1968 *Present :* **T. S. Fernando, J., and Tambiah, J.**

V. E. HERAT, Applicant, *and* E. A. NUGAWELA (Chairman of the Public Service Commission) and 2 others, Respondents

S.C. 448/67—Application for the issue of a mandate in the nature of a Writ of Certiorari on the Public Service Commission

Public officers—Public Service Commission—Power to require a public officer to retire after the age of 55 years—Rule fixing the age of optional retirement—Validity—Should the officer be given a hearing ?—Natural justice—Public Service Commission Rule 61—Ceylon (Constitution) Order in Council, 1946 (Cap. 379), ss. 58, 60—Public and Judicial Officers (Retirement) Ordinance (Cap. 355), s. 2—Ceylon Independence Order in Council, 1947 (Cap. 377), s. 8.

Section 60 of the Ceylon (Constitution) Order in Council, 1946, read with the rules passed under section 2 of the Public and Judicial Officers (Retirement) Ordinance and with the Proclamation made under section 8 of the Ceylon (Independence) Order in Council, 1947, empowers the Public Service Commission to require a public officer to retire from the public service upon his completing the age of fifty-five years or at any time thereafter.

Quaere, whether the public officer should be given a hearing before he is required to retire.

APPLICATION for a writ of *certiorari* on the Public Service Commission.

C. Thiagalingam, Q.C., with *A. H. C. de Silva, Q.C.*, *N. Sivagnanasunderam, E. B. Vannitamby* and *T. Jothilingam*, for the applicant.

H. L. de Silva, Crown Counsel, for the respondent.

Cur. adv. vult.

March 18, 1968. T. S. FERNANDO, J.—

The applicant joined the Public Service on January 4, 1937 and served in the Department of Public Works where at the date of the filing of this application he was occupying the post of Deputy Director of Public Works. He reached the age of 55 years on September 3, 1967.

The Administrative Regulations of the Government require a public servant who wishes to continue in service after the age of 55 years to make an application for that purpose to the Head of his Department. In compliance with the relevant administrative regulation (187), the applicant by letter A of March 3, 1967 informed the Director that he wished to continue in service after September 3, 1967. In reply to this letter the Director by letter B of June 23, 1967 informed the applicant that he proposed to take steps to retire him from the public service as from September 3, 1967, and called upon him to make any statement

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he desired so that it may be forwarded to the Permanent Secretary of the Ministry of Public Works. By his letter C of June 30, 1967, the applicant made representations to the Public Service Commission in support of his request that he be allowed to remain in the public service even after he has reached the age of 55 years. The Permanent Secretary of the Ministry by letter E of September 5, 1967 intimated to the applicant that the Public Service Commission had ordered that he be retired from the public service after three months' notice and that, accordingly, he has made order for retirement of the applicant as from December 6, 1967.

On this application the applicant seeks a mandate in the nature of a writ of *certiorari* from this Court quashing the order of retirement made by the Public Service Commission on two main grounds, (1) that the Commission had no legal power or authority to order his retirement and (2) that, if it did have such power or authority, the order has been made in excess of that authority and contrary to the principles of natural justice.

With the introduction of a new Constitution for Ceylon by the Ceylon (Constitution) Order in Council, 1946, the appointment, transfer, dismissal and disciplinary control of public officers became vested in the Public Service Commission (section 60) established in the manner described in section 58 of that Order in Council. The ordinary meaning of the word "dismiss" when used in relation to employment is wide enough to include a release or other termination; but, even on an assumption that power to retire public officers is not vested in the Public Service Commission by the (Constitution) Order in Council as such, it is undeniable that such a power can be granted to it by other law. The Public and Judicial Officers (Retirement) Ordinance (now Cap. 355) makes provision for the compulsory retirement of public and judicial officers. Section 2 (1) of that Ordinance empowers the Governor-General to make 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. Section 2 (2) enacts that "in particular and without prejudice to the generality of the power conferred by the preceding sub-section, 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*) . . . .

(*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."

An argument was addressed to us designed to show that the modification or adaptation of section 2 (2) (*c*) of this Ordinance to

enable the authority competent to make the respective appointments to require retirement of public or judicial officers, as the case may be, was devoid of lawful authority ; but we think that this argument failed to take sufficient note of section 8 of the Ceylon (Independence) Order in Council, 1947, which empowered the Governor-General to make by Proclamation additions to and modifications or adaptations of any written law as he was satisfied was necessary to bring such written law into accord with that Order in Council and the (Constitution) Order in Council. Whereas before the establishment of the Public Service Commission the Governor was the appointing authority, after the introduction of the new Constitution, the Governor-General was required to take the action necessary to bring the written law into conformity with the paramount law. The modification or adaptation that was questioned on behalf of the applicant was properly effected by Proclamation published in *Gazette* 9,889 of July 28, 1948, and, in our opinion, the written law is now correctly reproduced in the existing provisions of Cap. 355.

Certain Rules published in *Gazette* 9,970 of April 29, 1949, have been made under section 2 of the Retirement Ordinance (Cap. 355), and these have been amended from time to time. Rule 1 (1) of the Rules of April 1949 fixed the age of compulsory retirement at sixty years, while Rule 2 (1) of the same Rules empowered the authority competent to make the appointment concerned also to require the officer in question to retire upon his completing the age of fifty-five years or at any time thereafter. This latter may, for convenience, be referred to as the rule fixing the age of optional retirement. While the April 1949 Rules specified in Rule 2 (2) certain conditions which require to be specified before an officer could be called upon in terms of Rule 2 (1) to retire upon his reaching the age of optional retirement, this Rule 2 (2) was deleted by the Rule published in *Gazette* 10,713 of September 17, 1954. It was submitted that this deletion was capable of working injustice to officers who had given of their best to the service concerned ; this submission was, in our opinion, not devoid of merit, but, beyond making that observation, there is nothing that this Court can do in regard to the present state of the rules. We are bound to assume that the rule-making authority had good reason for the deletion of the sub-rule referred to above.

It was next submitted on behalf of the applicant that the rule in question (Rule 2 (1)) is *ultra vires* the powers of the Governor-General by reason of non-compliance with the conditions under which the rule could have been made. More specifically, it was argued that, inasmuch as section 2 (1) of the Public and Judicial Officers (Retirement) Ordinance empowers rules to be made regulating the age at which, the reasons for which, and the conditions subject to which, officers shall be required to retire, the power has to be construed as one exercisable conjunctively and not disjunctively. For instance, the argument is that, if a rule seeks to regulate an age of retirement, that rule should also regulate the reasons for which and the conditions subject to which the retirement

should take place. We did not find ourselves at all able to agree with the argument that was put forward by counsel. For instance, Rule 1 (1) which fixes the age of compulsory retirement has been and obviously can be made by construing the rule-making power as one that can be exercised disjunctively. Even if it may be conceded, for the sake of argument, that the reasons for requiring compulsory retirement at a certain age are obvious and may therefore be implied, such a rule does not need tc set out the conditions subject to which retirement shall take place. Then again, if the power conferred by section 2 (1) has to be construed as one that has to be exercised conjunctively, such a construction cannot easily be reconciled with section 2 (2) (*c*) which, while prescribing the optional retiring age, seeks to empower the authority competent to make the appointment to prescribe conditions as to notice or otherwise. The power to prescribe conditions granted by Rule 2 (2) (*c*) would clearly be superfluous if the power granted by Rule 2 (1) is construed as one excercisable conjunctively. Examples of this nature could be multiplied. It is not possible to place an interpretation on section 2 (1) of the Ordinance which reduces the Court to hold that in the case of certain rules the power is one that may be exercised disjunctively, while in the case of others it must be exercised conjunctively. The contention that Rule 2 (1) is *ultra vires* is unsound and must be rejected. The first main ground relied on in support of the application therefore fails.

In regard to the other main ground upon which the intervention of this Court has been prayed for, viz. the denial of natural justice, learned Crown Counsel brought to our notice a decision of the Supreme Court of India in *Dhingra v. Union of India* [1] where that Court, in construing Article 311(2) of the Constitution of India which is in the following terms :

> " No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him."

held that any and every termination of service is not a dismissal, removal or reduction in rank. In the words of Das, C.J., " a termination of service brought about by the exercise of a contractual right is not *per se* dismissal or removal . . . . . . Likewise, the termination of service by compulsory retirement in terms of a specific rule regulating the conditions of service is not tantamount to the infliction of a punishment and does not attract Article 311 (2) . . . . . It is true that misconduct, negligence, inefficiency or other disqualification may be the motive or the inducing factor which influences the Government to take action under the terms of the contract of employment or the specific service rule, nevertheless, if a right exists, under the contract or the rules, to terminate the service the motive operating on the mind of the Government is

[1] *A. I. R. 1958, S. C. p. 37 at p. 49.*

wholly irrelevant . . . . . The real test for determining whether the reduction in such cases is or is not by way of punishment is to find out if the order for the reduction also visits the servant with any penal consequences."

The tests applied by the Supreme Court of India in the case referred to above, it is interesting to note, were applied by the Privy Council in the Malaysian case of *Munusamy v. Public Service Commission* [1].

While I have referred to these two decisions of the Indian Supreme Court and the Privy Council respectively, I must point out that in the case of this applicant the Director of Public Works, the Head of the applicant's Department, at the time the applicant was informed by letter B that it is proposed to take steps to retire him from the Public Service, called upon him to make any statement he desired so that it may be forwarded to the Permanent Secretary. Public Service Commission Rule 61 requires the Permanent Secretary when making the recommendation to the Commission in respect of the proposal to retire to forward the statement of the officer, if any. It is the Commission that ultimately decided that this officer should be retired. The application filed in this Court itself recites that the procedure prescribed by the Public Service Commission Rules has been followed and, indeed, the applicant has appended to his application here a copy of his very full statement which we have no reason to think has not been considered by the Commission before ordering his retirement. Therefore, even if this had been a case where the applicant had to be given a hearing before the order was made, the procedure of calling upon him to make a statement, a procedure of which he took advantage, would have rendered it difficult for him to maintain his contention that there was here a denial of natural justice. Moreover, natural justice does not invariably require that a personal hearing be granted.

For the reasons outlined above, we dismissed with costs the application for intervention by this Court by way of *certiorari*, but we must here state that learned Crown Counsel at the outset of his argument submitted that, in any event, the order made by the Public Service Commission was one that could not be questioned by way of an application for a writ of *certiorari*. There are certain decisions of this Court which support this contention of Crown Counsel, but we intimated to him at the time he raised the point that, having regard to the importance of deciding upon the validity of the Rules made under the (Retirement) Ordinance, we need consider the point only if the question of the validity of the Rules is decided in favour of the applicant. In the result it has been possible for us to dispose of this application without ourselves considering the question of the availability of the remedy sought for by the applicant.

TAMBIAH, J.—I agree.

Application dismissed.

[1] *(1966) 3 W. L. R. 872.*

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