[2009] UKPC 53
Privy Council Appeal No 0042 of 2009

JUDGMENT

Josine Johnson
Yuclan Balwant
v
The Attorney General of Trinidad and Tobago

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Rodger
Lord Walker
Lady Hale
Lord Collins
Lord Kerr

JUDGMENT DELIVERED BY
LORD RODGER
ON

14 December 2009

Heard on 20 October 2009

Appellant	*Respondent*
Sir Fenton Ramsahoye S.C. Alan Newman Q.C. Anand Ramlogan (Instructed by Bankside Law)	Peter Knox QC (Instructed by Charles Russell LLP)

LORD RODGER

1. The first appellant, Josine Johnson, is a female police officer. She is divorced, but has a grown-up son. The Police Service Commission Regulations ("the Police Service Regulations") apply to her. They were originally made in 1962 under section 102 of the Constitution of Trinidad and Tobago 1962 ("the 1962 Constitution"). Regulations 51 and 52 provide:

> "51. (1) The Commission may terminate the appointment of a police officer on grounds of inefficiency as a result of a number of adverse reports.
>
> (2) Where the Commissioner makes a recommendation in writing that the appointment of a police officer should be terminated on grounds of inefficiency, the police officer shall be informed in writing of such recommendation and shall be given an opportunity to make representations thereon.
>
> (3) Where a police officer makes representations under subregulation (2), the representations shall be forwarded in their original form to the Commission by the Commissioner together with such comments as the Commissioner thinks fit.
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> (4) The Commission may, upon application of the police officer or on its own motion, cause an investigation to be made before making a final decision.
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> 52. The Commission may terminate the appointment of a female police officer who is married on the grounds that her family obligations are affecting the efficient performance of her duties and the procedure for the termination of such appointment shall be in accordance with regulation 51(2), (3) and (4)."

2. The second appellant, Yuclan Balwant, is a female employee of the San Fernando City Corporation. She is not married. The Statutory Authorities Service Commission Regulations ("Statutory Authorities Regulations") apply to her. The Regulations were originally made in 1968 under section 6 of the Statutory Authorities Act. Regulations 57 and 58 provide:

> "57. (1) The Commission may terminate the appointment of an officer on grounds of inefficiency.
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> (2) Where a Head of a Statutory Authority makes a recommendation in writing that the appointment of an officer should be terminated on grounds of inefficiency, the officer shall be informed in writing of such recommendation and shall be given an opportunity to make representations thereon.
>
> (3) Where an officer makes representations under subregulation (2), the representations shall be forwarded in their original form to the Commission by the Head of the Authority with such comments as the Head of the Statutory Authority thinks fit.
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> 58. The Commission may terminate the appointment of a female officer who is married on grounds that her family obligations are affecting the efficient performance of her duties and the procedure for the termination of such appointment shall be in accordance with regulation 56(2), (3) and (4)."

It is unnecessary to examine the terms of regulation 56(2), (3) and (4), since they are purely procedural and are not in issue in these appeals.

3. The appeals arise out of the appellants' applications to the High Court for redress by way of originating motion under section 14 of the Constitution of the Republic of Trinidad and Tobago ("the Constitution"), which was enacted in the Schedule to the Constitution of the Republic of Trinidad and Tobago Act 1976 ("the Act"). The appellants first seek a declaration that regulation 52 of the Police Service Regulations ("regulation 52") and regulation 58 of the Statutory Authorities Regulations ("regulation 58") are null and void under section 2 of the Constitution because they unfairly discriminate against women in contravention of section 4(b) and/or (d) of the Constitution. They further seek a declaration that, pursuant to section 5(1) of the Constitution regulations 52 and 58 are to be construed as severed from the respective Regulations on the ground that they are inconsistent with section 4 of the Constitution.

4. Best J dismissed the application and the Court of Appeal (Warner, Kangaloo and Mendonca JJA) dismissed the appellants' appeal from that decision.

5. The affidavit made by Josine Johnson includes the following paragraphs:

> "6. I am presently involved in a stable, serious relationship. I have been considering the question of marriage but am deterred by the fact that if I did in fact re-marry, I would be at a great disadvantage because of regulation 52. I would very much like to re-marry but do not wish to be liable to or in jeopardy because of regulation 52.
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> 7. I do not wish to create an additional possible ground of termination by virtue of marriage. I am a family-oriented woman and would want to devote time to my family obligations. I have thus far chosen to remain unmarried or divorced because I do not wish to be subject to the possibility of an additional ground of termination which does not apply to unmarried woman [sic] police officers."

6. The affidavit by Yuclan Balwant is in identical terms, apart from the substitution of regulation 58 for regulation 52 at the end of para 6, but not where regulation 52 first appears in that paragraph. Both affidavits refer to re-marrying in para 6 but to having chosen to remain "unmarried or divorced" in para 7. Plainly, the affidavits have been drafted by a lawyer and are not well crafted to reflect the actual position of each of the appellants. That said, the defendants did not apply to cross-examine the officers on the affidavits and their thrust is clear: the officers say that their decision as to whether to marry or remarry is affected by the fact that, if they do, they will become vulnerable to an additional ground for having their appointment terminated – under regulation 52 and regulation 58, respectively.

7. In that situation there is no room for the argument that, since the two officers are actually unmarried, regulations 52 and 58 do not apply to them and so the proceedings are premature. It is sufficient that the regulations affect the appellants, as female officers, when deciding whether or not to marry; male officers are not similarly affected when deciding whether or not to marry. There is therefore discrimination on the ground of sex, which would usually contravene section 4 of the Constitution.

8. Despite the ingenious argument presented by Mr Knox QC on behalf of the State, the Board has indeed no doubt that the regulations

are discriminatory. He submitted that, so far from providing for an additional ground for dismissing a female officer, the regulations were designed to make plain (for the avoidance of doubt) that it is not a complete bar to dismissal on grounds of inefficiency under regulations 51(1) and 57(1) that the inefficient performance of the officer's obligations is caused by her family obligations. In other words, the provision was inserted simply to counter the anticipated argument by a female officer that she was performing her duties inefficiently only because of her competing family obligations. If the provision was limited to female officers, this was simply because, back in the 1960s, no one would have anticipated that a male officer would ever raise such a point.

9. The Board cannot accept the argument. If regulations 52 and 58 had really been designed simply to deal with the application of regulations 51(1) and 57(1), then their substance would surely have been included in some sub-paragraph of those regulations. Instead, they appear as separate regulations with references to the procedures to be followed if disciplinary proceedings based on them are to be taken against an officer. Plainly, they contain a further ground for dismissal.

10. Regulations 52 and 58 are indeed typical of measures which used to discriminate against married women. Quite often, women were simply dismissed if they married. Regulations 52 and 58 do not go that far, but they proceed on an assumption that married women, as opposed to married men, will be taken up with family obligations which they may well not be able to combine with the proper discharge of their professional obligations. So, unlike in the case of married male officers, provision is made for dismissing married female officers on the ground that their family obligations are affecting the efficient performance of their professional duties. Regulations 52 and 58 undoubtedly reflect attitudes which were still current in the 1960s when they were adopted. Equally undoubtedly, they discriminate against women officers.

11. The appellants say that is enough: the regulations are inconsistent with section 4 of the Constitution. So far as relevant, that section provides that "in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely: …(b) the right of the individual to equality before the law and the protection of the law; … (d) the right of the individual to equality of treatment from any public authority in the exercise of any functions…". Hence, the appellants submit, the regulations are void by virtue of section 2 which provides:

> "This Constitution is the supreme law of Trinidad and Tobago, and any other law that is inconsistent with this Constitution is void to the extent of the inconsistency."

12. The contention that there is discrimination by reason of sex, affecting the right to equality before the law, seems preferable. But the point is not crucial, since either contention involves ignoring section 6(1) and (2) of the Constitution which provide:

> "(1) Nothing in sections 4 and 5 shall invalidate -
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> (a) an existing law;
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> (b) an enactment that repeals and re-enacts an existing
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> law without alteration; or
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> (c) an enactment that alters an existing law but does not
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> derogate from any fundamental right guaranteed by this
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> Chapter in a manner in which or to an extent to which the existing law
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> did not previously derogate from that right.
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> (2) Where an enactment repeals and re-enacts with modifications an existing law and is held to derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right then, subject to sections 13 and 54, the provisions of the existing law shall be substituted for such of the provisions of the enactment as are held to derogate from the fundamental right in a manner in which or to an extent to which the existing law did not previously derogate from that right."

13. The effect of section 6(1) is that an "existing law" is not to be invalidated by section 4 of the Constitution and is not to be regarded as inconsistent with the Constitution by reason of anything in section 4. To put the point another way, section 6(1) makes an existing law

constitutional, i e, consistent with the Constitution, even though it would conflict with section 4 if that section applied to it.

14. According to section 6(3), "existing law" means "a law that had effect as part of the law of Trinidad and Tobago immediately before the commencement of this Constitution, and includes any enactment referred to in subsection (1)."

15. Section 18 of the 1976 Act is of some importance:

> "All enactments passed or made by any Parliament or person or authority under or by virtue of the former Constitution and not before the appointed day declared by a competent Court to be void by reason of any inconsistency with any provision of the former Constitution, including in particular sections 1 and 2 thereof, and that are not repealed, lapsed, spent or that had not otherwise had their effect, shall be deemed to have been validly passed or made and to have had full force and effect as part of the law of Trinidad and Tobago immediately before the appointed day, even if any such enactments were inconsistent with any provision of the former Constitution, including in particular sections 1 and 2 thereof."

This section means that, since the regulations had not been declared void by reason of inconsistency with section 1 of the 1962 Constitution, they were deemed to have been validly made and to have had full force and effect as part of the law immediately before the commencement of the Constitution in 1976. The section neatly excludes the line of argument which succeeded in *Bowe v The Queen* [2006] 1 WLR 1623, where there was no similar provision in the Bahamas.

16. Regulations 52 and 58 were never challenged under the 1962 Constitution. Mr Newman QC argued, however, that, while the Police Service Regulations were "made … under" section 102 of the 1962 Constitution, the Statutory Authorities Regulations were "made under" section 6 of the Statutory Authorities Act and not under the Constitution. But that is much too narrow an interpretation. From 1962 until 1976, all enactments, whether by primary or secondary legislation, were made "under the Constitution". How else could they have been validly made? The plain intention of section 18 is that any law passed while the Independence Constitution was in force, and not declared void by the time the new Republican Constitution commenced, was deemed to be valid and to be in full force and effect at that date.

17. It follows that, since regulations 52 and 58 had not been declared invalid, they had effect immediately before the Constitution came into effect in 1976 and so are "existing laws" in terms of section 6(1). Looking simply at sections 2, 4 and 6(1) of the Constitution, the position is clear: since regulations 52 and 58 were existing laws, section 4 does not apply to them. So, even though they discriminate against women by reason of their sex, they are constitutional.

18. Sir Fenton Ramsahoye SC submitted, however, that this was to overlook section 5(1) of the Act which provides:

> "Subject to the provisions of this section, the operation of the existing law on and after the appointed day shall not be affected by the revocation of the Order-in-Council of 1962 but the existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Act."

In brief, Sir Fenton submitted that, since the regulations discriminated by reason of sex, they violated section 4 of the Constitution and so they were to be construed with the necessary modifications or adaptations to bring them into conformity with section 4 of the Constitution.

19. Sir Fenton was, in effect, trying to advance precisely the argument that was accepted by the majority of the Board in *Roodal v State of Trinidad and Tobago* [2005] 1 AC 328, but then reconsidered and rejected by the majority of the nine-man Board in *Matthew v State of Trinidad and Tobago* [2005] 1 AC 433. Lord Hoffmann's judgment in *Matthew* has to be read along with his judgment in *Boyce v The Queen* [2005] 1 AC 400 which was delivered just before it and to which it refers. There can be no question of the Board re-opening those hard-fought decisions – and, indeed, counsel for the appellants did not suggest that it should.

20. The fundamental point made by the Board in *Matthew* was that the Constitution is supreme. That is said explicitly not only in section 2 of the Constitution but in section 3 of the Act. Since the Constitution is supreme, nothing in it is to be qualified by anything said in the Act, which is not supreme but subordinate to the Constitution. If anything in the Act had been intended to modify or qualify some provision of the Constitution, it would have been included in the Constitution itself: see *Matthew* [2005] 1 AC 433, 450, para 17, read along with *Boyce* [2005] 1 AC 400, 411, paras 2-5. It follows that section 5(1) of the Act is not

intended to, and does not, override or qualify section 6(1) of the Constitution.

21. As its terms make clear, section 5(1) only involves construing existing laws in such a way as to bring them into conformity with the Act. But, in the case of regulation 52 and regulation 58, nothing needs to be done to bring them into conformity with the Constitution scheduled to the Act, since they are only said to be inconsistent with section 4 of the Constitution and, by virtue of section 6(1) of the Constitution, section 4(1) is not a basis for invalidating existing laws. In other words the regulations conform to the Constitution in the relevant respect. There is therefore no occasion to apply section 5(1) of the Act in this case. The decision of the Court of Appeal was correct on this point.

22. That being so, it is unnecessary to go further and define the scope of the power of modification in section 5(1) of the Act. But one obvious example of a situation where the power could be used was given by the minority in *Roodal v State of Trinidad and Tobago* [2005] 1 AC 328, 364-365, paras 86-89. Section 6(1) of the Constitution applies only to sections 4 and 5 of the Constitution. An existing law is not to be invalidated by anything in those sections. But, if an existing law were inconsistent with some other provision of the Constitution, then, by virtue of section 2 of the Constitution, it would be void to the extent of the inconsistency. Section 5(1) of the Act comes in to deal with that situation and provides that the existing law is to be construed with such modifications etc as may be necessary to bring it into conformity with the Constitution. Subsections (2)–(5) make further provision to achieve the same general purpose. So, in that situation, the existing law is made constitutional by being construed in such a way as to make it conform to the Constitution.

23. In *Matthew* [2005] 1 AC 433, 451, paras 22 and 23, Lord Hoffmann discusses the application of section 5(1) of the Act in a different situation, viz, where an existing law, which is not open to objection on grounds of substance, is bound up, as a matter of form, with provisions which are inconsistent with the Constitution and so objectionable. These paragraphs have to be read along with the much fuller discussion in *Boyce* [2005] 1 AC 400, 419-422, paras 37-50. No issue of that kind arises in the present case. But it is none the less worth noting that the Board concluded its discussion, at p 422, para 50, with the affirmation that powers to modify and adapt "make no sense in relation to laws which would otherwise be valid." Which, by virtue of section 6(1) of the Constitution, is the position with regulations 52 and 58 in the present case.

24. For these reasons the Board is satisfied that regulations 52 and 58 are not inconsistent with the Constitution and are therefore valid. The appeal must therefore be dismissed.

25. While the legal position is clear, it cannot be described as satisfactory. Like the Court of Appeal, the Board cannot part with the case without expressing the hope that steps will soon be taken to remove regulations 52 and 58. Counsel for the State made the point that there was no sign that they had actually been used in practice or would be used in future. If that is really so, it is all the more remarkable that the State has defended them so tenaciously right the way up through the courts to this Board. The simple fact is that they are a relic of a bygone age. The Board respectfully recommends that their continued inclusion in the relevant Regulations should be reviewed.

26. The parties should make any submissions on costs in writing within 21 days.