Privy Council Appeal No. 42 of 1997

Elloy de Freitas *Appellant*

v.

(1) The Permanent Secretary of Ministry of Agriculture,

Fisheries, Lands and Housing

(2) The Public Service Commission and

(3) The Attorney General *Respondents*

FROM

THE COURT OF APPEAL OF ANTIGUA

AND BARBUDA

JUDGMENT OF THE LORDS OF THE JUDICIAL

COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 30th June 1998

Present at the hearing:-

Lord Browne-Wilkinson

Lord Lloyd of Berwick

Lord Hoffmann

Lord Clyde

·*[Delivered by* ***Lord Clyde****]*

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1. The question in this appeal arises out of the participation by a civil servant in certain demonstrations in September and October 1990 against Government corruption in **Antigua and Barbuda**. In 1990 the appellant was an Extension Officer in the Ministry of Agriculture, Fisheries, Lands and Housing of **Antigua and Barbuda**. In that year a Commission of Inquiry was held in Antigua relating to the transhipment into Antigua of a consignment of guns. In the course of the Inquiry various allegations of Government corruption were made. Some of these allegations were directed at the Minister of Agriculture, Mr. Hilroy Humphreys. The appellant admitted in an affidavit that on 24th and 25th September 1990, after the Inquiry and while he was on vacation, he was one of several persons peacefully picketing the Headquarters of the Ministry. Some of the placards displayed by the appellant were critical of Mr. Humphreys.

2. The Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing, who is the first respondent, immediately claimed that the appellant was acting in breach of the restraints imposed on civil servants by section 10(2)(a) of the Civil Service Act Laws of **Antigua and Barbuda** c. 87 and threatened to refer the matter to the Public Service Commission for disciplinary action. That body is the second respondent. The appellant replied denying that he was infringing that section and referred to the Constitution of **Antigua and Barbuda**, sections 12 and 13 of which protected his rights of expression and assembly. On 27th September 1990 while he was still on vacation and on 2nd October after he had returned to work he made further peaceful demonstrations. After further communications between himself and the first respondent the latter, under a power which he possessed under the Public Service Commission Regulations 1967, interdicted the appellant from the exercise of the powers and functions of his office. In November 1990 the appellant issued an Originating Motion seeking redress under section 18 of the Constitution, which makes provision for the enforcement of the protective provisions in the Constitution. The motion was opposed by the first and second respondents and by the Attorney-General who is the third respondent. The matter came before Redhead J. and on 26th February 1993 he declared that section 10(2)(a) of the Civil Service Act was unconstitutional. He took the view that it had not been demonstrated that section 10(2) fell within the permissible limits prescribed by the Constitution. He accordingly granted the various orders which the appellant had sought. The matter was then taken to the Court of Appeal and that Court on 3rd July 1995 allowed the appeal. In addition to the point of constitutionality certain issues

of jurisdiction and of prematurity were canvassed before the Court of Appeal, but these are not now pursued.

3. The arguments which were deployed before their Lordships fell into two distinct chapters. In the first place a general question was raised as to the constitutional validity of section 10(2)(a) of the Act of 1984. If that subsection is invalid, then that is an end of the case. The second area of argument only arises if the subsection is valid. Here two questions require to be determined, and they are questions related to the circumstances of the particular case and not of generality, namely, first, whether the interdiction and the intended disciplinary proceedings impose restrictions on the appellant which are reasonably required for the proper performance of his functions and, second, whether they are reasonably justifiable in a democratic society. These were the narrower issues which the appellant initially raised in his Notice of Motion. Only at a later stage of the case did he more precisely and expressly formulate a wider attack upon the validity of the statutory provision. The wider ground no doubt lay behind the particular remedies which he sought but it appears that the respondents did not initially appreciate that the wider attack was intended.

4. It is appropriate at this stage to refer to section 10 of the Civil Service Act. Section 10(1) provides that a civil servant is disqualified from membership of the Senate, the House of Representatives or any local government body. Section 10(2) provides:-

"A civil servant may not -

(a)in any public place or in any document or any other medium of communication whether within **Antigua and Barbuda** or not, publish any information or expressions of opinion on matters of national or international political controversy;

(b)be a polling agent or counting agent under the Representation of the People Act. …"

5. The word "publish" is defined in subsection (4) as meaning:-

"… to communicate the information or opinion to any other person whether by word or in writing and includes the broadcasting of word and pictures by wireless telegraphy, and in relation to any writing means exhibiting in public or causing to be read or seen or showing or delivering or causing to be shown or delivered in order that the writing may be read or seen by any person."

Subsection (3) states certain reservations from section 10(2)(a) in the following terms:-

"The provisions of subsection (2)(a) do not apply -

(a)where a civil servant is acting in the execution of his official duties; or

(b)where the information or opinion is published in the course of a lecture or address, the subject matter of which is approved by the Minister to whose Ministry the civil servant is attached, made or given at an educational institution in the *bona fide* pursuit of the professional or vocational activities of the civil servant; or

(c)where the information or opinion is expressed in an article or other literary contribution, the subject matter of which is approved by the Minister to whose Ministry the civil servant is attached, to an approved journal or other periodical or document prepared in pursuit of the professional or vocational activities of the civil servant."

Their Lordships are satisfied that the activities in which the appellant engaged in his demonstrations fell within the terms of section 10(2)(a) and were not excluded by anything in section 10(3). While some argument was presented to the effect that the appellant's actings were related neither to matters of controversy nor to matters political, the contrary position was, in their Lordships' view, clearly established on the facts. It should also be recorded that no argument was levelled at the provisions contained in section 10(1) and while there was some mention in the course of argument of the width of the terms of the definition of the word "publish" in section 10(4) no point arises in the present case in that regard and their Lordships are not concerned to comment further upon it.

Under section 6 of the Civil Service Act it is provided that a civil servant shall hold office "subject to the provisions of the Constitution, this Act or any other written law ..." so that the

tenure of office of a civil servant is to be subject to both the Act and the Constitution. Section 12(1) of the Constitution provides that "Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression". Section 12(4) however provides that:-

"Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision - …

(b)that imposes restrictions upon public officers that are reasonably required for the proper performance of their functions;

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

Section 13(1) correspondingly provides that no person shall be hindered in the enjoyment of his freedom of peaceful assembly and association and section 13(2) contains a provision in the same terms as section 12(4) in relation to public officers. But it is substantially with section 12 that the present case is concerned. Notice should also be taken of section 31 of the Civil Service Act which provides that:-

"For the avoidance of doubt it is hereby declared that nothing in this Act shall be construed as applying in relation to any matter for which specific provision is made in the Constitution in respect of any public officer."

This latter provision may be seen as an echo of section 2 of the Constitution which provides that the Constitution is the supreme law of **Antigua and Barbuda**, that the Constitution is to prevail over any other law if such law is inconsistent with it, and that such other law shall to the extent of the inconsistency be void.

It is accepted that civil servants are "public officers". It is also accepted that in the construction of statutory provisions which contravene human rights and freedoms there is a

presumption of constitutionality (*Attorney-General of The Gambia v. Momodou Jobe* [1984] A.C. 689) and that in construing constitutional provisions a liberal approach is required (*Minister of Home Affairs v. Fisher* [1980] A.C. 319.

6. Their Lordships also recognise the special position which is enjoyed by civil servants in a democratic society. As Sir Vincent Floissac C.J. pointed out in the Court of Appeal, in every truly democratic society a civil servant holds a unique status in many respects. As the servant or agent of the state he enjoys special advantages and protections and correspondingly must submit to certain restrictions. Their special position is recognised in the existence of a special chapter, chapter VII, in the Constitution containing provisions relating to them and to the express provisions in sections 12 and 13 authorising restrictions on the freedoms contained therein. The preservation of the impartiality and neutrality of civil servants has long been recognised in democratic societies as of importance in the preservation of public confidence in the conduct of public affairs. The point can be found in the quotation which Redhead J. took from Hood Phillips' Constitutional and Administrative Law, 5th edition (1973) at page 299:-

"… the public interest demands the maintenance of political impartiality in the Civil Service and confidence in that impartiality as an essential part of the structure of government in this country."

7. Along with these elements of neutrality and impartiality their Lordships would associate an element of loyalty, in particular to the Minister whom the civil servant has been appointed to serve. The importance of these characteristics lies in the necessity of preserving public confidence in the conduct of public affairs. That is at least one justification for some restraint on the freedom of civil servants to participate in political matters and is properly to be regarded as an important element in the proper performance of their functions.

8. The Court of Appeal took the view that the appellant's expressions of ridicule and contempt for the Minister would not be tolerable in private sector employment if advanced by an employee about his employer. But the analogy is not valid. The Minister was not the employer of the appellant; they are both servants of the State. More importantly, the Minister is a politician and one necessarily and properly exposed to public opinion. Their Lordships do not find the suggested analogy of assistance in resolving the issue in the present case. The acceptability or otherwise of the appellant's conduct as matter of what might be thought proper or seemly is not relevant to the immediate issue of the validity of the restrictions imposed by section 10 of the Civil Service Act.

9. The general proposition that civil servants hold a unique status in a democratic society does not necessarily justify a substantial invasion of their basic rights and freedoms. The proper balance to be struck between the freedom of expression and the duty of a civil servant properly to fulfil his or her functions was discussed by Dickson C.J.C. in *Re Fraser and Public Service Staff Relations Board* (1985) 23 D.L.R. (4th) 122, 131:-

"The act of balancing must start with the proposition that *some* speech by public servants concerning public issues is permitted. Public servants cannot be, to use Mr. Fraser's apt phrase, 'silent members of society'. I say this for three reasons.

10. First, our democratic system is deeply rooted in, and thrives on, free and robust public discussion of public issues. As a general rule, all members of society should be permitted, indeed encouraged, to participate in that discussion.

11. Secondly, account must be taken of the growth in recent decades of the public sector ... as an employer. A blanket prohibition against all public discussion of all public issues by all public servants would, quite simply, deny fundamental democratic rights to far too many people.

12. Thirdly, common sense comes into play here. An absolute rule prohibiting all public participation and discussion by all public servants would prohibit activities which no sensible person in a democratic society would want to prohibit."

13. The restrictions which may consistently with the Constitution be imposed upon the freedom of expression in section 12 and the freedom of assembly in section 13 of the Constitution in the case of civil servants must be restrictions which are reasonably required for the proper performance of their functions. Furthermore they must be reasonably justifiable in a democratic society. The considerations which are relevant to these two requirements may to an extent overlap, but their Lordships turn first to the former.

14. The critical words of this provision are that the restrictions must be "reasonably required" for the stated purpose. It can be, and indeed it was, argued that the provisions of

section 10 could be regarded as a valid expression of the restraints on the freedoms contained in sections 12 and 13 of the Constitution which are permitted by the reservations in those sections. An absolute prohibition may constitute a restriction (*Council of Civil Service Unions v. United Kingdom* 20th January 1987 (Application No. 11603/85) (1987) 50 D.& R. 228. Moreover, so the argument may run, the restrictions in section 10 are not universal since they relate only to matters of national or international controversy. The freedoms in question can be exercised without restraint outwith matters in that category.

15. But their Lordships are not persuaded that the restrictions set out in section 10 without qualification would meet the condition that they be reasonably required for the proper performance of the civil servant's functions. A blanket restraint on all civil servants from communicating to anyone any expression of view on any matter of political controversy would in the view of their Lordships be excessive. It would not satisfy the qualification in the Constitution that the restriction be reasonably required for the proper performance of their functions. Their Lordships recall the observation made by the majority of the European Court of Human Rights in *Vogt v. Germany* 26th January 1995; Publications of the European Court of Human Rights, Series A, No. 323 in paragraph 59 at page 28 in relation to the duty of loyalty of a teacher under the particular provisions of German law:-

"Even so, the absolute nature of that duty as construed by the German courts is striking. It is owed equally by every civil servant, regardless of his or her function and rank. It implies that every civil servant, whatever his or her own opinion on the matter, must unambiguously renounce all groups and movements which the competent authorities hold to be inimical to the Constitution. It does not allow for distinctions between service and private life; the duty is always owed, in every context."

16. Section 10(2)(a) then cannot survive as it stands. That indeed was accepted by the Court of Appeal. But what that Court sought to do was to secure its validity by endeavouring to apply the presumption of constitutionality and taking the view that there should be implied in the sub-section some such words as "when his forbearance from such publication is reasonably required for the proper performance of his official functions". Thereby the Court sought to give effect to the legislative intention expressed in section 6 of the Civil Service Act that a civil servant should hold office subject to the provisions of the Constitution.

17. Their Lordships cannot regard that solution to the problem as a permissible one. While it may be justifiable on occasion to imply words into a statute where there is an ambiguity or an omission and the implied words are necessary to remedy such a defect, in the present case subsection 10(2)(a) is perfectly clear and entire, free from any ambiguity or omission.

As Lord Diplock explained in *Attorney-General of The Gambia v. Momodou Jobe* [1984] A.C. 689, at p.702 the presumption of constitutionality is:-

"… but a particular application of the canon of construction embodied in the Latin maxim magis est ut res valeat quam pereat which is an aid to the resolution of any ambiguities or obscurities in the actual words used ..."

18. Secondly, Parliament has made express provision in section 10(3) to cover situations where publication of information or expression of opinion may be permitted and it is difficult in the light of the existence of express provision to read in by way of implication some further exception. Thirdly, their Lordships are not persuaded that the formula proposed by the Court of Appeal meets the intention of section 12(4) of the Constitution. By virtue of section 6 of the Civil Service Act the Act and the Constitution must be read together, and where necessary the one must be understood to be qualified by the other. But where section 12(4) refers to:-

"the extent that the law in question makes provision ...

(b)that imposes restrictions upon public officers that are reasonably required for the proper performance of their functions"

the reference must, even if it includes an implied provision, at least not be to an implied provision which simply echoes the description of the kind of provision which may lawfully be made.

19. But that does not end the matter. Even if the solution proposed by the Court of Appeal was to be adopted their Lordships are not persuaded that the validity of the provision can thereby be secured. What the solution seeks to do is to remove the excessive scope of the express terms of the sub-section. But in the view of their Lordships it fails effectively to achieve that. One principle which has to be observed here is that of legal certainty. This was succinctly expressed by the European Commission on Human Rights in *G. v. Federal Republic of Germany*, 6 March 1989 Application No. 13079/87 60 D.& R .256, 261, where it was stated that "legal provisions which interfere with individual rights must be ... formulated with sufficient precision to enable the citizen to regulate his conduct". The

critical question then is whether the prohibition in section 10(2) as qualified by the Court of Appeal produces a rule sufficiently precise to enable any given civil servant to regulate his conduct.

20. The rule applies to all civil servants without distinction so that it is left to the individual in any given circumstances to decide whether he is or is not complying with the rule. Their Lordships are not persuaded that the guidance given is sufficiently precise to secure the validity of the provision. It is to be noticed that the provision is fenced with a possible criminal sanction in section 32 of the Act and it is necessary that in that context a degree of precision is required so that the individual will be able to know with some confidence where the boundaries of legality may lie. It cannot be that all expressions critical of the conduct of a politician are to be forbidden. It is a fundamental principle of a democratic society that citizens should be entitled to express their views about politicians, and while there may be legitimate restraints upon that freedom in the case of some civil servants, that restraint cannot be made absolute and universal. But where the line is to be drawn is a matter which cannot in fairness be left to the hazard of individual decision. Even under the formulation suggested by the Court of Appeal the civil servant is left with no clear guidance as to the exercise of his constitutional rights.

21. Further, the provision remains too wide in its scope and possible application. The principle here was expressed by Brennan J. in the United States Supreme Court in *National Association for the Advancement of Colored People v. Button* (1963) 371 U.S. 415, 433, in these terms:-

"The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application ... These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions ... Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."

22. Similar views may be found in *Gooding v. Wilson* 405 U.S. 518, 521 (1972) and in the passage in the judgment of Kania C.J. in *Romesh Thappar v. State of Madras* [1950] SRC 594 which was quoted by Redhead J in the present case.

23. A further formulation of the deficiency of the proposed solution can be found in the principle that an enactment construed by severing, reading down or making implications into what the legislature has actually said should take a form which it could reasonably be supposed that Parliament intended to enact. The proposed solution requires the subsection to be applied on a case by case basis, amounting for all practical purposes to a retrospective imposition of liability on those civil servants considered by the Court to have fallen on the wrong side of the line. That would be an altogether different provision from that which Parliament enacted. In this context reference may usefully be made to the observations of Sopinka J., giving the judgment of the majority of the Supreme Court of Canada in *Osborne v. Canada (Treasury Board)* (1991) 82 D.L.R. (4th) 321. In that case the Supreme Court held unconstitutional a statute which prohibit public servants from "engaging in work" for or against a political party or candidate. It will be noticed that the statute did not prohibit freedom of expression as such and so would probably not have attracted the principle of overbreadth applied by the United States Supreme Court to First Amendment rights; see *Broadrick v. Oklahoma* (1973) 413 U.S. 601. Nevertheless, the Supreme Court of Canada held the entire provision unconstitutional on the principle of "reading down". Sopinka J. said at page 347:-

"The language of (the section) is so inclusive that (the trial judge) declined to provide any definition of its scope but rather preferred to deal with the activity of each of the plaintiffs individually in measuring the restriction imposed by the section against the Charter. The number of instances in which the operation of the section would otherwise have been in breach of ... the Charter is extensive. On this basis there is little doubt that in future other instances will arise which will require a similar reading down of the section. In the final analysis, a law that is invalid in so many of its applications will, as a result of wholesale reading down, bear little resemblance to the law that Parliament passed and a strong inference arises that it is invalid as a whole ... In my opinion, it is Parliament that should determine how the section should be redrafted and not the court. Apart from the impracticability of a determination of the constitutionality of the section on a case-by-case basis, Parliament will have available to it information and expertise that is not available to the court."

24. It is precisely the same considerations which in the view of their Lordships apply to the solution proposed by the Court of Appeal and render it inadequate to save the validity of the provision in question.

25. Even if the subsection, with or without the supplementary provision sought to be implied by the Court of Appeal satisfied the first of the two requirements already referred to, namely that was a restraint upon the freedom of civil servants "reasonably required for the proper performance of their functions", it would still have to satisfy the second requirement of

being "reasonably justifiable in a democratic society". Their Lordships were referred to three cases in which that phrase has been considered. In *Government of the Republic of South Africa v. The Sunday Times Newspaper* [1995] 1 L.R.C. 168 Joffe J. adopted from Canadian jurisprudence four criteria to be satisfied for a law to satisfy the provision in the Canadian Charter of Rights and Freedoms that it be "demonstrably justified in a free and democratic society". These were a sufficiently important objective for the restriction, a rational connection with the objective, the use of the least drastic means, and no disproportionately severe effect on those to whom the restriction applies. In two cases from Zimbabwe, *Nyambirai v. National Social Security Authority* [1996] 1 L.R.C. 64 and *Retrofit (Pvt.) Ltd. v. Posts and Telecommunications Corporation*, [1996] 4 L.R.C. 489, a corresponding analysis was formulated by Gubbay CJ., drawing both on South African and on Canadian jurisprudence, and amalgamating the third and fourth of the criteria. In the former of the two cases at page 75 he saw the quality of reasonableness in the expression "reasonably justifiable in a democratic society" as depending upon the question whether the provision which is under challenge "arbitrarily or excessively invades the enjoyment of the guaranteed right according to the standards of a society that has a proper respect for the rights and freedoms of the individual". In determining whether a limitation is arbitrary or excessive he said that the Court would ask itself:-

"whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

26. Their Lordships accept and adopt this threefold analysis of the relevant criteria.

27. Their Lordships would be prepared to accept in principle that the first two of these criteria could be met in the case of civil servants once it is noticed that their special status, with its advantages and restraints, is recognised as proper in the administration of a free society. But the third criterion raises a question of proportionality which was developed in argument by junior counsel for the appellant and gives rise to real difficulty for the respondents. The blanket approach taken in section 10 imposes the same restraints upon the most junior of the civil servants as are imposed upon the most senior. The point was made by Redhead J. that in the United Kingdom there are classes of civil servants related to the seniority of the posts which they fill and a distinction is made between the classes as to the extent of any restraints imposed upon them in regard to their freedom of political expression. In the Civil Service Act of **Antigua and Barbuda** a considerable analysis of the grades of civil servants is set out in the First Schedule and it would plainly be practical to devise a comparable system of classification as has been adopted in the United Kingdom. Without some such refinement their Lordships are not persuaded that the validity of the

provision can be affirmed. The distinction between the different grades of civil servant and the application of the provision in particular circumstances to particular individuals cannot in their Lordships' view sufficiently be made by the implied condition proposed by the Court of Appeal for the reasons which have already been set out. It was for the appellant to show that the restraint, with its qualification, was not reasonably justifiable in a democratic society and their Lordships are persuaded that that has been shown to be the case.

28. For the foregoing reasons it becomes unnecessary to explore the more particular issues relating to the particular proceedings of which the appellant complains. It follows from the view taken by their Lordships on the general issue that the interdiction and the intended disciplinary proceedings contravene the appellant's constitutional rights.

Their Lordships will accordingly humbly advise Her Majesty that the appeal should be allowed and the orders pronounced by Redhead J. restored. The appellant is entitled to his costs in the appeal to the Court of Appeal and in the appeal to their Lordships.

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