

Peter Sookoo (an infant by Harry Sookoo his father and next friend) and Harry Sookoo Appellants

v.

The Attorney-General of Trinidad and Tobago Respondent

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

REASONS FOR DECISION OF THE LORDS OF THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE
18TH SEPTEMBER 1985, DELIVERED THE 28TH OCTOBER 1985

Present at the Hearing:

LORD SCARMAN
LORD ELWYN-JONES
LORD FRASER OF TULLYBELTON
LORD DIPLOCK
LORD TEMPLEMAN

[Delivered by Lord Scarman]

The appellants are the plaintiffs in an originating summons issued on 16th July 1985 to determine a question of construction arising upon section 136(2) of the Constitution of Trinidad and Tobago. The respondent is the Attorney-General of the Republic. It will be convenient to refer in this judgment to the appellants as the plaintiffs and to the respondent as the Attorney-General.

The question which their Lordships of the Judicial Committee are called upon to answer is whether Mr. Justice Kelsick, who was the Chief Justice of the Republic immediately prior to 15th July 1985, the day on which he attained the age of 65 years, has been validly continued by the President in the office of Chief Justice until 21st December 1985.

The circumstances which are said to have given rise to the question are strange. On 16th July 1985 the plaintiffs' solicitor sought to issue a writ on their behalf against the Minister of Health and the Attorney-General claiming damages for negligence in

respect of medical attention or treatment received by the infant plaintiff in hospital between 18th November and 5th December 1984. By Order 6 rule 1 of the Rules of the Supreme Court of Trinidad and Tobago every writ must be in a form which necessitates that it be witnessed by the Chief Justice. The act of witness is, of course, delegated to the officer authorising the issue of the writ and takes a form, not unknown in the history of English law, of a printed declaration of witness incorporated in the writ. Mr. Justice Kelsick was immediately prior to 15th July 1985 the Chief Justice. On that day he attained the age of 65 years, which is the age set by law for the retirement of a judge. He was, however, permitted by the President to continue in office until 21st December 1985 to enable him to complete judicial business which he had begun but had not finished at the date set by law for his retirement.

No doubt there were excellent reasons why the writ was not issued before 15th July 1985 when the difficulty said to arise now under the Constitution would not have existed: but their Lordships have not been informed, nor is it necessary for them to know, what those reasons were. As from 15th July, however, the process of the law has moved with an immediacy and speed which are not always the mark of litigation. Within 24 hours of the judicial age limit being reached by the Chief Justice, the plaintiffs issued their originating summons requiring the Court to determine three questions which can be abbreviated into one: whether upon the true construction of sub-sections (1) and (2) of section 136 of the Constitution the President had power to permit Kelsick J. to continue in office as Chief Justice after attaining the age of 65 years.

The facts relating to the purported extension of the Chief Justice's period in office after his retirement date are these. By letter of 28th June 1985 the Chief Justice impliedly requested of the President, and expressly advised him, that he should grant him permission to continue in office after 15th July and until 21st December 1985 "so as to enable me to deliver judgment and to do any other thing in relation to proceedings that were commenced before me prior to my attaining the retiring age". By letter of the same date the President, purporting to act pursuant to section 136(2) of the Constitution, permitted the Chief Justice "to continue in office as Chief Justice" until 21st December to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before him before 15th July.

It is the submission of the plaintiffs that upon its true construction section 136(2) of the Constitution does not permit the extension of tenure

of the office of Chief Justice but only of the office of Judge, and that the purpose of, and constitutional limitation upon, a permitted extension of tenure is the completion by the retiring judge of his unfinished judicial business. In other words, the judge whose tenure of office is continued beyond the age limit set by law may sit as a judge during the extended period but only for the purpose of completing the judicial business which he had not finished when he reached the age limit.

The Attorney-General's submission is that upon the true construction of section 136(2) the President is empowered to continue a retiring Chief Justice in office as Chief Justice, that the purpose of the permissible extension is to enable him to complete his unfinished judicial business, but that this purpose does not limit the functions which he can perform during the period of extension. In other words, if the judge whose tenure of office is being extended is the Chief Justice, he is empowered and obliged to perform during the extended period all the functions and duties appropriate to the office of Chief Justice. These functions will include the extra-judicial duties of the office of Chief Justice, one of which is, of course, the witnessing of the issue of writs.

The point in issue is a short one of construction of a few words in section 136(2) of the Constitution. Mr. Justice Deyalsingh decided the point in favour of the plaintiffs: the Court of Appeal, reversing him, decided it in favour of the Attorney-General: and the plaintiffs now appeal to the Judicial Committee. If the submission of the plaintiffs should be upheld, it would appear that the Chief Justice of the Republic since 15th July has been not Kelsick J. but Clinton Bernard J.: for on 12th July he was appointed to the office of Chief Justice with effect from the date on which Kelsick J. vacates it: Trinidad and Tobago Gazette (Extraordinary) Entry 1419 published on 16th July 1985.

Chapter 7 of the Constitution establishes the judicial system of the Republic. There is a Supreme Court consisting of a High Court and a Court of Appeal: section 99. The Judges of the High Court are the Chief Justice "ex officio" (emphasis supplied) and a prescribed number of Puisne Judges: section 100(1). The Judges of the Court of Appeal are the Chief Justice, who is the President of the Court, and a prescribed number of Justices of Appeal: section 101(1). The Chief Justice is to be appointed by the President of the Republic after consultation with the Prime Minister and Leader of the Opposition: section 102. The Judges other than the Chief Justice, that is to say the Puisne Judges and the Justices of Appeal, are to be appointed by the President of the Republic,

acting in accordance with the advice of the Judicial and Legal Service Commission: section 104(1). If the "office of Chief Justice" should become vacant, the President after consultation with the Prime Minister and Leader of the Opposition may make an acting appointment: section 103. Where the office of any Judge other than the Chief Justice becomes vacant, the President upon the advice of the Judicial and Legal Service Commission may appoint a person "to act in the office of Justice of Appeal or Puisne Judge": section 104(2). Section 106(1) applies sections 136 and 137 to the tenure of judicial office.

Sections 136 and 137 are included in Chapter 9 of the Constitution which deals, *inter alia*, with the tenure of public office. Section 136(1) sets an age limit for the tenure of certain special offices which, by section 106(1) *supra*, include judicial office. Section 136(2) makes provision for the transitional problem which arises where the law sets a fixed date, as it does in Trinidad, for the vacation of judicial office. These provisions are of sufficient constitutional importance to be entrenched against alteration save by a bill commanding a majority of not less than two-thirds of all the members of each House of Parliament: section 54.

The sub-sections are in these terms:-

- "136.(1) The holder of an office to which this sub-section and sub-sections (3) to (11) apply (in this section referred to as "the officer") shall vacate his office on attaining the age of sixty-five years or such other age as may be prescribed.
- (2) Notwithstanding that he has attained the age at which he is required by or under sub-section (1) to vacate his office, a Judge may, with the permission of the President, acting in accordance with the advice of the Chief Justice, continue in office for such period after attaining that age as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before him before he attained that age."

The first question of construction in the appeal is as to the meaning of "office" in the words "continue in office" where they appear in sub-section (2). Clearly it is an office held by the judge, who has attained the age at which he is required to vacate it: it is "his" office. Section 3(1) of the Constitution provides an interpretation of the word "Judge" where used in the Constitution: it "includes the Chief Justice, a Judge of Appeal and a Puisne

Judge". As Warner J.A. observed in his judgment in the Court of Appeal, this is the only place where the term "a Judge of Appeal" is used in the Constitution, and it must be a draftsman's error for "Justice of Appeal": for the only judicial offices for which provision is made in the Constitution are the offices of Chief Justice, Justice of Appeal, and Puisne Judge.

The plaintiffs' submission is that there is an office of a judge which a person assumes on his appointment as Chief Justice, Justice of Appeal, or Puisne Judge, as the case may be. When, therefore, a Chief Justice reaches retiring age under section 136(1), he vacates his appointment as Chief Justice and his office as a judge. Section 136(2) enables him to be continued for a period in his office as a judge for the completion of his unfinished judicial business but does not authorise the continuation of his appointment as Chief Justice. Their Lordships agree with the Court of Appeal in thinking this to be an impossible construction to be put upon the language of the Constitution. The term "Judge" includes Chief Justice: the Constitution recognises (e.g. sections 100(1) and 103) that there is an office of Chief Justice: and it was the office of Chief Justice which Kelsick J. held immediately prior to attaining the age of 65. When, therefore, section 136(2) provides that he may "continue in office" with the President's permission, it can only mean that he may continue in the office which he was holding on attaining retirement age. That office was the office of Chief Justice.

The second question of construction is as to the functions permissible to a judge continued in office under the sub-section. Is he limited to the completion of unfinished business? Or is such completion the purpose of the continuation but not a limitation of the functions of the judge during the extended period? The wording, in their Lordships' view, is as the Court of Appeal also thought, plain and unambiguous. The Judge, in the instant case the Chief Justice, is continued "in office". He is not permitted merely to sit as a judge to complete unfinished business: he is continued in office for that purpose.

Their Lordships recognise that there are several ways in which the problem of unfinished judicial business can be tackled in a judicial system where there is a fixed age limit for the tenure of judicial office. Warner J.A. in his very helpful judgment in the Court of Appeal gives some examples from comparable "Westminster model" constitutions of other countries. Suffice it to note that in some the retiring judge is enabled merely to sit as a judge to complete his unfinished cases, while in others he is

continued in office without limitation of function for a fixed period of time. There can be no doubt as to the choice made by the draftsman of the Republic's Constitution: and their Lordships do not find it helpful to draw any inferences from a comparison of the Constitution of the Republic with that which preceded it.

In the Court of Appeal a good deal of time was spent inquiring into the problems which would arise if it should be held that a retiring Chief Justice can continue as a judge but not as the Chief Justice. They are clearly very real, but their Lordships base their opinion simply and exclusively upon the wording of the Constitution.

There is, however, one point sought to be taken by the plaintiff/appellants upon which their Lordships think it necessary to say a few words. The President acts under section 136(2) "in accordance with the advice of the Chief Justice". If it be possible under the sub-section for the President to continue the Chief Justice in his office as Chief Justice, it must be, so the submission runs, an infringement of natural justice and an opportunity for abuse of power to require that the President shall act in accordance with the advice of the Chief Justice. The submission is misconceived. The reason why the Chief Justice's advice is needed is, of course, that the sub-section is concerned with the business of the courts over which he presides as Chief Justice. To suggest that misbehaviour by a Chief Justice in advising the President is a mischief which requires that this sub-section be construed in such a way that it cannot arise is absurd (as well as insulting to the judiciary). If a Chief Justice or any other Judge is guilty of misbehaviour, he may be removed from office under section 137 of the Constitution. Section 136(2) deals with a specific problem arising in the business of the courts and reasonably and properly proceeds upon the basis of judicial integrity. Judicial misconduct is another matter altogether and is the subject of separate constitutional provision.

Junior counsel for the plaintiff/appellants, made a point which their Lordships consider a serious one, though not capable of displacing the plain meaning of the sub-section. If the purpose of the extension, which is the completion of unfinished business, is not also a limitation upon the functions which the judge can perform during the extension period, what is to prevent a Judge from beginning work during the period and failing to finish it at its expiry? In such a case does the President have power to grant a second extension - and so on *ad infinitum*? Their Lordships doubt very much whether the Constitution permits a second extension of a judge's tenure of office. Be that as it may, it will be the duty of a

judge to refrain from undertaking new work which may run beyond the expiry date set by the President. But in all other respects there is no reason why during his period of continuation in office a judge should not participate in the ordinary business of the courts: and there are many good reasons why he should. Similarly, the Chief Justice has by reason of his office a number of extra-judicial duties, all of which he is clearly able and obliged to perform so long as he remains in office.

For these reasons their Lordships dismissed the appeal with costs.

