

Kemrajh Harrikissoon - - - - - *Appellant*

v.

The Attorney General of Trinidad and Tobago - - *Respondent*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 15TH JANUARY 1979

Present at the Hearing :

LORD DIPLOCK

VISCOUNT DILHORNE

LORD EDMUND-DAVIES

LORD RUSSELL OF KILLOWEN

LORD SCARMAN

[Delivered by LORD DIPLOCK]

These proceedings in which the appellant claims a declaration that human rights guaranteed to him by section 1 of the 1962 Constitution had been contravened and seeks redress from the High Court under section 6, are, in their Lordships' view, wholly misconceived.

His complaint was that, at a time when, as a member of the Teaching Service, he was serving in the post of a Class I teacher at Penal Government Primary School, he had been unlawfully transferred by the Teaching Service Commission to a similar post at Palo Seco Government Primary School.

The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the Court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the Court as being made solely

for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.

The instant case concerns and concerns only the right of a holder of a public office not to be transferred against his will from one place to another. In their Lordships' view it is manifest that this is not included among the human rights and fundamental freedoms specified in Chapter I of the Constitution.

The suggestion made on behalf of the appellant that it constitutes "property" within the meaning of section 1(a), viz:

"the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law"

needs only to be stated to be rejected.

The only support relied on for this suggestion was a passing phrase to be found in the judgment of Crane J.A. in a case in the Guyana Court of Appeal, *Re Gerriah Sarran* (1969) 14 W.I.R. 361, page 366; but the learned judge was there referring not to the expression "property" as used in the Constitution of Guyana, but to what he understood to be the effect of a particular passage in a text book dealing with the subject of Domestic Tribunals in which the word "property" appeared. It has no relevance to the meaning of the word "property" in the Constitution of Trinidad and Tobago.

The only alternative suggestion was that the transfer of the appellant from one school to another contravened his right under section 1(b), viz:

"the right of the individual to equality before the law and the protection of the law."

This too is manifestly untenable. What the appellant was entitled to under this paragraph was the right to apply to a court of justice for such remedy (if any) as the law of Trinidad and Tobago gives to him against being transferred from one post to another against his will. There is nothing in the material before the High Court to give any colour to the suggestion that he was deprived of the remedy which the law gave him. On the contrary he deliberately chose not to avail himself of it.

He had been appointed to the post at Palo Seco Primary School by the Teaching Service Commission in the exercise of their functions under section 99C(1) of the Constitution. This section was added to the Constitution by the Trinidad and Tobago Constitution (Amendment) Act, 1968. It is in the following terms:—

"99C(1). Subject to the provisions of this Constitution, power to appoint persons to hold or act in public offices in the Teaching Service (including power to make appointments on promotion and transfer and to confirm appointments) and to remove and exercise disciplinary control over persons holding or acting in such offices shall vest in the Teaching Service Commission:"

Prior to this amendment, the corresponding functions in relation to members of the Teaching Service were exercised by the Public Service Commission.

The transfer of the appellant from one school to the other was thus on the face of it an administrative act performed by the Teaching Service Commission in the exercise of functions vested in them by section 99C. The procedure for transfer is dealt with under Regulations made by the

Teaching Service Commission under section 102(1) of the Constitution (as amended by the Act of 1968).

By notice which appeared in the Trinidad and Tobago Gazette on 6 February 1968 the Teaching Service Commission adopted as their own the Public Service Commission Regulations, 1966, with the substitution of the words "Teaching Service Commission" for the words "Public Service Commission" wherever they occurred.

(Unfortunately, in the instant case, this notice was not drawn to the attention of the Court of Appeal who gave their judgments on the erroneous assumption that, since the passing of the Amendment Act of 1968, there had been no Regulations in existence dealing with the procedure for transfer of members of the Teaching Service.)

The relevant Regulations applicable to the transfer of the appellant are as follows: —

" 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 . . .

135. (1) Where the Commission proposes to transfer a teacher . . . 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.

(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 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).

(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 . . . and shall submit with the notice his representations in writing.

(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 . . . thereon to the Commission.

(6) The Commission shall consider the representations of the teacher and the Permanent Secretary . . . submitted to it under paragraphs (4) and (5) and shall record its decision in writing.

136. Notwithstanding that a teacher in respect of whom an order has been made under paragraph (1) or (2) of regulation 29 has made representation under paragraphs (5) and (6) of the said regulation the teacher shall assume his duties on transfer pending the review of the order by the Commission".

These Regulations define the legal rights enjoyed by the appellant in relation to his transfer from one post to another in the Teaching Service. It is in the exercise of these rights that he is entitled to the protection of the law.

The facts in relation to his transfer on which the appellant's claim was based can be stated briefly. On 28 January 1975 the appellant, who was then on the staff of Penal Government School, was informed by the Teaching Service Commission that he had been allotted for duty to Palo Seco Government School with effect from the date of his assumption of duty there; no specific date for this was given. He took no steps under Regulation 135 (3) and (4) to obtain a review of this order by the Commission. On 25 February 1975 he attended for duty at Penal School and was told by the Principal that he was to discontinue performing his duties there. On the following day, his solicitor wrote a letter of protest to the Commission. The letter claimed that the transfer was contrary to the Public Service Commission Regulations, 1966, but gave no reason why this should be so. It requested that the appellant should be allowed to continue his duties at Penal School. On 27 March 1975 the appellant received a letter from the Teaching Service Commission in the following terms:

“ 20th March, 1975.

Sir,

I wish to inform you that the Teaching Service Commission has decided that you should be, and you are hereby transferred to the Palo Seco Government Primary School, in the exigencies of the Services.

2. You should report to the Principal, Palo Seco Government Primary School for duty on 14th April, 1975, the date on which schools are due to re-open after the Easter vacation.
3. Kindly acknowledge receipt of this letter on the duplicate attached and return the signed copy to the person delivering this letter to you.

I have the honour to be,

Sir,

Your obedient servant,
Director of Personnel
Administration”.

Again, the appellant made no representations under Regulation 135 (3) and (4) to obtain a review of this order. Instead on 6 May 1975 he chose to go straight to the High Court purportedly under section 6 of the Constitution.

For reasons already stated, the adoption of this procedure, instead of pursuing the remedy given by the Regulations to a teacher aggrieved by an order of transfer, was, in their Lordships' view, misconceived.

The grounds on which the appellant claimed that the transfer was unlawful were disclosed, for the first time, in the affidavit which he swore in the proceedings in the High Court. They consisted of

- (1) an allegation that the transfer was intended as a punishment for his having made in July 1973 allegations of improprieties at the Penal Government Primary School; and
- (2) an allegation that the exigencies of the service did not justify his being transferred on less than three months' notice.

If he objected to the transfer on these or other grounds such as personal inconvenience (on which he also relied), the protection that the law afforded him was, in the first instance, to give notice to the Permanent Secretary of his desire to make representations to the Commission for a review of the order and to submit his representations in writing to the Permanent Secretary for transmission to the Commission, together with the

Permanent Secretary's own comments thereon. Then, and not before then, it would become the duty of the Commission to consider any representations against the order that the appellant wished to make, together with the Permanent Secretary's comments on them. Having failed to avail himself of this remedy—apparently deliberately, for he was acting on legal advice—his claim that the order for his transfer was unlawful, in their Lordships' view, fails *in limine*.

Strictly speaking this makes it unnecessary for their Lordships to decide whether, if the appellant had followed the procedure laid down in the Regulations, and the Commission, after considering his representations and those of the Permanent Secretary, had adhered to their decision to order him to be transferred to Palo Seco Primary School, the High Court would have had any jurisdiction to quash the Commission's order, not, as their Lordships have indicated, under section 6 of the Constitution, but upon an application for *certiorari*. Those hypothetical circumstances correspond more closely with those which the Court of Appeal assumed to exist since they were unaware that there were Regulations applicable to the appellant which gave him a right to seek a review by the Commission of the order of transfer.

One of the grounds on which both the High Court and the Court of Appeal dismissed the appellant's claim was because they regarded themselves as precluded from adjudicating upon it by section 102(4) of the Constitution which provides:

“ The question whether

(a) A Commission to which this section applies has validly performed any function vested in it by or under this Constitution;

.....
shall not be enquired into in any court.”

The ouster of the Court's jurisdiction effected by this section is in terms absolute. In their Lordships' view it is clearly wide enough to deprive all Courts of jurisdiction to entertain a challenge to the validity of an order of transfer on either of the grounds alleged by the appellant in the instant case; and that is sufficient to support the dismissal of the appellant's claim on this ground also.

In all the judgments below, however, there is considerable discussion of recent English cases dealing with “ ouster of jurisdiction clauses ” contained in Acts of Parliament. Section 102(4) does not form part of an Act of Parliament; it is part of the Constitution itself. Their Lordships do not think that the instant appeal provides an appropriate occasion for considering whether section 102(4) of the Constitution, despite its unqualified language, is nevertheless subject to the same limited kind of implicit exception as was held by the House of Lords in *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 1 All E.R. 208 to apply to an ouster of jurisdiction clause in very similar terms contained in an Act of Parliament. This question is best left to be decided in some future case if one should arise, in which the facts provide a concrete example of the kind of circumstances that were discussed in the judgments in the *Anisminic* case. The facts in the instant appeal do not.

The appeal is dismissed with costs.

In the Privy Council

KEMRAJH HARRIKISSOON

v.

**THE ATTORNEY GENERAL
OF TRINIDAD AND TOBAGO**

**DELIVERED BY
LORD DIPLOCK**