PEERTHUM V INDEPENDENT COMMISSION AGAINST CORRUPTION & ANOR

2013 PRV 82

[2014] UKPC 42

Privy Council Appeal No 0082 of 2013

JUDGMENT

Peerthum (Appellant) *v* Independent Commission against Corruption and another (Respondents)

From The Supreme Court of Mauritius

(Court of Civil Appeal)

before

Lady Hale
Lord Kerr
Lord Wilson
Lord Hughes
Lord Toulson

JUDGMENT DELIVERED BY

LORD HUGHES

ON

18 December 2014

Heard on 27 October 2014

Appellant		*Respondent No 1*
Mr Sudarshan Bhadain Mr Yash Bhadain (Instructed by Mr Preetam Chuttoo)		Mr Stuart Denney QC Mr Kaushik Goburdhun Ms Preesha Bissoonauthsing (Instructed by Mr Sultan Sohawon)
		Respondent No 2 Mr William Frain-Bell (Instructed by Deputy Chief State Attorney)

LORD HUGHES:

1. The question in this appeal is whether the secondment of police officers to the Mauritian Independent Commission against Corruption ("ICAC") is unconstitutional.

ICAC

2. The Prevention of Corruption Act 2002 ("the PCA") established ICAC as a new independent body corporate. Its functions are set out in section 20 and include the education of the public and enlisting its support against corruption, monitoring public contracts and the procedures and working methods of public bodies, advising such bodies on ways of eliminating corruption, drafting codes of conduct and collaborating with similar bodies in other countries. Its functions also include the detection and investigation of offences of corruption, some of which are created by Part II of the same statute and the detection and the investigation of money-laundering events referred to it by a separate body, the Financial Intelligence Unit.

3. ICAC has, under the statute, a board consisting of a Director General appointed by the Prime Minister after consultation with the Leader of the Opposition in accordance with section 20(4), and two other members, appointed by the Prime Minister. Within ICAC there must be a Corruption Investigation Division, a Corruption Prevention and Education Division and a Legal Division, and there may be other divisions if ICAC so determines. Each of the specified divisions is to have a Director, who is to be appointed by the Commission after consultation with the Prime Minister, or, in the case of the Chief

Legal Adviser, as provided under section 31(1). The statute sets out the principal responsibilities of the specified Directors of Division.

4. Section 24 deals with the staff of ICAC. Its principal provisions are as follows:

> "(1) Subject to subsection (2), the Commission shall employ such officers as it considers necessary to discharge its functions, on such terms and conditions as it thinks fit."
>
> (2) [contains provisions for advertising vacancies and selection]
>
> (3) [contains provisions for salaries and terms of employment generally]
>
> (4) Employment by the Commission under subsection (1) shall not be deemed to be employment in a public office.
>
> (5) Notwithstanding subsection (1), the Commission may -
>
> > (a) with the approval of the relevant Service Commission, recruit a public officer or an officer of a local authority on contract; or
> >
> > (b) for the purpose of this Act, make use of the services of a police officer or other public officer designated for that purpose by the Commissioner of Police or the Head of the Civil Service, as the case may be.
>
> (6) Where the Commission recruits an officer under subsection (5) (a), that officer shall be granted leave without pay from his service for the duration of his contract of employment with the Commission but shall not be granted any further leave, with or without pay, for the purposes of any extension or renewal of such contract of employment.
>
> (7) Notwithstanding any condition contained in the contract of employment of an officer employed under subsections (1) and (5) (a), the Commission may, where it is satisfied that it is in the interests of the

Commission to do so, but subject to subsection (8), terminate the employment of an officer.

(8) [contains provisions for fair process of termination of employment]

(9) Where the Commission terminates the employment of an officer who was employed under subsection (5) (a) -

(a) that officer shall be reinstated to the office which he held immediately prior to his appointment as an officer;

(b) the Commission may, where the officer's employment was terminated on grounds of fraud, corruption or dishonesty, recommend to the relevant Service Commission that disciplinary proceedings be taken against that officer."

5. In aid of the functions of ICAC, section 53 of the PCA creates a limited power of arrest which may be exercised by any of its officers. This power is different from, and more restricted than, a policeman's powers of arrest. It may be exercised only if the Director General is satisfied that the person concerned is either about to leave Mauritius, or has interfered with a potential witness, or intends to destroy documentary evidence in his possession which he refuses to give to ICAC. If it is exercised, there are special rules as to the treatment of the person arrested; for example he must be questioned only if the process is video-recorded, which is a provision which does not apply generally to arrested persons in Mauritius. These powers of arrest are quite separate from the ordinary process of arrest by a police officer in relation to a suspected offence when the conditions for it lawfully to be carried out are met. They do not, it is clear, constitute exhaustive provisions for arrest in relation to suspected offences of corruption or money-laundering. Suspected offence of those kinds may of course be investigated by ICAC, but its powers to do so are not exclusive; such offences may well be investigated by the police force, for example (but not only) where they are wrapped up with other suspected offences, such as, perhaps, drug trafficking, fraud or economic crime. Nor is the section 53 power of arrest particularly geared to the arrest of persons suspected of committing offences. It is there in aid of ICAC's powers generally, which, significantly, include calling

for hearings in relation to possible acts of corruption and the summoning of persons to give evidence on oath, whether suspects or not (sections 47 and 50). The limited section 53 power of arrest, clearly intended to cope with urgently arising situations, extends to any person who is judged by the Director General to be able to assist any investigation.

The present case

6. ICAC investigated offences of corruption allegedly committed by the claimant, a senior local government officer. He was arrested and provisionally charged on four occasions by a police officer (Assistant Superintendent Coret) who was working for ICAC under the provisions of section 24(5)(b). The arrests were made on the basis of suspected commission of offence(s) of corruption. Mr Coret purported to exercise the ordinary powers of arrest available to a police officer in relation to a person suspected of a serious offence. The more limited powers of arrest given by section 53 PCA to all ICAC staff would not have been available. The claimant was bailed in each case. A number of prosecutions of him for alleged offences of corruption followed but no trial has yet been completed. In November 2011 notice was given to the claimant that a further similar arrest was to be made. He challenged the legality of the last (and indirectly of the earlier) arrests by way of application for leave to seek judicial review.

The Constitutional challenge

7. The principal basis of the claimant's challenge was the assertion that section 24(5)(b) is contrary to the Constitution. His contention is that it is unconstitutional for a police officer to work for ICAC whilst continuing to hold the position and powers of a police officer. He says that a police officer can only work for ICAC if employed by way of contract by it pursuant to section 24(5)(a). In that event, says the claimant, he would cease *pro tem* to hold the position and powers of a police officer, being on leave without pay under section 24(6), would not have a policeman's powers of arrest and would have instead only the limited powers of arrest given to officers of ICAC generally by section 53 of the statute. The constitutional contentions failed before the Supreme Court and are now renewed before the Board pursuant to leave which the Supreme Court granted on the basis that section 81(1)(a) of the Constitution affords an appeal as of right where the case involves a decision upon the interpretation of the Constitution.

8. The claimant's argument as to constitutionality is thus based upon the constitutional provisions which stipulate the control and discipline authorities for disciplined forces generally and for the police in particular. Someone in the position of Assistant Superintendent Coret cannot, it is said, serve two masters.

9. The provisions of the Constitution relied upon are sections 91, 71 and 118.

10. Section 91 provides:

> "**91. Appointment in Disciplined Forces**
>
> (1) Subject to section 93, power to appoint persons to hold or act in any office in the disciplined forces (including power to confirm appointments), to exercise disciplinary control over persons holding or acting in such offices and to remove such persons from office shall vest in the Disciplined Forces Service Commission:
>
> Provided that appointments to the office of Commissioner of Police shall be made after consultation with the Prime Minister.
>
> (2) The Disciplined Forces Service Commission may, subject to such conditions as it thinks fit, by directions in writing delegate any of its powers of discipline or removal from office to the Commissioner of Police or to any other officer of the Disciplined Forces, but no person shall be removed from office except with the confirmation of the Commission."

11. The Police Force is one of the Disciplined Forces. For the claimant, Mr Bhadain contends that a policeman who goes to work for ICAC in purported application of section 24(5)(b) is being removed from his office as policeman and this cannot, according to section 91, be done without the authority of the Disciplined Forces Service Commission. He is being removed from his office as policeman, so the argument runs, because he is appointed an officer of ICAC. Section 2 of the PCA defines an officer of ICAC thus:

> ""officer" -
>
> (a) means an officer appointed under section 24; and

(b) includes the Director of the Corruption Investigation Division, the Director of the Corruption Prevention and Education Division and the Chief Legal Adviser;"

As an officer of ICAC, it is said, a police officer working there under section 24(5)(b) comes under the authority of ICAC, in the last resort of the Director General, and is no longer therefore under the control and discipline of the Disciplined Forces Service Commission. Moreover, section 81 of the PCA provides that every officer of ICAC must take an oath of confidentiality in the form prescribed by Schedule 2 to the Act. That oath requires the officer to keep secret and confidential all documents and information relating to the operations of ICAC and to refrain from disclosing them to any unauthorised person. It is the practice of policemen working at ICAC under section 24(5)(b) to take this oath. That demonstrates, it is said, that such a policeman is under the control and discipline of ICAC in a manner inconsistent with his remaining a police officer under the control and discipline of the Disciplined Forces Service Commission, hence it is clear that he has been removed from his position as policeman.

12. A similar argument is mounted for the claimant upon section 71 of the Constitution. That provides:

"**71. Commissioner of Police**

(1) There shall be a Commissioner of Police whose office shall be a public office.

(2) The Police Force shall be under the command of the Commissioner of Police.

(3) The Prime Minister, or such other Minister as may be authorised in that behalf by the Prime Minister, may give to the Commissioner of Police such general directions of policy with respect to the maintenance of public safety and public order as he may consider necessary and the Commissioner shall comply with such directions or cause them to be complied with.

> (4) Nothing in this section shall be construed as precluding the assignment to a Minister of responsibility under section 62 for the organisation, maintenance and administration of the Police Force, but the Commissioner of Police shall be responsible for determining the use and controlling the operations of the Force and, except as provided in subsection (3), the Commissioner shall not, in the exercise of his responsibilities and powers with respect to the use and operational control of the Force, be subject to the direction or control of any person or authority."

Says Mr Bhadain, a policeman working for ICAC under section 24(5)(b) has ceased to be under the control and discipline of the Commissioner for Police, and the Commissioner has surrendered all or some of his responsibilities for that policeman to the Director General of ICAC and has to that extent infringed the rule in section 71(4) that he must not be subject to the direction or control of any (other) person.

13. Thirdly, the claimant relies upon section 118 of the Constitution. This contains supplemental provisions for the carrying out of their functions by Commissions established by the Constitution, thus including the Disciplined Forces Service Commission. By section 118(4) this provision confirms that, subject to a stated exception which does not apply here,

> "... no such Commission shall be subject to the direction or control of any other person or authority."

The same submissions are made, to the effect that a policeman working for ICAC under section 24(5)(b) has come under the control of ICAC in breach of this provision.

14. The fallacy in this reasoning is the proposition that such a police officer has been removed from his position as such and ceases to hold his office as policeman. That is precisely what does not happen. Section 24(5)(b) provides for secondment of a police officer to ICAC. Secondment is very common in many fields. Policemen in particular may, like officers in the armed services, be posted by way of secondment to a variety of bodies operating in linked areas, such as other police forces, regulatory agencies, prosecution authorities, border control agencies, training bodies or the like. It is in the

nature of secondment that the seconded person remains a member of his home organisation. A policeman remains a policeman. There is no question of a policeman seconded to ICAC under section 24(5)(b) being removed from his office of policeman.

15. The key characteristic of such secondment, which is specifically provided for by section 24(5)(b) is that it is accomplished by the force to which the policeman belongs, here by the Commissioner of Police. A policeman can only go to work at ICAC under section 24(5)(b) if the Commissioner of Police designates him for this purpose. The Commissioner can likewise withdraw his designation as and when he chooses. It follows that the Commissioner has in no sense come under the control of any other person. Nor has he ceded his command of the seconded policeman to ICAC. He has agreed that for as long as the designation lasts, the policeman shall function within the organisation of ICAC, and thus that he will be given instructions by senior ICAC officers, but he has agreed this voluntarily; it is a form of temporary delegation of part of his control of the policeman, and it is subject to his own control of him wherever he needs to exercise it.

16. It is no doubt possible, in theory at least, for conflicting instructions to the seconded policeman to come into existence. It should happen only in the rarest of circumstances, but it might occur. This remote possibility does not, however, involve any unconstitutional self-subjection to the control of a third party by the Commissioner of Police. If such a situation were to arise, there would no doubt be sensible co-operation between ICAC and the Commissioner. But in the last resort, the Commissioner retains the power to terminate the designation, and his instructions will, accordingly, prevail in the unlikely event of an irreconcilable conflict.

17. The retention by the Commissioner of Police of his control of seconded officers is well illustrated by a written instruction issued by him on 27 June 2003. Headed "CP's Circular No 29/2003: Administrative Orders and Guidance for ICAC Police Officers", its relevant parts provide:

> "1. Police officers who have been granted leave without pay to take employment on contract with [ICAC] are referred to as ICAC officers and not as police officers during their tenure of office with ICAC. ICAC officers do not have any powers of arrest other than those provided by section 53 of the Prevention of Corruption Act 2002.

2. Police officers who are on attachment to the ICAC and are still under the operational and administrative control of the Commissioner of Police have retained their police powers of arrest. However, they are hereby reminded that while performing their duties at ICAC, they must strictly abide by Police Standing Orders and other instructions and guidance issued by way of CP's circulars to the Force.

3. Police officers posted to ICAC are to take all necessary precautions so as to ensure that they do not unduly encroach on the fundamental rights of the citizen as enshrined in the Constitution. Moreover they must scrupulously observe the Judges Rule. Under no circumstances should they effect any arrest unless same has been ordered by the Commissioner of Police after perusal of the relevant case file and assessment of the evidence on hand."

The Order goes on to require separate approval by the Commissioner himself for any detention following an arrest, and prohibits any acceptance of an arrested person by any police station without such personal authorisation. There are then consequential orders relating to the conduct of any prosecution which may follow.

18. Thus the Order first distinguishes between, on the one hand, police officers who take employment with ICAC and are granted leave without pay from the Force (section 24(5)(a)) and, on the other, seconded officers (section 24(5)(b)). Then, in relation to the latter, it issues orders which make it clear that they remain under Police control and discipline. In particular, arrests made by them in the course of their secondment to ICAC require the personal written authority of the Commissioner himself, after sight of the case file. This document was provided not only to policemen but also to the head of ICAC, as well as to the Home Secretary, the Director of Public Prosecutions and the Solicitor General. It establishes a regime which has clearly been accepted and operated by the Director General of ICAC for more than ten years.

19. The oath of confidentiality taken by all ICAC staff, including seconded policemen, is not inconsistent with this analysis. In seconding ("designating") a policeman to ICAC under section 24(5)(b), the Commissioner has clearly accepted that he will owe this duty of confidentiality to ICAC whilst there, on top of his duty of confidentiality as a policeman.

For its part, ICAC has clearly accepted, in particular but not only by the assent to the operation of the Commissioner's Order in Circular No 29/2003, that the policeman remains under the ultimate control of the Commissioner. The Commissioner of Police is clearly an authorised person for the purposes of the oath, insofar as a seconded policeman is concerned. Ad hoc arrangements would no doubt have to be made if it were to happen that ICAC were investigating the Commissioner or a senior police officer, but so they must be made if such a person is the subject of any other, non-corruption, criminal investigation.

20. The Board was referred to a report of the Select Committee on Fraud of the National Assembly which preceded the enactment of the PCA. In it, attention was drawn to the desirability of ICAC selecting its own staff, rather than depending on nomination by others, such as the Commissioner of Police, and misgivings were expressed about the capacity of the police force to investigate serious corruption. That report did not, however, contain any draft bill, and the Act subsequently adopted by Parliament plainly departed from it to the extent that it included section 24(5)(b). There is no ambiguity in that subsection and the Select Committee report cannot be resorted to in aid of its interpretation.

21. The foregoing analysis is consistent with the practice in the UK for secondment of police officers. Guidance issued with the concurrence of the Police Advisory Board for England and Wales (December 2013), replacing guidance in a different form makes clear, for example, that whilst different secondments may need ad hoc treatment, the basic principle is that the seconded officer retains his status as police officer and is entitled to return after secondment to his home force in the same rank as before.

22. It is unnecessary to these conclusions to decide separately whether Mr Coret or any other policeman seconded to ICAC under section 24(5)(b) is within the definition of "officer" of ICAC. It is, however, clear that he is not. The definition of "Officer", in relation to the staff of ICAC, is contained in section 2 (see para 11 above). A policeman seconded under section 24(5)(b) is not, in the clear view of the Board, "appointed" under section 24, within this definition. That expression contemplates appointment by ICAC to an employed position. Rather, such a policeman is designated by the Commissioner of Police. Section 24 distinguishes between persons employed on contract, who include policeman "recruited" under section 24(5)(a) and seconded policemen who, according to

section 24(5)(b), are not referred to as employed or on contract but rather as persons of whose services ICAC may "make use". The former, recruited under section 24(5)(a), have, as officers of ICAC, the powers of arrest created by section 53. The latter, seconded under section 24(5)(b), do not have those powers but as policemen retain the ordinary police powers of arrest.

23. The Board's principal conclusion, that a seconded policeman remains in the police service and subject to the control of the Commissioner of Police, was also that reached some years ago by the Court of Appeal in *Ha Yeung v ICAC* [2003] SCJ 273. The Board does observe, however, that in that case the policeman in question, originally seconded under section 24(5)(b), had additionally been appointed under section 29 PCA as the (acting) Director of the Corruption Investigation Division. Once appointed to that position, he undoubtedly was an "officer" of ICAC, as the terms of the definition in section 2 make expressly clear. The Board has not heard argument upon the question whether, once so appointed and during his appointment, such a policeman/Director can remain able to exercise at the same time both his powers as an officer of ICAC and also his powers as a police officer, as the Court of Appeal then held that he could. Such suggested dual capacity raises different questions and may well be more difficult to sustain, but the issue does not arise in this case, and it is neither necessary nor desirable to express any opinion upon it.

24. Likewise, whilst the Board recognises that part of the appellant's case is to assert that repeated arrests were not justified and that his trials have been unwarrantably delayed, those issues are not before it and it has no means of knowing whether the complaints are well-founded or not. If they are well founded, the appellant's remedy lies in the trial process and not in the constitutional contention presently advanced.

25. For the reasons here set out, the Board's conclusion is that this appeal should be dismissed