

## CERTIORARI—A REPLY

### *Munusamy v. Public Services Commission*

The writer joins issue with Mr. T. T. B. Koh on the point he raised in a note on<sup>1</sup> *Munusamy v. Public Services Commission*<sup>2</sup> as regards the question whether the Public Services Commission acting under Article 153 of the Malayan Constitution exercises a judicial function.

Article 153 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.

The query raised by Mr. Koh with respect to *Munusamy's* case was provoked by an *obiter dictum* of the learned judge in that case, where he said:

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 taken by the Commission in contravention of the Article (135) must be constitutionally invalid, for the Constitution is the supreme law of the land. In such cases,

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

1. (1962) 4 U.M.L.R. 305.

2. (1960) 26 M.L.J. 220.

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.

Mr. Koh rightly pointed out that:

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.

However, the present writer disagrees with the conclusion arrived by Mr. Koh, *i.e.* that the Public Services Commission, acting under Article 135(2), does not exercise a judicial function.

Mr. Koh's reasoning was that:

. . . 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.<sup>3</sup>

He then applied the test of whether the procedure applied by the Public Services Commission was analogous to that of a court of law so as to characterise the function as judicial, and came to the conclusion that it was not, because:

All that Article 135(2) requires is that the Public Services Commission gives 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.<sup>4</sup>

It is submitted that this view is erroneous, for two reasons. Firstly, it ignores the fact that this is a "highly acrobatic part of the law"<sup>5</sup> where there is no straight-jacket definition of the term "judicial". Indeed, the procedural test is but one of several tests, none of which is conclusive.<sup>6</sup> Moreover, very frequently, the characterization of a function as judicial is no more than an *ex post facto* rationalization of a conclusion reached on other considerations. In view of the above, the mere fact that a function fails to satisfy the procedural test does not *ipso facto* render it non-judicial in nature.

Secondly, it is submitted that the function of the Public Services Commission in the instant case satisfies the procedural test. It should be noted that Article 135(2) does not only guarantee a civil servant a hearing prior to dismissal or reduction in rank, but an effective hearing, *viz. a reasonable opportunity of being heard*. This has been equated by the Privy Council in *Surinder Singh Kanda v. The Government of the Federation of Malaya*<sup>7</sup> with the *audi alteram partem* rule.<sup>8</sup> The Privy Council defined "reasonable opportunity of being heard" as ensuring an effective hearing. It said:

3. *Op. cit.*, p. 306. This proposition was based on *Franklin v. Minister of Town and Country Planning* [1948] A.C. 87.

4. *Ibid.*

5. Willis in (1940) 53 Harv. L. Rev. at p. 281.

6. De Smith, *Judicial Review of Administrative Action* 1959 at pp. 37-51.

7. (1962) 28 M.L.J. 169.

8. 28 M.L.J. at pp. 172-173.

If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them.<sup>9</sup>

It can thus be seen that the procedure to be applied by the Public Services Commission is analogous to that of a tribunal, and in view of this, it would not be unwarranted to regard its power of dismissal or reduction in rank as judicial in nature. Indeed the Privy Council in *Surinder Singh's case*, albeit *obiter*, did not doubt it to be so, as evidenced by their recognition of the appropriateness of certiorari as a remedy, though not the exclusive remedy in such a situation.<sup>10</sup> This view is also amply supported by a large number of Indian cases in which the courts have granted certiorari to quash orders relating to the dismissal or reduction in rank of civil servants under Article 311(1) and (2) of the Indian Constitution which correspond to Article 135(2) of the Malayan Constitution.<sup>11</sup>

9. *Ibid.*
10. *Ibid.*, at p. 173.
11. *Jagdish Prasad Saxena v. State of Madhya Bharat* A.I.R. 1961 S.C. 1070; *State of Madhya Pradesh v. Chintaman Sadashita Waishampayan* A.I.R. 1961 S.C. 1623; *Choudhury v. Union of India* A.I.R. 1956 Calcutta 662; *Joga Rao v. State of Madras* A.I.R. 1957 Andhra Pradesh 197; *Ramchandra Gopalrao v. D.I.G. Police* A.I.R. 1957 Madhya Pradesh 126; *Raghu Bans v. State of Bihar* A.I.R. 1957 Patna 100; *Ramesh Chandra Verma v. Verma* A.I.R. 1958 Allahabad 532; *Naresh Chandra v. Director of Fisheries* A.I.R. 1959 Calcutta 100; *Athokpam Mombi Singh v. Officer on Special Duty, Manipur State Transport* A.I.R. 1960 Manipur 45.