Privy Council Appeal No. 47 of 1980

Endell Thomas – – – – – – – – *Appellant*

v.

The Attorney-General – – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JULY 1981

Present at the Hearing:

LORD DIPLOCK
LORD EDMUND-DAVIES
LORD ROSKILL
SIR JOHN MEGAW
SIR OWEN WOODHOUSE

[*Delivered by* LORD DIPLOCK]

This is an interlocutory appeal in an action which was started in October, 1972. It raises matters of great constitutional importance as to the terms of employment and security of tenure of members of the public service of Trinidad and Tobago in general and in particular of members of the Police Force. That it should have taken so many years to come before this Board for final decision after giving rise to acute divergences of judicial opinion in the High Court and Court of Appeal is, in their Lordships' view, a matter for regret.

The action itself arose out of events that occurred between April 1970 and August 1972, and culminated in the Police Service Commission removing Mr. Thomas (plaintiff in the action and appellant before this Board) from the Police Service in which he then held the rank of Assistant Superintendent. These events occurred at a time when Trinidad and Tobago was still a constitutional monarchy under the 1962 Constitution and before it became a republic. In dealing with the appeal their Lordships will have to use the terminology of the 1962 Constitution and refer to the Governor-General and the Crown instead of to the President and the State. The change from a monarchy to a republic, however, has not affected the rights of members of the police and other public services with which the instant appeal is concerned.

Mr. Thomas's removal was ordered by the Commission as a result of disciplinary proceedings in which he was charged with three offences against discipline. In view of one of the questions of law which their Lordships are required to answer it is appropriate that the three charges laid against him should be here set out in full.

" *Charge 1*

Endell L. Thomas, being a Police Officer, while attached to the Tobago Police Division, committed an offence against discipline, to wit, Neglect of Duty, contrary to Regulation 74(2)(*d*) of the Police Service Commission Regulations, 1966.

PARTICULARS OF OFFENCE

On 4th April, 1970 at the Mount Irvine Golf Course Club House, Tobago, without good and sufficient cause you failed to take prompt and diligent action against demonstrators who were committing acts of malicious damage to the said Club House and property therein, to wit, smashing glasses, tables, ash trays, flower pots, destruction of the Visitors' Book and smashing of the glass door to the Bar.

Charge 2

Endell L. Thomas, being a Police Officer, while attached to the Tobago Police Division, committed an offence against discipline, to wit, Neglect of Duty, contrary to Regulation 74(2)(*d*) of the Police Service Commission Regulations, 1966.

PARTICULARS OF OFFENCE

On the 20th April, 1970 at the Scarborough Car Park, Tobago, without good and sufficient cause, you failed to take prompt and diligent action against a crowd of persons who were threatening to commit a breach of the peace at the said Car Park, to wit, threatening violence against Detective Sgt. 5141 Alleyne, Detective Cpl. 5468 Williams and Detective Constable 6300 Denoon.

Charge 3

Endell L. Thomas, being a Police Officer, while attached to the Tobago Police Division, committed an offence against discipline, contrary to Regulation 74(1)(*a*) of the Police Service Commission Regulations, 1966.

PARTICULARS OF OFFENCE

On the 24th April, 1970 you failed to investigate in a proper manner, as instructed by Superintendent S. Phillip, the presence of Yacht CORYPHAENA in the Bay of Speyside, Tobago."

By his Statement of Claim Mr. Thomas contended that the offences with which he had been charged, being purportedly created by regulations made by the Police Service Commission under section 102 of the Constitution, did not exist in law because the power to create disciplinary offences was vested under the Constitution in the Governor-General to the exclusion of the Police Service Commission. This defect, he asserted, made the whole of the disciplinary proceedings brought against him, including the Commission's order removing him from the Police Force, *ultra vires* and therefore void. He also alleged various procedural irregularities in the conduct of the disciplinary proceedings; but with these their Lordships in this interlocutory appeal are not concerned—except to note that they did *not* involve any allegation that Mr. Thomas was deprived of a fair hearing in accordance with the principles of fundamental justice. The relief claimed in the action consisted of various declarations as to the nullity of the regulations creating the disciplinary offences with which he had been charged, and of the disciplinary proceedings brought against him and his purported removal from the Police Force. He claimed a declaration that he was still a member of the Police Force or in the alternative damages for wrongful dismissal. The claim to continued membership of the Force is now academic. He long ago embarked upon a different career in which he has achieved success.

So far as is relevant to the questions of law which their Lordships must decide, the defence of the Attorney-General, in addition to asserting the validity of the regulations, the disciplinary proceedings and the removal of Mr. Thomas from the Police Force, raised two additional alternative defences. The first was that the jurisdiction of the High Court to enquire into the matter was ousted by the provision in section 102(4) of the Constitution:

> " The question whether (*a*) a Commission to which this section applies " [sc. the Police Service Commission] " has validly performed any function vested in it by or under this Constitution . . . . shall not be enquired into in any court."

The second alternative defence was a contention that Mr. Thomas was " a servant of the Crown dismissible at pleasure ".

On this state of the pleadings an order was obtained with commendable promptitude from Maharaj J. ordering that the three questions set out below be tried as preliminary points of law on or before the hearing of the Summons for Directions in the action. The questions were phrased thus:

> " (1) Whether the power to create offences for which the plaintiff was triable resides in the Governor-General only or whether the three offences with which the plaintiff was charged were validly and properly created by the Police Service Commission Regulations, 1966 made by the Police Service Commission with the consent of the Prime Minister under section 102 of the Constitution of Trinidad and Tobago and existed in law at any material time.
>
> (2) Whether the plaintiff's action is maintainable in view of sections 99 and 102 of the Constitution of Trinidad and Tobago.
>
> (3) Whether the plaintiff was a servant of the Crown dismissible at pleasure."

These are pure questions of law; to answer them does not call for any evidence of fact, except of the actual terms (set out above) in which the charges against Mr. Thomas were framed. All three questions and particularly (2) and (3), which affect the public service generally as well as the Police Force, raised constitutional issues of great public importance upon which speedy and authoritative clarification by the courts as interpreters of the Constitution was patently desirable. Yet it was not until three years later, in July 1976, that the three-day argument on the questions of law was heard; and not until December of that year that the carefully reasoned judgment of Braithwaite J. was delivered. In effect he answered all three questions in favour of Mr. Thomas. He held that the three offences with which Mr. Thomas had been charged were not validly created by the Police Service Commission Regulations, 1966 and did not exist in law; that the jurisdiction of the High Court to entertain the action was not ousted by what it will be convenient to refer to as the " no certiorari " clause in section 102(4) of the Constitution: and that Mr. Thomas, though a servant of the Crown, was not dismissible at pleasure.

Both parties appealed from this decision to the Court of Appeal, the Attorney-General seeking the reversal of the judge's answers to each of the three questions, Mr. Thomas seeking additional relief which, in effect, would amount to judgment in his favour in the action, subject only to the assessment of the damages recoverable for wrongful dismissal. The reasoned judgments of the Court of Appeal were delivered on 17 January, 1979, and disclosed a difference of opinion between the majority, Hyatali C.J. and Kelsick J.A., and the minority Phillips J.A. Phillips J.A. in substance agreed with Braithwaite J. on all three questions and would also have granted Mr. Thomas the additional relief

sought by his cross-appeal. The majority answered each of the questions in the opposite way to Braithwaite J. and thus in favour of the Attorney-General. They allowed the appeal and, since their answer to Question (2) involved a holding that the High Court had no jurisdiction to entertain the action, ordered that the action be dismissed. (Through some error, their instruction that the action be dismissed does not appear in the formal order of the Court of Appeal of 19 January, 1979, which refers only to allowing the Attorney-General's appeal and dismissing the cross-appeal of Mr. Thomas.)

In all four judgments in the courts below Question (3) was dealt with first. Their Lordships too will follow the same order. It is, in their Lordships' view, the most important of the three questions, for it affects the security of tenure and insulation from political patronage and pressure not only of members of the Police Force itself but also of every member of the public service (including the Teaching Service) of the State of Trinidad and Tobago.

In dealing with this question the judgments in the courts below incorporate a detailed and erudite examination of judicial decisions and dicta dealing with the right of the Crown to dismiss its servants at pleasure that are to be found in English cases and in cases that have arisen in other Commonwealth jurisdictions. The purpose of these citations of case law was to extract from them the appropriate principle of statutory construction to be applied in order to determine whether the current Act of Parliament dealing with the Police Force, the Police Service Act, 1965, upon its true interpretation excluded the right of the Governor-General, as representative of Her Majesty under section 19 of the 1962 Constitution, to dismiss at pleasure police officers of the rank of Mr. Thomas. While expressing their indebtedness to the analysis of the provisions of the Police Service Act, 1965, and of the legislative history of the Act, which have been of great assistance to their Lordships in their consideration of Questions (1) and (2), they nevertheless think that the answer to Question (3) is to be sought and found in the Constitution itself and, in particular, in Chapter VIII, rather than in legislation, whether primary or subordinate, made before the 1962 Constitution came into force or enacted by the Parliament of Trinidad and Tobago thereafter without prior amendment of the Constitution in accordance with the provisions of section 38(2).

To speak of the right of the Crown to dismiss its servants at pleasure is to use a lawyer's metaphor to cloak a political reality. " At pleasure " means that the Crown servant may lawfully be dismissed summarily without there being any need for the existence of some reasonable cause for doing so—in other words " at whim "; and " the Crown " in the context of the 1962 Constitution of Trinidad and Tobago meant the Governor-General who, in this regard, was required by section 63 of the Constitution to act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet. Under a party system of government such as exists in Trinidad and Tobago and was expected to exist after independence in other Commonwealth countries whose constitutions followed the Westminster model, dismissal at pleasure would make it possible to operate what in the United States at one time became known as the " spoils " system upon a change of government, and would even enable a Government, composed of the leaders of the political party that happened to be in power, to dismiss all members of the public service who were not members of the ruling party and prepared to treat the proper performance of their public duties as subordinate to the furtherance of that party's political aims. In the case of an armed police force with the potentiality for harassment that such a force possesses, the power of summary dismissal opens up the prospect of converting it into what in effect might function as

a private army of the political party that had obtained a majority of the seats in Parliament at the last election. Their Lordships do not suggest that there is any likelihood of any of these extreme consequences of the existence of a legal right of summary dismissal without cause occurring in Trinidad and Tobago; but what has actually happened in some other countries suggests that the possibility of their occurrence was not too far-fetched to justify the constitution-makers in the nineteen-sixties making provision to eliminate any such risk in constitutions which follow the Westminster model.

The whole purpose of Chapter VIII of the Constitution which bears the rubric " The Public Service " is to insulate members of the civil service, the teaching service and the police service in Trinidad and Tobago from political influence exercised directly upon them by the Government of the day. The means adopted for doing this was to vest in autonomous commissions, to the exclusion of any other person or authority, power to make appointments to the relevant service, promotions and transfers within the service and power to remove and exercise disciplinary control over members of the service. These autonomous commissions, although public authorities, are excluded by section 105(4)(*c*) from forming part of the service of the Crown. Subject to the approval of the Prime Minister they may delegate any of their powers to any of their members or to a person holding some public office (limited in the case of the Police Service Commission to an officer of the Police Force); but the right to delegate, though its exercise requires the approval of the Prime Minister, is theirs alone and any power so delegated is exercised under the control of the Commission and on its behalf and not on behalf of the Crown or of any other person or authority.

In respect of each of these autonomous commissions the Constitution contains provisions to secure its independence from both the executive and the legislature. No member of the legislature may serve on the commission; all members must be appointed for a fixed term of years which must not be less than three or more than five, during which a member may only be removed for inability to discharge his function or for misbehaviour. The quarantine period imposed by making it a requirement of eligibility that a member shall not have served in any public office within the last three years and also making him ineligible for appointment to any public office for three years after ceasing to serve as a member of the commission is clearly intended to avoid any risk of his being influenced in favour of the executive by considerations of advancement in his own career.

The provisions of Chapter VIII of the Constitution that are directly relevant to the legal nature of Mr. Thomas's tenure of office in the Police Force are to be found in section 98, which establishes the Police Service Commission and section 99 which confers its functions on it. Corresponding provisions, in language that is in all relevant respects identical, are made for the Public Service Commission by sections 92 and 93; for what in 1968 became the Teaching Service Commission by sections 99A and 99C; and, with some modifications appropriate to the nature of the public offices to which it makes appointments, for the Judicial and Legal Service Commission by sections 83 and 84.

Sections 98 and 99 of the Constitution read as follows:—

> " **98.**—(1) There shall be a Police Service Commission for Trinidad and Tobago which shall consist of a Chairman and four other members.
>
> (2) (*a*) The members of the Police Service Commission shall be appointed by the Governor-General, acting in accordance with the advice of the Prime Minister.

(*b*) The Chairman of the Police Service Commission shall be either the Chairman or the Deputy Chairman of the Public Service Commission.

(3) A person shall not be qualified to be appointed to or to hold the office of a member of the Police Service Commission if he is a Senator or a temporary member of the Senate or a member of the House of Representatives or a Minister or a Parliamentary Secretary or if he holds or is acting in or has held any public office within the period of three years immediately preceding such appointment.

(4) A person who has held office or acted as a member of the Police Service Commission shall not, within a period of three years commencing with the date on which he last so held office or acted, be eligible for appointment to any public office.

(5) The office of a member of the Police Service Commission shall become vacant at the expiration of five years from the date of his appointment or such shorter period, not being less than three years, as may be specified at the time of his appointment.

(6) A member of the Police Service Commission may be removed from office by the Governor-General, acting in accordance with the advice of the Prime Minister, for inability to discharge the functions of his office (whether arising from infirmity of mind or body or any other cause) or for misbehaviour.

(7) A member of the Police Service Commission shall not be removed from office except in accordance with the provisions of this section.

(8) If the office of a member of the Police Service Commission is vacant or a member is for any reason unable to perform the functions of his office, the Governor-General, acting in accordance with the advice of the Prime Minister, may appoint a person who is qualified for appointment as a member of the Commission to act as a member of the Commission, and any person so appointed shall, subject to the provisions of subsection (3) of this section, continue to act until his appointment is revoked by the Governor-General, acting in accordance with the advice of the Prime Minister.

99.—(1) Power to appoint persons to hold or act in offices in the Police Force (including appointments on promotion and transfer and the confirmation of appointments) and to remove and exercise disciplinary control over persons holding or acting in such offices shall vest in the Police Service Commission:

Provided that the Commission may, with the approval of the Prime Minister and subject to such conditions as it may think fit, delegate any of its powers under this section to any of its members or to the Commissioner of Police or any other officer of the Police Force.

(2) Before the Police Service Commission appoints to any office in the Police Force any person holding or acting in any office power to make appointments to which is vested by this Constitution in the Judicial and Legal Service Commission, it shall consult with that Commission.

(3) Before the Police Service Commission appoints to any office in the Police Force any person holding or acting in any office power to make appointments to which is vested by this Constitution in the Public Service Commission, it shall consult with that Commission.

(4) The Police Service Commission shall not remove, or inflict any punishment on, the holder of an office in the Police Force on the grounds of any act done or omitted to be done by him in the exercise of a judicial function conferred upon him unless the Judicial and Legal Service Commission concurs therein.

(5) Before the Police Service Commission makes an appointment to the office of Commissioner or Deputy Commissioner of Police it shall consult the Prime Minister, and a person shall not be appointed to such an office if the Prime Minister signifies to the Police Service Commission his objection to the appointment of that person to such an office."

To " remove " from office in the Police Force in the context of section 99(1), in their Lordships' view, embraces every means by which a police officer's contract of employment (not being a contract for a specific period), is terminated against his own free will, by whatever euphemism the termination may be described, as, for example, being required to accept early retirement. Before this Board the Attorney-General has not sought to argue that, after the 1962 Constitution had vested in the Police Service Commission the power to remove police officers, the Governor-General acting on behalf of the Crown but on the advice of the Cabinet retained any concurrent power to dismiss them either with or without reasonable cause. Retention of a power in the Government to dismiss police officers without the need for showing any reasonable cause would enable it to render abortive the exercise also by the Commission of their functions of appointing, promoting and transferring members of the Police Force; since the Governor-General could by this means terminate immediately appointments made by the Commission of any persons of whom the Government of the day did not approve.

The way the argument for the Attorney-General was put before this Board was that in the case of police officers the exercise of the right of the Crown to dismiss its servants at pleasure was merely transferred by section 99(1) of the Constitution from the Governor-General to the Police Service Commission and was embraced in the power to " remove " from office that became vested in them by that section. The contention was that the Commission need not look for any reasonable cause for exercising its power of dismissal in the particular case, although in practice it would normally do so; nevertheless it is legally entitled to act without any reasonable cause but simply and solely at its own whim; though that, of course, is not what it purported to do in the instant case.

In their Lordships' view there are overwhelming reasons why " remove " in the context of " to remove and exercise disciplinary control over " police officers in section 99(1) and in the corresponding sections relating to the other public services must be understood as meaning " remove for reasonable cause " of which the Commission is constituted the sole judge, and not as embracing any power to remove at the Commission's whim. To construe it otherwise would frustrate the whole constitutional purpose of Chapter VIII of the Constitution which their Lordships have described. It would also conflict with one of the human rights recognised and entrenched by section 1(*d*) of the Constitution, viz. " the right of the individual to equality of treatment from any public authority in the exercise of any functions ". Dismissal of individual members of a public service at whim is the negation of equality of treatment.

If supplementary reasons for rejecting the construction sought to be placed on section 99(1) by the Attorney-General were needed, their Lordships would point out that the constitutional doctrine of dismissibility of Crown servants at pleasure is, as a matter of legal theory, based upon an implied term in their contracts of employment. True, the implied term has the unique feature that it is treated as overriding even an express term to the contrary, unless the incorporation of such a term by the executive acting on behalf of the Crown, in entering into

the contract, has been authorised by the legislature i.e. the Queen in Parliament. Nevertheless when the Crown summarily dismisses a Crown servant without needing to show any cause it does so in the exercise of a right conferred upon it as employer under the contract of employment which it has entered into with the servant. The Police Service Commission does not by section 99 replace the Crown as employer of police officers; the definitions of " public office ", " public officer " and " the public service " in section 105(1) rule this out. So when the Commission " removes " a police officer under section 99 it is exercising a function newly-created by that section: there are not vested in it any contractual rights that it is capable of exercising as a party to the contract of employment of the police officer.

It may be worth while adding as a footnote that even under the successive pre-Independence Constitutions of Trinidad and Tobago, between 1924 and 1950, the power of dismissal of Crown servants in the colony that was delegated to the Governor by the Royal Letters Patent was not the unfettered power to dismiss at pleasure but was restricted to dismissal " upon sufficient cause to him appearing ". Although the Governor's decision as to what amounted to sufficient cause in the individual case was not open to judicial review, these Royal Instructions justify the declaration in section 1 of the 1962 Constitution that the right of the individual to equality of treatment from any public authority in the exercise of any functions had already existed in Trinidad and Tobago, so far as the dismissal of public officers was concerned.

Their Lordships accordingly answer Question (3) in the negative: the survival of the historic legal doctrine of dismissibility at pleasure of police and other public officers was inconsistent with the 1962 Constitution of Trinidad and Tobago and remains inconsistent with its present Constitution as a republic.

Their Lordships accordingly next turn to Question (1). It speaks of " offences " with which Mr. Thomas was charged. These were not criminal offences but offences against discipline and are so described in regulation 74 of the Police Service Commission Regulations, 1966, which is referred to in each of the three charges. " Discipline " in this context means the code of conduct which a police officer is under a duty to observe: what he is required to do and not to do, whether the particular requirement is imposed upon him by legislation, primary or subordinate, or by the express or implied terms of his contract of employment. In discussing, as their Lordships must, the division of functions between the Governor-General and the Police Service Commission in relation to what in the Constitution is called the Police Force but is now known as the Police Service, they will find it conducive to clarity to use the expression " code of conduct " instead of " discipline " and to speak of " misconduct " rather than " an offence against discipline ".

The functions of the Police Service Commission fall into two classes: (1) to appoint officers to the Police Service, including their transfer and promotion and confirmation in appointments and (2) to remove and exercise disciplinary control over them. It has no power to lay down terms of service for police officers; this is for the legislature and, in respect of any matters not dealt with by legislation, whether primary or subordinate, it is for the executive to deal with in its contract of employment with the individual police officer. Terms of service include such matters as (a) the duration of the contract of employment—e.g. for a fixed period, for a period ending on attaining retiring age, or for a probationary period as is envisaged by the reference to " confirmation

of appointments " in section 99(1), (b) remuneration and pensions and (c) what their Lordships have called the " code of conduct " that the police officer is under a duty to observe.

The legislature has acted in the matter of laying down terms of service by passing the Police Service Act, 1965, which replaces and repeals the former Police Ordinance, though it preserves the regulations made under that Ordinance until they have been replaced by regulations made under the new Act. There are only a few sections of this Act to which reference need be made. Sections 9 to 11 which appear under the rubric " Tenure " read as follows—

> " 9. A police officer shall hold office subject to the provisions of this Act and any other enactment and any regulations made thereunder and, unless some other period of employment is specified, for an indeterminate period.
>
> 10. A police officer who is appointed to an office in the police service for a specified period shall cease to be a police officer at the expiration of that period.
>
> 11. A police officer may resign his office by giving such period of notice as may be prescribed by Regulations."

Section 61 provides the ways in which an appointment for an indeterminate period may be brought to an end. They include compulsory retirement on attaining retirement age which thus is made a statutory term of a police officer's contract of employment and is dealt with in section 62. These sections are as follows:—

> " 61. The modes by which a police officer may leave the Police Service are as follows:—
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> (*a*) on dismissal or removal in consequence of disciplinary proceedings;
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> (*b*) on compulsory retirement;
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> (*c*) on voluntary retirement;
>
> (*d*) on retirement for medical reasons;
>
> (*e*) on resignation;
>
> (*f*) on the expiry or other termination of an appointment for a specified period;
>
> (*g*) on the abolition of office.
>
> " 62. (1) A police officer in the Second Division shall be required to retire from the Police Service on his attaining the age of fifty-five years but may, with the approval of the Police Service Commission, be permitted to retire on his attaining the age of fifty years.
>
> (2) A police officer in the First Division shall be required to retire from the Police Service on attaining the age of sixty years, but may, with the approval of the Police Service Commission, be permitted to retire on his attaining the age of fifty-five years, Provided that a police officer in this Division who has had a continuous period of not less than thirty years service, may with the permission of the Governor-General be permitted to retire on attaining the age of fifty years."

Section 61, however, in speaking as it does of the modes by which a police officer *may leave* the Police Service, does not, apart from its reference to disciplinary proceedings and to compulsory retirement, purport to regulate his removal from the Police Service against his will; for that, like the conduct of disciplinary proceedings themselves, is a function of the Police Service Commission.

The Act of 1965 was passed before the Police Service Commission had made any regulations under the power newly conferred upon it

to do so with the approval of the Prime Minister by section 102 of the Constitution. It presumably continued to act under the Police Service Commission Regulations, 1961, which were made at a time when the Commission's functions were advisory only. These earlier regulations made no attempt to define and classify offences against discipline; they made use of the general expression " misconduct ".

Section 102 of the Constitution, so far as is relevant to Questions (1) and (2), is in the following terms:—

> " **102.**—(1) Subject to the provisions of subsection (3) of this section, a Commission to which this section applies may, with the consent of the Prime Minister, by regulation or otherwise regulate its own procedure, including the procedure for the consultation with persons with whom it is required by this Constitution to consult, and confer powers and impose duties on any public officer or on any authority of the Government of Trinidad and Tobago for the purpose of the discharge of its functions.
>
> (2) Without prejudice to the generality of the powers conferred by subsection (1) of this section, a Commission to which this section applies may by regulation make provision for the review of its findings in disciplinary cases.
>
> (3) . . . . .
>
> (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
>
> (*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.
>
> (5) References in this section to a Commission to which this section applies are references to the Judicial and Legal Service Commission, the Public Service Commission or the Police Service Commission, as the case may be, established under this Constitution."

Regulations under section 102 were made in 1966 and their Lordships will have to consider later whether regulation 74 in particular was *ultra vires* the powers conferred in the Commission by that section; but the absence of any such post-1962 regulations at the time that the Police Service Act, 1965, was passed may explain the fact that some of the matters in respect of which power to make regulations was conferred upon the Governor-General by section 65 of that Act were expressed in terms which, unless very restrictively construed, appeared to authorise him to usurp the constitutional functions of the autonomous Police Service Commission, viz:—

> " 65. (1) The Governor-General may make regulations for carrying out or giving effect to this Act, and in particular for the following matters namely:—
>
> (*a*) for prescribing classifications for officers in the police service, including qualifications, duties and remunerations;
>
> (*b*) for prescribing the procedure for appointments from within the police service;

(*c*) for prescribing the probationary period on first appointment and for the reduction of such period in appropriate cases;

(*d*) for prescribing conditions for the termination of first appointments;

(*e*) for prescribing the procedure for the recovery of any penalties from a police officer;

(*f*) for regulating the hours of attendance of police officers and the keeping and signing of records of attendance or for prescribing other methods of recording attendance;

(*g*) for regulating the duties to be performed by police officers;

(*h*) for regulating the granting of leave to police officers;

(*i*) for prescribing arrangements and procedures for providing, assisting in or co-ordinating staff developing programmes;

(*j*) the enlistment, training and discipline of the Police Service;

(*k*) the description and issue of arms, ammunition, accoutrements, uniform and necessaries to be supplied to the Police Service;

(*l*) for prescribing and providing for the use of powers under this Act or the regulations;

(*m*) for regulating generally the terms and conditions of temporary employment;

(*n*) generally, for the good order and government of the Police Service.

(2) . . .

(3) Any Regulations and any other regulations respecting the police service in operation at the coming into operation of this Act shall have effect in relation to police officers under this Act until regulations have been made under this Act."

Their Lordships would mention in passing that paragraphs (*b*) to (*d*) appear to deal with promotions and transfers and with appointments and confirmation of appointments, which are exclusive functions of the Commission under section 99(1); but what has been principally relied upon as conferring upon the Governor-General the sole power to create " offences against discipline " is paragraph (*j*): " the enlistment, training and discipline of the Police Service ".

If " enlistment " were interpreted as including the process of selection of recruits to the Police Service, as distinct from laying down physical and educational qualifications for recruitment, it would to that extent be inconsistent with section 99(1) of the Constitution which vests the function of selection exclusively in the Commission. Similarly if " discipline " were interpreted as meaning more than a code of conduct for police officers and were treated as embracing also such matters as laying down the procedure for disciplinary proceedings or laying down the penalties for various categories of misconduct it would, for the same reason, to that extent also be inconsistent with section 99(1). In the absence of any prior alteration to the Constitution under section 38(1) —and there had been none—the Police Service Act, 1965, and any regulations made or continued in force under section 65 of the Act would to the extent of such inconsistencies be void.

No fresh regulations have been made by the Governor-General under section 65(1); so by section 65(3), the Police Regulations, 1954, made under the Police Ordinance have remained in force to the extent that they are not inconsistent with the Constitution. They include a large number of highly miscellaneous specific rules of conduct but nothing in the nature of a general code. They also made provision for the procedure to be followed when disciplinary charges are brought against a police officer and for the classification of " disciplinary offences " according to the penalty that may be awarded, but they do not contain a definition in

relation to any of these classes of what constitutes a disciplinary offence. These latter provisions as to procedure and penalties clearly could not survive the coming into force of section 99(1) of the Constitution; they had ceased to be in operation when the Police Service Act, 1965, was passed and so were not preserved by section 65(3). So when the Police Service Commission Regulations, 1966, were made the legal position was that no general code of conduct for police officers had been laid down by Act of Parliament or by regulation: the general obligations of a police officer to carry out the lawful orders of his superior officers and not to neglect his duties but to perform them to the best of his abilities were left to necessary implication from the contract of employment into which he had entered with the Crown.

Before turning to those provisions of the Police Service Regulations, 1966, the validity of which has been attacked by Mr. Thomas, their Lordships should say something about what is inherent in the grant itself of powers " to remove and exercise disciplinary control over " members of the Police Service quite apart from any regulations that may be made under section 102(1) and (2). Their Lordships have already explained why " remove " must be construed as meaning remove for what in the judgment of the Commission constitutes reasonable cause. Reasonable cause is not confined to wilful misconduct; it would embrace reasons such as ill-health or unsuitability of temperament or even some personal characteristic, any one of which, through no fault of his own, had rendered a particular officer unfitted to perform with reasonable efficiency the duties of a policeman. Removal for causes such as these is included among the functions of the Commission to decide what causes justify removal even although it is not carried out in the exercise of the Commission's powers of disciplinary control.

Removal from the service in the exercise of disciplinary control is what is directly attacked in the instant case, but " disciplinary control " covers the infliction of lesser penalties than dismissal. It is for the Commission to determine what are the kinds of penalties that may be inflicted, as well as deciding which of them is appropriate for the particular form of misconduct committed by the police officer in each individual case. It is inherent in this function that the Commission should be entitled to publish in a form calculated to bring it to the attention of all members of the Police Service an indication of the various kinds of misconduct which in its opinion are capable of justifying disciplinary proceedings, and of the various kinds of penalties that such misconduct may incur; and in their Lordships' view it is in the interests of justice and open government alike that the Commission should do so.

Their Lordships accordingly now turn to the Police Service Commission Regulations, 1966. They consist of 115 regulations divided into 10 Chapters. Of these regulations, six are attacked by Mr. Thomas in the action as being *ultra vires* and void, viz: regulation 74 which appears in Chapter VII which bears the rubric " Conduct " and regulations 80, 81, 86, 99 and 101, all of which appear in Chapter VIII which bears the rubric " Disciplinary Procedure ". Regulation 74 is the only one that is directly relevant to Question (1), but the others may be germane to Question (2).

Chapter VII which starts with regulation 55 and consists of twenty regulations ending with regulation 74 contains what purports to be a detailed code of conduct for police officers, while regulation 74 itself purports to prescribe what constitute " offences against discipline " which render an officer liable to punishment. The only parts of the regulation that need be cited are 74(1) and 74(2)(*d*); the remaining paragraphs in 74(2) describe in considerable detail a whole variety of instances of misconduct.

"74.(1) A police officer who without reasonable excuse does an act which:—

(*a*) amounts to failure to perform in a proper manner any duty imposed upon him as a police officer; or

(*b*) contravenes any of the provisions of these regulations; or

(*c*) contravenes any enactment relating to the Service; or

(*d*) is otherwise prejudicial to the efficient conduct of the Service or tends to bring discredit on the reputation of the Service;

commits an offence against discipline and is liable to such punishment as is prescribed by regulation 101 or by other regulation.

(2) Without prejudice to the generality of the provisions of paragraph (1) a police officer commits an offence against discipline if he is guilty of—

. . . .

(*d*) *Neglect of duty*, that is to say, if a police officer—

(i) neglects, or without good and sufficient cause omits, promptly and diligently to attend to or carry out anything which is his duty as a police officer, or

(ii) idles or gossips while on duty, or

(iii) fails to work his beat in accordance with orders, or leaves his beat, point, or other place of duty to which he has been ordered, without due permission or sufficient cause, or

(iv) by carelessness or neglect permits a prisoner to escape, or

(v) fails, when knowing where any offender is to be found, to report the same, or to make due exertions for making him amenable to justice, or

(vi) fails to report any matter which it is his duty to report, or

(vii) fails to report anything which he knows concerning a criminal charge, or fails to disclose any evidence which he, or any person within his knowledge, can give for or against any prisoner or defendant to a criminal charge, or

(viii) omits to make any necessary entry in any official document or book, or

(ix) neglects, or without good and sufficient cause omits, to carry out any lawful instructions of a medical officer of the Service or, while absent from duty on account of sickness, is guilty of any act or conduct calculated to retard his return to duty."

The relevant regulation-making power under section 102 pursuant to which Chapter VII of the Regulations purported to be made was the power of the Commission with the consent of the Prime Minister to regulate its own procedure. Laying down codes of conduct to be observed by police officers is not comprised in regulating the Commission's own procedure, however desirable it may be that it should take steps in some form or another to make police officers aware of the kinds of misconduct which the Commission regard as capable of justifying disciplinary proceedings. Before this Board it has been conceded by the Attorney-General that a regulation under section 102 did not provide a legally appropriate way of doing this and that Chapter VII of the Regulations for the most part and regulation 74 in particular is *qua* regulation, *ultra vires*. He contends, however, that Chapter VII is severable from the remainder of the Regulations and in particular from those in Chapter VIII which deal with the various forms of penalties that the Commission may impose in disciplinary proceedings.

With this, their Lordships agree. The result is that, in the absence of any *comprehensive* code of conduct embodied in the Police Service Act, 1965, or in *intra vires* regulations made under it, the only misconduct with

which Mr. Thomas could be charged was wilful neglect or breach of duties imposed upon him by the implied terms of his contract of employment as a police officer. This the particulars of offence under each of the three charges brought against him manifestly disclosed. Regulation 74, although its inclusion in regulations purporting to be made under section 102 of the Constitution was *ultra vires*, contained material which the Commission might properly and helpfully have published in the form of a notice. The references to it in the charges can in no way have misled Mr. Thomas. Their Lordships agree with the Chief Justice that in view of the particulars of the offences set out in the charges, the references to regulation 74 may be treated as surplusage and as in no way invalidating the Commission's imposition of the penalty of removing him from the Police Service under regulation 99.

For the sake of completeness their Lordships would add that regulation 99 and those other regulations contained in Chapter VIII, which prescribe the various penalties which the Commission may impose and the circumstances in which it may impose them, are properly classified as regulating the Commission's own procedure and are *intra vires* section 102.

It follows that Question (1) cannot, in their Lordships' view, be usefully answered in the form in which it is put. It treats the Commission's powers to impose penalties upon a police officer for misconduct of the kind with which Mr. Thomas was charged as being derivable from two sources only: viz. regulations made by the Governor-General under the Police Service Act, 1965, and regulations made by the Commission under section 102 of the Constitution; whereas, as their Lordships have explained, the true legal source of the power the Commission exercised over Mr. Thomas was section 99 of the Constitution itself.

Finally, their Lordships turn to Question (2): the effect of the "no certiorari" clause in section 102(4). Whether that clause ousts the jurisdiction of the court to enquire in any circumstances into the validity of administrative orders made by the Commission is a question that this Board deliberately left open in *Harrikissoon v. Attorney-General of Trinidad and Tobago* [1980] A.C. 265. Clearly the question that it was sought to have decided by the High Court in the action brought by Mr. Thomas was the validity of the Commission's order removing him from the Police Service which it made in purported exercise of disciplinary control over him. Jurisdiction to remove him from the Police Service and also generally to exercise disciplinary control over him while he remained a member of the Police Service is expressly conferred upon the Commission by section 99(1) of the Constitution in words so ample, simple and unqualified that they are in marked contrast to the detailed and restrictive definitions of the jurisdiction of administrative tribunals that are normally found in the Acts of Parliament which set them up. Their Lordships use the expression "jurisdiction" rather than "power" because of the use of this expression in *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147 which was relied on in the instant case by Phillips J.A., and because in acting as it did in relation to Mr. Thomas, the Commission, although an administrative body, was performing a quasi-judicial function which would affect his legal rights and obligations and so attracted his constitutional right under section 2(*e*) of the Constitution to a fair hearing in accordance with the principles of fundamental justice.

In exercising such jurisdiction the Commission is clearly performing a function vested in it by the Constitution and the question whether it has performed it validly by removing Mr. Thomas from the Police Service falls fairly and squarely within the language of section 102(4)(*a*) as a question into which by the Constitution itself the court is prohibited from enquiring.

At the date when the Constitution was drafted the decision of the majority of the House of Lords in *Smith v. East Elloe R.D.C.* [1956] A.C. 736 still held the field, upholding the complete ouster of the jurisdiction of the courts by a "no certiorari" clause in similar terms to that contained in section 102(4). It was, no doubt, present to the mind of the draftsman of that section. Having granted to government employees a security of tenure superintended by autonomous commissions it may well have been thought not to be in the interest of efficient government if every appointment, promotion, transfer, termination of employment, made by the Commission, or disciplinary penalty imposed by it, were left open to attack in a court of law with the delay in determining the status of individual officers within the public service that, as the instant case so dramatically illustrates, recourse to the courts would be likely to involve.

The full doctrine laid down in *Smith v. East Elloe R.D.C.* (ubi sup.) as to the effectiveness of "no certiorari" clauses has since fallen into disfavour and has been whittled down considerably in England after the 1962 Constitution of Trinidad and Tobago had been drafted; particularly by the decision of the House of Lords in *Anisminic* where one of the few remaining "no certiorari" clauses that had survived the Tribunals and Inquiries Act, 1958, was held to be insufficient to oust the jurisdiction of the High Court to set aside an order of an administrative tribunal that acted outside the limited jurisdiction conferred on it by Parliament because its decision had involved its posing and answering a question different from any of the only questions that it was empowered to decide. However, their Lordships do not find it necessary in the instant case to analyse the speeches in *Anisminic* and later English cases that have followed it, or to do more than say that it is plainly for the court and not for the Commission to determine what, on the true construction of the Constitution, are the limits to the functions of the Commission. This is the task on which their Lordships have been engaged in answering Questions (1) and (3). If the Police Service Commission had done something that lay outside its functions, such as making appointments to the Teaching Service or purporting to create a criminal offence, section 102(4) would not oust the jurisdiction of the High Court to declare that what it had purported to do was null and void.

There is also, in their Lordships' view, another limitation upon the general ouster of the jurisdiction of the High Court by section 102(4); and that is where the challenge to the validity of an order made by the Commission against the individual officer is based upon a contravention of "the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations" that is secured to him by section 2(*e*) of the Constitution, and for which a special right to apply to the High Court for redress is granted to him by section 6. *Generalia specialibus non derogant* is a maxim applicable to the interpretation of constitutions. The general "no certiorari" clause in section 102(4) does not, in their Lordships' view, override the special right of redress under section 6.

In the instant case, however, there is no suggestion that Mr. Thomas was not given a fair hearing in accordance with section 2(*e*). Nor can it be plausibly argued that the Commission acted outside its jurisdiction in removing Mr. Thomas from the Police Service in the exercise of disciplinary control over him. What it did fell fairly and squarely within the functions and jurisdiction conferred upon it by section 99(1). The High Court had no jurisdiction to inquire whether it was validly done or not.

Their Lordships' answer to Question (2) is: "No"; and since this necessarily disposes of Mr. Thomas's action their Lordships in dismissing the appeal will also order that the action itself be dismissed with costs here and below.

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In the Privy Council

ENDELL THOMAS

v.

THE ATTORNEY-GENERAL

DELIVERED BY
LORD DIPLOCK

Printed by HER MAJESTY'S STATIONERY OFFICE
1981