Certiorari — A Rejoinder

Munusamy v. *Public Services Commission*[1]

Miss S. M. Huang disagrees with my view that the Public Services Commission, in acting under Article 153 of the Malayan Constitution, does not exercise a judicial function. She advances two reasons for adopting the opposite view.

Firstly, she argues that my view of the matter ignores the fact that this is a "highly acrobatic part of the law" where there is no straight jacket definition of the term "judicial." She states that the test which I advanced for identifying judicial functions in determining whether certiorari would lie, and which she labelled as the procedural test, is but one of several tests, none of which is conclusive.

That this is a part of the law which abounds with unsatisfactory decisions, I do recognise. But I am not prepared to abandon the search for principles even in this "highly acrobatic part of the law." The definition which I adopted was first advanced by Atkin L.J. in *R.* v. *Electricity Commissioners* [2] which has been approved in many subsequent cases. It combines what Miss Huang calls the procedural test with two others, namely, that "after investigation and deliberation, the tribunal performs an act or makes a decision that is binding and conclusive and imposes obligations upon or affects the rights of the individuals"; and that the tribunal's decision has to be based on only the evidence adduced by it at hearings attended by the disputants.

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.

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

2. [1924] 1 K.B. 171 at pp. 204-205.

I regard this as the decisive definition of the term judicial when the question being asked is whether certiorari lies. I recognise that some decided cases are inconsistent with this definition. I however do not agree that one should interpret the existence of such deviations from the norm as proof of its non-existence.

Continuing, Miss Huang states that, very frequently, the characterisation of a function as judicial is no more than an *ex post facto* rationalisation of a conclusion reached on other considerations. I agree that this is very often the case. But this fact in no way affects the requirement that the rationalisation should satisfy the requirements of the definition of the term "judicial."[3]

Secondly, Miss Huang argues that the Public Services Commission does satisfy the definition I put forward of the term "judicial". Our difference of opinion is focussed on the one point whether or not the said commission has a duty to act judicially.

Miss Huang correctly observes that by virtue of Article 135(2) of the constitution, the commission is under a duty to observe the *audi alteram partem* rule, which is one of the two rules collectively referred to as the rules of natural justice.

It is however submitted that the function of a body which complies with the *audi alteram partem* rule should not be characterised as judicial unless, in coming to a decision on the *lis inter-partes,* it confines itself to the evidence adduced by the tribunal at its hearings which were attended by the disputants.[4]

In my original note, I attempted to show that the commission does not fulfil this requirement. To recapitulate, I argued that all officers in the Federal services named in Article 132(1) of the constitution held office at the pleasure of the Yang di-Pertuan Agong by virtue of Article 132 (2A). That 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 commission. That, subject to the condition in Article 135(2) to grant a reasonable opportunity of being heard, the commission's decision is therefore unfettered.

The position I maintain derives partial support from the decisions of Indian courts.[5] Article 135(2) of the Malayan constitution is similar to Article 31(2) of the Indian constitution and Article 132 (2A) of the Malayan constitution corresponds to Article 310(1) of the Indian constitution.

Shinda and Dixit JJ. in *Lilawati Mutatkar* v. *State of Madhya Bharat*[6] held that the Indian counterpart of the Public Services Commission in making an order of dismissal or reduction in rank is not acting judicially and certiorari will not lie.

Dixit J. said: [7]

> But the feature which separates a quasi-judicial act from an administrative act is, the mode or manner in which the opinion on the basis of which the act is done by the authority in the exercise of its discretion, is formed. The decision of the authority is quasi-judicial if in reaching that decision the authority is required first to ascertain certain facts by means of evidence

3. I therefore disapprove of cases such as *Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B. (N.S.) 180 where the *ex post facto* rationalisation does not satisfy the definition of the term "judicial".
4. *R.* v. *Electricity Commissioners, supra*; *R.* v. *Manchester Legal Aid,* Ex p. Brand (R.A.) & Co. [1952] 2 Q.B. 413 at 431.
5. The cases cited by Miss Huang in footnote 7, are precedents sub *silentio* in that in none of those cases was the question whether *certiorari* was an appropriate remedy raised. This is also true of the Privy Council's dictum in *Surinder Singh Kanda* v. *The Government of the Federation of Malaya* (1962) 28 M.L.J. at 173.
6. A.I.R. 1952 M.B. 105.
7. At p. 111.

and is then free to take such action as it may think fit on the facts so ascertained. In such a case, the authority must consider the representations of the parties and give them an opportunity to adduce and examine the evidence. On the other hand, the decision would be purely administrative if in taking the decision the authority has the freedom to base its opinion on whatever material it thinks fit, whether obtained in the ordinary course of its executive functions or derived from the evidence at an inquiry, if there is any. The answer, therefore, to the question whether an authority in the discharge of its statutory duties acts in an administrative or quasi-judicial capacity must necessarily depend on the particular provisions of the statute in their application to the particular subject-matter.

Applying these principles here, it is evident on the language of Arts. 310 and 311 of the Constitution that an order of dismissal, removal or reduction of a Civil Servant is an administrative order. There is nothing in the language of these articles to suggest that in making such an order the competent authority is obliged to act judicially. As I have already pointed out, these articles recognise the principle that a Civil Servant holds his employment at the pleasure of the President, Governor, or the Raj Pramukh, as the case may be, and they may put an end to the employment at any time for any reason stated or unstated, if in their opinion, the continued employment of the Civil servant is detrimental to the interests of the State and the service. It is, no doubt, true that Art. 311 (2) prohibits the dismissal, removal or reduction of a Civil servant until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. But this provision of 'a reasonable opportunity of showing cause against the action proposed to be taken in regard to him' cannot be treated as a condition imposing a quasi-judicial duty on the competent authority in passing an order of dismissal, removal or reduction of a Civil servant.

His Lordship also states that,[8]

It seems to me that all service under the State being public service and for the public benefit, in making a decision, about the removal, dismissal, or reduction of a Civil servant the authority must obviously be guided by its own views as to what is expedient in the interests of the State and the Service. The authority can base its opinion on whatever material it may think fit. This cannot be affected by the fact that the authority decides to hold an inquiry. The object of such an inquiry can only be to clear matters upon which the authority may like to be better informed. The inquiry cannot bind the discretion of the authority as to the material on which it may take action, although it may have some bearing on the question of *bona fides.*

T. T. B. KOH.

8. At p. 112.