'inducement pay' by virtue of paragraph 192. It was this technicality which the Colonial administration had taken advantage of from the very beginning. I have no doubt if Plaintiff had proceeded to India after his acceptance of the offer the Colonial administration would find it difficult to refuse him 'inducement pay'."

p. 73 ll. 30-40

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The learned Judge was, it is respectfully submitted, in error in his conclusion. He does not appear to have paid any attention to the facts that following the partition of India in 1947 into a new India and Pakistan thousands of people previously resident in the former India found themselves, as a result of the constitutional changes, residents in a hostile Pakistan; that as refugees therefrom, they sought to establish themselves in the new India and in other countries; that the Plaintiff was born in that part of the former India which became Pakistan and that circumstances had compelled him to leave his birthplace where his parents were once resident; and that, deprived of any permanent home and residence of his own he had, in his application to the Colonial Office, given the address of his father-in-law in the new India, not as his permanent or habitual residence, but merely as an accommodation address which could, for the purpose in question, and only for that purpose, be regarded as a permanent address.

20

30

23. The learned Trial Judge drew attention to the outfit allowance of £60 which was paid to the Plaintiff subsequent to his appointment under Paragraph 47(1) of the Sarawak Government General Orders which reads:-

"An outfit allowance of £60 shall be payable to an officer who is eligible for inducement pay under General Order 192 engaged outside Sarawak and -

p. 74, ll. 15-23

"(a) who is on first appointment; or

"(b) for whom the Chief Secretary approves such an allowance."

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p. 74, ll. 30-34
p. 75, ll. 18-24
p. 75, ll. 32-38

In the opinion of the learned Judge this was a strong indication that "the Secretary of State was under the impression that the Plaintiff was eligible to inducement pay". In the view of the learned Judge the effect of this payment clearly amounted to a misrepresentation and it was no excuse to say that "the payment was made as a matter of grace". He considered it to be contrary to reason for the Defendant to say that the Sarawak Government General Orders - among them General Order 192 - applied to the Plaintiff but that the said Para. 47(1), of the said Orders (outfit allowances) did not. But, he thought also that the Plaintiff could not invoke the said Para. 47 (1) and yet deny knowledge of General Order 192.

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The learned Trial Judge appears to have overlooked the fact that the payment of the outfit allowance to the Plaintiff was regarded by him - and not unreasonably - as a positive act of recognition of his right to inducement pay and this merely confirmed his previous belief that he was so entitled in the natural order of things; and that this belief would be consistent with his denial of having any knowledge of General Order 192.

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pp. 76-77
p. 76, l. 36 to p. 77, l. 6

24. For reasons that he gave, the learned Trial Judge was of opinion that the Colonial administration was wrong to forward to the Secretary of State for the Colonies the petition which the Plaintiff had sent to the Governor; for, in his view, this was a matter to be determined only by the Governor-in-Council, which determination was not subject to review by the Courts. In the present case he thought that it would be contrary to public policy to grant to the Plaintiff the declaration he sought as to his right to inducement pay for this would amount to an "unnecessary interference of a prerogative right".

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p. 78

25. An Order in accordance with the Judgment of the learned Trial Judge was drawn up on the 10th September, 1965, and against the said Judgment and

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Order the Plaintiff appealed to the Federal Court of Malaysia on the several grounds stated in his Memorandum of Appeal, dated the 19th November, 1965. pp. 80-85

10 On the ground that Her Majesty's Government of Great Britain and Northern Ireland had not been made a party to the action in the subject matter of which it had an interest, the Defendant filed a cross-appeal against the decision of the learned Trial Judge that the Plaintiff was entitled to the said second declaration as to his eligibility for designation as a "designated officer" within the Schedule to the Overseas Service Ordinance (No. 15 of 1961). pp. 86-87

26. By its Judgment, dated the 9th September, 1966, the Federal Court of Malaysia (E. R. Harley A. C. J., Ismail Khan J. and S. S. Gill J.) dismissed the appeal and allowed the cross-appeal. pp. 105-115

20 27. Delivering the main Judgment of the Federal Court, E. R. Harley A. C. J. (with whom Ismail Khan and S. S. Gill JJ. agreed) on the first declaration sought by the Plaintiff (as to his membership of Her Majesty's Overseas Civil Service) expressed his opinion that the Court below was right in refusing "to declare something not in dispute". p. 105, ll. 30-34

30 On the other declarations, the learned Acting Chief Justice expressed the view that the Plaintiff was not an "expatriate" within the "technical" meaning of that word as used in the said advertisement in the British Medical Journal (see paragraph 4 hereof). As to the "outfit allowance", he said that "clearly it does not follow that if a man is paid an outfit allowance that therefore he is an induced officer". p. 107, l. 18 to p. 108, l. 10 p. 109, ll. 35-37

In the Appellant's respectful submission if the payment of an "outfit allowance" under Paragraph 47(1) of the Sarawak Government General Orders was not conclusive as to the Appellant's right to inducement pay, it was, in the circumstances of this case, at least, strongly indicative that the Authorities regarded him as being entitled to the benefit in question.

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p. 112, ll. 3-17

28. The learned Acting Chief Justice said that if the provisions of the said General Order 192 (see paragraph 14 hereof) applied to the Plaintiff it would exclude him from the right to receive inducement pay because he was "habitually resident" in India. His eligibility for inducement pay would then, in accordance with General Order 192(ii), be for the decision of the Governor-in-Council. If however the General Orders (including General Order 192) did not apply to the Plaintiff then the Plaintiff's claim to inducement pay would be founded in contract. In the opinion of the learned Acting Chief Justice "the learned Trial Judge had very properly held that the advertisement could not be incorporated into the contract and was in fact merely an invitation to treat". It was his opinion that the Plaintiff's claim to inducement pay failed not only because of the provisions of General Order 192 but also in contract. 10

p. 113, ll. 16-19

29. As to the Plaintiff's claim that he was eligible for designation as a "designated officer", the learned Acting CHIEF Justice said that a "designated officer" could only be so designated by the Secretary of State for the Colonies and expressed his opinion that "to be a 'designated officer', one must also be an 'expatriate officer' ". Referring to a ground of appeal in the Memorandum of Appeal which claimed that designation as a "designated officer" would entitle the Plaintiff to "inducement pay", he dismissed it with the observation that "this Court cannot rule on a question giving rise to claims for inducement pay without impinging on the authority of the Governor-in-Council", which authority was, in his view, concerned with both the second and third declarations. He was in agreement with the grounds of the cross-appeal which prayed for the reversal of the decision of the Court below because Her Majesty's Government of Great Britain and Northern Ireland had not been made a party to the action and because any declaration as to the Plaintiff's eligibility for designation as a "designated officer" would be neither effective nor enforceable. 20 30

p. 114, ll. 1-14

p. 114, l. 14 to p. 115, l. 9

30. An Order in accordance with the Judgment of the Federal Court was drawn up on the 18th October, 1966, and is now before ~~Her Majesty in Council~~, the Appellant having been granted leave to appeal ~~therefrom~~ to the Yang di-Pertuan Agong by Final Order of the Federal Court, dated the 11th September, 1967.

pp.116-117

pp.118-119

In the Appellant's respectful submission this appeal ought to be allowed, with costs throughout, for the following among other

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REASONS

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1. Because, in the circumstances of this case and on the evidence before the Courts below, the Appellant was entitled to all three declarations which he sought.
2. Because the refusal of the Courts below to grant to the Appellant the first declaration - that he is a member of Her Majesty's Overseas Civil Service - on the ground that the matter had, following the Defendant's concession after the institution of proceedings, become academic, was contrary to reason and to law.
3. Because the refusal of the Federal Court to confirm the decision of the High Court that the Appellant was entitled to the second declaration - that he is eligible for designation as a "designated officer" - on the ground that the granting of the declaration would impinge on the authority of the Governor-in-Council, was not in accordance with law.
4. Because, in regard to the said second declaration, it was not necessary for the Appellant to have made Her Majesty's Government of Great Britain and Northern Ireland a party to the action and the

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Federal Court was therefore in error in allowing the cross-appeal.

5. Because the refusal of the Courts below to grant to the Appellant the third declaration he prayed for - that as a member of Her Majesty's Overseas Civil Service he was entitled to benefits, such as "inducement pay" - was not in accordance with reason or with law.
6. Because General Order 192 could not lawfully affect the contract of employment which the Appellant had entered into. 10
7. Because in the interpretation of the documents constituting the said contract due regard was not paid by the Courts below to the contents of the said advertisement in the "British Medical Journal" which had caused the Appellant to apply for the position advertised.
8. Because there was no evidence which could lawfully or reasonably lead to the conclusion that the Appellant was, on the material dates, "habitually resident" either in India or in Pakistan and the Appellant's contract was unaffected therefore by the provisions of General Order 192. 20
9. Because the decision of the Governor-in-Council that the Appellant was not entitled to "inducement pay" was not arrived at independently but only after consultation with the Secretary of State for the Colonies.
10. Because it is an implied term in General Order 192(ii) that the Governor-in-Council if called upon to decide a dispute as to "inducement pay" will do so only after giving the aggrieved party an opportunity of offering all necessary explanations in 30

support of his claim - a rule of natural justice which was not observed.

11. Because the Appellant's right to "inducement pay" is, in any event, a justifiable matter and the Courts below were in error in their views to the contrary.

E. F. N. GRATIAEN

R. K. HANDOO

T. O. THOMAS

JUDICIAL COMMITTEE OF THE
IN THE PRIVY COUNCIL

No. 28 of 1967

ON APPEAL FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN:

M. N. GUHA MAJUMDAR

Appellant
(Plaintiff)

- and -

THE ATTORNEY-GENERAL OF SARAWAK

Respondent
(Defendant)

CASE FOR THE APPELLANT

HATCHETT JONES & CO.,
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