
O N A P P E A L

FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

IN THE MATTER OF THE CONSTITUTION OF TRINIDAD AND
TOBAGO BEING THE SECOND SCHEDULE TO THE TRINIDAD AND
TOBAGO (CONSTITUTION) ORDER IN COUNCIL 1962

B E T W E E N :

KEMRAJH HARRIKISSOON Appellant

- AND -

THE ATTORNEY GENERAL OF TRINIDAD
AND TOBAGO Respondent

CASE FOR THE APPELLANT

Record

- 1. This is an appeal by final leave to appeal granted to the appellant by the Court of Appeal of the Supreme Court of Judicature of Trinidad and Tobago on the 18th day of June 1977 against the judgment of that Court (Sir Isaac Hyatali C.J., Phillips and Rees J.J.A.) dismissing with costs an appeal against a judgment of the High Court (Cross J) which had also dismissed with costs a motion brought by the appellant pursuant to section 6 of the Constitution of Trinidad & Tobago 1962. Page 34
Pages 18-31
Pages 11-15
- 2. The motion was supported by an Affidavit sworn to by the appellant and was commenced on the 6th May 1975 praying for redress for infringements of the rights and freedoms guaranteed to the appellant by section 1 of the Constitution of Trinidad & Tobago. Pages 3-7
Page 2
- 3. The facts and matters upon which the appellant relied were set out in the affidavit and were as follows:
 - (i) The appellant was appointed by the Teaching Service Commission of Trinidad & Tobago herein called "the Commission" by a letter dated 9th October 1972 but with effect from 11th September 1972 to a position as Class I Teacher at the Penal Government Primary School herein called Page 3
Lines 20-26

Record

"Penal" on two years probation.

Page 3
Lines 27-30

- (ii) The appointment and tenure were regulated by the Public Service Regulations 1966, made under section 102 of the Constitution of Trinidad & Tobago. (These Regulations had been adopted by the Teaching Service Commission: See Trinidad & Tobago Gazette Notice No. 303 of 6th February 1968, which reads as follows:

303/69

Adoption of the Public Service Commission Regulations, 1966 by the Teaching Service Commission 10

It is notified for general information that the Teaching Service Commission, with the consent of the Prime Minister, has adopted the Public Service Commission Regulations, 1966, with retroactive effect from the 26th day of September 1968.

These Regulations with the words "Teaching Service Commission" substituted for the words "Public Service Commission" wherever these words occur therein will therefore continue to apply to members of the Teaching Service, until further notice. 20

Albert A. Mark
Chairman, Teaching Service Commission.)

Page 3
Lines 31-36

- (iii) The appellant was informed by the Teaching Service Commission by letter dated 28th January 1975 that he had been allotted for duty as Teacher 1 at Palo Seco Primary School herein called "Palo Seco" from an unspecified date at the same salary, but he continued to work at Penal until 25th February 1975 when he was forced by the Principal of the school and a Corporal of Police to leave the school premises and to discontinue the performance of his duties there. 30

Page 4
Lines 1-20
Lines 37-38

Page 5
Lines 1-3

Page 4
Lines 21-38
Page 5
Lines 1-28

- (iv) The Solicitor for the appellant wrote to the Teaching Service Commission on the 26th February protesting the purported transfer and the exclusion of the appellant from Penal on the ground that the transfer was made in breach of the Regulations and contrary to the terms and conditions of the appellant's service. No reply to this letter was received by the appellant's solicitor, but on the 20th March 1975, the Commission again wrote directly to the appellant informing him that he was transferred to Palo Seco in the exigencies of the service with effect from 14th April 1975 and requested him to assume duties there on that day. 40

Line 29

Lines 30-40
Page 6
Lines 1-5

Record

- 10 (v) The transfer was a punishment of the appellant and was intended to be so for allegations of misconduct which were made against him by the Principal of Penal. The allegations were never established. They were made following complaints made by the appellant to the Permanent Secretary of the Ministry of Education and Culture concerning improprieties at Penal including a breakdown in discipline. Page 6
Lines 27-38
- (vi) No exigencies existed in the service to justify the procedures adopted to transfer the appellant from Penal. The appellant was deprived of the opportunity to make representations before a decision was made by the Commission to transfer the appellant to Palo Seco. Page 6
Lines 39-42
Page 7
Lines 1-3
- 20 (vii) The transfer created grave hardship and expense because Palo Seco was 36 miles away from the appellant's home and travelling facilities were such that the appellant would be obliged to travel for four hours each day at an additional expense of \$70.00 per month to undertake duties there. Page 7
Lines 4-16
- (viii) The appellant had received from the Commission no communication concerning facts or matters which grounded the claim that the transfer was made in the exigencies of the service. Page 7
Lines 17-21
- 30 (ix) The transfer was decided upon by the Commission in breach of the rules of natural justice. Page 7
Lines 22-23
4. The allegations in the appellant's affidavit were not disputed by the Respondent who filed no evidence in answer thereto.
5. The motion came on for hearing before the High Court (Cross J) on the 23rd June 1975 when the Respondent in limine objected to the jurisdiction of the Court. Pages 8-10
- 40 6. The arguments for the Respondent before the High Court were that section 102(4) of the Constitution was a preclusive clause which barred investigation by the High Court into the matters raised by the motion, that the appellant had no right to be heard before he was transferred and the Regulations had conferred none upon him. Section 102(4) of the Constitution reads as follows:-
Pages 8-9
Lines 1-7
Page 10
Lines 9-22
- 102.(4) The question whether -
- (a) a Commission to which this section applies

has validly performed any function vested in it by or under this Constitution;

(b) any member of such a Commission or any other person has validly performed any function delegated to such member or person in pursuance of the provisions of subsection (1) of section 84, or subsection (1) of section 93, or subsection (1) of section 99, as the case may be, of this Constitution; or

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(c) any member of such a Commission or any other person has validly performed any other function in relation to the work of the Commission or in relation to any such function as is referred to in the preceding paragraph;

shall not be enquired into in any court.

Page 9
Lines 9-33

The appellant in reply argued that the powers of the Commission were granted subject to the provisions of the Constitution so that where the complaint was that the Commission infringed fundamental rights and freedoms which were guaranteed by section 1 of the Constitution the High Court had jurisdiction. Further, the appellant did have a right to be heard before he could be transferred and there was nothing in the facts or circumstances to support the allegation that exigencies existed to avoid the application of regulation 135 of the Public Service Regulations 1966 to procedures taken in relation to the appellant who was being transferred in breach of the terms and conditions attached to his contract of service with the Government of Trinidad and Tobago. Regulations 134, 135 and 137 of the Public Service Regulations read as follows:-

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Line 34

Page 5
Lines 12-16

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Transfers (General)

134. Every application for an appointment on transfer in the Teaching Service shall be addressed to the Director through the Permanent Secretary on the prescribed form and, in the case of an application from a teacher in an assisted school, through the Board to the Permanent Secretary.

135. (1) Where the Commission proposes to transfer a teacher other than as a result of a request by a Board under regulation 137 the Commission shall, except where the exigencies of the Teaching Service do not permit, make an order of transfer in writing and shall give not less than three months' notice to the teacher who is to be transferred.

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(2) Where a teacher has applied for a transfer to a particular public school and the Commission proposes to transfer the teacher, but not to the particular school, the Commission shall, except where the exigencies of the Teaching Service do not permit make an order of

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transfer in writing and shall give not less than three months' notice to such teacher.

(3) A teacher who is aggrieved by an order made under paragraph (1) or (2) may make representation to the Commission for a review of the order in accordance with paragraph (4).

10 (4) Where a teacher desires to make representation to the Commission for a review of an order made under paragraph (1) or paragraph (2), such teacher, within fourteen days of the receipt of the order, shall give notice in writing to the Permanent Secretary or, in the case of an assisted school, to the Board, to be forwarded to the Permanent Secretary and shall submit with the notice his representations in writing.

20 (5) The Permanent Secretary shall, within seven days of the receipt of any representation made to him in writing under paragraph (4) forward such representation together with his comments or the comments of the Board thereon to the Commission.

(6) The Commission shall consider the representations of the teacher and the Permanent Secretary or the Board, as the case may be, submitted to it under paragraphs (4) and (5) and shall record its decision in writing.

Transfers (Special)

30 137. A Board may apply to the Commission to have a teacher transferred from an office in an assisted school if the religious persuasion of the teacher is not satisfactory to the Board, or on moral grounds.

40 7. The High Court upheld the arguments for the Respondent and dismissed the motion with costs on the 30th June 1975. Cross J. held that there was authority for the view that the Court would not apply an ouster clause where an inferior tribunal acted without jurisdiction or exceeded its jurisdiction and while it may be that a failure to comply with the requirements of natural justice may be a case in which the ouster clause will not be applied the appellant had no right to a hearing in this case because:-

(a) The function of the Commission in transferring him was purely administrative;

Pages 11-15

Page 13
Lines 26-30

(b) Members of the public service had no legally

Page 13
Lines 38-43

Record

Page 14 Lines 1-7	enforceable rights in English law in relation to appointments, promotions, dismissals or transfers;	
Page 14 Lines 8-46	(c) The provisions of the Public Service Regulations including regulation 135 thereof did not confer on the appellant a legal right to three months' notice before his transfer;	
Page 15 Lines 29-31	(d) The appellant was transferred in any event in the exigencies of the service and in that case he was not entitled to such notice;	10
Page 15 Lines 1-2	(e) The appellant did not in fact make any representations under regulation 135.	
Lines 3-8	Cross J. further held that the application raised the question whether the Commission had validly exercised a function vested in it and the Court had no jurisdiction to inquire by reason of the provisions of Section 102(4)(a) of the Constitution.	
Pages 15-17 Page 16 Lines 3-40	8. On the 7th July 1975, the appellant appealed to the Court of Appeal against the decision of the High Court on the ground that in exercising its power of transfer the Commission was bound by the rules of natural justice and regulation 135 of the Public Service Regulations 1966. The appellant also claimed that the Commission denied him the protection of the law, equality of treatment, the protection of procedural provisions existing for the protection of his fundamental rights and the right to hold his office at a particular school without being removed therefrom save in accordance with law.	20
Page 17 Lines 1-10		
Pages 24-30	9. The main judgment of the Court of Appeal was delivered by Rees J.A. After reviewing the facts of the case he first considered the question whether the Public Service Regulations 1966 applied to the appellant's appointment and held without considering Government Notice No. 303 in the Trinidad and Tobago Gazette of 6th February 1968 that the Regulations did not apply. Rees J.A. then considered the extent of the powers granted to the Commission and held that these were limited by the provisions of the Constitution. He also held that there was no evidence that the appellant was being transferred as a punishment for reports of misconduct made against him. He agreed with the High Court (Cross J) that the transfer was in the nature of an administrative decision made in the exigencies of the service. He held that although it may well have been that it caused the appellant financial loss and inconvenience the interest of the appellant was to be subordinated to the public interest for the good and welfare of the Teaching Service. He further held that the Court had no jurisdiction to inquire into the question whether the	30
Pages 24-25		
Page 26 Lines 24-47		
Page 27 Lines 1-15		
Pages 27-28		
Page 29 Lines 1-46		40
Page 30 Lines 2-5		
Lines 6-16		50

order of transfer which was intra vires the Commission was actuated by an ulterior motive or extraneous consideration.

10. In a concurring judgment Sir Isaac Hyatali C.J. agreed with Rees J.A. He reviewed the judgment and reasoning of the High Court. He also concluded without reference to Government Notice No. 303 in the Trinidad and Tobago Gazette of 6th February 1968 that the Public Service Regulations 1966 did not apply to the Commission. He criticised the affidavit of the appellant which he found wanting because the affidavit did not disclose the time when the allegations of misconduct against the appellant were made, to whom they were made and what they were about. He took the view that the appellant had omitted to state whether the allegations of misconduct 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 made by the appellant against the Principal of Penal had been brought to the notice of the Commission. The Chief Justice specifically rejected a contention that the case had to be disposed of on the assumption that all the facts and matters deposed to in the affidavit were correct. He rested his decision to dismiss the appeal on the grounds that:
- (a) The Public Service Regulations 1966 were not applicable;
 - (b) The affidavit of the appellant was deficient and did not enable the appellant to show that the order of transfer was a nullity;
 - (c) The order of transfer enjoyed a presumption of validity and the facts in the affidavit had failed to overturn the presumption;
 - (d) The jurisdiction of the Court to inquire into the appellant's complaint in the circumstances was ousted by section 102(4)(a) of the Constitution.

Phillips J.A. agreed with the judgment of the Chief Justice.

11. It is submitted that assuming but not admitting that the appellant could have been transferred without his having sought an appointment on transfer the facts and circumstances of the appellant's undisputed case did not justify the conclusion of the High Court or the Court of Appeal that the appellant had no right to be heard and was not

Record

entitled to claim the protection of regulation 135 of the Public Service Regulations 1966 which was in any event misinterpreted by the Commission. The letter of the 28th January 1975 by its terms and by reason of the unspecified date of transfer showed that the Commission had eschewed the regulation and had made an arbitrary appointment. The notice of transfer which was communicated on the 27th March 1975 to the appellant by letter dated 20th March 1975 specifying the 14th April 1975 as the effective date of transfer supplied no evidence that exigencies of the service existed to justify a departure from the requirement of notice. Further, the absence of any communication by the Commission to the appellant of facts or matters which would have justified the departure from established procedures before transfer also justified the inference that no exigencies existed. The High Court and the Court of Appeal it is submitted did a grave injustice to the appellant by failing to consider this issue in the light of the facts which the appellant was able to present and in the absence of evidence from the Respondent.

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12. It is further submitted that in respect of decisions taken on or before the dates of the letters of 28th January and 20th March 1975 to appoint the appellant on transfer to Palo Seco, these were unconstitutional, null and void because they violated his right to be heard. This right either existed prior to the commencement of the Constitution at common law or under the Education Regulations Ch.14 No. 1., and was entrenched in the guarantee ensuring the appellant the protection of the law in terms of Section 1 of the Constitution or in the alternative, was conferred on the appellant by the Public Service Regulations which were made under section 102 of the Constitution and in particular regulation 135 thereof which was promulgated for the appellant's protection. Regulation 69 of the Education Regulations Ch.14 No. 1 which had existed up to the time the Public Service Regulations became applicable read as follows:

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69. For misconduct, breaches of the Regulations, general neglect of duty, lack of zeal, unpunctuality or absence without leave, a teacher after due enquiry shall be subject to disciplinary action as the Director in each case may determine.

Such action may take the form of a warning, a reprimand, transfer to another school at the teacher's expense, loss of increment, reduction in grade and/or status.

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Provided that the approval of the Governor shall be necessary before a teacher suffers loss of increment

for a consecutive period exceeding one year or reduction in pensionable emoluments;

And provided further that absence without leave and without reasonable excuse may render a teacher liable to forfeiture of salary for the period of such absence or, in serious cases, to dismissal according as the circumstances, in the opinion of the Director, may warrant.

10 13. It is further submitted that in any event the
appellant was entitled to a hearing in the
circumstances of his case before a decision to
transfer him was made by the Commission. The
appellant lawfully held an appointment at Penal
and had sought no other appointment on transfer.
If the Commission claimed to have the power to
appoint him to another school without an application
by him to be transferred from Penal the power could
not properly be exercised to the detriment of the
20 appellant without an opportunity to be heard
being given him.

14. It is further submitted that the Court of
Appeal erred in finding deficiencies in the
affidavit where none was found by the High Court
and that the affidavit of the appellant could not
be properly held to be defective for want of better
particularity in the matters alleged by the
appellant and which were referred to by the Chief
Justice and Rees J.A. in their judgments. In
30 particular the allegations of misconduct are
presumed to have been made to the Commission which
had responsibility for dealing with them and the
appellant's allegation that he was being punished
by onerous transfer was reasonable in the
circumstances of the case.

15. It is further submitted that the appointment
on transfer although purporting to be made in
pursuance of a power to transfer vested in the
Commission was shown by the appellant to have been
40 made in violation of a statutory instrument made
in pursuance of and under the authority of Section
102 of the Constitution itself, to wit, the
Public Service Regulations 1966, which forms part
of the Constitutional and Administrative Law of
Trinidad and Tobago, and was unconstitutional,
null and void on that ground.

16. It is also submitted that Cross J. was correct
in holding that the preclusive provisions of
section 102(4) of the Constitution may not apply
50 where a breach of the rules of natural justice was
found and that Rees J.A. in the Court of Appeal was

correct in taking the view in the main judgment that the powers granted to the Commission were limited by the other provisions of the Constitution a view which, it is submitted, made it necessary for him to inquire into the appellant's contention that there had been a breach of the rules of natural justice. It is submitted that Rees J.A. erred in holding that the rules of natural justice had not been violated in relation to the appellant because he had no right to be heard and that the Chief Justice and Phillips J.A. also erred in agreeing with that conclusion and with Cross J. on this point

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17. It is further submitted that nothing in section 102(4)(a) puts the Commission above judicial review in deciding whether it exceeded the powers granted by Section 99C of the Constitution and that the jurisdiction of the High Court under Section 6 of the Constitution to hear a complaint that the Commission had infringed any of the constitutional guarantees in Chapter 1 of the Constitution of Trinidad and Tobago was not ousted. The reservation by the Chief Justice on this point was not caused by any argument raised in the High Court or Court of Appeal and the doubt whether section 6 of the Constitution applied where a Service Commission infringed fundamental rights and freedoms was not well founded.

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Page 23
Lines 38-45

18. The appellant therefore prays that this appeal be allowed that the judgment of the Court of Appeal of Trinidad and Tobago be reversed and that judgment be entered for the appellant in terms of the motion or in such other terms as may be appropriate with costs in the Privy Council and in the Courts below for the following among other

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R E A S O N S

1. BECAUSE the High Court's jurisdiction to grant redress under Section 6 of the Constitution of Trinidad and Tobago was not ousted or barred by the provisions of section 102(4)(a) of the 1962 Constitution in respect of an infringement by the Teaching Service Commission of fundamental rights and freedoms guaranteed by section 1 of the Constitution;

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2. BECAUSE section 1 of the Constitution guaranteeing the protection of the law was infringed by the Commission in relation to the appellant when the order transferring him from Penal to Palo Seco was made without proper notice of intention to transfer him being given to him and because he had not applied for an appointment on transfer;

3. BECAUSE regulation 135 of the Public Service Regulations 1966 did confer rights upon the appellant

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and imposed obligations upon the Commission the Regulations being a statutory instrument made under the authority of the Constitution itself, to wit, section 102 thereof and being part of the constitutional and administrative law of Trinidad and Tobago;

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4. BECAUSE the facts and circumstances of the case did not warrant the conclusion that the exigencies of the Service did not permit established procedures under regulation 135 of the Public Service Regulations 1966 to be followed in relation to the appellant;
 5. BECAUSE the order of transfer was made in breach of the rules of natural justice the appellant having had a right to be heard in any event in the circumstances of the case;
 - 20 6. BECAUSE the uncontradicted affidavit of the appellant had disclosed all that was necessary to support his claim to relief;
 7. BECAUSE the Judgments of the Court of Appeal and of the High Court were wrong.

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