

CERTIORARI

*Munusamy v. The Public Services Commission*¹

Munusamy was a probationer Assistant Passport Officer in the External Affairs Service. The Public Services Commission decided to terminate his appointment as probationer Assistant Passport Officer and revert him to his former post in the Immigration Department. Munusamy applied to the High Court for an order of certiorari to quash the decision of the Public Services Commission on the ground that Article 135(2) of the Federation's Constitution had not been complied with.

Article 135 reads as follows:

135(1). No member of any of the services mentioned in paragraphs (b) to (g) of clause (1) of Article 132 shall be dismissed or reduced in rank by an authority subordinate to that which, at the time of the dismissal or reduction, has power to appoint a member of that service of equal rank. (2) No member of such a service as aforesaid shall be dismissed or reduced in rank without a reasonable opportunity of being heard.

Ong J. held that reversion from a probationary appointment to a formerly held substantive post does not amount to a reduction in rank within the meaning of Article 135. In the event any discussion of whether certiorari would lie to quash the decision of the Commission is academic. Ong J.'s 'academic' discussion is open to question. He said:

22. (1852) 1 De G.M. & G. 660 at p. 679.

23. See also *Kettlewell v. Refuge Assurance Co.* [1908] 1 K.B. 545 applied [1909] A.C. 243; *Hughes v. Liverpool Victoria Legal Friendly Society* [1916] 2 K.B. 482.

1. (1960) 26 M.L.J. 220.

There is no need to discuss whether, under Article 135(2) of the Constitution, the Public Services Commission must act as a judicial or quasi-judicial tribunal, since, under that Article, the Commission must hear the public officer it is intended to dismiss or reduce in rank. Any action by the Commission in contravention of the Article must be constitutionally invalid, for the Constitution is the supreme law of the land. In such cases, certiorari, can and must issue to quash the order, because it is the right and the duty of the court to maintain the rule of law and declare invalid any transgression of the limits of the Constitution. Nor is it necessary to invoke the principle of *audi alteram partem*, because it is part of the Article itself. I need refer only to *High Commissioner for India v. I.M. Lall* A.I.R. 1948 P.C. 121.²

It is true that there is no need to discuss whether the Public Services Commission must act as a judicial or quasi-judicial tribunal in order to determine if the tribunal should grant a hearing to the public officer in question. There is need however to discuss whether the Public Services Commission has a duty to act judicially in order to determine whether certiorari will lie. And the fact that the Public Services Commission has a duty to grant a hearing does not, by itself, necessarily qualify the Public Services Commission as a tribunal having a duty to act judicially.³

In order that certiorari will lie, the tribunal must have a legal duty to determine questions affecting the rights of subjects and have a duty to act judicially.⁴ And it will only be granted on one of the following grounds: (1) lack of jurisdiction, (2) breach of the rules of natural justice, (3) error of law on the face of the record and (4) fraud or collusion.

That the Public Services Commission's authority to act is derived from law is clear. That its determinations affect the rights of subjects is equally apparent. But does the Public Services Commission have a duty to act judicially?

It is fairly certain that if the procedure followed by a tribunal is analogous to that of a court in the sense that the tribunal is faced with a proposal and an opposition and receives evidence adduced for each side and then decides on the basis of the evidence so adduced, the tribunal is said to have a duty to act judicially.⁵ There is also case-law to support the proposition that a tribunal whose procedure is not analogous to that of a court of law may also be said to have a duty to act judicially if the tribunal is "quite unconcerned with questions of policy" — and where the tribunal has to "decide the matter solely on the facts of the particular case, solely on the evidence before them and apart from any extraneous considerations."⁶

Is the Public Services Commission's procedure analogous to a court of law? No. All that Article 135(2) requires is that the Public Services Commission give the officer in question a reasonable opportunity of being heard. The evidence in support of the proposal to dismiss or reduce in rank is not required to be taken at hearings at which the officer affected is present. There is no express or implied duty on the part of the Public Services Commission to disclose the evidence in its possession to the officer.

2. (1960) 26 M.L.J. 221.

3. *Franklin v. Minister of Town and Country Planning* [1948] A.C. 87.

4. *Rex v. Electricity Commissioners* [1924] 1 K.B. at 204-205.

5. *Nakkuda Ali v. Jayaratne* [1961] A.C. 66. See de Smith's *Judicial Review of Administrative Action* at pp. 281-283.

6. *R. v. Manchester Legal Aid Committee ex p. Brand. (R.A.) & Co.* [1952] 2 Q.B. 413. See de Smith's *Judicial Review of Administrative Action* at pp. 283-286.

It is also submitted that the Public Services Commission in coming to its decision is not unconcerned with questions of policy nor does it decide the matter solely on the facts adduced at the hearing and apart from any extraneous considerations. All officers in the Federal services named in Article 132(1) hold office at the pleasure of the Yang di-Pertuan Agong.⁷ And since the power to dismiss or reduce in rank is by law vested in the Public Services Commission, the officers in reality hold office at the pleasure of the Public Services Commission. Subject to the condition in Article 135(2), to grant a reasonable opportunity of being heard, the Public Services Commission's decision is unfettered. The Public Services Commission's decision may be wholly based on governmental policy. It may be completely unsupported by the facts. In neither case can the decision be impugned.

It follows from the above that the Public Services Commission does not have a duty to act judicially and that therefore the order of certiorari will not lie to quash its decision. Ong J.'s error is in assuming that because the Public Services Commission has a duty to grant a hearing therefore it has a duty to act judicially.

This does not mean that a decision of the Public Services Commission arrived at without complying with Article 135(2) is valid or, if invalid, the officer is left without remedy. The decision is illegal and void but the appropriate remedies are the declaration and injunction. It is curious that Ong J. should have cited the case of *High Commissioner for India v. I.M. Lall*⁸ in support of his statements because in that case, in an analogous situation, the aggrieved officer applied for and obtained a declaration and not an order of certiorari.

7. Art. 132 (2A) of the Federation's Constitution. This clause was added by an amending Act of 1960 but is declaratory in effect.

8. A.I.R. 1948 P.C. 121.