NOTES OF CASES

DISMISSAL OF GOVERNMENT SERVANT

Surinder Singh v. *The Government of the Federation of Malaya*[1]

How supreme is a Constitution which claims it is supreme? Can an "existing law" which substantially conflicts with a Constitutional provision that is "subject to the provisions of existing: law" reign supreme even when there are provisions for the modification of existing laws to bring them into accord with the Constitution? Elementary though they may appear, these, indeed, were the more interesting questions that highlighted the case, and which posed "a difficult point"[2] to their Lordships in the Privy Council when they granted the appeal from the decision of the Court of Appeal in Malaya. The facts of the case, briefly, are as follows.

The appellant was a Police Officer in the Royal Federation of Malaya Police Force, being first appointed in 1951. In 1958 he was dismissed by the Commissioner of Police on the ground that he had been guilty of a disciplinary offence. Appellant brought an action in the High Court challenging the dismissal. He argued that at that time the power to appoint or dismiss an officer of his rank was vested in the Police Service Commission and therefore the dismissal by the Police Commissioner was contrary to Article 135(1) of the Constitution. He also argued that there had been a denial of natural justice and therefore a violation of Article 135(2) which entitles him to a reasonable opportunity to be heard. At first instance Rigby J. gave judgment for Surinder Singh on both grounds, declaring that the dismissal was void. When the Government appealed, the Court of Appeal (Thomson C.J. and Hill J.A., Neal J. dissenting) allowed the appeal, holding that Singh was validly dismissed. However, on further appeal, the Judicial Committee of the Privy Council, in an opinion delivered by Lord Denning, found for Surinder Singh and set aside the judgment of the Court of Appeal. [3]

The case concerns some important constitutional issues, centering largely on the interpretation of several provisions of the Malayan Constitution and it is now proposed to consider three main aspects of the case.

The proper authority to dismiss:

By far this was the most interesting phase of the case. It reflects the various approaches that may be taken in judicial interpretation, especially when what is being interpreted is a written Constitution that has large areas yet to be judicially explored.

1. (Lords Denning, Hodson and Devlin) (1962) 28 M.L.J. 169. (The decision of the Court of Appeal is reported in (1961) 27 M.L.J. 121. The decision at first instance is reported in (1960) 26 M.L.J. 115.

2. *Ibid.*, *per* Lord Denning at p. 171.

3. For a case-note on the Court of Appeal decision see Manoeuvrability in *Judicial Interpretation* (note) by Miss Huang Su Mien, (1961) 3 U.M.L.R. 112. This note primarily concerns itself with the part of the decision turning on Article 135(1).

Surinder Singh was dismissed in 1958 and therefore his dismissal came under the operation of Article 135 (1) of the Constitution [4] which reads:

> No member of any of these services mentioned [*which includes the police service*] shall be dismissed or reduced in rank by an authority subordinate to that which, at the time of dismissal or reduction, has power to appoint a member of that service of equal rank.

He was dismissed by the Commissioner of Police under provisions of the Police Ordinance, 1952. It is clear that before the introduction of the Constitution, the Commissioner could appoint an officer of this rank under section 9(1) and could dismiss him for a disciplinary offence under section 45(1). The question was whether this law continued to operate after the introduction of the Constitution. If it did, then the dismissal effected in 1958 by the Commissioner of Police was not contrary to Article 135(1).

Surinder Singh contended that the provisions of the Police Ordinance did not operate after the introduction of the Constitution. He argued that the Constitution created a Police Service Commission with powers to appoint members of the Police Service; that at the date of dismissal the power to appoint was vested in this Police Service Commission; and that, since the Commissioner of Police was "an authority subordinate" to the Commission, the dismissal was contrary to Article 135(1). The provisions as to the powers of the Police Service Commission read:

> Art. 140(1). There shall be a Police Service Commission, whose jurisdiction shall, subject to Article 144, extend to all persons who are members of the police service.
>
> Art. 144(1). Subject to the provisions of any existing law and to the provisions of this Constitution, it shall be the duty of a commission ... to appoint, confirm, . . . promote, transfer and exercise disciplinary control over members of the service ... to which its jurisdiction extends.

The Government joined issue on this contention with a remarkable[5] argument. While not disputing the creation of the Police Service Commission, the Government referred to the opening words of Article 144(1) "subject to the provisions of any existing law . . ." and maintained that this gave priority to existing law and preserved it intact and that the powers and duties of the Police Service Commission were subject, *inter alia,* to the power of the Commissioner of Police to appoint superior police officers under the Police Ordinance. The Government contention, in the words of Lord Denning, boiled down to this: "The Constitution is subject to the existing law and not *vice versa."* [6]

On this point, the majority[7] of the Court of Appeal found substance in the Government's "eminently reasonable"[8] contention, and felt that the words "subject

4. The Constitution came into operation on Merdeka Day, 31st August, 1957.

5. The argument must surely be remarkable when we consider that at the same time the Government made the damaging admission that at the date of dismissal the Police Commissioner *was* subordinate to the Police Service Commission.

6. *Per* Lord Denning (1962) 28 M.L.J. at p. 171.

7. Neal J. dissented. He felt that, considering the Constitution in its entirety, the combined effect of Arts. 140 and 144 was to create the Police Service Commission with jurisdiction over all members of the police service "which Commission shall perform its duties in accordance with the principles of and procedure created by existing law as at Merdeka Day". The learned judge felt that if this construction was at fault, the existing law should be modified under Art. 162(6).

8. *Per* Hill J.A. (1961) 27 M.L.J. at p. 131.

to the provisions of any existing law" should be construed as words of restriction and found authority in *Smith* v. *London Transport Executive*[9] for this construction.

Having come to this conclusion, Thomson C.J. found no necessity to act under the following provisions in the Constitution for modification of existing law:

> Art. 162(6). Any Court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka under this Article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution.
> (7). In this Article 'modification' includes amendments, adaptation and repeal.

The Privy Council thought otherwise and felt that there was a conflict between the existing law (as to the powers of the Commissioner of Police) and the Constitutional provisions as to the duties of the Police Service Commission, and that as the time for making modifications in the powers of the Police Commissioner by the Yang di-Pertuan Agong had lapsed, it was the duty of the Court to make the necessary modification under Article 162(6). The Privy Council was of the opinion that as soon as the Police Service Commission was established it had jurisdiction over all members of the police service, including the power to appoint or dismiss, and that the words "subject to the provisions of any existing law" could mean only such provisions "as were consistent with the Police Service Commission carrying out the duty entrusted to it". [10]

In this connection, the Privy Council said:

> It appears to their Lordships that there cannot, at one and the same time, be two authorities, each of whom has a concurrent power to appoint members of the police service. One or other must be entrusted with the power to appoint. In a conflict of this kind between the existing law and the Constitution, the Constitution must prevail. The Court must apply the existing law with such modifications as may be necessary to bring it into accord with the Constitution.[11]

This led the Privy Council to the conclusion that the dismissal of Surinder Singh by the Police Commissioner (being subordinate to the Police Service Commission) was contrary to Article 135(1) and therefore void.

Reasonable opportunity to be heard:

Curiously, Surinder Singh discovered his strongest argument in this phase of the case only during the course of the trial. As a result of various events suggesting that Surinder Singh had committed a disciplinary offence (*i.e.* encouraging perjury to be committed during a case), the Commissioner of Police set up a Board of Inquiry to inquire into the circumstances of the case. This Board of Inquiry produced a lengthy report which condemned him as a "thoroughly unscrupulous officer, who is prepared to go to any lengths, including the fabrication of false evidence . . .". As a result, disciplinary proceedings were instituted against Surinder Singh which were conducted by an Adjudicating Officer.

9. [1951] A.C. 555

10. (1962) 28 M.L.J. at p. 171.

11. *Ibid.*

The Report of the Board of Inquiry was sent to the Adjudicating Officer before he sat to inquire into the charge and obviously he had full knowledge of its contents. But Surinder Singh never had it and never had the opportunity of dealing with it in the Inquiry before the Adjudicating Officer. Indeed, he got it only on the fourth day of the hearing of his action before Rigby J. This turned out to be, as Thomson C.J. put it, "the high water mark" of Surinder Singh's case, the allegation being that he should have had this report prior to the disciplinary proceedings in order fully to appreciate and meet the case against him. The failure to do this resulted, it was argued, in a denial of natural justice that vitiated the proceedings and amounted to a violation of Article 135(2) of the Constitution. This article reads: —

> No member of such a service as aforesaid [*which includes the police* service] shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard.

The learned judges both at the Court of Appeal and at first instance, confused the issue on this point. The trial judge felt that the fact that the Adjudicating Officer had been furnished with the report of the Board of Inquiry created a very real likelihood that he would have a predetermined bias or prejudice against Surinder Singh and consequently held that that amounted to such a denial of natural justice that he had not been given a reasonable opportunity of being heard.

Though Thomson C.J. suspected the fallacy in this approach,[12] both he and the other two learned judges only added to the confusion when they proceeded to point out various factors showing that the Adjudicating Officer could not have been biased against Surinder Singh. Adopting this approach all members of the Court of Appeal held that there was no likelihood of bias and that therefore Article 135(2) had not been violated.

The Privy Council made it clear that the learned judges had missed the point:

> In the opinion of their Lordships, however, the proper approach is somewhat different. The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it … they are separate concepts and are governed by different considerations. In the present case Inspector Kanda complained of a breach of the second. He said … he had been dismissed without being given a reasonable opportunity of being heard.[13]

Enunciating basic principles, the Privy Council pointed out that "to be a real right which is worth anything" the right to be heard must include the right of the accused to know the case against him, to know the evidence against him and any statements affecting him. He must also be given an opportunity to correct or contradict them, and the adjudicator should not hear evidence or receive representations from one side behind the back of the other. Moreover, whether such evidence or representations did work to his prejudice was immaterial:

> No one who has lost a case will believe he has been fairly treated if the other side has had access to the judge without his knowing.[14]

12. Commenting on Rigby J.'s approach, he said, "In other words Inspector Kanda was not given a 'reasonable opportunity' of being heard because there was a likelihood that the Adjudicating Officer who heard him would have a 'predetermined bias' against him by reason of having read the report of the Board of Inquiry, although it is difficult to understand how this would have been otherwise had a copy . . . been supplied to Inspector Kanda."

13. (1962) 28 M.L.J. at p. 172.

14. *Ibid.*

As a consequence, the Privy Council felt that in not being given a report of the Board of Inquiry Surinder Singh had not been given a reasonable opportunity of being heard as required by Article 135(2).

Opportunity or Opportunities to be heard?

Another argument of Surinder Singh alleged violation of Article 135(2) in that, after being informed that the charges against him were proved, he should have been entitled to a second hearing as to the punishment to be inflicted. He was in fact inviting the Court to accept the Indian interpretation of "reasonable opportunity"[15] which entitles a civil servant to be heard not only on the charges against him, but also to a second hearing on the punishment when the charges against him had been proved.

It is true that the opinion of their Lordships in the Privy Council did not make any reference to this argument, nor to its treatment by the Malayan Courts. However, the Court of Appeal's judgment has more than once been cited[16] as authority for the proposition that "reasonable opportunity" in Article 135(2) means only the opportunity to be heard on the charges, and that (unlike in India) there does not exist an additional opportunity to be heard on the punishment. The writer of this note respectfully wishes to disagree, and is of the opinion that the Court of Appeal did not decide this point. Considering the importance which may be attached to this question, it is now proposed to examine the opinions of each of the three judges of the Court of Appeal to show that they held differing views on this question.

The Chief Justice made it sufficiently clear[17] that he found no substance in this argument. He referred to the difference between the Indian provisions[18] (on which the Indian cases turned) and Article 135(2). The learned Chief Justice seemed to find a significant distinction between:

> " reasonable opportunity to be heard". (Malaya Art. 135(2))
>
> and
>
> " reasonable opportunity of showing cause against the action proposed to be taken against him". (India Art. 311(2))

While this difference may considerably lessen the persuasiveness of the Indian cases, the learned Chief Justice failed to inquire if Article 135(2), by itself, is not capable of being given the "two opportunities" interpretation sought by Surinder Singh. In dismissing the argument, Thomson C.J. also said that "it must be borne in mind" that in Malaya police officers had a right to appeal from the decision of the Commissioner of Police, "whereas in India there would appear to be no appeal from a decision of the Public Service Commission."

Hill J.A. in dealing with Article 135(2) quoted[19] a passage from the judgment of the trial judge:

15. See, *High Commissioner for India* v. *I.M.* Lall, A.I.R. 1948 P.C. 121.

16. See: H. E. Groves: "Government as Employers" (1961) III *Journal of the Indian Law Institute* p. 311 see footnote 15; L. A. Sheridan: "Digest of Dismissal, Reduction and Removal" (1962) *Public Law* 285.

17. (1961) 27 M.L.J. at p. 128.

18. Article 311(2) of the Indian Constitution, formerly s.240(3) of the Government of India Act, 1934.

19. (1961) 27 M.L.J. at p. 132.

On this aspect of the case the learned trial judge found as follows (pp. 129 and 130 of the record):—

> 'The argument put forward on ground (a) is that copies of various statements made by witnesses and copies of Police documents for which he had asked before his trial as being relevant to his defence were either not supplied to him or supplied too late to give him an adequate opportunity to prepare his defence. Subject to one vitally important qualification to which I shall refer later, I am satisfied that copies of all documents relevant to his defence were supplied to him and I find no substance in this contention.
>
> 'As to ground (b) Mr. Jag-Jit Singh submitted on the authority of the decision of the Privy Council in the case of the *High Commissioner for India* v. *I.M. Lall* that the plaintiff had a right to be heard both at the time when the charges against him were being inquired into by the Adjudicating Officer and after conviction when the question arose as to the proper punishment to be awarded. I accept that as correct. I have already said that I am satisfied that the Adjudicating Officer after notifying the plaintiff that the case against him on the original charge had been proved, intimated to him sufficiently clearly that in view of the serious nature of the charge he proposed to recommend dismissal. The plaintiff was then asked if he had anything to say and what he did say was duly recorded by the Adjudicating Officer and forwarded to the Commissioner of Police, for his consideration as to whether or not he should confirm the recommendation for dismissal. In my view that was sufficient compliance with the requirement of Article 135(2).

Immediately after reciting this passage, Hill J.A. states:

> With this finding I respectfully agree and this quite irrespective of whether the decision of the Privy Council in the case of the *High Commissioner for India,* v. *I.M. Lall* applies.

What does the learned judge mean? It is a matter for regret that Hill J.A. did not make his views on this point more explicit, but it is submitted that he must be taken to agree with the essence of Rigby J.'s finding on this point. And inherent in the trial judge's finding is his acceptance as "correct" the view that there is a right to be heard on two occasions (though apparently he seems to have been influenced by *Lall's* case). Considering this then, it is submitted that Hill J.A. accepts the view that there are two opportunities though he differs from the trial judge in that he is not willing to base his acceptance purely on *Lall's* case.[20]

Neal J., on this point, said: [21]

> The respondent relies upon, as did the Judge in the Court below, the Indian decisions. For myself I derive no assistance from the Indian decisions having regard to the differences between the provisions of the Constitution of India and the Constitution here. It is not in dispute that the respondent had the opportunity to make and did make before the Adjudicating Officer after he had reached a finding of guilt a plea in mitigation. Put in other words, he had received and exercised the same rights as are accorded to an accused person in the Courts and I see no reason to so widely construe Article 135(2) as to give him the additional right which is sought.

20. Which leaves us to believe that the learned judge's acceptance of the "two opportunities" view rests on his interpretation of Article 135(2) itself.

21. (1961) 27 M.L.J. at p. 134

It is submitted that on this point, Neal J.'s attitude was correct. He declines to accept the Indian decisions. He then points out that Surinder Singh in fact was given an opportunity to say something on the punishment after being found guilty.

But this cannot mean that Neal J. is of the opinion that Article 135(2) is not capable of being given the interpretation sought. All he does, it is submitted, is to decline to decide on this point. It is clear that Neal J. was only applying the well known maxim of constitutional interpretation expounded by Brandeis J. that the court "will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."[22]

So in the ultimate analysis, we find Thomson C.J. and Hill J.A. in disagreement on this point and Neal J. declining to decide the question. It is submitted therefore that the Court of Appeal's judgment still leaves undecided the question whether "reasonable opportunity" in Article 135(2) comprises one occasion or two occasions of being heard. It is true that all three judges were unwilling to accept the Indian decisions. Nevertheless this still leaves open the question whether Article 135(2) by itself may not be capable of being interpreted to give the civil servant an additional right to be heard on the question of punishment.

S. JAYAKUMAR.

22. See *Ashwander* v. *Tennessee Valley Authority* 297 U.S. 288 at p. 347 80 L. Ed. 688 at p. 711 (1930).