

The Public Disclosure Commission

Appellant

v.

Kendal G.L. Isaacs

Respondent

FROM

THE COURT OF APPEAL OF THE  
COMMONWEALTH OF THE BAHAMAS

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 20TH JUNE 1988

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*Present at the Hearing:*

LORD BRIDGE OF HARWICH  
LORD BRANDON OF OAKBROOK  
LORD BRIGHTMAN  
LORD GRIFFITHS  
LORD ACKNER

*[Delivered by Lord Bridge of Harwich]*

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The Public Disclosure Act, 1976 ("the Act") requires Senators and the Members of Parliament in the Commonwealth of The Bahamas to make disclosure to the Public Disclosure Commission ("the Commission") of their financial affairs. In October 1984 the respondent to the present appeal, Mr. Kendal Isaacs Q.C., the Leader of the Opposition, made a formal complaint to the Commission that for each of the years 1977 to 1982 the declarations made under the Act by the Prime Minister, Sir Lynden Pindling, relating to his financial affairs had been incomplete. The Commission investigated the complaint and on 20th December 1984 reached the conclusion that it was not substantiated. A notice to that effect was in due course published in the Official Gazette.

In April 1985 the respondent instituted proceedings for judicial review applying for orders of certiorari to quash the Commission's decision and mandamus to require them to hear his complaint according to law. The application was dismissed by Georges C.J. on 5th July 1985. This decision was unanimously reversed by the Court of Appeal (Luckhoo P., Henry and Smith J.J.A.) on 27th February 1986, who granted the

orders of certiorari and mandamus sought. The Commission now appeal to Her Majesty in Council pursuant to leave granted by the Court of Appeal on 21st October 1986.

It appears from the affidavit of the respondent sworn in support of his application that in November 1983 the Governor-General of the Commonwealth of The Bahamas appointed a Commission of Inquiry to inquire into drug trafficking between The Bahamas and the United States of America and other ancillary matters. It is important to emphasise that their Lordships know nothing of the proceedings of that Commission of Inquiry and are in no way concerned with its subject-matter. The only relevance of the Commission of Inquiry is that the factual basis of the complaint made to the Commission by the respondent was a statement by one Inspector Richter relating to the financial affairs of Sir Lynden Pindling which was exhibited to the respondent's affidavit as representing the evidence given by Inspector Richter to the Commission of Inquiry. Again it must be noted that the issues which arise for determination in this appeal do not require their Lordships to examine the factual material contained in Inspector Richter's statement, still less to pass any judgment upon it. The fact that the present proceedings arise from a dispute between the Prime Minister and the Leader of the Opposition in the Commonwealth of The Bahamas of a somewhat dramatic character is of no relevance to the appeal and their Lordships are certainly not required, nor are they in any position, to pronounce upon the merits of that dispute. The only issues their Lordships have to decide are whether the procedure followed by the Commission in investigating the respondent's complaint contravened in any way the provisions of the Act or can otherwise be impugned as failing to conform to procedural standards applicable in accordance with established principles of public law.

It is common ground that the object of the Act is the maintenance of probity in public life. Sections 4 and 5 require every Senator and Member of Parliament to make an annual declaration to the Commission in a prescribed form disclosing the assets, income and liabilities of himself and his family. The critical sections on which the issues in the appeal primarily depend are sections 6, 7 and 8 which provide as follows:-

"6.(1) The Commission shall examine every declaration furnished to it and may request from a Senator or Member of Parliament any information or explanation relevant to a declaration made by him, which in its opinion, would assist it in its examination.

- (2) Where upon an examination under subsection (1) the Commission is satisfied that a declaration has been fully made, it shall publish a summary of that declaration in the Gazette in the form prescribed by Form B in the Second Schedule.
- (3) Where the Commission publishes a summary of a declaration under subsection (2) any person may make a written complaint to the Commission in relation to that summary.

7.(1) Where -

- (a) upon an examination under section 6(1) the Commission is not satisfied that a declaration has been fully made and is of the opinion that further investigation is necessary; or
- (b) after a summary of a declaration has been published in the Gazette under section 6(2) and any person makes a written complaint to the Commission in relation to that summary and the Commission, after consideration of the complaint, is of the opinion that the complaint should be investigated,

the Commission may -

- (i) in writing request the Senator or Member of Parliament concerned or the complainant to furnish such further information or documents as it may require, within such time as it may specify;
- (ii) in writing require the Senator or Member of Parliament concerned to attend on the Commission at such time as may be specified by the Commission;
- (iii) make such independent inquiries and investigation relating to the declaration or complaint as it thinks necessary;
- (iv) summon witnesses, require the production of documents and do all such things as it considers necessary or expedient for the purpose of carrying out its functions; and
- (v) in respect of paragraph (b), in addition, summon the complainant,

hear the complainant, (who may be represented by a counsel and attorney), and any witnesses of the complainant in support of the complaint.

- (2) Where a Senator or Member of Parliament is required to attend on the Commission pursuant to subsection (1), he shall have the right to be accompanied, and represented by a counsel and attorney for the purpose of such enquiry, and may require the Commission to summon such witnesses as he thinks necessary.

8.(1) Where -

- (a) any person fails to furnish the Commission with a declaration which he is required to furnish in accordance with this Act; or
- (b) the Commission examines a declaration and any related information or documents, or conducts an enquiry into any such declaration or into a complaint made in respect of any summary of a declaration and is not satisfied with any aspect thereof,

the Commission shall report the matter (setting out such details and particulars as the Commission in its discretion thinks fit) to the Prime Minister and the Leader of the Opposition.

- (2) The Prime Minister or the Leader of the Opposition, when a report is made pursuant to subsection (1), may -
- (a) publish by way of communication to the House of Assembly any information furnished to him by the Commission;
- (b) cause to be published to the Senate any information furnished to him by the Commission;
- (c) authorise the furnishing of any information furnished to him by the Commission to the Attorney-General or the Commissioner of Police.
- (3) Where the Commission after conducting an enquiry in accordance with section 7(1) into any complaint made under section 6(3) is satisfied that the complaint is groundless or has not been substantiated it

shall publish a statement in the Gazette to that effect, and in addition, where the complaint is groundless, the Commission shall report the matter to the Attorney-General."

Section 10 imposes a duty on the Commission and their staff to treat all documents and information relating to a declaration as secret and confidential and prohibits their disclosure otherwise than as authorised by or for the purposes of the Act. Section 13 makes it a criminal offence, *inter alia*, to make "any frivolous, vexatious or groundless complaint to the Commission in relation to a summary of a declaration".

As already indicated, the respondent, in making his complaint to the Commission, relied on the factual material contained in the statement of Inspector Richter as showing that the Prime Minister had failed to make proper disclosure in his statutory declarations under section 4 of the Act for the years 1977 to 1982. He did not then suggest, nor has it at any time been suggested in the course of the proceedings, that he had any additional relevant factual material which he was in a position to put before the Commission in support of his complaint.

The procedure of the Commission in investigating the complaint is described by the Chairman of the Commission in an affidavit as follows:-

- "4. On 27th November, 1984 the Commission of which I was a member and the Chairman commenced consideration of the complaint pursuant to our duty under section 7 of the Public Disclosure Act, 1976.
5. On considering the complaint we enquired into the matters complained of and on November 29th, 1984 we called upon Sir Lynden Pindling for clarification and explanation as to particular aspects of his declaration to the Commission for the years 1977 to 1983 inclusive.
6. On December 13th, 1984 the Commission received explanations and answers from Sir Lynden Pindling, and the Commission continued its consideration of and enquiry into the complaint.
7. On December 20th, 1984 the Commission concluded its consideration and enquiry. The decision of the Commission was that the complaint had not been substantiated."

The deponent to this affidavit was not cross-examined.

No issue was raised in argument before the Board turning on the construction of any of the detailed provisions of the statute and, in particular, it was common ground that the several powers conferred on the Commission by section 7(1)(i) to (v) are discretionary. The essence of the attack on the procedure of the Commission mounted on behalf of the respondent was in the submission that, either as a matter of construction arising from a consideration of the underlying purpose of the Act or as a matter of procedural fairness to a complainant, once the Commission formed the opinion under section 7(1)(b) that a complaint should be investigated, they were obliged to give the complainant the opportunity not only to lay before them whatever factual material he relied on, but also to controvert, refute or rebut any case made to the Commission by the declarant in answer to the complaint.

At the outset, their Lordships express their agreement with Georges C.J. that if the Commission were provisionally minded to find a complaint frivolous, vexatious or groundless and, in so reporting to the Attorney-General under section 8(3), to expose the complainant to the risk of prosecution for an offence under section 13, they would have to indicate to the complainant the reasons for their provisional view and give him a fair opportunity, at an oral hearing if he so wished, to demonstrate that their provisional view was unfounded and that he had at least good ground for making the complaint. But such a question would ordinarily arise before the Commission ever called on the declarant to meet or answer the complaint and in any event does not arise in this case.

It is important, in their Lordships' judgment, to appreciate the implications of the case made for the respondent. Mr. Potts Q.C., in presenting the argument, appeared reluctant to go further than saying that the Commission, having received from a declarant his answer to a complaint, must reveal to the complainant the gist of that answer. Their Lordships find it difficult to understand how this would significantly advance the matter or how merely being told the gist of the declarant's answer would assist a complainant in making good his complaint. In their Lordships' judgment there can really be no half-way house in this matter. Once the complainant has laid before the Commission all the material upon which he relies in support of the complaint, the ensuing procedure must take one of two courses. One alternative is that the Commission should conduct their investigation of the complaint wholly in private as a purely inquisitorial body making whatever further inquiry they think necessary into the material furnished by the complainant, calling for any answers and explanations they require from

the declarant and reaching their own conclusions. The other alternative is that the procedure on investigation of a complaint should take on a fully adversarial character treating the complainant and the declarant as parties to a lis each having an equal opportunity to challenge and comment upon the case made by the other, with the Commission simply adjudicating between them.

Their Lordships think that there are clear indications in the statute that it was the inquisitorial, not the adversarial, procedure which the legislature contemplated. First, it is to be noted that a full investigation into the declaration made by a Senator or Member of Parliament may be undertaken by the Commission either of their own motion under section 7(1)(a) before they publish any summary or after publication of the summary on receipt of a complaint under section 7(1)(b). The discretionary powers available to them in either case, save those expressly referring to the complainant, are the same. It is difficult to see why the procedure should be fundamentally different in the one case than in the other. If evidence casting doubt upon the sufficiency of a declaration comes to the attention of the Commission before they publish any summary, they may investigate it fully themselves and reach the conclusion that the declaration is nevertheless satisfactory. If then, after publication of the Commission's summary, exactly the same evidence is submitted to them in support of a complaint, they may properly form the opinion under section 7(1)(b) that, the matter having already been investigated, no further investigation is necessary. This was rightly conceded by Mr. Potts in argument. It underlines the difficulty of construing the statute as requiring fundamentally different procedures to be followed by the Commission in investigating the selfsame material according to whether it reaches them before they publish any summary or after publication by way of complaint.

But a second and perhaps even more formidable obstacle to a construction which would require the Commission to afford to every complainant the rights of a party litigant is that this would necessarily undermine the provisions protecting the secrecy and confidentiality of information which Senators and Members of Parliament may have to disclose to the Commission in relation to their private affairs. The publication of the summary for which section 6(2) and the Second Schedule to the Act make provision is already a substantial and no doubt necessary invasion of privacy. But the legislature have provided by section 10 that the possibly intimate and more far reaching information relating to the private affairs of a declarant and his family which he may have to disclose to the Commission in the course of an

investigation under section 7 shall be protected from public scrutiny. An adversarial procedure would destroy that protection by making such information available to a complainant who could not then be prevented from disseminating it further.

Accordingly, so far from supporting the respondent's contention, a construction of the Act in the light of its underlying purpose appears to their Lordships to weigh heavily against it.

The respondent succeeded in the Court of Appeal on the alternative ground that the so-called *audi alteram partem* rule applied. The principle underlying the rule is clearly expressed in the judgment of Lord Denning M.R. in *Regina v. Race Relations Board, Ex parte Selvarajan* [1975] 1 W.L.R. 1686 at pp. 1693, 1694, where he said:-

"In recent years we have had to consider the procedure of many bodies who are required to make an investigation and form an opinion ... In all these cases it has been held that the investigating body is under a duty to act fairly: but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely afflicted by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it."

With respect to the Court of Appeal, their Lordships do not think that this principle has any application to a complainant under the Act, save in the case already considered and not here applicable where the Commission are minded to report to the Attorney-General under section 8(3) that the complaint was groundless. In any other case the complainant is not liable to be subjected to any pains or penalties or exposed to prosecution. He is not seeking to enforce any private right, so there is no question of depriving him of any remedies or redress to which he may be entitled. He is acting as a public spirited citizen in giving information to the Commission to assist them in the performance of their public duty. Any personal or political interest he may have in the outcome is irrelevant. He cannot be "told the case made against him and afforded a fair opportunity of answering it" because no case is made against him; it is he who makes a case against the declarant. It was submitted for the respondent that he was adversely affected by the publication in the Gazette of the Commission's



conclusion that his complaint was not substantiated. Their Lordships cannot accept that this is a matter of sufficient weight to prevail against the countervailing considerations to which attention has already been directed. The language used in the statute distinguishing between complaints which are frivolous, vexatious or groundless on the one hand and complaints which are not substantiated on the other may be open to misunderstanding by uninformed members of the public. But on the true construction of the statute a finding that a complaint has not been substantiated connotes no more than that, when investigated and considered in the light of all available evidence, the complaint was not made out. Such a finding casts no adverse reflection on the complainant. Any person making a complaint under section 7(1)(b) must be presumed to know that, although made in good faith and on sufficient grounds, his complaint may fail because it can be successfully rebutted and that this will lead to a published statement by the Commission that it was not substantiated.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be allowed, the order of the Court of Appeal set aside and the order of Georges C.J. restored. The respondent must pay the Commission's costs in the Court of Appeal and before the Board.

