[IN THE PRIVY COUNCIL]

1963 *Present:* **Lord Goddard, Lord Morton of Henryton, Lord Evershed, Lord Guest, and Lord Pearce**

SIDNEY G. DE ZOYSA, Appellant, *and* THE PUBLIC SERVICE COMMISSION and others, Respondents

PRIVY COUNCIL APPEAL NO. 50 OF 1961

S. C. 250—Application for Writs of Certiorari and Mandamus

Public officers—Constitutional position—Compulsory retirement of a police officer after reaching the age of optional retirement—Unfettered power of the Public Service Commission—Ceylon (State Council) Order in Council, 1931, ss. 86 (1), 89 (1), 89 (3)—Regulations dated 30th June, 1931, Regulations 82 to 90—Ceylon (Constitution) Order in Council, 1946, ss. 7 (c), 57, 60 (1), 61, 87—Public Service Regulations of 1947, Regulations 62, 63—Manual of Procedure, Regulations 186 to 188—Ceylon Independence Order in Council, 1947, Schedule and s. 7—Public and Judicial Officers (Retirement) Ordinance, ss. 1, 2, 3 and Rules 1 (1), 2, 5 made in 1949 under s. 2—Public Service Commission Instructions, 1950, Rules 60, 61—Instructions of 1956, Rules 60, 61—Instructions of 1956, Rules 60, 61—Certiorari.

Under Rule 2 (1) of the Rules made in 1949 by virtue of the provisions of section 2 of the Public and Judicial Officers (Retirement) Ordinance, the power of the Public Service Commission (as the competent authority under Rule 5) to require a police officer to retire at any time after his completing the age of fifty years (the age of optional retirement) is unqualified and requires no preliminary steps for the justification of an order. In such a case it is not necessary that the officer should be informed of the recommendation of the Head of his department and that the procedure prescribed by Regulation 63 of the Public Service Regulations of 1947 should be followed.

APPEAL from an order of the Supreme Court reported in (*1960*) *62 N. L. R. 492.*

E. F. N. Gratiaen, Q.C., with *J. G. Le Quesne, Q.C.*, and *Kenneth Potter*, for the appellant.

Stephen Chapman, Q.C., with *Dick Taverne*, for the respondents.

Cur. adv. vult.

January 29, 1963. [*Delivered by* LORD GUEST]—

This is an appeal from an order of the Supreme Court of Ceylon (Fernando J.) refusing an application by the appellant for the issue of

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a writ of certiorari quashing an order of the first respondents compulsorily retiring the appellant from the Ceylon Police Force and for the order of a writ of mandamus consequential on the writ of certiorari.

The appellant was appointed a Probationary Assistant Superintendent of the Ceylon Police Force on 7th December, 1931 and this appointment was confirmed on 7th December, 1933. On 29th January, 1955 he was appointed Deputy Inspector-General of Police. He continued to serve in this capacity until 1959 when on 27th November of that year an order was made on behalf of the Public Service Commission (the first respondents) that he be retired from the Public Service with effect from 1st March, 1960.

The events which preceded this order were the subject of a statement of claim and of an affidavit by the appellant before the Supreme Court. The respondents did not lodge a counter affidavit. Their Lordships are however relieved of the necessity of considering these allegations by reason of a concession made by counsel for the appellant in the Court below that these allegations were not relevant to the questions of law arising on the petition. They accordingly refused to hear argument from the appellant's counsel as to the relevancy of these allegations. The sole question for determination is whether the Public Service Commission acted in excess of their statutory powers in making the order requiring the appellant to retire and whether this order should accordingly be quashed as being null and void.

In order to discuss the arguments presented to the Board it is necessary to narrate the constitutional position in Ceylon. When Ceylon was a Crown Colony there was vested in the Governor the appointment, promotion, transfer, dismissal, and disciplinary control of public officers (Ceylon (State Council) Order in Council 1931, Section 86(1)). There was a Public Service Commission to advise the Governor in the exercise of his powers (Section 89(1)) and the Governor was empowered to make regulations prescribing the duties and procedure to be followed by the Commission (Section 89(3)). Regulations, dated 30th June, 1931 were made by the Governor under this Order in Council. Regulations 82–90 provide for the retirement of officers of the Public Service. These regulations have now admittedly been superseded and it is therefore unnecessary to detail them. They did however provide for the compulsory retirement of public officers at the age of 55 years (Regulation 82) and by Regulation 87 (as amended in 1938) for the Head of a Department making a recommendation to the Public Service Commission in the case of public officers whose emoluments exceeded Rs. 1,500 that they should retire. With internal self-government in Ceylon an Order in Council was made in 1946. By section 57 of this Order every person holding office under the Crown was to hold office during His Majesty's pleasure and by section 60(1) the appointment, transfer, dismissal and disciplinary control of public

officers was vested in the Governor acting on the recommendation of the Public Service Commission. Section 87 was in the following terms :

" 87. (1) The Governor may, at any time before the first meeting of the House of Representatives under this Order, make such regulations as appear to him to be necessary or expedient, in consequence of the provisions of this Order, for modifying, adding to or adapting the provisions of any general order, financial regulation, public service regulation or other administrative regulation or order, or otherwise for bringing the provisions of any such administrative regulation or order into accord with the provisions of this Order or for giving effect thereto.

(2) Every regulation made under subsection (1) of this Section shall have effect until it is amended, revoked or replaced by the appropriate Minister or authority under this Order. "

In exercise of the powers conferred on him by section 87 the Governor on 17th September, 1947 made the Public Service Regulations (referred to as the 1947 Regulations). In section IV headed " Retirements " there appear the following Regulations 62 and 63 :

" 62. The duty of recommending the compulsory retirement of a Head of a Department who has reached the age of optional retirement will devolve upon the Permanent Secretary to the Ministry who will recommend such retirement to the Public Service Commission where he deems it advisable to do so in the public interest. If the Head of Department is unwilling to retire, the Permanent Secretary shall inform him that a recommendation of retirement is being made and call upon him to submit a statement of his reasons for wishing to remain in service, for submission to the Public Service Commission along with his recommendation. The Public Service Commission will, after considering the recommendation of the Permanent Secretary and the statement of the Head of the Department, if any, make its own recommendation on the matter to the Governor.

" 63. If a Head of a Department considers it to be in the public interest that an officer in his department whose emoluments exceed Rs. 2,520 per annum should be required to retire on or after attaining the age of optional retirement he should make a recommendation accordingly to the Permanent Secretary to the Ministry who will, if he thinks fit, address the Public Service Commission. If the officer is unwilling to retire, the Head of the Department shall inform the officer that such a recommendation is being made and call upon the officer to submit a statement of his reasons for wishing to remain in service, for submission to the Permanent Secretary. The Permanent Secretary will make his recommendation, forwarding the statement of the officer, if any, to the Public Service Commission. The Public Service Commission will decide whether the officer should be retired. "

This Section was to be read with Regulations 186 to 188 in the Manual of Procedure.

Further developments took place in the constitutional position on 19th December, 1947 when the Ceylon Independance Order in Council was passed. This provided for the appointment of a Governor-General to be appointed by His Majesty. By the Schedule to this Order section 60 of the 1946 Order was amended to the effect of vesting the appointment, transfer, dismissal and disciplinary control of public officers in the Public Service Commission which by section 61, as amended, could delegate its powers. Thus for the first time the disciplinary control of public officers came under the Public Service Commission. Section 87 of the 1946 Order which authorised the Governor to make rules was revoked, but by a saving clause, section 7, nothing was to affect the validity or continued operation of any regulation made under the 1946 Order. The 1947 Regulations therefore remained operative until revoked.

The Public and Judicial Officers (Retirement) Ordinance, 12th August, 1910, as later amended, provided as follows :

" 1. This Ordinance may be cited as the Public and Judicial Officers (Retirement) Ordinance.

" 2. (1) The Governor-General may make, and when made may revoke, vary or amend, rules regulating the age at which, the reasons for which, and the conditions subject to which, public or judicial officers shall be required to retire from the public or judicial service.

(2) In particular and without prejudice to the generality of the power conferred by the preceding subsection, such rules may—

(*a*) prescribe the age at which the retirement of public or judicial officers or of any particular class of public or judicial officers shall be compulsory ;

(*b*) provide, in such cases and subject to such conditions as may be prescribed, for the extension of the employment of public or judicial officers beyond the age prescribed by rule for compulsory retirement, and for the exemption of any particular class of public or judicial officers from the operation of any rule relating to the compulsory retirement of public or judicial officers ;

(*c*) prescribe an age earlier than the age at which retirement from the public or judicial service is compulsory at which the authority competent to make the respective appointments may, subject to such conditions as to notice and otherwise as may be prescribed, require public or judicial officers to retire from the public or judicial service.

" 3. In this Ordinance, ' judicial officer ' and ' public officer ' have the same meaning as in the Ceylon (Constitution) Order in Council, 1946."

Rules were made in 1949 (known as the 1949 Rules) by the Governor-General under this Ordinance. By Rule 1(1) the age of compulsory retirement of every public....officer was to be sixty years. Further Rules 2 and 5 were made :

Rule " 2. (1) The competent authority may require any public or judicial officer to retire upon his completing the age of fifty-five years or at any time thereafter :

Provided, however, that any officer of any class or description specified in Column I hereunder may be required to retire at any time after the completion of the age or the period of service, as the case may be, specified in the corresponding entry in column II. "

Column I	*II*
" (iii) Officer of Police Department	—fifty years of age. "

Rule " 5. In these rules ' competent authority ' in relation to the retirement of any officer means the authority competent to make appointments to the office held by that officer. "

Finally on 15th March, 1950 Instructions (known as the 1950 Instructions) were issued by the Public Service Commission regulating the appointment, transfer, dismissal and disciplinary control of public officers. These instructions were declared to take the place of the Public Service Regulations (1947). Rule 60 corresponding to Rule 62 of the 1947 Regulations is in the following terms :

" 60. The duty of recommending that a Head of Department who has reached or is about to reach the age of optional retirement should be required to retire under the provisions of Rule 2 of the Rules made under Section 2 of the Public and Judicial Officers (Retirement) Ordinance will devolve upon the Permanent Secretary to the Ministry who will make his recommendations to the Public Service Commission."

and Rule 61, corresponding to Rule 63 of the 1947 Regulations provides as follows :

" 61. If a Head of Department considers that an officer in his department, the commencing salary of whose post exceeds Rs. 3,780 per annum, should be required to retire under the provisions of Rule 2 of the Rules made under Section 2 of the Public and Judicial Officers (Retirement) Ordinance, he will make a recommendation accordingly to the Permanent Secretary to the Ministry. If the Officer is unwilling to retire he shall be informed of the reasons why the recommendation is being made and shall be given an opportunity of submitting a statement in reply. The Permanent Secretary will make his recommendation to the Public Service Commission, forwarding the statement of the officer, if any. The Commission will decide whether the officer should be retired. "

The instructions current at the material date are the 1956 Instructions of which Rules 60 and 61 are in corresponding terms.

The appellant's ground for quashing the order of the Public Service Commission requiring him to retire was that the first respondents had failed to comply with the terms of Regulation 63 of 1947 in respect (1) that the Head of the appellant's department had not made a recommendation to the Permanent Secretary to the Ministry that the appellant should be required to retire, (2) that the appellant had never been informed of any such recommendation and called upon to submit his reasons for wishing to remain in the service for submission to the Permanent Secretary, (3) that the Permanent Secretary had not made any recommendation to the Public Service Commission. It was matter of agreement that the appellant had reached the age of optional retirement at the relevant date, having been born on 15th January, 1909. Previously he had been granted an extension of service for one year from 15th January, 1959. By letter dated 20th October, 1959 he was granted a further extension of service for one year from 15th January, 1960. But counsel for the appellant conceded that the extension thus allowed did not fetter the power of the Public Service Commission to make an order of retirement under the relevant Rules. It was also conceded by the respondents that none of the steps detailed in Regulation 63 of 1947 had been carried out in the appellant's case. He had simply been required to retire upon a notification from the Public Service Commission. In the Supreme Court Fernando J. after an extensive examination of the Regulations and some Indian authorities held that the 1947 Regulations did not have the force of law and were not a mandatory enactment qualifying the right of dismissal involved in section 57 of the Order in Council of 1946. The first respondents were not obliged to carry out the terms of Regulation 63 before requiring the appellant to retire. He accordingly dismissed the application.

In the view which their Lordships take it is unnecessary to deal with the question raised by the trial judge whether the 1947 Regulations have the force of law and they accordingly express no opinion upon it. Counsel for the respondents introduced into the case for the first time the Public Service Commission Instructions, 1950 and submitted that these superseded the 1947 Regulations. Counsel for the appellant conceded that if this was so, the 1950 Rules being administrative only, and not mandatory, he could not rely on the first respondents' failure to comply with these rules as a ground for certiorari. Their Lordships find it unnecessary to decide whether the 1950 Rules superseded the 1947 Regulations and they assume in the appellant's favour that the Regulations current at the material date were the 1947 Regulations.

The argument for the respondents proceeded on the basis that public officers held office at His Majesty's pleasure and that since Ceylon became independent the function of appointing and dismissing public officers was vested in the Public Service Commission. As the competent authority under Rule 5 of the 1949 Rules the first respondents were under Rule 2(1) entitled to require the appellant to retire at the age of fifty which in his case as an officer of the police department was the optional

age, and that the first respondents did not require to take any other preliminary steps to their effective order. Although the 1949 Rules are mentioned at the outset of the learned trial judge's judgment, he did not rely on them for his decision, but as previously stated he based his judgment on the ground that the 1947 Regulations did not have the force of law.

The appellant contended that the 1947 Regulations had not been revoked or abrogated by any subsequent order or regulation. They were validly made by the Governor under section 87 of the 1946 Order in Council and they took effect until revoked, amended or replaced. Their validity and continued operation was saved by section 7(*c*) of the 1946 Order. As the 1949 Rules did not expressly or by implication revoke the 1947 Regulations the latter provided a protection to the appellant when he was required to retire. Section IV contained a complete code for the procedure to be adopted when a public officer was to be retired on or after reaching the age of optional retirement. By failing to comply with the terms of Regulation 63 the first respondents acted outside their powers and their order was accordingly revoked.

Their Lordships do not consider that there is any necessary inconsistency between the 1947 Regulations and the 1949 Rules. The two sets of regulations run in parallel streams. Regulation 63 applies to the special cases where a Head of a Department considers it to be in the public interest that an officer should be required to retire at the age of optional retirement. If the Head of the Department initiates the procedure, then the authorities should comply with the terms of Regulations 63. But this is without prejudice to the powers of the Public Service Commission under Rule 2(1) of 1949 Rules to require a police officer to retire at fifty. Their power under this Rule is unqualified and requires no preliminary steps for the justification of an order. To hold otherwise would involve the Commission in the embarrassing position that it could act only where a Head of a Department was prepared to make a recommendation that an officer should be retired at the age of optional retirement. It is not without significance that the new unfettered power of the Commission under Rule 2(1) came with the achievement of independence by Ceylon, and it may be that it was thought that the executive should have the control of public officers and should have an overriding power to require an officer to retire at the age of optional retirement. But whether this be so or not, it was not said that Rule 2 is *ultra vires* of the Governor-General. It is clear in its terms and affords complete justification for the first respondents' action. In the view of their Lordships the first respondents acted within their statutory powers in requiring the appellant to retire.

In the result their Lordships agree with the conclusion arrived at by the learned trial judge though for different reasons. They will accordingly humbly advise Her Majesty that the appeal be dismissed. In the circumstances of this case their Lordships will make no order as to costs.

Appeal dismissed.