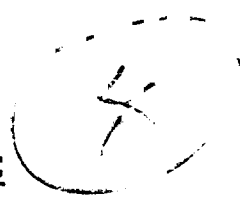


4, 1969



IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL

No. 28 of 1967

ON APPEAL FROM
THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

M. N. GUHA MAJUMDER

Appellant

- and -

THE ATTORNEY GENERAL OF SARAWAK

Respondent

RECORD OF PROCEEDINGS

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
- 9 MAR 1970
25 RUSSELL SQUARE
LONDON, W.C.1.

HATCHETT JONES & CO.,
90 Fenchurch Street,
London, E.C.3.

Solicitors for the
Appellant.

STEPHENSON HARWOOD & TATHAM,
Saddlers' Hall,
Gutter Lane,
London, E.C.2.

Solicitors for the
Respondent.

IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL

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1.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

No. 28 of 1967

ON APPEAL FROM
THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

M. N. GUHA MAJUMDER Appellant

- and -

THE ATTORNEY GENERAL OF SARAWAK
Respondent

10

RECORD OF PROCEEDINGS

No. 1

WRIT OF SUMMONS

In the High
Court of
Sarawak

IN THE HIGH COURT OF SARAWAK,
NORTH BORNEO AND BRUNEI

No. 1

Writ of Summons

Civil Summons
No. 25/29

Action No. C/122 1963

28th August
1963.

Between M.N. Guha Majumder Plaintiff
and the Attorney-General Defendant

20 To the Attorney-General of Sarawak, Kuching.

You are hereby commanded in Her Majesty's name to attend this Court at Kuching on Tuesday the 10th day of September, 1963 at 9.00 o'clock in the forenoon for mention of an action by M.N. Guha Majumder of c/o Medical Department, Kuching against you.

The plaintiff's claim (1) For a declaration, etc.-

2.

In the High
Court of
Sarawak

see attached statement
of Claim;

No. 1

(2) Any other relief as the
Court may deem fit;

(3) Costs.

Writ of Summons

Issued at Kuching the 28th day of August, 1963.

28th August
1963
(continued)

Filing	50.--
Service	.50
Judgment	1.--
	<u>\$51.50</u>

10

R/No.774889/193 of 27/8/63. (Sgd.) E.R. Harley

Judge

TAKE NOTICE - That if you fail to attend at
the hearing of the action or at any continuation
or adjournment thereof, the Court may allow the
Plaintiff to proceed to judgment and execution.

No. 2

No. 2

Statement of
Claim.

STATEMENT OF CLAIM

IN THE HIGH COURT OF SARAWAK, NORTH BORNEO AND BRUNEI

27th August
1963.

(HOLDEN AT KUCHING)

20

Between: M.N. Guha Majumder,
c/o Medical Department,
Kuching. .. Plaintiff

AND

The Attorney-General of Sarawak,
Kuching. .. Defendant

STATEMENT OF CLAIM

1. The plaintiff is a Medical Officer in Sarawak,
possessing the qualifications M.B., B.S., D.P.H.,
D.I.H., D.T.M. & H.

30

2. The relevant letter of appointment from the then Acting Chief Secretary, Sarawak, dated the 6th December, 1958, addressed to the plaintiff commenced as follows: "I am directed to inform you that His Excellency the Governor has been pleased to appoint you to be a Medical Officer in Sarawak in Her Majesty's Overseas Civil Service with effect from 1st December, 1958".

In the High
Court of
Sarawak

No. 2

Statement of
Claim.

10 3. The said letter of the 6th December, 1958, from the Chief Secretary further stated: "The appointment is on the permanent and pensionable establishment." The plaintiff accepted the said appointment and sent an undertaking to the Chief Secretary in the prescribed form, as requested, together with a declaration of secrecy.

27th August
1963
(continued)

20 4. The said appointment of the plaintiff as a Medical Officer in Sarawak in Her Majesty's Overseas Civil Service was announced by the Colonial Office and published in The London Gazette and in periodicals such as the British Medical Journal of 7th March, 1959. The plaintiff has since been confirmed in the said appointment in December, 1961.

30 The Government of Sarawak never paid and refuses to pay benefits such as expatriation pay (also called inducement pay) due to the plaintiff as a Member of Her Majesty's Overseas Civil Service. While there are some officers in Sarawak not admitted to Her Majesty's Overseas Civil Service receiving inducement pay, according to the knowledge and best belief of the plaintiff there is no other member of Her Majesty's Overseas Civil Service in Sarawak who is not receiving inducement pay.

40 6. The plaintiff did at all material times believe and continues to believe that he is a member of Her Majesty's Overseas Civil Service and that he is entitled to all benefits, such as inducement pay, to which officers in that Service are eligible. Only in about August, 1961, the plaintiff knew that the salary paid to him did not include inducement pay. Thereupon by a petition to His Excellency the Governor-in-Council dated the 19th August, 1961, the plaintiff asked for inducement pay with retrospective effect "from the date of my appointment in Her Majesty's Overseas Civil Service."

7. The Chief Secretary, Sarawak, replied to the

In the High
Court of
Sarawak

No. 2

Statement of
Claim.

27th August
1963
(continued)

said petition dated the 19th August, 1961, stating that the plaintiff's claim for inducement pay could not be admitted, but did not refute the plaintiff's contention that he was appointed in Her Majesty's Overseas Civil Service. The plaintiff has, however, been informed recently by a letter dated the 17th August, 1963, from the Chief Secretary, Sarawak, that the plaintiff is "not a member of H.M.O.C.S.," etc. Photostat copy of the said letter dated the 17th August is attached, marked "A".

10

8. The plaintiff's first enquiry about the appointment was addressed to the Director of Recruitment Colonial Office, London, as a result of an advertisement (BCD 117/24/01) that the plaintiff saw, while in England, in the British Medical Journal, the said advertisement was headed:

"HER MAJESTY'S OVERSEAS CIVIL SERVICE

Sarawak

MEDICAL OFFICER",

20

and it was expressly stated therein that "expatriation pay (pensionable)" was payable in respect of the appointment. Photostat copy of the said advertisement is attached herewith, marked "B".

9. On the 29th day of January, 1958, the plaintiff completed and returned the application form for the appointment to the director of Recruitment, Oversea Service Division, Colonial Office, clearly stating in answer to question 5 (a), namely, Type of appointment desired, that he was applying to be a "Medical Officer in Sarawak in Her Majesty's Overseas Civil Service" and referred expressly to the advertisement abovementioned (BCD 117/24/01).

30

10. The said application form for appointment submitted by the plaintiff also contained a question: "About when would you be available to go overseas (if selected)." Photostat copy of the first page of the said application form submitted to the Director of Recruitment, Oversea Service Division, Colonial Office, is attached, marked "C".

40

11. The offer of appointment as a result of the plaintiff's said application was made to him by the Secretary of State for Colonies (Mr. Secretary

Lenox - Boyd) and the plaintiff accepted the offer bona fide believing it to be the appointment for which he applied.

In the High
Court of
Sarawak

12. Before arriving in Sarawak to take up the appointment the plaintiff was issued with an "outfit allowance of £60 (sixty pounds sterling) as a means of assistance towards the purchase of essential tropical kit."

No. 2

Statement of
Claim.

10 13. The plaintiff's appointment as a member of Her Majesty's Overseas Civil Service was never disputed except for the letter of the 17th August, 1963, even though the plaintiff contended at all material times, including in the said petition addressed to His Excellency the Governor-in-Council dated the 19th August, 1961, that he is, and has been, a member of Her Majesty's Overseas Civil Service.

27th August
1963
(continued)

20 14. The plaintiff's annual confidential report was submitted every year invariably in the "Colonial Service Annual Confidential Report" form specially applicable to members of Her Majesty's Overseas Civil Service (G. 16) which included the question:

"8. (a) Should opportunity arise, would you wish to be considered for posts in other Colonies?

(b) If so, would you wish to exclude any Colonies or areas or to stipulate minimum salary?"

30 15. There is no means by which the plaintiff can at this time obtain legal determination of the matter/s at issue except by obtaining the decision of this Honourable Court and relief by way of declaration.

The plaintiff claims:

I. Declaration of Court that the plaintiff is, and has always been, a member of Her Majesty's Overseas Civil Service with effect from the 1st day of December, 1958.

40 II. Declaration of Court that the plaintiff is eligible for designation as a "designated officer" within the meaning of that phrase as defined in the Schedule to the Overseas Service Ordinance (No. 15 of 1961).

In the High Court of Sarawak

III. Declaration of Court that it would be unlawful to refuse to the plaintiff benefits such as inducement pay payable to a Member of Her Majesty's Overseas Civil Service.

No. 2

Alternatively

Statement of Claim.

~~Declaration of Court that it is inequitable to deny to the plaintiff benefits such as inducement pay payable to a member of Her Majesty's Overseas Civil Service.~~

27th August 1963 (continued)

IV. Any other relief as the Court may think just.

10

V. Costs.

Dated 27th August, 1963.

(Sgd.) Thomas & Co.

(Thomas & Co.)
9, India Street, Kuching.
Advocates for the Plaintiff.

No. 3

No. 3

Defence.

DEFENCE

2nd December 1963.

IN THE HIGH COURT IN BORNEO

20

(HOLDEN AT KUCHING)

Between: M.N. Guha Majumder,
c/o Medical Department,
Kuching. .. Plaintiff

AND

The Attorney-General of Sarawak,
Kuching. .. Defendant

DEFENCE

1. Paragraph (1) of the Statement of Claim is admitted.

30

2. As to paragraph (2) of the Statement of Claim,

the Defendant admits that the sentence of the letter therein referred to commenced as alleged but says that it continued and ended with the following words, namely, "on the conditions embodied in the Secretary of State's letter to you reference BCD/P-13847 dated 12th June, 1958" and the Defendant will, at the trial of the action, refer to the said Secretary of State's letter and to the memorandum enclosed therewith and will contend that the said letter and memorandum formed the basis and set out the terms and conditions of the offer of appointment accepted by the Plaintiff.

In the High
Court of
Sarawak

No. 3

Defence.

2nd December
1963
(continued)

3. The Defendant admits paragraph (3) of the Statement of Claim but repeats that such appointment was on the terms and conditions set out and/or referred to in the Secretary of State's letter dated 12th June, 1958, referred to in paragraph 2 above, and in particular that his appointment was subject to the General Orders of the Government of Sarawak.

4. The Defendant admits that the Plaintiff was confirmed in his appointment as a Medical Officer, Sarawak, with effect from 4th December, 1961. Save for the foregoing, each and every allegation of fact contained in paragraph (4) of the Statement of Claim is denied.

5. As to paragraph (5) of the Statement of Claim, the Defendant admits that no inducement pay was paid to the Plaintiff but denies that any inducement pay was at any time, or is now, due to the Plaintiff as a member of Her Majesty's Overseas Civil Service or at all. The Defendant will contend that the Plaintiff is not and never has been, under the terms of his appointment or otherwise entitled to inducement pay. The Defendant will further contend that the Plaintiff is not and never has been under General Order 192 (a copy of which General Order as in force at the material time is annexed and marked "1"), eligible for inducement pay, and the Defendant states that membership of Her Majesty's Overseas Civil Service does not ipso facto confer any entitlement to inducement pay and is not confined to persons in receipt of inducement pay.

The Defendant denies that the Plaintiff did not know until August, 1961, that he was not.

In the High
Court of
Sarawak

receiving inducement pay and states that, inter alia, that fact was clearly disclosed to the Plaintiff on his monthly salary slips.

No. 3

Defence.

2nd December
1963.
(continued)

The Defendant further contends:

- (a) that the Plaintiff was at all material times habitually resident in India;
- (b) that in his petition of 16th September, 1961, the Plaintiff's claim to inducement pay was on the ground that he satisfied the requirements of General Order 192; 10
- (c) that the Plaintiff was engaged in India for service in Sarawak through the United Kingdom's High Commissioner in India and with the consent of the Government of India;
- (d) that though he resided in England for two and a half years he never registered himself in that country as a citizen of the United Kingdom and Colonies;
- (e) that in April, 1958, namely after he had so applied and before he was offered a formal appointment by the Secretary of State for the Colonies the Plaintiff withdrew his contributions to the United Kingdom National Health Service Superannuation Scheme; 20
- (f) that in his said application for appointment the Plaintiff declared himself to be an Indian National and in a statutory declaration dated 16th July, 1962, made for the purposes of becoming registered under the British Nationality Act, 1948, as a citizen of the United Kingdom and Colonies he declared himself to be a citizen of India; 30
- (g) that on 4th December, 1958, namely, on his first entry into Sarawak, the Plaintiff entered Sarawak on an Indian passport;
- (h) that on 3rd August, 1962, the Plaintiff was registered in Sarawak as a citizen of the United Kingdom and Colonies by virtue of his residence in that Colony;
- (i) that as from Malaysia Day the Plaintiff has been by operation of law a citizen of Malaysia. 40

6. As to paragraph (6) of the Statement of Claim the Defendant repeats the third sentence of paragraph 5 hereof and admits that the Plaintiff on 16th September, 1961, petitioned the Governor-in-Council about inducement pay as alleged, but save as herein admitted, denies each and every allegation of fact contained in the said paragraph.

In the High
Court of
Sarawak

No. 3

Defence.

10 7. As to paragraph (7) of the Statement of Claim, save that the petition referred to therein was dated 16th September, 1961 and that it did not specifically raise in issue any claim by the Plaintiff to be a member of Her Majesty's Overseas Civil Service, the Defendant admits paragraph (7).

2nd December
1963.

(continued)

20 8. The Defendant admits paragraph (8) of the Statement of Claim but contends that the advertisement referred to was intended for applicants normally resident in Britain and it is unreasonable of the Plaintiff to contend that references to Her Majesty's Overseas Civil Service and expatriate pay should apply to him. The Defendant further contends that the said advertisement was at most an invitation to treat.

9. Paragraph (9) of the Statement of Claim is admitted.

10. Paragraph (10) of the Statement of Claim is admitted.

30 11. As to paragraph (11) of the Statement of Claim, the Defendant admits that the offer of appointment was made by the Secretary of State for the Colonies. The Defendant repeats paragraph 2 above and says that the said offer of appointment set out and/or referred to the terms and conditions on which the Plaintiff was being offered appointment. Save as aforesaid, each and every allegation of fact contained in paragraph (11) of the Statement of Claim is denied.

40 12. The Defendant admits paragraph (12) of the Statement of Claim but says that entitlement to such outfit allowance was an express condition contained in the offer of appointment referred to in paragraphs 2 and 11 above.

13. As to paragraph (13) of the Statement of Claim, the Defendant states that although the

In the High
Court of
Sarawak

No. 3

Defence.

2nd December
1963.
(continued)

Secretary of State for the Colonies has now, as an act of grace, enrolled the Plaintiff as a member of Her Majesty's Overseas Civil Service, and that although such enrolment will for the purposes of the Sarawak (Compensation and Retiring Benefits) Order in Council, 1963, be treated as if the Plaintiff had been so enrolled on the 30th day of August 1963, the Defendant will object that the enrolment of a person as such a member is a matter solely within the discretion of Her Majesty's Government and is exercisable by the Secretary of State for the Colonies, and is not a matter over which the Government of Sarawak has any power or control and that the first claim of the Plaintiff is not justifiable in this Honourable Court and is not within its jurisdiction. The Defendant will however regard the plaintiff for the purposes of these proceedings as if he had been enrolled in Her Majesty's Overseas Civil Service on the 1st day of December, 1958.

10

20

14. With regard to paragraph (14) of the Statement of Claim the Defendant denies that the form of Annual Confidential Report referred to therein and which was used in relation to the Plaintiff is specially applicable to members of Her Majesty's Overseas Civil Service and states that that form of report was and is used in relation to all officers in Divisions I and II of the service of the Government, including local and other non-induced officers.

30

15. Each and every allegation of fact contained in paragraph (15) of the Statement of Claim is denied. The Defendant states that the claim of the Plaintiff relates to matters in respect of which administrative procedures would at all material times have enabled him to have his claim determined by the proper authorities and in particular that in respect of his claim to entitlement to inducement pay the Plaintiff is, by the terms of his appointment, bound to accept as final the decision of the Governor in Council in accordance with General Order 192 and that that course is still open to the Plaintiff.

40

16. As to the claim that the Plaintiff is eligible for designation as a designated officer under the Overseas Service (Sarawak) Agreement, 1961, the Defendant ~~will object that~~ will contend that,

10 subject to the consent of the United Kingdom
Treaty; designation is a matter wholly within the
competence and discretion of one of Her Majesty's
principal Secretaries of State and is not within
the competence of the Sarawak Government. The
Defendant will further contend that under section 1
of the Overseas Service Act 1961 the Plaintiff
cannot be designated under the Overseas Service
(Sarawak) Agreement 1961 without the consent of
the United Kingdom Treasury; and the Defendant
 will further object that the Overseas Service
 (Sarawak) Agreement, 1961, is an agreement made
 between the Sarawak Government and Her Majesty's
 Government in the United Kingdom to which the
 Plaintiff is not a party, and that for this reason
 the issue of designation under the said Agreement
 is not justifiable in any proceedings in this
 Honourable Court, and that the second claim of the
 Plaintiff is therefore misconceived and should be
 20 struck out. In any event, the Defendant states
 that the Plaintiff has no legally enforceable right
 to such designation as it was mutually agreed
 between the United Kingdom Government and the
 Government of Sarawak prior to the execution of the
 said Agreement that, without prejudice to the
 discretion of the United Kingdom Government to
 designate officers outside the scope of the
 definition, that the term expatriate officer
 should for the purposes of the said Agreement, be
 30 interpreted as meaning:-

40 "an officer who was on the occasion of his
 first appointment habitually resident in a
 country other than Borneo, Burma, Ceylon,
 China, the Federation of Malaya, Hong Kong,
 India, Indonesia, Pakistan, the Philipines or
 Singapore and has his principal family and
 social ties and general background in any such
 country, and whose appointment to the Civil
 Service of Sarawak and North Borneo represents
 a material degree of dislocation and dis-
 turbance in connection with the resulting
 change in his residence or place of work".

17. The Defendant will contend that the third
 claim of the Plaintiff is vague and based on a
 false promise and is not sustainable and in
 particular contends that persons can be and have
 been enrolled as members of Her Majesty's Overseas
 Civil Service who have not been eligible for

In the High
Court of
Sarawak

No. 3

Defence.

2nd December
1963.

(continued)

In the High Court of Sarawak

inducement pay, inducement allowance or expatriation pay.

No. 3

18. The Defendant will contend that the Plaintiff is an established member of the Sarawak Civil Service and denies that the documents referred to in the Statement of Claim create any legally enforceable obligation upon the Government of Sarawak.

Defence.

2nd December 1963 (continued)

Dated this 2nd day of December, 1963.

Sgd. P.E.H. Pike

10

State Attorney-General, Sarawak.

No. 4

No. 4

Reply.

REPLY

9th December 1963.

IN THE HIGH COURT IN BORNEO (HOLDEN AT KUCHING)

Between: M.N. Guha Majumder, c/o Medical Department, Kuching ... Plaintiff

AND

20

The Attorney-General of Sarawak, Kuching. ... Defendant

R E P L Y

The plaintiff as to the defence says that:

1. He joins issue.

2. The defendant is estopped from denying that the plaintiff has been a member of Her Majesty's Overseas Civil Service with effect from 1st December, 1958.

3. His Excellency the Governor of Sarawak, when appointing the plaintiff to be a Medical Officer in Sarawak in Her Majesty's Overseas Civil Service

30

with effect from 1st December, 1958, was acting directly as an agent of the Crown/Her Majesty's Government, even if the Governor had to obey orders and directions from another agent of the Crown/Her Majesty's Government, namely the Secretary of State for Colonies.

In the High
Court of
Sarawak

No. 4

10 4. The Crown/Her Majesty's Government, held out the Governor of Sarawak as the agent with authority to give the plaintiff a formal letter of appointment. In the circumstances the Governor's act binds his principal to the extent of the apparent authority the principal permitted the Governor to assume, whether he had actual authority or not, while appointing the plaintiff to be a Medical Officer in Her Majesty's Overseas Civil Service with effect from 1st September, 1958.

Reply.

9th December
1963.
(continued)

20 5. At all material times the plaintiff had no knowledge whatsoever of General Order 192 and it was impossible for the plaintiff to have access to General Order No. 192 or any other General Order of the Government of Sarawak until he signed the declaration of secrecy after his arrival in Sarawak on the 4th December, 1958, although the plaintiff's appointment took effect from 1st December, 1958.

30 6. Statements/allegations contained in paragraph 5(a) to (i), even if true, are all irrelevant to the issues and should be struck out. In particular the defendant's allegation that as from Malaysia day the plaintiff has been by operation of law a citizen of Malaysia, is false and malicious.

40 7. This Honourable Court having become seized of the matter when the Court was the Queen's Court in the Colony of Sarawak and the defendant having entered appearance before Malaysia day, there is no ground/s for questioning the jurisdiction/competence of this Honourable Court to declare that the plaintiff is eligible for designation as a "designated Officer" within the meaning of that phrase as defined in the Schedule to the Overseas Service Ordinance, especially in view of the fact that the defendant has been taking instructions from his "true clients in London" as was stated in Court and in a letter dated 15th November, 1963, from the defendant to the plaintiff's Advocate (copy of which letter is annexed marked "D").

In the High
Court of
Sarawak

No. 4

Reply.

9th December
1963.
(continued)

8. The concept of privity of contract has nothing to do with the plaintiff's claim for Declaration of Court that he is eligible for designation as a designated officer under the Overseas Service (Sarawak) Agreement, 1961, an agreement between Her Majesty's Government in the United Kingdom and Her Majesty's Government in the Colony of Sarawak, as it was intended for the benefit of certain human persons including the plaintiff.

9. The term expatriate officer should, for the purposes of Overseas Service (Sarawak) Agreement, 1961, be given its ordinary meaning, especially in view of the fact that the said Agreement as set out in the Schedule to Ordinance No. 15 of 1961 contains (in paragraph 1) interpretations of words having meanings other than ordinary meaning/s for the purpose of the said Agreement. The said Agreement is not an Agreement or Treaty between two sovereign states and as such historical interpretation (Travaux preparatoires) of the said Agreement is not permissible.

10

20

10. The alleged mutual agreement between the United Kingdom Government and the Sarawak Government regarding the interpretation of the term expatriate is inadmissible, as such an agreement if in existence (which is disputed) cannot affect the rights the plaintiff had acquired antecedent to such agreement and also because it is obviously secret as far as the plaintiff is concerned.

11. Her Majesty's Government lacked the competence to enter into any agreement whereby the plaintiff's right/s acquired under the terms and conditions of his appointment could be taken away, without the prior consent of the plaintiff.

30

12. The plaintiff was never informed that the plaintiff's nationality, race or colour of his skin had anything to do with terms and conditions of his service. And, indeed, the terms and conditions governing the plaintiff's appointment were, at all material times, understood to be those set out in the advertisement mentioned in paragraph 8 of the Statement of Claim, except for variations expressly set out in the letter from the Secretary of State for Colonies dated the 12th June, 1958. There was no suggestion whatsoever until after the plaintiff accepted the appointment that he would not be entitled to expatriation pay.

40

13. The plaintiff will at the trial refer to The Sarawak (Compensation and Retiring Benefits) Order in Council, and especially to the interpretations of terms such as "entitled officer" and "overseas officers" as set out in the said Order in Council.

In the High Court of Sarawak

No. 4

14. The plaintiff will also rely, as far as may be necessary, upon the law of nations and especially upon general principles of law recognised by civilized nations.

Reply.

9th December 1963.
(continued)

10 Dated 9th December, 1963.

(Sgd.) Thomas & Co.

(Thomas & Co.)
9, India Street, Kuching.
Advocates for the Plaintiff.

No. 5

No. 5

NOTES OF THE HON. MR. JUSTICE LEE HUN HOE

Notes of the Hon. Mr. Justice Lee Hun Hoe.

Civil Suit No.122 of 1963

Majumder v. Attorney-General.

14th and 15th July 1965.

Coram: Lee Hun Hoe, J.

20 9.00 a.m. Thomas for plaintiff
14.7.65 Goodbody for defendant

Thomas: Apply for two minor amendments. Para 5 Page 3 "in Sarawak" to be inserted between the words "service" and "who" in the last line. My learned friend has no objection.

Third claim page 6. The alternative declaration be deleted.

30 Goodbody: No objection to amendment. Refer to page 29 of agreed correspondence. Para.(a) admitted plaintiff is H.M.O.S. Para. (b) "will contend that subject to the consent of the United Kingdom Treasury". Treaty misprint. Para. (c) "The defendant will further etc. etc. Treasury".

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No. 5

Notes of the
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14th and 15th
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(continued)

Court: Leave granted for both amendments by
plaintiff and defendant to be made.

Thomas: Special occasion. Case unique. First
trial of Your Lordship in the Kuching High
Court. Unique Government Officer suing
Government. Outlined facts.

Working in England. Saw advertisement.
Applied. Selected and appointed. Former
letter of appointment sent. Appointment
published in Medical Journal and London Gazette. 10
Later letter of appointment from C.S. also
mentioned appointment in H.M.O.S.

Plaintiff under impression he was
receiving inducement pay. To his surprise
and disappointment in August 1961 he found he
was not paid inducement pay. He made repre-
sentation but was unsuccessful. Then with
the coming of Malaysia plaintiff wrote to C.S.
Refer No. 12 of agreed documents. Shocked to
receive reply No. 14. 20

No difference whether Queen's Court or
King's Court. Between filing of defence and
now certain facts have been agreed.

Exh.D Produced document of agreed facts.

Goodbody: Have just been told that there is a
policemen who does not receive inducement pay.
But I have not as yet been able to ascertain.
Subject to this para. 3 agreed with what my
l.f. said.

Thomas: Notice to produce given. No. 30 in 30
pleading. Also refer to No. 28 in agreed
documents. Read document of agreed facts.
Will now call plaintiff.

P.W.1. Manindra Nath Guha Majumder, affirmed and
states in English:

I have been a medical officer w.e.f.
1.12.58. I am now serving as Div. medical
officer, Third Division, Sarawak. MB. BS.,
D.P.H., D.I.H. (Eng.), D.T.M & H. (Eng.) To
my knowledge there is no officer in Sarawak 40
with my qualification in so far as public
health is concerned.

This is the application I submitted in connection with my appointment. Addressed to Director of Recruitment, Colonial Office, London.

In the High Court of Sarawak

I applied for post of medical officer in H.M.O.S. Specifically stated in para. 5 of application.

No. 5

I have the advertisement which I referred to. Same reference number given by me.

Notes of the Hon. Mr. Justice Lee Hun Hoe.

10 Finish post graduate study in England in February, 1957. After that joined Rochford Hospital Essex under the National Health Services. I joined as I intend to live in England as I was a refugee from Pakistan. At that time I had no home in India at the time. Born in Rangpur, now in Pakistan. 1946 Pakistan and India partitioned. I have no address of my own in India. I did not own any property in India at that time. The address in Calcutta is the address of my father-in-law. I left Rochford Hospital as I was almost certain of getting the appointment in Sarawak as that was the impression I got during the interview. If I had not been selected for appointment in Sarawak I would go back to England to continue my service after visiting my wife's family in India.

20

14th and 15th July 1965.
(continued)

30 I was in the National Health Service. Quite easy to obtain appointment as England was short of qualified doctors.

Refer to No. 3 of agreed documents.

I understood that I had been selected but only needed to pass a medical examination.

I took it for granted that the terms and conditions appearing in the advertisement applied to me in my appointment.

Refer to No. 12 of agreed documents.

Letter of 12.6.58.

40 When I received the letter and enclosure I believed I was getting inducement pay. I thought inducement pay was included because

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the salary scale starts at \$930.- while I got \$1,155. I got the impression because of para. 5 of the Colonial Office Appointments in H.M's O.C.S. Part II. I thought my salary was inclusive of inducement pay.

I did go through the memorandum attached to the formal letter. The memorandum did not say that I would not be receiving inducement pay.

Para. 6 line 3 of memo. Pensionable emolument I took it to include inducement pay. Para. 7 rate of contribution is 5% of salary plus inducement pay. I had no suspicion at all that I did not receive inducement pay. I took it in good faith that I was receiving inducement pay. Para. 4 of memo. At the time I accepted the appointment I had no knowledge of the G.O. of Government of Sarawak. No copy was given to me. Neither was relevant extract given to me.

10

20

I accepted the offer on 10.10.58. (No.6). I signed declaration of secrecy on 11.12.58. (No. 11).

I had no access to the G.O. of Government of Sarawak as they are for official use only. As a Div. Medical Officer I have a copy of the G.O. I have a copy here.

G.O. 7 read.

I got to know that I did not actually receive inducement pay in 1961 about August when I had to apply for my leave which is due in 1962. I came to know that induced officers are supposed to go on leave after 3 years whereas in my case it was mentioned as 4 years. So I made further inquiry why that was so. Then I came to know that I was not receiving inducement pay.

30

Then in September 1961 I petitioned to the Governor in Council about non-payment of inducement pay. It is admitted that the petition was not successful.

40

By a letter dated 30.12.61 I was informed of my confirmation of appointment. (Letter inspected and returned).

Refer to No. 12 and No. 13 in agreed documents.

Reply No. 14

Thereupon I instructed my solicitors to institute proceeding in this Court.

I know of officers who are not members of H.M.O.S. but still receiving inducement pay. They are Dr. H.C. Raj in Agriculture Dept. L.S.V. Murthy in Forest Dept. They are Indians. They were recruited before 1957. I am the only one who being a member of H.M.O.S. was being refused inducement pay since December 1958.

I received tropical kit allowance of \$60.- on my first appointment.

G.O. 47 read.

I have got a Sarawak Staff List 1964, Part I, here at page 69. I was shown here after correction that I was an induced officer. On the front page it is stated to be printed by authority of the Government Printer.

Referred to No. 13 of agreed documents. Last sentence in para. 2. I got to know of the circular through a colleague of mine who is in H.M.O.S. I have the circular letter ref. 42/C/5047/61/1. Signed by Jakeway. Dated 10.11.61. It is not confidential. Read para. 1 of circular letter. Letter set out various benefit in the scheme. \$1,155 was what I got on my appointment. I would receive \$240.00 per month as my inducement pay on my present salary £360 per year. According to the circular letter new inducement pay \$483. p.m.

Exh. A. Produced Application Form

B. Advertisement.

C. Circular Letter.

That was the reason why I claimed to be a designated Officer.

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XXD Born in India which is now Pakistan. Stayed there until 1955. Qualified in Calcutta University. I went to England in 1955 for 1st time. It would be easier to get appointment in England. I did go to England for further study and actually took an appointment.

In March 1957 I joined Rochford Hospital. I think it was about £910 per year. I was a Senior House Physician. Employed for two years but might be extended. Had superannuation right. Accommodation was supplied. Food supplied. About £150 per year was deducted. House within Hospital compound. Was married at the time. My wife was in India staying in Calcutta. She is with me now.

10

Saw advertisement in B.M.J. In fact both pay and climate induced me to apply. Also there is pension. The appointment I got is more attractive one. Very shortly after I saw advertisement I wrote to Colonial Office for a form. Saw advertisement with salary scale. Thought would start at beginning of scale. Thought had no practical experience though had qualification so did not know whether would get extra. \$1,155 p.m. What was offered to me I thought included inducement pay. In other words inclusive salary.

20

Yes, I know what expatriate pay was. It was paid to those in H.M.O.S.

30

I did not ask how much expatriate pay I would get.

I had no suspicion or reason to believe that I did not get inducement pay.

Nothing said about whether I received inducement pay.

I had pay slips given to me when I received my pay. There is a column for inducement pay. Nothing odd. I thought my pay was inclusive. I have not seen Dr. Raj's salary slip.

40

I thought members of H.M.O.S. were entitled to expatriation pay. First time I realised I

was not receiving inducement pay when I was applying for leave in 1961.

I know Dr. Raj. He is a friend. I learned that my tour was 4 years and others 3 years because I was not an induced officer. Then I petitioned to the Governor in Council.

They said under the G.O. I was not an induced officer. Before I signed contract the G.O. did not come in.

10 I am basing my case on the advertisement, the letter and memorandum. G.O. had got nothing to do with. I had no knowledge of the G.O.

I could have seen the G.O. at any way.

Refers 10 in agreed documents.

I knew nothing about the G.O.

20 Probably the G.O. would not be given if I asked. I thought I had no access to the G.O. If it affected terms and conditions it would be mentioned on the memorandum.

I was in India at the time. I did not have the chance to have seen a copy. I would see the rules of the club if I joined the club.

I did not ask for the G.O. as I thought the document was not available to me.

30 I went to India to see my wife on holidays. I got a letter from the British High Commissioner. My appointment was done through the British High Commission. I do not think the Govt of India had to consent to my accepting my post.

I am saying that I was habitually resident in England. I intended to stay in England. I wanted to make U.K. my home. I intend ultimately to retire to U.K. At the time I had an Indian Passport. I was short of money back to India. I got my superannuation allowance.

In the High Court of Sarawak

No. 5

Notes of the Hon. Mr. Justice Lee Hun Hoe.

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(continued)

In the High Court of Sarawak

I was of Indian origin. Had Indian Passport. Also British subject under British Nationality Act.

No. 5

RXD No question.

Notes of the Hon. Mr. Justice Lee Hun Hoe.

P.W.2. L.S.V. Murthy, affirmed and states in English:

14th and 15th July 1965 (continued)

Asst. Conservator of Forest, Sarawak. Came originally from India. Joined Sarawak Government in 1956 January. I was in U.K. Edinburgh when I applied for the job. That was in 1955. Final Forestry students were asked to go to Colonial Office who wanted to contact prospective officers. I wanted to be in H.M.O.S. I am afraid I can't remember what address I gave. Indian or U.K. address. Reply was sent to me to Edinburgh.

10

I am in receipt of inducement pay. I had all along been in receipt of inducement pay.

Ordinance No. 9 of 1963 was published because I was not a member of H.M.O.S. I got letter of appointment from Secretary of State saying that I was selected for appointment for service for Sarawak. I believe I was on H.M.O.S. In 1961 I put in my application to be member of H.M.O.S. In 1962 I was informed I was not accepted.

20

XXD When I was appointed I was given inducement pay. I was told during interview what I would be paid. Colonial representative went to Edinburgh University. Then we went to Colonial Office. I am on pensionable service

30

I am afraid I can't remember.

It was specifically stated that I would get expatriation pay. Reason because I was recruited in U.K. I am Indian.

I learned about the G.O. after my arrival here. I had to pass examination.

My pay slip showed my inducement pay.

RXD No question.

11.30 a.m. Adj. till 2 p.m. this afternoon.

40

Court: (Sgd.) Lee Hun Hoe.

2 p.m.

14.7.65 Court resumed.

Thomas: That is my case.

Goodbody: Will call Mr. Williams.

Court: Will mark the agreed bundle of correspondence as Exhibit E.

D.W.1. John Alexander Williams, State Establishment Officer, Sarawak, affirmed and states in English:

10 I have a copy of the G.O. Current copy is one with blue cover.

Up to 1st August 1957 G.O. 192 reads as follows. Copy produced. The position is now altered as to part (a). Copy in the pleading.

EXH. G Old General Order 192 produced.

Thomas: Staff List public document.

S.75 of Evidence Ordinance.

S. 79 of Evidence Ordinance.

20 S. 80 of Evidence Ordinance.

S. 4 (2) of Evidence Ordinance.

Goodbody: Do you know whether any alteration has been made to staff list?

Alteration made some time ago taking out a symbol in the Staff List in respect of plaintiff.

30 If a person is engaged in Nigeria he would get inducement pay. Coming from Nigeria or Aden would represent dislocation and disturbance.

XXD No Nigerian in the service of the Sarawak Government. Not conjecture. No Nigerian applied.

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Notes of the Hon. Mr. Justice Lee Hun Hoe.

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(continued)

Referred to No. 12 of agreed documents.

Petition from plaintiff. Marginal note on last para. It was initiated by me. Certainly not presumptuous. It was my opinion.

Referred to No. 14 of agreed documents. My opinion was supported by Secretary of State of the Colony at the time. I had read the papers about the matter and was of the opinion that Dr. Majumder was not so entitled.

I do know that now defendant has admitted plaintiff is a member of H.M.O.S. I also do know that he has been certain compensation. 10

Referred to No. 9 of agreed documents. It is correct I had copy of this letter in my file when I made the remark.

I dare to express an opinion to be correct. First I have not seen this file for two years. Not at the moment entirely on fox with the matter. I was going through the file at the time and came to that opinion. That is all I can say about it. 20

I may well have seen it. I am saying that para. 1 on No. 9 was wrong. I did not know plaintiff's appointment was published in the London Gazette. Not at that time anyway. No racial discrimination at all in the establishment Branch. Resent the remark.

There is no connection between membership of H.M.O.S. and inducement pay. At the time in question grant of inducement pay was a matter for the discretion of the territory concerned. Membership of H.M.O.S. was governed by rules and regulations interpreted by H.M.'s Secretary of State. I can show that there was no relationship because some officers in the Sarawak Government Service who are not members of H.M.O.S. were on the other hand in receipt of inducement pay. 30

The answer why plaintiff did not receive inducement pay was simply because he was recruited after the G.O. 192 was amended to include India. 40

Why Mr. Murthy was not admitted to H.M.O.S.?

In the High Court of Sarawak

I am not competent to answer. This is a matter for the H.M.'s Secretary of State.

No. 5

Exh.F Staff List to be marked "F".

The correction shown he was an induced officer. One correction was wrong.

Notes of the Hon. Mr. Justice Lee Hun Hoe.

10 RXD To the best of my knowledge Mr. Murthy made a joint petition to the Secretary of State or the Government. He and co-petitioner were in receipt of inducement pay. They would be in a difficult and invidious position following Malaysia Day in respect of being regarded as local officers. They received inducement pay legitimately before G.O. 192 was amended. They were always regarded as expatriate officers in the furthest sense of the term. H.M.'s Secretary of State would not agree without contention.

14th and 15th July 1965 (continued)

20 XD by Court: Inducement pay was paid at that time by the Sarawak Government. With effect 1.4.61 H.M.G. paid inducement pay.

Goodbody: Not calling any other witness.

Address

Goodbody: Statement of Claim

Received letter of appointment when plaintiff was in India together with memo. Letter dated 12.6.58.

Para. 4 admitted.

30 Para 5. not disputed.

Para 6. signed application form. Advertisement referred. Thought he was a member of H.M.O.S. Obvious he was. Clear now possible to be a member H.M.O.S. but not in receipt of inducement pay. Petition to Governor. Not successful.

40 Para.7 not dispute that expatriation pay mentioned in advertisement. Not part of contract. Merely for information.

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(continued)

Para. 12 Tropical kit allowance. G.O.47
entitled to allowance if eligible to
inducement.

Para. 14 nothing much. Claims for declaration.

Defence

Never asked for G.O.

Admitted no inducement pay paid to plaintiff.

Reason: he was a gentleman recruited from India
after the amended G.O. came into force.

If it could be shown he was habitually resident
in England G.O. 192 would apply.

10

Can we say principal family there?

Wife in India. Never visited him in England.
Why claim not raised before. Inclusive salary.
Inducement pay in separate column in pay slip.
Waited for 3 years to find out. Knew about it
in 1961 when he applied for leave. Assume
plaintiff is now citizen of commonwealth or
commonwealth subject. Designation is matter
for U.K. Treasury. Could not compel British
Govt to comply. Plaintiff wants inducement
pay. It is pensionable. Action does not lie
in contract.

20

Reply

Para. 2 does not apply now.

Defendant has already admitted. G.O. not
confidential. Only not available to public.

Would leave para. 9 to Thomas to expand.

Can have treaty between Britain and a colony.
Merely constitution arrangement.

30

Muddle and mistakes.

Hence claim brought.

When Dr. Majumder saw advertisement which is
invitation to treat not forming part of contract.

Carbolic Smoke Ball Co. case (1893) 1 Q.B.256.
Their definite offer. Different here.

In the High
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Chitty on Contract General Principle 22nd
Edition page 56 - deals in General - page 57.
Contract is contained in letter written by
Secretary of State plus memo. plus G.O.
Memo. did not mention inducement pay in the
sense of how much he would be entitled. Not
specifically stated.

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Justice Iee
Hun Hoe.

10 According to G.O. 47 entitled to tropical kit
allowance if eligible to inducement.

14th and 15th
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(continued)

Certain inconsistency in memorandum.

Plaintiff says looking on the case as a whole
he is entitled to inducement pay. Pleading
did not say that contract is to pay such. But
by inference he claimed to be so entitled. 5%
of salary etc. Nothing has been said about
how much he was entitled to inducement pay.
20 If plaintiff could show he was habitually
resident in England he could bring himself
within G.O. 192.

Stroud Dictionary - no difference between
ordinary and habitual residence. Would say
stronger in the case of habitual. Even if
plaintiff would like to stay in England. It
would be for a reasonable time. Bought house
and have wife and children there. Social
background. G.O. 192. Doing temporary job
in Rochford Hospital.

30 Letter of 12th June 1958 is of some importance.
Para. 3 certain allowances mentioned. No
word of inducement pay mentioned.

Page 10 of agreed documents. Inconsistence.
Plaintiff did petition the Governor.

Shorter Oxford Dictionary "habitually
residence".

We say a matter of how contract contained in
these documents.

40 Unfortunate memo. mentioned G.O. which is no
unreasonable person is bound even if he did
not read it.

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(continued)

Curtis v. Chemical Cleaning Co. (1951) 1 K.B. 805 page 807 Lord Somervell. Party bound when he read document if it is mentioned in agreement.

Law Quarterly Review 1939 on some aspect of offer and acceptance page 518. Article by Professor Winfield.

Mr. Murthy recruited before the alteration of the G.O. came in. Understand special Ordinance had to be passed to enable him and others to receive compensation. 10

True to say all officers in the H.M.O.S. except plaintiff had received inducement pay.

It has been pleaded that no action against Crown on contract except in certain cases.

Cannot sue Crown for wrongful dismissal. Pensionable emolument. If they refused to pay plaintiff can recover.

Chitty on Contract General Principal 22nd Edition. 20

Plaintiff claiming for declaration asking for certain relief.

Hoiser Brothers etc. (1918) 2 K.B. 671

If you can't get relief or money payment not entitled to a declaration.

Riordan v. War Office (1959) 1 W.L.R. 1046

Inland Revenue Commissioners v. Hambrook (1956) 2 K.B. 641.

Constitutional arrangement between British and Sarawak. 30

Ordinance No. 15 of 1961. This deals with the question of designation. Seems to me Dr. Majumder is an expatriate Officer. Mr. Murthy is an expatriate Officer but not a member H.M.O.S. but was appointed by H.M.'s Secretary of State.

Fawcett. British Commonwealth in International Law.

In the High Court of Sarawak

Thomas: Object to the book. No authority like Oppenheim.

No. 5

Court: See no reason to object.

Goodbody: Page 115 of Fawcett.

Notes of the Hon. Mr. Justice Lee Hun Hoe.

Submit one or two. Inconsistencies do not give plaintiff the right to inducement pay.

Thomas: Would take about 2 hours.

14th and 15th July 1965 (continued)

10 4.15 p.m.

Court: Adj. till 9.30 a.m.

(sgd.) Lee Hun Hoe.

14.7.65

9.30 a.m.

15.7.65 Court resumed.

20

Goodbody: Do not think position change as I understand it as far as the Court is concerned. Question whether Dr. Majumder is a "designated officer". Once admitted that he was a member of H.M.O.S. he is in same position as everyone. Constitution changes make no difference to the suit. Designation of course is quite a different matter from being a member of H.M.O.S.

Thomas: For convenience I have given copy of my submission to defendant and copy to Court for reference.

30

Unique case. Plaintiff sued Govt. Apply for 3 declarations. 1st declaration conceded by defendant. Background of plaintiff. How he was appointed Medical Officer Sarawak. Appointment published. Overwhelming evidence hence plaintiff conceded 1st claim.

Will deal with 3rd claim first. H.M. Overseas Service. Miscellaneous No. 520

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(A) Explanatory Note

(B) Special Regulations by the Secretary of State for the Colonies.

Obvious plaintiff had to be an expatriate officer before he was appointed.

Price v. Humphries (1958) 2 A.E.R. 725

Mr. Murthy not a member of H.M.O.S. yet in receipt of inducement pay. Absurd to refuse inducement pay when he is accepted as expatriate officer.

10

Mr. Williams mentioned about the correction in the Staff List and he said it was wrong. One agent cannot contradict another.

Terms of Contract. Agree advertisement invitation to treat.

No. 8 of pleading. Advertisement.

Jacobs v. Batavia (1924) 2 Ch. 329

McClelland v. N. Ireland Health Bd. (1957) 2 A.E.R. 129.

H.L. case. Lord Oaksey page 130 1st para. 132 "Counsel.....pensionable post".

20

Ask Y. Lordship to take advertisement into account.

Letter 2nd May, 1958.

No. 3 in agreed documents. "Provisionally"

Branca v. Cobarro (1947) 2 A.E.R. p.101 at 103

Letter 12th June 1965.

No. 5 and 5A in agreed documents.

Clause 4

Plaintiff has no knowledge of G.O. 192. G.O. 47.

30

Clause 7

5% of salary plus inducement pay etc.

In the High Court of Sarawak

Clause 6

Pensionable emolument.

"Emolument" wider than salary.

R. v. P.M.G. (1878) 3 Q.B.D. 428

The Dictionary of English Law.

Earl Jowitt

"Salary scale" No. 5 in agreed documents.

10 Plaintiff offered \$1,155.--.

Doubt in interpreting memo. should be resolved against the Crown.

Contra proferentum rule.

Chitty on Contract - General principal 22nd Edition para. 613.

John Lee & Son (Brantham) Ltd. v. Railway Executive

Staff List - Public document

S.75 Evidence Ordinance

20 S.79 (1) (a) (ii) Evid. Ord.

S. 4 (2) Evidence Ordinance

S.80 (1) Evidence Ordinance.

Submit plaintiff has proved that he is an induced officer and justified in asking for a declaration.

Now will deal with 2nd declaration.

"Designated Officer". Schedule to the Overseas Service Ordinance (15/1961).

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(continued)

Declaration sought of something specified in
the said Ordinance.

Referred No. 1 in pleading.

Writ issued by Queen's Court.

Defence filed after communicating with "true
clients" in London.

No. 15 of agreed documents.

Appearance unconditional.

Claim now justifiable and within jurisdiction.
Para. 13 of Defence. 10

Court has power to make declaration under
O. 25 r. 5 to make declaration. Even before
Malaysia Day this order is applicable.

Even if plaintiff has no cause of action
entitled to declaration.

(1915) 2 K.B. 536

(1911) 1 K.B. 422

(1931) 145 L.J. 208 Report not available.

Jurisdiction discretionary. Test laid down by
Lord Dunedin in 1921 quoted in (1956) 3
A.E.R. 944. 20

"Re question sought".

Question real, interest real, proper
contradictor.

No. 15 of agreed documents.

Also No. 16 of agreed documents.

No. 23 of agreed documents.

"top level discussion" Only last week original
application form was obtained.

Circular Letter Exh. "C" shows various
benefits in the scheme applicable to Sarawak. 30

Crown has to satisfy court why plaintiff who is an expatriate is not one now.

In the High Court of Sarawak

Defendant has failed to discharge onus.

Ordinance 15/1961. No definition of "expatriate officer". No special definition - discriminatory.

No. 5

Command Paper 1193. Service with Overseas Govts". Particularly page 6 para. 9.

Notes of the Hon. Mr. Justice Lee Hun Hoe.

10

Nothing in Agreement to exclude plaintiff from benefits of the scheme.

14th and 15th July 1965 (continued)

Defendant submitted to jurisdiction.

Re Dulles' Settlement (1951) 2 A.E.R. 69 at page 71. Lord Evershed

"..... where merits"

Defendant submitted to jurisdiction.

20

Conceded 1st declaration. According to defendant both 1st and 2nd declaration within discretion of Secretary of State for Colonies. Whether plaintiff is a member of H.M.O.S. is within his discretion.

Before Malaysia Queen's Court. Had jurisdiction whether now that it is no longer Queen's Court affect jurisdiction.

International Law applies. Lapse of jurisdiction.

Page 51 T.O. Thomas Right of Passage over Indian Territory. Specimen of declaration of acceptance.

30

Time factor in the jurisdiction of the International Court of Justice by Shabtai Rosenne. Page 30 and 31. "The lapse Declarations".

Case concerning Right of Passage Over Indian Territory. Page 142.

"It is a rule of law already established."

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(continued)

Extrensic fact. Establishment of Malaysia
seised.

Conclusion

Deal with general matters. Court not concern
with obedience. Top discussion. Overseas
Service Act 1961. No evidence that Secretary
of State asked Treasury for consent.

"Eligible" to declaration as designated
officer but NOT "entitled".

Para. 18 of Defence.

10

The contention does not stand now.

"Legally enforceable".

Submit the declaration is properly brought.

Crown Proceedings Ordinance, particularly
Ss. 3 (e) and 14 (2).

Judicial Review of Administrative Action by
S.A. de Smith. No copy available in Kuching
except mine. Page 369 and 370. Court may
exercise discretion in settling words of
declaration if Court considers desirable.

20

Court: Petition to Governor in Council. Was
there any reply?

Thomas: Reply from Chief Secretary.

(Inspected by Court).

12.00 noon

Court: Cur Adv. Vult.

(Sgd.) Lee Hun Hoe.

15.7.65.

No. 6
 PLAINTIFF'S COUNSEL ADDRESS
 AND SUBMISSIONS

In the High
 Court of
 Sarawak

MAJUMDER Vs. ATTORNEY-GENERAL

Submissions of Counsel for the Plaintiff

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As I already mentioned while opening this case, this is a unique case in that for the first time in these Courts a serving officer of the Government of Sarawak, who is now the Divisional
 10 Medical Officer, Third Division, has sued the Government under whom he is serving for the vindication of his rights.

The plaintiff Dr. Majumder, by his Statement of Claim, asked for three Declarations of Court. They are:

- 20 "i. Declaration of Court that the plaintiff is, and has always been, a member of Her Majesty's Overseas Civil Service with effect from the 1st day of December, 1958.
- ii. Declaration of Court that the plaintiff is eligible for designation as a "designated officer" within the meaning of that phrase as defined in the Schedule to the Overseas Service Ordinance (No.15 of 1961).
- 30 iii. Declaration of Court that it would be unlawful to refuse to the plaintiff benefits such as inducement pay payable to a Member of Her Majesty's Overseas Civil Service."

The defendant has at last conceded the plaintiff's claim to the first of these three declarations. It is, however, useful to remember that this was not conceded gracefully but after a desparate fight which proved more and more hopeless.

As has been proved in this Court in 1957 the plaintiff was working in the General Hospital,

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Rochford, England. Then he saw an advertisement in the British Medical Journal calling applications for the post of Medical Officer in Sarawak in Her Majesty's Overseas Civil Service.

In response to that advertisement the plaintiff applied to the Director of Recruitment, Overseas Service Division, Colonial Office, London. His application referred specifically, in column 5, to the earlier Colonial Office advertisement and stated that he was applying for the post of "Medical Officer in Sarawak in Her Majesty's Overseas Civil Service". 10

The plaintiff was as a result of the said application appointed a Medical Officer in Sarawak. The relevant letter of appointment from the Acting Chief Secretary Sarawak, dated the 6th December, 1958, addressed to the plaintiff commenced as follows: "I am directed to inform you that His Excellency the Governor has been pleased to appoint you to be a Medical Officer in Sarawak in Her Majesty's Overseas Civil Service with effect from 1st December, 1958". 20

Furthermore, the said appointment of the plaintiff as a Medical Officer in Sarawak in Her Majesty's Overseas Civil Service was announced by the Colonial Office and published not only in periodicals such as the British Medical Journal but also in the London Gazette.

And, the plaintiff's status as a member of Her Majesty's Overseas Civil Service was never disputed until August, 1963. In July 1963, the plaintiff wrote to the Chief Secretary enquiring about his rights on the formation of Malaysia under the Scheme of Retirement Benefits as a member of Her Majesty's Overseas Civil Service. The Chief Secretary replied on the 17th August, 1963, stating that the plaintiff was not a member of Her Majesty's Overseas Civil Service and that the plaintiff did not qualify as an 'entitled officer' under the Malaysia Retirement Scheme. 30 40

According to the Defence, filed on the 2nd day of December, after these proceedings

were instituted the Secretary of State for Colonies, as an act of grace, enrolled the plaintiff as a member of Her Majesty's Overseas Civil Service and, that "such enrolment will for the purposes of the Sarawak (Compensation and Retirement Benefits) Order in Council, be treated as if the plaintiff had been so enrolled on the 30th day of August, 1963".

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10 The plaintiff was not prepared to abandon the claim for the 1st declaration merely because the defence made a very limited concession. Good sense prevailed. Seeing that the plaintiff's claim for the first declaration regarding his membership of Her Majesty's Overseas Civil Service is unassailable in the fact of overwhelming documentary evidence such as the appointment letter and the notification in the London Gazette the defendant has at last conceded this claim.

20 The defendant pleaded (by paragraph 8 of the Defence) that it is unreasonable of the plaintiff to contend references in the advertisement to Her Majesty's Overseas Civil Service and expatriate pay should apply to him, at last agreed without reservation that the plaintiff is a member of Her Majesty's Overseas Civil Service from 1st December, 1958.

30 The defendant no longer stands by the absurd contention in paragraph 18 of the Defence that "the plaintiff is an established member of the Sarawak Civil Service".

I would like to, if I may, deal next with the plaintiff's third claim for declaration of Court, namely, that it is unlawful to refuse inducement pay to the plaintiff and, lastly with the second claim touching designation of the plaintiff as a designated officer.

40 Before I proceed further I would like to draw your lordship's attention to the fact that the terms "expatriation pay" and "inducement pay" are admitted to be synonymous, as pleaded in paragraph 5 of the Statement of Claim.

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It has been admitted by the defendant that at all material times there was not even a single member of Her Majesty's Overseas Civil Service in Sarawak who was not in receipt of inducement pay EXCEPT the plaintiff. In other words, of all officers Members of Her Majesty's Overseas Civil Service who served in Sarawak during the last many years the plaintiff was the only person refused inducement pay.

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Her Majesty's Overseas Civil Service was established as such in 1954. Here I would like to refer your Lordship to the publication called 'Her Majesty's Overseas Civil Service - Special Regulations by the Secretary of State for Colonies - Miscellaneous No. 520.

No. 2 of the said special regulations by the Secretary of State says: "Appointments to Her Majesty's Overseas Civil Service shall be held during Her Majesty's pleasure as signified through the Secretary of State".

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Regulation No.1 of the said Special Regulations sets out the eligibility for membership. From the language of Regulation No. 1 (2) it is obvious that plaintiff had to be an "expatriate officer" before he could be appointed to membership of Her Majesty's Overseas Civil Service in 1958. Apparently according to the Secretary of State the plaintiff satisfied the essential requirement of being an "expatriate officer" before appointment to Her Majesty's Overseas Civil Service.

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The presumption of regularity applies to the appointment of the plaintiff. It is to be presumed that official appointments were duly made and that official acts were duly performed. The maxim omnia praesumuntur rite esse acta applies. It is a presumption that applies even in criminal cases - Price v. Humphries (1958) 2 All. E.R. p. 725 at p. 727.

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And, it is also in evidence that certain

officers have been in receipt of inducement pay even though they were not members of Her Majesty's Overseas Civil Service. One of them is an Indian, Mr. Murthy, Assistant Conservator of Forests, though they were in Sarawak Government Service as induced officers since before the plaintiff joined service they were never appointed to Membership of Her Majesty's Overseas Civil Service.

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10 Mr. Murthy was in the United Kingdom (in Edinburgh) at the time he applied for the appointment in the Forest Department. He was accepted for appointment. It was in the year following the establishment as such of Her Majesty's Overseas Civil Service. However, Mr. Murthy was not appointed to Membership of Her Majesty's Overseas Civil Service, even though he has at all material times been in receipt of inducement (expatriate) pay.

20 There is no evidence at all before the Court to the effect that the plaintiff who was obviously an expatriate at the time of his appointment to Membership of Her Majesty's Overseas Civil Service subsequently ceased to be an expatriate officer.

30 As I submitted earlier it has been pleaded in the Defence (paragraph 8) that it is unreasonable of the plaintiff to contend that references to Her Majesty's Overseas Civil Service and expatriate pay should apply to him. Your lordship may agree with me that it is not only unreasonable but also absurd to argue that expatriation pay must be refused to the plaintiff whom the Secretary of State for Colonies, accepted as an "expatriate officer" by appointing him to Membership of Her Majesty's Overseas Civil Service.

40 The defendant has to satisfy this Court why the plaintiff was appointed to membership of Her Majesty's Overseas Civil Service, which was open only to expatriate officers, if it was intended that the plaintiff should be denied expatriation pay. It is possible that the set up in the Colonial Secretariat in Sarawak did not like to see an officer of Indian origin

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appointed to Her Majesty's Overseas Civil Service. But surely Her Majesty the Queen can't have intended that the plaintiff should be the only one member of Her Majesty's Overseas Civil Service in Sarawak to be refused inducement pay.

It is also important to remember that each agent of the Crown, whether he be the Secretary of State or the Chief Secretary in the Colony of Sarawak or a minor civil servant, acts directly as agent for the Crown. Some are subordinate to others in the matter of giving orders and directions and obedience to them, nevertheless they are common servants of the Crown and one is not the agent for another. The Crown is not to be credited with giving contradictory orders through different agents.

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It is, of course, a matter for your lordship to decide. I am, however, obliged to submit that the plaintiff appears to have been discriminated against merely on the basis of his race - he is a man of Indian origin. There have been many many officers in Her Majesty's Overseas Civil Service in Sarawak and all of them have been in receipt of inducement pay, EXCEPT the plaintiff. Allegations contained in paragraph 5(a) to (i) of the Defence lends strong colour to the suggestion that the plaintiff has been the victim of racial prejudice. Most of these allegations, as your lordship will observe, relate to race, domicile, nationality, etc., matters which are thoroughly irrelevant to the issues before your lordship.

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It is necessary to scrutinise the terms of the plaintiff's contract of employment. In interpreting the terms of that contract as to pay and the allowances due regard must, in the special circumstances of this case, be paid to the language of the Colonial Office advertisement calling for applications for appointment to the service in Sarawak on terms as to salary, allowances and pension rights specified in the document.

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It is true that this advertisement, taken by itself, constitutes only an "invitation to treat" and not a "binding offer". Nevertheless in the plaintiff's case it has an important bearing on the meaning of the language of the subsequent documents constituting the offer and acceptance which eventually created contractual rights and obligations in respect of the plaintiff's salary, allowances and pension rights.

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Accordingly, the statement in the advertisement that "In addition expatriation pay (pensionable) is payable varying from £252 to £336 a year" should be taken to explain, and to that extent, to regulate, the language of the subsequent documents constituting the contract in relation to the same context - Jacobs v. Batavia (1924) 2 Ch. p. 329 and McClelland v. N. Ireland Health Board (1957) 2 All E.R. 129.

The plaintiff in due course applied for appointment to the Service in a signed document the Form of which had been prepared by the Colonial Office, and his statements in the relevant columns unambiguously disclosed the information asked for as to his nationality and domicile. His application also referred specifically, in column 5, to the earlier Colonial Office advertisement. In other words, he was applying for employment in an office which had been stated in the advertisement without any words of qualification to attract "expatriation pay", in addition to salary, on pensionable basis.

After the plaintiff's application had been received at the Colonial Office he was interviewed by the Medical Appointments Committee and, he was provisionally selected for appointment as a Medical Officer in Sarawak. He was informed of this by letter dated the 2nd May, 1958. The word "provisional" is explained by Lord Greene, M.R., in Branca v. Cobarro (1947) 2 All E.R. p.101 at p.103. To quote Lord Greene: "The ordinary meaning of "provisional" is something which is going to operate until something else happens".

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According to the letter of 2nd May, 1958, which informed the plaintiff of "provisional" selection the plaintiff had to wait for formal letter of appointment until he was examined by the consulting physician.

The terms and conditions governing the plaintiff's appointment were then understood to be those set out in the advertisement, neither more nor less.

The promised formal letter of appointment (dated 12th June, 1958) was made by Colonial Office subject inter alia to the "conditions ~~set~~ out in the enclosed memorandum". The formal letter did not offer everything that was contained in the advertisement and all of which the plaintiff was expected to get according to the understanding given by the letter from the Colonial Office (dated 2nd May, 1958) about the "provisional" selection of the plaintiff.

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However, the formal letter of appointment (of 12th June, 1958) had expressly referred to a rate of pension based on "salary plus inducement pay" and there were no express words indicating that only certain categories of expatriate officers would be eligible for inducement pay, and, if so, what were the qualifications for eligibility. In the absence of any language to the contrary, the plaintiff's acceptance of the offer of employment was intended to be understood to attract "inducement pay" or "expatriation pay" as set out in the formal advertisement which was manifestly addressed to all expatriate applicants without reference to race, domicile or other discriminatory conditions.

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Similarly, the Memorandum attached to the offer must prima facie be presumed to have applied to the offeree himself in the absence of very clear indications to the contrary. All the more so because the conditions set out in the Memorandum do not follow exactly the conditions set out in the advertisement. The defendant has not rebutted the prima facie presumption that

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the Memorandum applied to the plaintiff himself.

In this connection I would also submit that Clause 4 of the Memorandum declaring an officer on his appointment to be "subject to the General Orders of the Government in which he is serving" - the terms of which were not communicated to him and to which he had no means of access at the time - refer to matters which affected other conditions of service and which were not inconsistent with terms of the Contract as to Salary, allowances and pension rights set out in the memorandum (as explained by the language of the original advertisement).

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It is in evidence that at all material times the plaintiff had no knowledge whatsoever of General Order 192 and it was not possible for the plaintiff to have access to General Order No.192 or any other General Order of the Government of Sarawak until after the plaintiff arrived in Sarawak in December, 1958, very much after accepting the offer contained in the letter from the Colonial Office dated the 12th June, 1958. The subsequent letter of appointment dated 6th December, 1958, formally confirming that the contract was regulated by the terms of the earlier offer does not carry the matter any further in either direction.

If General Orders are to be relied upon there is proof that the Secretary of State accepted the plaintiff as an induced officer when the plaintiff was granted an outfit allowance of £60 on his first appointment. I would refer to General Order 47. General Order 47(i) says:

"An outfit allowance of £60 shall be payable to an officer who is eligible for inducement pay under General Order 192 engaged outside Sarawak and

(a) who is on first appointment; or

(b) for whom the Chief Secretary approves such an allowance.

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In the case of the plaintiff it was not the Chief Secretary who approved such an allowance. It was the Secretary of State who accepted the plaintiff as an induced officer and granted the outfit allowance of £60 on first appointment.

In Clause 7 of the Memorandum it is said that the rate of contribution for Widow's and Orphans' pensions is "5% of salary plus inducement pay". In the absence of very clear indications to the contrary the plaintiff was entitled to assume that he was to get inducement pay as set out in the advertisement.

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Then, again, the same Memorandum at paragraph 6 speaks of "pensionable emoluments", not once but twice. The term "emolument" is wider than basic salary or remuneration - R. v. P.M.G. (1878) 3 Q.B.D. 428. That being so reference to "pensionable emoluments" in the case of the plaintiff also goes to prove that the plaintiff was to have a rate of pension based upon his basic salary plus pensionable "expatriation pay" mentioned in the advertisement.

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I would submit that the letter of the 12th June, 1958, read with the Memorandum leads to the irresistible conclusion that the appointment which the plaintiff accepted carries with it inducement pay. It does not seem reasonable in the circumstances to interpret the words "salary and inducement pay" in clause 7 of the Memorandum as meaning "salary and inducement pay, if any", especially in view of the words "pensionable emoluments" in paragraph 6 of the same Memorandum.

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As it is, now the plaintiff is being told that his pension will be based upon his basic salary, and nothing more. Basic salary scale is set out in the advertisement as \$870 to \$1,420 a month. The letter of 12th June also sets out the same scale - the only difference being the letter calls it "Salary Scale", where the advertisement calls it "Basic Salary Scale", and it is really and truly basic salary scale.

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The words "pensionable emoluments" in paragraph 6 of the Memorandum would make no sense if it is not to include pensionable "expatriation pay" mentioned in the advertisement, that being the only item that is pensionable in addition to the basic salary. If it was the intention not to pay inducement (expatriation) pay to the plaintiff the paragraph on Pensions in the Memorandum should have said:

10 The rate of pension in Sarawak is 1/600th of the salary or basic salary".

Any doubt arising on the interpretation of any point arising from the documents such as the Memorandum should be resolved against the Crown which had drafted the relevant documents: I submit that the plaintiff is entitled to rely on the contra proferentem rule. The rule has been constantly cited (see Chitty on Contracts, 22nd Ed., para. 613)

20 as a rule of construction from Coke's time to the present day. For instance, Coke says: "it is a maxim in law that every man's grant shall be taken by construction of law most forcibly against himself".

And, in 1949, in John Lee & Son (Grantham) Ltd. v. Railway Executive, Evershed M.R. said:

30 "We are presented with two alternative readings of this document and the reading which one should adopt is to be determined, among other things, by a consideration of the fact that the defendants put forward the document. They have put forward a clause which is by no means free from obscurity and have contended.....that it has a remarkably, if not an extravagantly, wide scope, and I think that the rule contra proferentem should be applied....."

The plaintiff is shown in the current Sarawak Government Staff List as induced officer. This has been admitted by the

40 defendant. The Sarawak Government Staff List is an official publication, "Published by Authority", printed at the Government Printing Office and published by the Government Printer. It is, therefore, a public document within section 75 of the Evidence Ordinance. It has been proved, in spite of the fact that it

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has been admitted, complying with the provisions of Evidence Ordinance section 79(i)(a)(ii).

In the result under section 4(2) of the Evidence Ordinance, read with section 80(1) of the same Ordinance the Court shall regard this proved unless and until it is disproved. In other words the Court shall regard the fact that Dr. Majumder, the plaintiff is an induced officer by virtue of the undisputed publication in the Sarawak Government Staff List showing Dr. Mujumder as an induced officer.

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My lord, I submit that the plaintiff has proved that he is an induced officer and he has justified his claim to declaration of Court regarding his rights to inducement (expatriate) pay.

III

My lord, I would now like to address your lordship on the claim for declaration of the Court that the plaintiff is eligible for designation as a "designated officer" within the meaning of that phrase as defined in the Schedule to the Overseas Service Ordinance (No.15 of 1961). The claim is not as wild and unfounded as the defence has tried to make out. The declaration is sought in respect of something set out in a Sarawak Ordinance.

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The Writ in this case was issued on the 28th day of August, 1963. The defendant was commanded in the name of Her Majesty the Queen to attend this Court. It was a command in the name of the Queen of England, who was then the Queen of the Colony of Sarawak. In other words, the Writ in this case was issued when this Court was the Court of the Queen of England.

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The case came for mention on the 10th September, 1963. Defence was filed on the 2nd day of December, 1964, after communicating with the defendant's "true clients in London". The appearance was in all respect unconditional. And, the defendant who contended (at paragraph

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13 of the Defence) that "the first claim of the plaintiff is not justiciable in this Honourable Court and is not within its jurisdiction", has since admitted that that claim is justiciable and is within this Honourable Court's jurisdiction, by conceding to the plaintiff's claim for the declaration of Court that the plaintiff is, and has always been, a member of Her Majesty's Overseas Service with effect from the 1st day of December, 1958.

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10 The Court has power under R.S.C. Ord. 25 r. 5 to make declarations at the instance of plaintiff even assuming that he has no cause of action against the defendant and the rule so construed is merely an extension of the practice and procedure of Court and is not ultra vires. This was decided by the Court of Appeal in Guaranty Trust Co. of New York v. Hannay & Co. (1915) 2 K.B. 536);

20 following the observations of Farewell, L.J., in Dyson v. Attorney-General (1911) 1 K.B. at p. 422 that "before the Judicature Act the Court of Chancery would not make declaration of right where the plaintiff did not, or at any rate could not, ask for consequential relief, Order XXV., r. 5, has altered this, and declarations of right can now be obtained in cases where the Court of Chancery would have refused to make them". "The language

30 of the rule must be read in its natural and ordinary meaning" (Court of Appeal in Ruislip-Northwood Urban District Council v. Lee (1931) 145 L.T. 208). And, the rule reads: "No action or proceedings shall be opened to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of rights whether any consequential relief is or could be claimed, or not".

40 Though the jurisdiction is discretionary, the discretion must be exercised in accordance with the test laid down by Lord Dunedin in 1921 in the Russian Commercial Bank case, quoted with approval by Viscount Kilmuir, L.C., in Vine v. National Dock Labour Board (1956) 3 All E.R. at p.944, namely, "The question must be a real and not a theoretical question he must be able to

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secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought." The case before your Lordship fully satisfied this test.

The question is a real one. The plaintiff has a real interest to raise it. There is a Proper contradictor. Letters from the defendant dated 15th November, 1963, 16th December, 1963, and 24th February, 1964, are all helpful on this aspect of the case. First of these letters speaks of communicating with "true clients in London". The second one speaks of obtaining information from London. The third one speaks of "top level discussions going on in connection with the case between the Malaysian and British Governments." It may also be mentioned that it was only last week that the defendant got from the Colonial Office the original Application Form that the plaintiff submitted to the Director of Overseas Recruitment at the Colonial Office. The contradictor has been doing everything to contradict with all the help available from all - resourceful Colonial Office.

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Plaintiff's interest in the matter is undisputed. The "Circular Letter to All Designated Officers of the Government of Sarawak under Her Majesty's Overseas Civil Service Aid Scheme" shows there are various benefits offered under the Scheme. And, the provisions of the Scheme have been made applicable to Sarawak. It does not say that the provisions should not apply to the one member of Her Majesty's Overseas Civil Service who is an officer of Indian Origin.

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Any agreement alleged to have been made (Para. 16 of Defence) between the United Kingdom Government and the Sarawak Government as regards the term "expatriate officer" for the purposes of the Overseas Service (Sarawak) Agreement, 1961, should not apply to the plaintiff, because he has already been held to be an expatriate by virtue of the fact

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10 that the Secretary of State of Colonies, in his capacity as agent of the Crown, appointed the plaintiff to Membership of Her Majesty's Overseas Civil Service. The Crown has to satisfy this Court as to the special reason why the plaintiff who was held to be an "expatriate officer" in 1958 should now be held to be not an expatriate officer. That burden the defendant has not discharged.

There is another reason why the term 'expatriate officer' should be given its ordinary meaning. It is that the said Overseas Service (Sarawak) Agreement, 1961, as set in the Schedule to Ordinance No. 15 of 1961 contains (in paragraph 1) interpretations of words having meanings other than ordinary meanings for the purpose of the said Agreement.

20 To give a special meaning to the term "expatriate officer" in order to exclude one single member of Her Majesty's Overseas Civil Service appears discrimination of the worst type. I would, in this connection, ask your lordship to refer to a Command Paper (1193) entitled 'Service with Overseas Governments' presented to Parliament by the Secretary of State for Colonies by Command of Her Majesty in October 1960. It is the Command Paper mentioned in the Circular Letter to all
30 Designated Officers of the Government of Sarawak under Her Majesty's Overseas Civil Service Aid Scheme.

40 At paragraph 9 (page 6) of the Command Paper it is said: "The arrangements envisaged by H.M. Government will include pensionable expatriate officers who are or become members of Her Majesty's Overseas Civil Service and expatriate contract officers who were or are appointed in the same way as members of Her Majesty's Overseas Civil Service (See Appendix A). The categories of officers brought within the scheme would thus not exclude persons engaged in countries other than the United Kingdom itself, and the exact categories to be included would be defined in the Agreements to be concluded with individual overseas Governments".

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The Agreement concluded with the Sarawak Government is set out in the schedule to the Overseas Service Ordinance (No.15 of 1961). There is nothing in that Agreement to show that the plaintiff is to be excluded from the benefits of Her Majesty's Overseas Civil Service Aid Scheme. If the Agreement is read with Command Paper 1193 the clear indications are that the plaintiff is to have the benefits of the Agreement, just like all other Members of Her Majesty's Overseas Civil Service in Sarawak.

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The defendant, I submit, has submitted to jurisdiction and has been doing everything possible to fight the issue on merits. Here I would like to refer your lordship to a case Re Dulles' Settlement (1951) 2 All E.R. p.69 at p. 71. This is what Lord Evershed M.R. said in the case on the question of submission to jurisdiction: ".....where a question of jurisdiction arises a man cannot both have his cake and eat it. He cannot fight the issue on the merit and at the same time preserve the right to say, if the worst comes to the worst, that the Court has no jurisdiction to decide against him, and he cannot consistently with that principle, take any step unequivocally referable to the issue on the merits".

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In this case there has been submission to jurisdiction not only to fight the issues on the merits but also submission to jurisdiction on the plaintiff's claim for the first declaration. If the question of designation of the plaintiff as a "designated officer" is within the discretion of one of Her Majesty's Principal Secretaries of State, so was the question of appointment to Her Majesty's Overseas Civil Service. It cannot be validly maintained that the Court has jurisdiction only in the matter of one of these two declarations.

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This High Court at Kuching was the Queen's Court when the Writ in this case was issued, as I mentioned earlier. At that date the Court undoubtedly had jurisdiction to hear and determine matters affecting the plaintiff's contract of service as a servant of the Queen

of England, who was also the Queen of Sarawak. The question may be asked whether the fact that it is no longer the Queen's Court affects the jurisdiction of this Court.

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10 I would ask the Court, if I may, to look at this aspect of the case from the point of view of international law, which is a part English law and of this Court. General principles of law recognised by civilised nations, like Britain and Malaysia, namely, international law should apply.

20 Both the present International Court of Justice and its predecessor the Permanent Court of International Justice had occasion to deal with objections of jurisdiction based upon lapse of time. As is well known the question of lapse of time arises in the matter of jurisdiction of the International Court because the acceptance by States of jurisdiction of the Court is optional under Article 36(2) of the Statute of the Court and such acceptance may be made (36 (3)) unconditionally or on condition.

30 Lapse of title to jurisdiction may work this way. Suppose State 'A' has accepted the jurisdiction of the Court on condition that the declaration of acceptance of jurisdiction is to lapse on 1st January, 1966. And, suppose State 'B' files an application with Court against 'A' on the 31st December, 1965: Has the Court jurisdiction to hear and determine the application of State 'B' against State 'A'? (See Thomas - Right of Passage Over Indian Territory - p. 50 for specimen declarations of acceptance of jurisdiction).

40 Here I would refer your lordship to the book "The Time Factor in the Jurisdiction of the International Court of Justice", by Sabathi Rosenne. This is what he says (at p. 30 - 31). The lapse of the title to jurisdiction after the introduction of the proceedings brought in reliance on it, does not affect the continuation of the proceedings so introduced. At first sight this, too, is obvious, and was applied automatically, and without discussion, in two cases brought before the Permanent

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Court. In the Losinger case the applicant's declaration accepting the compulsory jurisdiction expired shortly after the institution of the proceedings, and the respondent's declaration expired on the very day on which the proceedings were instituted. There was no dispute between the parties that on the date of the application, both declaration were in force. Similarly in the Phosphates in Morocco case the fixed period of the declarations of both parties expired after the filing of the application and before the hearings, but no question arose of the effect of this on the jurisdiction of the Court.

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The rule was, however, challenged by Guatemala in the Nottebohm case (Preliminary Objection), where the respondent's acceptance of the compulsory jurisdiction expired by effluxion of time shortly after the proceedings had been instituted. The basis of this challenge was that once the time-limit of the acceptance had expired, the Court had no jurisdiction "to treat, elucidate or decide cases which would affect Guatemala", and that Article 36, paragraph 6, of the Statute only gave the Court power to decide whether a given dispute fell within the categories enumerated in paragraph 2 of that Article. In a unanimous judgment (there was no judge ad hoc on the bench during this phase) the Court rejected this limitative interpretation of paragraph 6 of Article 36, and then went on to decide the issue of substance. After referring to the Losinger and the Phosphates in Morocco cases, and after drawing attention to the distinction between the seisin of the Court and its jurisdiction, the Court made the following remark:

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"At the time when the Application was filed, the Declarations of Guatemala and of Liechtenstein were both in force. The regularity of the seising of the Court by this Application has not been disputed. The subsequent lapse of the Declaration of Guatemala,

by reason of the expiry of the period for which it was subscribed, cannot invalidate the Application if the latter was regular: consequently, the lapse of the Declaration cannot deprive the Court of the jurisdiction which resulted from the combined application of Article of the Statute and the two Declarations".

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10 I would also like to refer your lordship
to a recent judgment of the International Court
of Justice on this point. It is from the
Case Concerning Right of Passage Over Indian
Territory (Preliminary Objections), Judgment
of November 26th, 1957L I C. J Reports 1957,
p.125 at p. 142: "It is a rule of law generally
accepted, as well as one acted upon in the
past by the Court, that, once the Court has
20 been validly seised of a dispute, unilateral
action by the respondent State in terminating
its Declaration, in whole or in part, cannot
divest the Court of jurisdiction. In the
Nottebohm case the Court gave expression to
that principle in the following words:

30 "An extrinsic fact such as the
subsequent lapse of the Declaration,
by reason of the expiry of the
period or by denunciation, cannot
deprive the Court of the jurisdiction
already established." (I.C.J. Reports
1953, p.123).

CONCLUSION

40 The Court has jurisdiction and the Court
may, under Order 25, r. 5, make "binding
declarations of right whether any consequential
relief is or could be claimed. The language
of the rule leaves the Court unrestricted
discretion. And, I submit that the case before
your lordship is a fit and proper case to make
the declaration sought.

The Court does not have to worry at all
about obedience, because the Court is not
asked to issue any order to the defendant.
It should be assumed that all parties concerned
including Her Britanic Majesty's Government

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will treat the views of this Court with great respect. Great Britain is a civilised country, a country that has respect for the rule of law. I, as a subject of the Crown of England, would be loath to suggest the contrary.

I would like to add that according to the letter from the defendant there has been top level discussions between the Malaysian and British Governments about this case. After all that the Governments concerned are not going to treat the views of this Court on this case with contempt. The Secretary of State can be expected to exercise his discretion in the matter of designation as a designated officer after this Court rules that the plaintiff is eligible for designation as a designated officer.

10

There is evidence from the Circular Letter (Exhibit "C") signed by the then Chief Secretary Mr. Jakeway that the provisions of the Overseas Services Scheme have been made applicable to Sarawak.

20

Under the Overseas Service Act, 1961, of England - "An act to authorise the Secretary of State to contribute to the expenses incurred in connection with the employment of persons in the public services of overseas territories or in respect of compensation paid to persons who are or have been employed in these services" - required the consent of the United Kingdom Treasury before designation by the Secretary of State.

30

It must be assumed that if the Secretary of State approaches the Treasury for consent the permission of the Treasury would be given under section 1(2) of the Overseas Services Act, 1961. There is no evidence at all before the Court even suggesting that the Secretary of State asked the permission of the Treasury for such consent in the case of the plaintiff.

40

And, if the Treasury has given its

consent under section 1(3) to designation of officers generally in respect of members of Her Majesty's Overseas Civil Service in Sarawak, subject to limitations "specified in the consent", the Court did not have evidence of any "such limitations".

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10 In the absence of evidence that the plaintiff alone has been excluded from the benefits of the Scheme which has been made applicable to members of Her Majesty's Overseas Civil Service serving in Sarawak, the plaintiff is entitled to the declaration of Court that he is eligible for designation as a designated officer.

20 The plaintiff has not asked for declaration that he is "entitled" because it is a matter for the Secretary of State to designate the plaintiff. But this Court can say that the plaintiff is "eligible" for designation as a "designated officer".

Now, coming to paragraph 18 of the Defence, whatever may be meant by the three words "legally enforceable obligation" in that paragraph this action for declaration is properly brought under the provision of the Crown Proceedings Ordinance (Cap. 47), particularly sections 3(e) and 14(2) of that Ordinance.

30 Whatever may have been the position before the Crown Proceedings Act, 1947, of England and the Sarawak Crown Proceedings Ordinance of 1957, the contention of the defendant is without any basis whatsoever in law.

40 For a short exposition as to how the remedy under the Petitions of Right Act, 1860, referred to in section 3(e) in the Crown Proceedings Ordinance developed into the present Order 25, rule 5, of the Rules of the Supreme Court, I would like to refer your lordship to pages 369 to 370 of Judicial Review of Administrative Action by S.A. de Smith.

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Order 25, rule 5, as I submitted
earlier, says inter alia that "the Court may
make binding declarations of right whether
any consequential relief is or could be claimed,
or not".

I have only to add that your lordship
may exercise your discretion in settling the
words of the declaration, if that is considered
by my lord to be desirable.

- - - - -

JUDGMENT

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In this case plaintiff brought an action against the Government of Sarawak by making the Attorney-General of Sarawak nominal defendant, claiming three declarations. They are as follows:-

- 10 "I. Declaration of Court that the plaintiff is, and has always been, a member of Her Majesty's Overseas Civil Service with effect from the 1st day of December, 1958.
- II. Declaration of Court that the plaintiff is eligible for designation as a "designated officer" within the meaning of that phrase as defined in the Schedule to the Overseas Service Ordinance (No. 15 of 1961).
- 20 III. Declaration of Court that it would be unlawful to refuse to the plaintiff benefits such as inducement pay payable to a Member of Her Majesty's Overseas Civil Service."

The Statement of claim was filed on 27th August, 1963. Defence and reply were filed on 2nd December, 1963 and 9th December, 1963 respectively. Certain documents were submitted as agreed bundle of documents.

30 Plaintiff was born on 1st January, 1926 in Bengal, India at Rangpur which is now part of Pakistan. He obtained his M.B.B.S. from Calcutta University in 1948. He then joined the R.G. Kar Medical College Hospital, Calcutta. From May 1950 to August, 1955 he served as a medical officer in the Indian Army Medical Corps with the rank of Captain. Soon after leaving the army he went to England in the later part of 1955 for post graduate medical studies. He obtained the following additional professional

40 qualifications:-

D.P.H., D.I.H., and D.T.M. & H.

In March 1959 he served as a Senior House Officer

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in the General Hospital, Rochford, Essex. While he was working in this hospital he saw an advertisement in the British Medical Journal for a post of Medical Officer in Sarawak. Subsequently he sent in his application for the post. He was interviewed by the Medical Appointment Committee on 27th March 1958. Following this interview he wrote to the Director of Recruitment Colonial Office requesting that further communication be sent to him at an address in Calcutta where he would be going. The address given was that of his father-in-law with whom plaintiff's wife had been staying while plaintiff was in England. 10

By a letter dated 2nd May, 1958 plaintiff was informed that he had been provisionally selected for appointment as Medical Officer, Sarawak and that a formal letter of appointment would soon be sent to him. Eventually a letter dated 12th June, 1958 was sent to him offering him an appointment on probation for three years as Medical Officer, Sarawak at a salary of \$1,155.00 a month in view of his professional experience and qualifications in what was then Division II (now Division I) Salary Scale A for medical officers. This salary scale is \$870/930x15-1050/1085x35-1260/BAR/1300x40-1420. He was informed that in addition to his basic salary, allowances would be payable at the rates shown in the memorandum which was enclosed in the letter. 20

Paragraphs 1 to 8 of the memorandum read:- 30

"1. Appointment

The probationary period is three years from the date of arrival in Sarawak. On completion of this period an officer is eligible, provided that he has passed the examinations prescribed by local regulations for confirmation in his appointment.

2. Half salary will be payable for the period of the voyage from the country of engagement to Sarawak on first appointment. For purposes of exchange with sterling one Sarawak dollar equals 2s. 4d. 40

3. Allowances

(i) Education Allowance Married officers dependant children may receive an

allowance in respect of the expense to them of educating their children, up to a maximum of two in number, outside the colony. The allowance would be payable at \$100 a month for children between the ages of 5 and 17 years.

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10

(ii) Child Allowance Married officers with one or more dependant children will receive an allowance at the rate of $7\frac{1}{2}\%$ of salary with a maximum of \$100 a month. The allowance will be payable in respect of a child or children under the age of 16 years only; provided that if the child or children are between 17 years and 21 years, the allowance shall still be payable for as long as the child is receiving full time education.

20

(iii) Outfit Allowance An allowance of \$60 is payable to officers on first appointment as a means of assistance towards the purchase of essential tropical kit.

4. General conditions of services

30

An Officer is subject to the General Orders of the Government in which he is serving, and to the Colonial Regulations for the time being in force in so far as the same are applicable. A copy of the current edition of the Colonial Regulations (Part I) is attached. The officer will be required to serve anywhere in Sarawak or in the State or Brunei.

5. Security

The holders of certain appointments are required to furnish security for the faithful discharge of their duties. Normally all premiums payable in respect of such security may be deducted from an officer's salary.

6. Pensions

40

Pensions are granted in accordance with provisions of the Sarawak pensions legislation. The rate of pension in Sarawak is 1/600th either of pensionable emoluments or retirement, or of pensionable emoluments averaged over the last three years of service for each completed month

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of pensionable service. Pensions are payable subject to the completion of 10 years' continuous public service and to retirement on the grounds of age or ill-health. Pension may be converted, subject to option exercisable on or before the date of retirement, into a reduced pension (3/4 of full pension) plus lump sum ($12\frac{1}{2} \times \frac{1}{4}$ of full pension). Officers may retire or be called upon to retire at any time after attaining the age of 45 subject, except where officers submitting an application to retire have attained the age of 50, to six months' notice. 10

7. Widows' and Orphans' Pensions

In accordance with the provisions of the Sarawak Widows' and Orphans' Pensions Legislation, male officers under the age of 54 and whether married or single are required to contribute to the Sarawak Widows' and Orphans' Pensions Fund. The rate of contribution is 5% of salary plus inducement pay, subject to a maximum of \$50 a month. 20

8. Vacation Leave

Officers will normally be required to serve, subject to the exigencies of the service a tour of duty of four years. Leave is granted at the rate of 34 days a year.

In addition to the leave thus earned, voyage leave is granted for the period of the voyage by an approved direct route to and from the officer's country of domicile." 30

The letter dated 12th June, 1958 was sent to plaintiff through the Deputy High Commissioner in Calcutta. Plaintiff replied on 10th October 1958 accepting the offer under the terms and conditions set out in the letter dated 12th June, 1958 and in the memorandum. Thus plaintiff came to Sarawak where he received from the Acting Chief Secretary a formal letter of appointment dated 6th December, 1958. This letter reads:- 40

"Sir,

I am directed to inform you that His Excellency the Governor has been pleased to appoint you to be a Medical Officer in Sarawak

in Her Majesty's Overseas Civil Service with effect from 1st December, 1958 on the conditions embodied in the Secretary of State's letter to you reference BCD/P-13847 dated 12th June, 1958.

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10

2. The appointment is on the permanent and pensionable establishment and the salary of the post is in Division II, Scale A \$870; \$930x30-1050x35-1260/BAR/1300x40-1420 a month. Child Allowance is payable at the rates laid down in Secretariat Circular No.10/1956; vacation leave, local leave, leave passages, travelling allowances and other privileges will be granted in accordance with the Sarawak General Orders.

3. You will enter the salary scale at \$1,155 a month, and your incremental date would be 4th December.

20

4. I have to request that if you accept the appointment you send an undertaking to this office in the Form attached hereto together with a declaration of secrecy in accordance with G.O. 570.

I am, Sir,

Your obedient servant,

(sgd) Lo Suan Hian

f. Acting Chief Secretary"

30

He was confirmed in his appointment as a medical officer with effect from 4th December, 1961. (See the Sarawak Government Gazette Part V dated 12th January, 1962, Notification No. 22).

40

Plaintiff stated that until August, 1961, he was all the time under the impression that his salary included inducement pay. When he realised that it was not so he submitted a petition dated 19th August, 1961, to the Governor-in-Council asking for inducement pay retrospectively from the date of his first appointment. The petition appeared to have been sent to the Secretary of State who agreed with the Government of Sarawak that plaintiff was not entitled to inducement pay. Thus the Chief Secretary replied to the petition that plaintiff's claim for inducement pay could not be

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admitted. There is no clear evidence whether this petition had gone to the Governor-in-Council as it should have been for under the Sarawak Government General Orders the decision of the Governor-in-Council is deemed to be final.

Plaintiff's appointment as a medical officer in Sarawak was published in the British Medical Journal and in London Gazette. It was admitted that the material for publication was supplied by the Colonial Office. Then there is the formal letter of appointment dated 6th December, 1958 written by the Acting Chief Secretary at the direction of His Excellency the last colonial Governor which clearly stated that plaintiff was appointed a medical officer in Sarawak in Her Majesty's Overseas Civil Service (hereinafter referred to as H.M.O.C.S.). That the plaintiff would get the said formal letter of appointment on his arrival in Sarawak was clearly indicated in the letter dated 12th June, 1958. In view of all the above it is not surprising for plaintiff to consider himself a member of H.M.O.C.S.

With the approach of the historical and constitutional changes in the shape of Malaysia plaintiff was not unaturally concerned with his position in the service. The reason appears to be that except plaintiff all expatriate officers who were members of H.M.O.C.S. and some not members of H.M.O.C.S. but in receipt of inducement pay were informed of their future in the service and the benefits they would get under the Malaysia Retirement Scheme as a result of the publication of the Report of the Inter-Governmental Committee, 1962, as Sessional Paper No. 1 of 1963. So he wrote a letter dated 17th July, 1963 to the Chief Secretary seeking clarification as to his position as member of H.M.O.C.S. under the said Scheme. The reply dated 17th August, 1963 was that he was not a member of H.M.O.C.S. and that he did not qualify as an "entitled officer".

I am happy to note that since the filing of the statement of claim and as a result of correspondence between the parties defendant has now conceded that plaintiff is a member of H.M.O.C.S. as from 1st December, 1958 and accordingly has become an "entitled officer". Since this admission certain sum of money was paid into plaintiff's bank as compensation and defendant wrote to plaintiff a letter dated 15th January, 1964 informing him that his enrolment as member of H.M.O.C.S. had been treated as having effect for purposes of the

Compensation and Retiring Benefits Order-in-Council, 1963 on the operative date, namely, 30th August, 1963, i.e. before the event of Malaysia.

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10 First I would like to say that in the light of the evidence as far as membership in H.M.O.C.S. is concerned plaintiff had been shabbily treated by the colonial administration. It is a sad spectacle for the administration to inform a civil servant at the time of his appointment that he was a member of H.M.O.C.S. and to turn round years later to say that he was not such a member.

20 On the other hand I find it hard to believe that until August, 1961 plaintiff was under the impression that his salary included inducement pay. The monthly salary slip would have indicated this to him. Further if he was paid an inclusive salary, as was suggested, then one would not expect him to be entitled to other benefits such as education allowance and child's allowance.

At the commencement of the hearing the parties agreed to certain facts. They are as follows:-

30 "1. The defendant concedes that the plaintiff has been a member of Her Majesty's Overseas Civil Service since 1st December, 1958. That is to say, the defendant does not oppose the plaintiff's claim contained in paragraph 1 of the Statement of Claim for a declaration of Court to this effect.

2. The defendant admits that the appointment of the plaintiff as a Medical Officer in Sarawak in Her Majesty's Overseas Civil Service was published in the British Medical Journal and also in the London Gazette.

40 3. The defendant further admits that since December 1958 all members of Her Majesty's Overseas Civil Service on the permanent and pensionable establishment of the Government of Sarawak have been in receipt of inducement (or expatriation pay), EXCEPT the plaintiff.

4. The defendant also admits that the plaintiff is an "entitled officer" for the purposes of the Compensation and Retiring

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Benefits Order-in-Council, 1963.

5. It has further been admitted by the defendant that in the current Sarawak Government Staff List the plaintiff is shown as an induced officer."

Counsel for plaintiff has stressed on the fact that plaintiff was stated to be an "induced officer" in the Sarawak Government Staff List, 1964 (Part I). This publication may be a public document but the cover clearly indicated that the publication is meant for "official use only". Its accuracy cannot be taken for granted. On the 3rd page of the publication can be found following words:- 10

"It is requested that any errors or omissions be brought to the notice of -

The State Secretary,
The Chief Minister's Office,
Kuching. "

I do not regard the publication as conclusive evidence of anything. The fact that the plaintiff is shown to be an "induced officer" by a corrigendum does not necessarily mean that he is such as it is admitted fact that plaintiff has never received any inducement pay since his appointment. Before the corrigendum plaintiff was shown as a "designated officer". Mr. Williams, the State Establishment Officer, informed the Court that the corrigendum was also wrong. What conclusion can one draw from this? Someone had made a mistake or the corrigendum was published without going through proper channel. 20 30

Before Malaysia procedural rules in Civil matters were governed by the Sarawak, North Borneo and Brunei High Court (Civil Procedure) Rules. Under rule 171 it was provided that

"Where no provision for procedure is made or no appropriate form is provided by these rules, the procedure and practice and forms for the time being in force or used in the Supreme Court of Judicature in England shall, as near as may be, be followed and adopted". 40

Since Malaysia the Rules of the Supreme Court, 1957 with slight modifications are made applicable to the High Court in Borneo. Order 25 rule 5 is in all respect similar to the English

rules similarly numbered and reads:-

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"No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not."

10 The declaratory jurisdiction has sometimes been represented as virtually unlimited. This is not so. Lord Davey in Barraclough v. Brown(1) speaking of Order 25 rule 5, said:-

"It would obviously be incompetent for the judges or the Rule Committee under a power to make rules of procedure to give the Court power to deal with a matter which is outside its jurisdiction. The rule relates to procedure only, and must be so construed."

20 I did not think the Court can be compelled to entertain any and every action for a declaration. It cannot be said that a claim for any declaration whatsoever it may be is a good ground of action. The Courts are not prepared to assume the power of declaring upon theoretical issues. This was emphasised by Lord Dunedin in Russian Commercial and Industrial Bank v. British Bank of Foreign Trade (2) in these words:-

30 "The question must be real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought".

Lord Dunedin was speaking of Scottish Law. However the same principle was applied to English law (3). The statement was quoted with approval by Viscount Kilmuir L.C. in Vine v. National Dock Labour Board (4).

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- 40 (1) (1897) A.C. 615, 624.
(2) (1921) 2 A.C. 438, 448
(3) Ruslip-Northwood Urban District Council v. Lee (1935) 143 L.T. 208, 214.
(4) (1956) 3 A.E.R. at 944.

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Now that the defendant has conceded that the Plaintiff is a member of H.M.O.C.S. since 1st December, 1958, there is no reason for me to make the first declaration as plaintiff's right is not in dispute any more. The Court will not decide a point of law which has since become academic even though defendant does not oppose to the making of the declaration. Accordingly, in exercise of my discretion, I decline to make the first declaration.

10

I now come to the second declaration that plaintiff is eligible for designation as a "designated officer". Defendant suggested that the term "expatriate officer" should be interpreted in accordance with the provisions of paragraph 192 of the Sarawak Government General Orders. I do not agree that that term should be given such a narrow interpretation. The term "expatriate officer" to my mind simply means an officer recruited from a country outside Sarawak (now perhaps Malaysia). In fact paragraph (1) of the latest edition of the Sarawak Government General Orders defines "expatriate officer" to mean an officer recruited from a country outside Borneo. At any rate defendant did not seriously dispute that plaintiff is an "expatriate officer".

20

As a result of an agreement between the British Government and the Government of Sarawak, the Overseas Service Ordinance, 1961 was enacted by the Legislature of Sarawak to take effect as from 1st April, 1961. This Ordinance thus became part of the Laws of Sarawak. This is an Ordinance to ratify and confirm the Overseas Service (Sarawak) Agreement, 1961 and to provide for matters connected therewith. The event of Malaysia did not cause any change. In fact by article 81 of the Malaysia Act the pension rights of members of the public service in Sarawak are preserved. In Wigg & Another v. Attorney General for the Irish Free State (1) a Treaty was entered into between Great Britain and Ireland upon the establishment of the Irish Free State. By article 10 of the Treaty the Irish Free State agreed to pay fair compensation in terms not less favourable than those accorded by the Government of Ireland Act, 1920, to civil servants who should retire in consequence of the change of Government effected under the Treaty. Act I of 1922, of the legislature

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(1) (1927)A.C.674

of the Irish Free State, gave the Treaty the force of law, and by article 78 of the Constitution which it enacted transferred civil servants were to have the benefit of article 10. The Judicial Committee of the Privy Council held that Act I of 1922 of the Irish Free State gave to the appellants a legal right to the benefit of article 10 of the Treaty enforceable in the Courts of that State.

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- 10 Defendant argued that subject to the consent of the United Kingdom Treasury designation is a matter wholly within the competence and discretion of one of Her Majesty's principal Secretaries of State and that designation under the said agreement is not justifiable in any proceedings in this Court. With regard to the first declaration took a similar line but had since conceded after communication with the "true clients in London".
- 20 Various authorities on international law were referred to me. I do not think it is necessary for me to go into all of them. The regularity of the seising of the matter by the court is not in dispute. Perhaps I should refer to the recent judgment of the International Court of Justice in the Case Concerning Right of Passage over Indian Territory (Portugal v. India) (1) which may be of some assistance and in which the Court said:-
- 30 "It is a rule of law generally accepted, as well as acted upon in the past by the Court, that, once the Court has been validly seised of a dispute, unilateral action by the respondent by the respondent State in terminating its Declaration, in whole or in part, cannot divest the Court of jurisdiction. In the Nottebohm case the Court gave expression to that principle in the following words:
- 40 'An extrinsic fact such as the subsequent lapse of declaration by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established, (I.C.J. Reports, 125)''.

(1) I.C.J. Reports, 1957, p. 125, 142.

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The three declarations sought by plaintiff appear to be closely linked. If I may say so defendant not only submitted to jurisdiction but chose to fight the issues on merits. Lord Evershed, then M.R., while discussing about jurisdiction, in Re Dulles Settlement Trusts (1) said :-

"It is, of course, plain that where a question of jurisdiction arises a man cannot both have his cake and eat it. He cannot fight the issue on the merits, and at the same time preserve the right to say, if the worst comes to the worst, that the court has no jurisdiction to decide against him, and he cannot, consistently with that principle, take any step unequivocally referable to the issue on the merits."

10

The said agreement is set out in a Schedule and forms part of the Ordinance. The term "designated officer" is defined to mean an officer designated as such by a Secretary of State who is -

20

"(i) an expatriate officer in the service of the Government of Sarawak on or after the appointed day and

(ii) who -

(a) is a member of Her Majesty's Overseas Civil Service; or

(b) was selected for appointment by or with the approval of a Secretary of State, or was recruited by the Crown Agents for Oversea Governments³⁰ and Administrations;

(c) was otherwise recruited to a post for which a normal channel of recruitment is either the Colonial Office or the Crown Agents for Oversea Governments and Administrations and whose appointment for the purpose of this Agreement is approved by a Secretary of State."

40

I may mention that the said agreement was the result of Command Paper No. 1193 entitled

(1) (1951) 2 A.E.R. p.60, 70, 71.

"Service with Overseas Governments" presented to the British Parliament by the Secretary of State for the Colonies by Command of Her Majesty in 1960. By a circular letter dated 10th November, 1961 signed by the Chief Secretary, Sarawak, all designated officers of the Government of Sarawak under Her Majesty's Overseas Service Aid Scheme were informed of the intentions of Her Majesty's Government as published in the said Command Paper.

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The first part of paragraph 9 under the heading of "The new arrangements" at page 6 of the said Command Paper reads:-

"H.M. Government are therefore ready to enter into Agreements with employing Governments in order to assist in resolving the problems which beset them, and the officers concerned, in relation to the employment of expatriate staff. The arrangements envisaged by H.M. Government will include pensionable expatriate officers who are or become members of Her Majesty's Overseas Civil Service and expatriate contract officers who were or are appointed in the same way as members of Her Majesty's Civil Service (See Appendix A). The categories of officers brought within the scheme would thus not exclude persons engaged in countries other than the United Kingdom itself, and the exact categories to be included would be defined in the Agreements to be concluded with individual Overseas Governments."

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30

As I see it the refusal to accord him this designation was because the colonial administration originally strenuously denied that plaintiff was a member of H.M.O.C.S. despite convincing evidence to indicate otherwise. Had the colonial administration taken the trouble in the earlier stage to seek legal advice inconvenience of this nature would not have been caused and plaintiff would have been relieved of much anxiety. The said Command Paper clearly indicated to whom the benefits would accrue when an agreement was to be concluded. In my opinion the Secretary of State was badly advised by the colonial administration. I am satisfied that plaintiff is an "expatriate officer". It has now been conceded and is therefore clear as a pikestaff that plaintiff is a member of H.M.O.C.S. Further he was selected for appointment by or with the approval of the

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70.

Secretary of State. In my judgment, having regards to the above, plaintiff is surely eligible for designation as a "designated officer" according to the true construction of the said Ordinance. Therefore I hold that plaintiff is entitled to the second declaration.

Finally I come to the third declaration that it would be unlawful to refuse plaintiff "inducement pay". The use of the word "unlawful" is inappropriate. In effect he is claiming to be entitled to additional pension. Normally a civil servant may expect to get a pension when he reached the age of compulsory retirement. But there is no absolute right to a pension under the Pension Ordinance (Cap. 89). A better choice of word would seem to be "unreasonable".

10

The terms "expatriation pay" and "Inducement pay" are synonymous. A perusal of the few editions of Sarawak Government General Orders would show that the latter term is of much more recent creation. The terms "expatriate officer" and "induced officer" are also synonymous. Except plaintiff all other members of H.M.O.C.S. were in receipt of "inducement pay". Thus Mr. Murthy, an Indian, an Assistant Conservator of Forests, who is not a member of H.M.O.C.S. is in receipt of "inducement pay". There is no difficulty in his case as he was appointed in the United Kingdom. Presumably he was offered his appointment while he was in Edinburgh and accepted the offer while he was still there. At any rate at the time paragraph 192 of the Sarawak Government General Orders (hereinafter referred to as paragraph 192) had not been amended yet. Before the amendment paragraph 192 reads:-

30

"192 - (i) An officer of the Senior Service shall be eligible for expatriation pay if

(a) On the occasion of his first appointment he was habitually resident in a country other than Borneo, the Federation of Malaya, Singapore, Indonesia or the Phillipines, and

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(b) he has his principal family and social ties and general background in any such country, and

(c) his appointment to the Sarawak

Civil Service represents a material degree of dislocation and disturbance in connection with the resulting change in his residence or place of work. Provided that an officer, who on the first occasion of his appointment had his permanent home in an overseas country but was resident in a country other than an overseas country solely for temporary purposes or for the purposes of his profession or calling, shall be deemed to have been recruited from an overseas country."

In the High Court of Sarawak

No. 7

Judgment
10th September
1965
(Contd.)

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After the amendment and as from 1st August, 1957 paragraph 192 reads:-

"192 - (i) An officer in Division I, II or III shall be eligible for inducement pay if:-

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(a) on the occasion of his first appointment he was habitually resident in a country other than Borneo, Burma, Ceylon, China, the Federation of Malaya, Hong Kong, India, Indonesia, Pakistan, the Phillippines, Siam or Singapore, and

(b) he has his principal family and social ties and general background in any such country, and

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(c) his appointment to the Sarawak Civil Service represents a material degree of dislocation and disturbance in connection with the resulting change in his residence or place of work. Provided that an officer, who on the first occasion of his appointment had his permanent home in an overseas country but was resident in a country other than an overseas country solely for temporary purposes or for the purposes of his profession calling, shall be deemed to have been recruited from an overseas country."

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I personally knew of three police officers recruited from Hong Kong in the Sarawak Government Service two of whom were in receipt of "inducement pay" while one was not. According

In the High
Court of
Sarawak

No. 7

Judgment
10th September
1965
(Contd.)

to Mr. Williams, the State Establishment Officer, plaintiff was not paid "inducement pay" because of the amendment to paragraph 192. "Inducement pay" was paid by the Government of Sarawak until 1st April, 1961 when the British Government assumed responsibility for such pay.

Counsel for plaintiff referred to Jacobs v. Batavia (1) and McClelland v. Ireland Health Board (2) on the question of terms of contract. I do not think they are of great assistance to me. They are not concerned with contract of service of the Crown and the paramount right of the Crown. It is well established that a contract of service with the Crown is terminable at the pleasure of the Crown and no claim for wrongful dismissal will lie in respect thereof(3). In actual fact once he is confirmed in his appointment he is secured in his employment until he reaches retiring age, apart, of course, from misconduct or complete inefficiency.

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Counsel for plaintiff also referred to paragraph 20 7 of the said memorandum relating to the rate of contribution to the Sarawak Widow's and Orphan's Pension Fund at 5% of salary plus inducement pay, subject to maximum of \$50 a month. Paragraph 7 in no way enhances the plaintiff's claim. Whether he is in receipt of inducement pay or not it makes no difference to his contribution since his basic salary was above \$1,000.00 his contribution would be at the maximum rate.

The term "domicile" is often used in a lax sense, meaning no more than is meant by the term "residence". It is fallacious to think that the terms "domicile" and "residence" are synonymous. The law has in several instances attributed to a person a "domicile" in a country where in reality he has not, and perhaps never had, a home. Some writers used the term "residence" as synonymous with the word "home" i.e. as including both "habitual physical presence" and "intention to reside" (animus manendi). "Residence" has in many instances been employed by Judges and others to denote a person's habitual

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- (1) (1924) 2 Ch. 324
(2) (1957) 2 A.E.R.129.
(3) Dunn v. The Queen (1896) 1 Q.B. 116;
Shenton v. Smith (1895) A.C. 229; Tarrel v. Secretary of State for the Colonies (1953) 2 Q.B. 482.

physical presence in a place or country which may or may not be his home(1). The word "habitual", in the definition of residence, does not mean presence in a place either for a long or for a short time, but presence there for the greater part of the period whatever that period may be (whether ten years or ten days). "Residence" connotes the idea of home or at least of habitation, and need not necessarily be permanent or exclusive (2). The word denotes the place where an individual eats, drinks and sleeps, or where his family or his servants eat, drink and sleep (3).

In the High
Court of
Sarawak

No. 7
Judgment
10th September
1965
(Contd.)

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It is true that plaintiff was in England when he saw the advertisement and applied for the post of medical officer in Sarawak. He was interviewed in England. However the offer of appointment was made to him while he was in India and he accepted the offer while in India. Although I sympathise with plaintiff I must say that the advertisement was no more than an invitation to (sic) a treat. It created no binding offer. No doubt the mention of expatriation pay in the advertisement tended to attract likely candidates. I have no doubt that the advertisement was in the main meant for candidates residing in the British Isles. Nevertheless it could not prevent persons residing elsewhere who came across the advertisement from applying for the post.

As I understand the term "resident" I would say his residence was in India when the offer was made and accepted. He was therefore caught by a technicality which disentitled him "inducement pay" by virtue of paragraph 192. It was this technicality which the colonial administration had taken advantage of from the very beginning. I have no doubt if plaintiff proceed to India after his acceptance of the offer the colonial administration would find it difficult to refuse him "inducement pay".

Plaintiff had accepted the offer as set out in the letter dated 12th June, 1958 and the memorandum which to my mind set out his salary

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- (1) See Jopp v. Wood (1865) 34 L.J. Ch. 212, 218, Gillis v. Gillis (1814) Ir. 8 Eq. 597.
 (2) See The Dictionary of English Law-Earl Jowitt Vol. 2.
 (3) R.V. North Curry (Inhabitants) (1825) 4 B & Cat 959.

In the High
Court of
Sarawak

No. 7
Judgment
10th September
1965
(Contd.)

and allowance clearly. Clause 4 of the memorandum indicated clearly to plaintiff that his appointment was "subject to the General Orders of the Government in which he is serving". General Orders were originally meant to benefit to a very large extent expatriate officers recruited from abroad. It is not uncommon that as soon as the benefits accrued to others not originally meant to be included the General Orders would be amended accordingly.

10

Counsel for plaintiff quite properly pointed out that the Secretary of State must have accepted plaintiff as an officer eligible for inducement pay when he granted him an outfit allowance of £60 on his first appointment. Paragraph 47 (i) of the Sarawak Government General Orders reads:-

"An outfit allowance of £60 shall be payable to an officer who is eligible for inducement pay under General Order 192 engaged outside Sarawak and

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(a) who is on first appointment; or

(b) from whom the Chief Secretary approves such an allowance."

I am satisfied in the appointment of plaintiff there had been considerable muddle on the part of the colonial administration. If plaintiff is entitled to "inducement pay" his pension would be increased on his retirement because "inducement pay" is pensionable. I regard the payment of outfit allowance to plaintiff as very strong indication that the Secretary of State was under the impression that plaintiff was eligible to "inducement pay".

30

Plaintiff argued that he was not aware of the provision of paragraph 192. Somervell L.J. at page 807 in *Curtis v. Chemical Cleaning and Dyeing Co.* (1) referred to the Statement of Scrutton L.J. in *L'Estrange v. F. Graucob Ltd.* (2) which reads:-

"When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party

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(1) (1951) 1 K.B. 805, 807 (1951) 1 All E.R.p.631
(2) (1934) 2 K.B. 394, 403 (1934) All E Rpt. 16.

signing it is bound, and it is wholly immaterial whether he has read the document or not."

In the High
Court of
Sarawak

In the same case (1) Denning L.J. at page 808 made this observation:-

No. 7

Judgment
10th September
1965
(Contd.)

10 "In my opinion any behaviour, by words or conduct, is sufficient to be a misrepresentation if it is such as to mislead the other party about the existence or extent of the exemption. If it conveys a false impression, that is enough. If the false impression is created knowingly it is a fraudulent misrepresentation; if it is created unwittingly, it is innocent misrepresentation; but either is sufficient to disentitle the creator of it to the benefit of the exemption."

20 It seems to me that by paying plaintiff an outfit allowance on his appointment an impression was created that plaintiff was eligible to "inducement pay". It might have been done unwittingly but to my mind was clearly a misrepresentation. It is no use turning round to say that this payment was made as a matter of grace. I will not go into the question of damages and rescission arising out of misrepresentation as it would not serve any useful purpose here. In my view when the impression was given that a person was eligible to something the party giving out that impression should not be allowed to turn round later to say 30 that he was after all not so eligible. Defendant cannot in one breath say that although the Sarawak Government General Orders apply to plaintiff, in particular paragraph 192 but not paragraph 47 of the said General Orders. In the same way plaintiff cannot say that he had no knowledge of paragraph 192 and at the same time invoke the provision of paragraph 47.

40 It is true that "inducement pay" was not specifically mentioned in the letter dated 12th June, 1953 and the memorandum because as the State Establishment Officer had indicated that until 1st April 1961 such payment was the concern of the Government of Sarawak. It was presumably for this reason that plaintiff's petition was forwarded to the

In the High
Court of
Sarawak

No. 7
Judgment
10th September
1965
(Contd.)

Secretary of State. I consider that the colonial administration was wrong to forward the petition to the Secretary of State because the question whether a civil servant is entitled to "inducement pay" or not is entirely a prerogative for the Governor-in-Council as laid down by paragraph 192 of the said General Orders. Every act which the executive Government can lawfully do without the authority of the Act of Parliament is done by virtue of this prerogative (1). Where the prerogative power exists the question whether or not it should be exercised and how it should be exercised are matters beyond the control of the Courts. 10

My attention has also been drawn to the fact that at present there are top level discussions going on in connection with plaintiff's position between the Malaysian and British Governments.

In consideration whether a case is one in which it is permissible to grant a declaration, and, if so, whether in the particular circumstances a declaration ought to be granted, the Courts exercise a very wide discretion. Declarations will be refused, e.g., where the matter is placed within the exclusive jurisdiction of another tribunal (2); where the proceedings are an abuse of the process of the Court (3); or where the proceedings would in any other respect be contrary to public policy(4). 20

In the circumstances, apart from commenting on certain undisputed facts, I consider that it would be improper for me to form any definite opinion in respect of the third declaration. It may be that I have expressed sympathy for plaintiff. But it is not unusual for a Judge to indicate his sympathy for a party and yet decide against that party. In my opinion it would be contrary to public policy for the court to make such a 30

(1) See Dicey's Law of the Constitution, 10th Edition, page 425.

(2) *Memudu Lagunju v. Oblubadan in Council Healey v. Minister of Health* (1952) A.C. 387; (1955) 1 Q.B. 221. 40

(3) *Roesin v. Attorney* (1918) 34 T.L.R. 417.

(4) See *British Association of Glass Bottle Manufacturers Ltd. v. Forster & Sons Ltd.* (1917) 86 L.J. Ch. 489 - 495.

declaration resulting in unnecessary interference of a prerogative right. The prerogative power of deciding whether plaintiff is entitled to "inducement pay" or not rests with the Governor-in-Council. Accordingly in the exercise of my discretion I decline to make the third declaration.

(sgd.) Lee Hun Hoe

Judge.

In the High
Court of
Sarawak

No. 7

Judgment
10th September
1965
(Contd.)

After hearing arguments on costs.

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Plaintiff is awarded costs on the higher scale. Costs to be taxed.

(sgd) Lee Hun Hoe

Judge.

10th September, 1965.

T.O. Thomas, Esq., of Messrs. Thomas & Co.,
Kuching, appeared for plaintiff.

Mr. Goodbody, D.P.P. appeared for the Defendant.

78.

In the High
Court of
Sarawak

NO. 8

ORDER

No. 8

M A L A Y S I A

Order dated
10th September
1965

IN THE HIGH COURT IN BORNEO
(KUCHING REGISTRY)

Civil Suit No. C/122 of 1963

B E T W E E N:

M.N. GUHA MAJUMDER

Plaintiff

- and -

ATTORNEY-GENERAL OF SARAWAK

Defendant

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BEFORE THE HON'BLE MR. JUSTICE LEE HUN HOE
IN OPEN COURT

This 10th day of September, 1965

O R D E R

This Action coming on for hearing before this Court on the 14th and 15 days of July, 1965 in the presence of Mr. T.O. Thomas of Counsel for the Plaintiff and Mr. D.M. Goodbody, Crown Counsel, for the Defendant AND UPON READING the pleadings AND UPON HEARING the evidence adduced on behalf of the Plaintiff and the Defendant and the arguments of Counsel as aforesaid IT WAS ORDERED that this Action do stand adjourned for judgment AND the same coming on for judgment this day.

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IT IS ADJUDGED AND DECLARED that the plaintiff is eligible for designation as a "designated officer" within the meaning of that phrase as defined in the Schedule to the Overseas Service Ordinance (No. 15 of 1961).

AND IT IS FURTHER ADJUDGED that the plaintiff recover against the defendant the costs of this action on the higher scale taxed by the proper officer of this Court.

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Given under my hand and the seal of the Court this 10th day of September, 1965.

(Sgd) Ag. REGISTRAR,
High Court, Kuching.

NO. 9

NOTICE OF APPEAL

IN THE FEDERAL COURT OF MALAYSIA

(APPELLATE JURISDICTION)

Civil Appeal No. X.8 of 1965

In the Federal
Court of
Malaysia

No. 9

Notice of
Appeal
9th October
1965

B E T W E E N:

M.N. GUHA MAJUMDER Appellant

- and -

THE ATTORNEY-GENERAL OF SARAWAK
Respondent

10

(In the matter of Civil Suit No. C/122/63 in the
High Court in Borneo at Kuching

B E T W E E N:

M.N. GUHA MAJUMDER Plaintiff

- and -

THE ATTORNEY-GENERAL OF SARAWAK
Defendant

NOTICE OF APPEAL

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Take notice that the plaintiff being dissatisfied
with the decision of the Hon'ble Mr. Justice Lee
Hun Hoe given at Kuching High Court on the 10th
day of September, 1965, appeals to the Federal
Court against his Lordship's refusal to grant the
First and Third Declarations.

Dated this 9th day of October, 1965.

(Sgd) Thomas & Co.

Advocates for the Appellant.

To: The Registrar, Federal Court of Malaysia,
Kuala Lumpur.

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And to: The Registrar, High Court in Borneo,
Kuching.

And to: The Attorney-General of Sarawak, Kuching.

The Address of service of the Appellant is care of
Messrs. THOMAS & COMPANY, ADVOCATES, 9 INDIA STREET,
KUCHING.

In the Federal
Court of
Malaysia

No.10
Memorandum
of Appeal
19th November
1965

80.

NO. 10

MEMORANDUM OF APPEAL

IN THE FEDERAL COURT OF MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL No.X.8 OF 1965

B E T W E E N:

M.N. GUHA MAJUMDER

Appellant

- and -

THE ATTORNEY-GENERAL OF SARAWAK Respondent

(In the matter of Civil Suit No. C/122/63 in
the High Court in Borneo at Kuching

10

B E T W E E N:

M.N. GUHA MAJUMDER

Plaintiff

- and -

THE ATTORNEY-GENERAL OF SARAWAK Defendant)

MEMORANDUM OF APPEAL

M.N. Guha Majumder, the Appellant above named,
appeals to the Federal Court against those parts
of the decision of the Hon'ble Mr. Justice Lee
Hun Hoe given at the High Court at Kuching on
the 10th day of September, 1965, refusing to grant
the First and Third declarations, on the following
grounds:

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(1) That the learned Trial Judge should have
held that the Colonial Office advertisement calling
for applications for appointments to service in
Sarawak had an important bearing on the meaning
of the language of subsequent documents
constituting the offer and acceptance which
eventually created (sic) constructual rights in
respect of the Appellant's salary, allowances
and pension rights.

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(2) That the statement in the Colonial Office

advertisement that a pensionable "expatriation pay" would be payable at the rates specified explained and, to that extent, regulated the language of the subsequent documents constituting the contract in relation to the same context.

In the Federal
Court of
Malaysia

No.10

Memorandum
of Appeal
19th November
1965
(Contd.)

10 (3) The learned Trial Judge failed to give adequate consideration to the fact that by his reference specifically, in column 5 of the application form to the earlier Colonial Office advertisement, the Appellant was applying for employment in an office which had been stated in the advertisement without any words of qualification to attract "expatriation pay", in addition to salary, on a pensionable basis.

20 (4) That clause 4 of the Memorandum declaring an officer on his appointment to be "subject to the General Orders of the Government in which he is serving (the terms of which were not communicated to him) referred only to matters which affected other conditions of service and which were not inconsistent with the terms of the contract as to salary, allowances and pension rights set out in the Memorandum as explained by the language of Colonial Office Advertisement.

30 (5) That the learned Trial Judge should have distinguished the case before him from the case of Curtis v. Chemical Cleaning and Dyeing Co. (1951) 1 K.B. 805 on the ground that the exception as to liability was fully set out in the document signed by the plaintiff in that case whereas General Order 192 was not communicated to the Appellant, he had no means of access to same until after he signed the Declaration of Secrecy on the 11th December, 1958, and General Order 7 forbade reference of General Orders to persons outside the Government service.

40 (6) That assuming that General Order 192 applied to the Appellant's case, the word 'final' in that General Order must be construed in the light of the fundamental rule of law stated by the House of Lords in the Pyx Granite Co. Case (1959) 3 All E.R. (at p.6), namely, "It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's Courts for the determination of his rights is not to be excluded except by clear words".

In the Federal
Court of
Malaysia

No.10

Memorandum
of Appeal
19th November
1965
(Contd.)

(7) That the Respondent should not have been allowed to pray in aid (paragraph 15 of the Defence) against the Appellant the wrong-doing of the Colonial administration, namely, the fact that the Appellant's petition for inducement pay to the Governor-in-Council was forwarded to the Secretary of State instead of submitting same for decision by the Governor-in-Council.

(8) That there was no justification whatsoever for appointing the Appellant to Membership of Her Majesty's Overseas Civil Service, which was open only to expatriate officers, if it was intended that the Appellant alone, of all the many members of Her Majesty's Overseas Civil Service in Sarawak since 1958, was to be refused inducement pay. 10

(9) That the learned Trial Judge failed to consider why the Appellant, unlike the induced officer Mr. Murthy who was refused Membership of Her Majesty's Overseas Civil Service, was admitted to Her Majesty's Overseas Civil Service if he was to be denied inducement pay, all members of that service on the permanent and pensionable establishment of the Government of Sarawak having been in receipt of inducement pay EXCEPT the Appellant. 20

(10) That the Appellant was accepted, by the Secretary of State, as an expatriate officer, admitted to Her Majesty's Overseas Civil Service and paid an outfit allowance of £60 which "shall be payable to an officer who is eligible for inducement pay under General Order 192 engaged outside Sarawak" and there was, at all material times, no authority in Sarawak competent to overrule the decision of the Secretary of State as to the Appellant's eligibility for inducement pay. 30

(11) That as the Appellant obviously satisfied the essential requirement of being an "expatriate officer" before appointment to Her Majesty's Overseas Civil Service in 1958 and the Secretary of State accepted the Appellant as an officer entitled to inducement pay there was no lawful justification for refusing inducement pay to the Appellant. 40

(12) The learned Trial Judge should have held that the maxim omnia praesumuntur rite esse acta applied to the obvious acceptance by the Secretary

of State, in 1958 of the Appellant as an "expatriate officer" eligible for expatriation pay and that the defendant had not satisfactorily rebutted the presumption of regularity.

In the Federal
Court of
Malaysia

No.10

Memorandum
of Appeal
19th November
1965
(Contd.)

10 (13) That according to well recognised rules laid down for ascertaining the intention of the parties to a written contract, the Appellant's contract of service included entitlement to inducement pay (expatriation pay). The main reasons, inter alia, being:

- (i) The formal letter of appointment (of 12th June, 1958) expressly referred to a rate of pension based on "salary plus inducement" and there were no express words indicating that only certain categories of expatriate officers would be eligible for inducement pay and, if so, what were the qualifications for eligibility.
- 20 (ii) In the absence of any language to the contrary, the Appellant's acceptance of the offer of employment was intended to be understood to attract "inducement pay" or "expatriation pay" as set out in the formal advertisement which was manifestly addressed to all expatriate applicants without reference to race, domicile or other discriminatory conditions.
- 30 (iii) The Memorandum attached to the offer must prima facie be presumed to have applied to the offeree himself and that presumption had not been rebutted in this case.
- 40 (iv) Under the contra proferentum rule any doubt arising on the interpretation of any point arising from the document (such as the Memorandum) should be resolved against the Crown which had drafted the relevant documents, especially in view of the admission by Counsel for the defendant of "Certain inconsistency in memorandum".
- (v) Payment of an outfit allowance on the Appellant's first appointment was made to him because the Secretary of State accepted the Appellant as an officer eligible for inducement pay, apparently under General Order 47.

In the Federal Court of Malaysia

No.10

Memorandum of Appeal 19th November 1965 (Contd.)

- (vi) Appointment of Appellant to Her Majesty's Overseas Civil Service unlike the induced officer Mr. Murthy whose application for admission to H.M.O.C.S. was refused
- (vii) Correction in Sarawak Government Staff List concerning the status of the Appellant.
- (14) The learned Trial Judge misdirected himself:

(i) By not distinguishing between the claim for declaration of Court as to the interpretation of the terms of a contract of service with the Crown and the Crown's right to termination of a contract of service with the Crown. 10

(ii) When his Lordship said of the Appellant's claim: "In effect he is claiming to be entitled to additional pension", because the claim concerned pensionable "expatriation pay". 20

(iii) By holding, without any evidence whatsoever, that the Colonial Office advertisement was meant mainly for those residing in the British Isles.

(iv) By presuming that the reason for forwarding to the Secretary of State the Appellant's petition to the Governor-in-Council without any evidence to support such presumption.

(15) That the learned Trial Judge erred in law in holding that it would be contrary to public policy for the Court to make a declaration as regards the Appellant's entitlement to inducement pay, when it should have, indeed, been thought surprising, as Viscount Simonds said in the Pyx Granite Case (1959) 3 All E.R. (at p.7), that the executive should not be glad to have such questions authoritatively determined. 30

(16) That it is highly illogical that the Appellant who has been declared and adjudged to be eligible for designation as a "desiganted officer", which designation should entitle him to inducement pay with additional allowances 40

with effect from April, 1961, should be denied inducement pay payable by Sarawak Government from December, 1958 to April, 1961.

(17) That having regard to the whole of the evidence and his Lordship's findings on facts, the learned Trial Judge should have exercised his discretion in favour of granting the first and third declarations.

Dated this 19th day of November, 1965.

10

(Sgd) Thomas & Co.,
Advocates for the Appellant

To: The Registrar, Federal Court of Malaysia,
Kuala Lumpur.

And to: The Registrar, High Court in Borneo,
Kuching.

And to: The Attorney-General of Sarawak,
Kuching.

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The Address of service of the Appellant is care of Messrs. Thomas & Co., Advocates, 9, India Street, Kuching.

In the Federal
Court of
Malaysia

No.10

Memorandum
of Appeal
19th November
1965
(Contd.)

NO. 11

In the Federal
Court of
Malaysia

NOTICE OF CROSS-APPEAL

No.11

Notice of
Cross-Appeal
1st December
1965

IN THE FEDERAL COURT OF MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO. X8 of 1965

B E T W E E N:

M.N. GUHA MAJUMDER

Appellant

- and -

THE ATTORNEY-GENERAL OF SARAWAK Respondent

(In the matter of Civil Suit No. C/122/63 in
the High Court at Kuching.

10

B E T W E E N:

M.N. GUHA MAJUMDER

Plaintiff

- and -

THE ATTORNEY-GENERAL OF SARAWAK Defendant

NOTICE OF CROSS-APPEAL

TAKE NOTICE that, on the hearing of the
above appeal, the State Attorney-General, Sarawak,
(formerly the Attorney-General of Sarawak), the
respondent above-named, will contend that the
decision of the Honourable Mr. Justice Lee Hun
Hoe given in the High Court at Kuching on the 10th
day of September, 1965, ought to be varied to
the extent and on the grounds hereinafter set out:

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(a) The nature of the relief claimed:

That the decision of the learned trial
judge should be varied by declaring that
the appellant is not entitled to the
second declaration sought by him.

(b) The grounds relied upon:

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(1) That the learned trial judge erred in law in making a declaration affecting a person not a party to the action namely Her Majesty's Government of Great Britain and Northern Ireland who had an interest in the subject matter of the declaration.

In the Federal
Court of
Malaysia

No.11

Notice of
Cross-Appeal
1st December
1965

10

(2) That the learned trial judge should have refused to make the second declaration as in the circumstances such a declaration was not effectual and enforceable.

(Contd.)

(Sgd) (Tan Chiaw Thong),

ACTING STATE ATTORNEY-GENERAL,
SARAWAK
RESPONDENT

Dated at Kuching this 1st day of December, 1965.

20

SHIM PAN CHI

Senior Assistant Registrar
High Court in Borneo
at Kuching, Sarawak.

To the advocates of the
above named Appellant
Messrs. Thomas & Co.,
9, India Street, Kuching.

The address of service of the respondent is the
State Attorney-General's Chambers, Kuching.

In the Federal
Court of
Malaysia

NOTES OF ARGUMENTS RECORDED
BY THE HON. JUDGES OF APPEAL

No.12(a)

Notes of Judges
of Appeal -
Mr. Justice
Harley -
20th June 1966

Monday 20th June, 1966

NOTES OF MR. JUSTICE E.R. HARLEY

Thomas: pp.76-80
Document p.16
G.O.No.7
Pyx Granite, 1959, 3 A.E.R. p.6
Word "final" is not sacrosanct.
Munnich v. Godstone, 1966, 1 A.E.R.p.930 10
Wigg v. A.G. 1927 A.C.674.
John Lee v. R.E. 1949, 2 A.E.R.581,583.
Chitty 22nd Ed.
Hyson's case, 1911, 1K.B.

Thomas: "All I am claiming in December 3 is
that that I am entitled to Inducement
Pay".

A.G.: Expt. officers or members of H.M.O.C.S.
are not necessarily entitled to
inducement pay. At material time
position was governed by G.O. 192. 20

ADVERT - extraneous document. Does
not influence offer
subsequently made. S.93 Ev.
Ord., Cap.54 S.95.

£1155 was basic salary.

Ex.33 Outfit allowance NOT
normally payable to officers
with salary over £870.

G.O.'s are not so secret or confidential 30
that candidates cannot be allowed to
read them. Appellant took no steps
to find out provisions of G.O.'s.

Ticket cases: Thompson v. L.M.S.
1930, 1 K.B. p.41.

G.O.192 (i) (b) disqualifies Appellant
from entitlement to Inducement Pay.

In the Federal
Court of
Malaysia

NO. 12 (b)

NOTES OF MR. JUSTICE ISMAIL KHAN

No.12(b)

Notes of Mr.
Justice Ismail
Khan
20th June 1966

20th June, 1966

Mr. T.O. Thomas for Appellant.
Mr. Tan Chiaw Thong (Attorney-General) for
Respondent.

Mr. Thomas refers to p. 76 of record as to
his submissions (line F) in lower court.

Ex. D. - advertisement for medical officers. 10
see p.16.
p. 77 line B.
see (1924) 2 Ch. p.329
(1957) 2 A.E.R. 129. (See judgment p.130,
p.132F, p.133).

Record p.77F. Application for employment.

See p.19 of record. No ambiguity as to
what applicant applied for.

Page 78 of record, line C.
(1947) 2 A.E.R. p.101.
Page 79, line C.

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Memorandum to letter of appointment - p.145
of record. Page 147, letter E.

Page 80.

See General Order 7. Appellant had no
chance of seeing General Order. At time of offer
appellant had no doubt as to inducement.

Ground 5

(1951) 1 K.B. 805.

Ground 6

(1959) 3 A.E.R. 6.

30

See General Order 192 (ii). Does not exclude
right of subject to have his right determined.

(1966) 1 A.E.R. 930, 933 (B).

In the Federal Court of Malaysia

Ground 14

No.12(b)
Notes of Mr. Justice Ismail Khan
20th June 1966
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- (i) Here, question of interpretation of terms of contract. (1911) 1 K.B. 414.
- (ii) Page 121 of record. Claim for pay here not pension.
- (iii) Page 127 of record.
- (iv) Page 131 of record.

Ground 15

(1959) 3 A.E.R. 7 Page 130, 132 of record.

Ground 16

Order of Court. Court has discretion in framing form of declaration in third prayer. 10

Mr. Tan

Status of expatriate officer does not carry induced pay. In Sarawak induced pay governed by General Order 192. On appointment for service in Sarawak pay payable to officer induced or not induced, basic salary and allowances. In respect of induced officer, induced allowances.

As to advertisement being prayed in aid, construe offer made to him against Evidence Ordinance. 20

Advertisement only invitation to negotiate.

See sections 93, 95 Evidence Ordinance.

Advertisement - p. 16 line E.

In this, itself, salary and other perquisites are separate.

Then appellant applied and offer was made by Secretary of State - see p. 142 of record.

I submit salary is not all inclusive. It is basic. Induced pay if it is to be given, should be expressly induced. Other allowances specified. 30

See memorandum - p. 145, paragraph 3.

Appellant says mention of outfit allowance. Secretary of State under the impression it carries induced pay. Outfit pay was given to appellant as it was in memorandum.

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Exhibit 33, p.6. Memorandum applicable to appellant. See form used which is common form with modification.

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10 Page 146 - paragraph 5. In this, nature of appointment does not require him to furnish security.

As to General Order 192, Order 7, and his ignorance of it. Offer made to appellant.

Order 7 prohibits mention of General Orders in communications. It does not prevent disclosure thereof to candidate for a government post. Appellant took no step to find out provisions in General Orders.

Appellant's attention was drawn to such provisions.

20 (1930) 1 K.B. p.41.

Appellant invoked General Order 47 but says General Order 192 does not apply to him General Order 192 excludes appellant from category of officers entitled to induced pay.

30 See General Order 192 (i) (b). Appellant was at time of application for job a few years in England. Application showed permanent address in India. His family was in India. Mention of 5% basic pay and induced pay in memorandum does not conclude matter.

Vacation leave: Show terms there indicate appellant was not induced officer.

See General Order Chapter V, p. 37.

Number of days leave - 34 days for appellant.

General Order p. 40. Borne out by Ex. 33, p. 12.

Induced pay excluded from memorandum borne out by p. 173 of record.

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Ground 6

Here contention is not that Court has no jurisdiction. It is that Court should not make a declaration - paragraph 15 of defence - see p. 31.

General Order intended to favour conditions of service. Cannot form basis of action.

See General Order 4.

Whether an officer is entitled to induced pay is a matter for Governor-in-Council.

10

Ground 8

Status of expatriate officer does not carry induced pay.

No evidence officers in the same category as appellant were given induced pay.

Ground 9

Dealt with in Ground 8.

See p. 56, evidence of Williams (D.W.1.).

Ground 10.

Second limb. See memorandum of offer.
Confirmed by Secretary of State in his reply.

20

See p. 110 of judgment.

Why did appellant not complain of induced pay until 3 years later when salary scheme would have brought it to his notice?

Ground 11

No indication Secretary of State accepted appellant as officer entitled to induced pay.

Ground 12

See documents, advertisement and memorandum which exclude such maxim.

30

Ground 13

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- (i) Dealt with.
- (ii) Only invitation to treat.
- (iii) Dealt with.
- (iv) Only to be applied in cases of ambiguity.
See documents, advertisement and memorandum of offer.

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(v) & (vi) Dealt with.

10 (vii) Adopt views of Judge - p. 111 of record.

Ground 14

- (1) Judge directed his mind to necessity of construing terms of offer.
- (2) There is evidence showing it is a reasonable presumption.
- (3) Sarawak was then a colony. Not improper to refer to Colonial Secretary.

Ground 15

20 Here not a case where Judge has not exercised his discretion and said "I refrain from exercising my discretion".

Prerogative to decide person entitled to Induced pay with Governor-in-Council.

Adjourned to 2.15 p.m.

I.K.

2.25 p.m.

As before.

30 Case of Wigg v. Attorney-General (Irish case). Principle not applicable here. Right in treaty in that case incorporated by local act.

Appellant's case is not based on legal right comparable to Wigg's case.

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Appellant's claim is based on pamphlet
entitled "Administrative Regulations".

Ground 16.

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Pre-April, 1961.

Post-April, 1961.

As to 1, even if appellant designated, such
officer cannot found on it claim to such period.
See Overseas Ordinance, 1961.

As to first declaration, it is not disputed
that appellant from date of appointment was
member of H.M.O. Service. 10

Judge declined to make declaration.
Has not exercised his discretion. See p. 140
of record.

There is action against Sarawak Government
before and after Malaysia. Before Malaysia he
was member of H.M.O.S. Before this Court
can declare him to be such if its decision would
bind H.M. Government. Order 25 Rule 4 can be
used only where there is a declaration of legal
right to be made. 20

Nixon v. Attorney-General (1930) 1 Ch. 566,
594.

(1966) 1 A.E.R. 268, 271.

As to cross-appeal

Two grounds:

1st ground:

See second declaration sought. See
definition of "designated officer". See schedule.

Ordinance 15 of 1961. 30

Secretary of State will decide if an
officer is designated officer. This Court
cannot make an order binding on H.M. Government.

(1942) A.C. 332, 344, 351.
(1956) 2 A.E.R. 1325, 1330
(1951) 1 K.B. 417, 421.

(1956) 1 W.L.R. 1267
 (1965) 1 Ch. 745
 (1915) 2 K.B. 536
 (1897) A.C. 615, 622.
 (1962) 3 A.E.R. 633
 (1892) 2 Ch. 331, 345
 (1955) 2 Q.B. 207, 217
 (1963) M.L.J. 96, 99.

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Mr. Thomas in reply:

10 Not open to respondent to say that advertise-
 ment should not be taken into consideration,
 having been admitted.

Page 81 of record - pensionable emoluments.

Legal Dictionary - definition of "emolument",
 p. 708.

See page 83 of record, line B.

S.A. de Smith on Judicial Review of
 Administrative Action - p. 374.

20 Appellant's rights set out in Ordinance 50
 of 1961, not only in pamphlet "Administrative
 Regulations".

Nixon's case irrelevant to our case. Chitty
 on Contracts, 22nd ed., p. 1105, on Crown servants.

Barraclough's case distinguished in (1959)
 3 A.E.R. 6.

See submissions:

Page 85.

Page 86. The words "The writ in this".

Page 87.

30 Page 88. Sarawak only a colony when writ
 issued. Only representative H.M. Government.

Respondent did not enter conditional appearance.
 (Mr. Thomas says he is addressing Court in cross-
 appeal).

Law of Sarawak, Vol. 2, p. 90, 91.

Section 3, 14 (2).

Wigg v. Attorney-General of Irish Free State,
 (1927) A.C. p. 679.

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In our case we have Ordinance 50 of 1961.
Agreement has become part of Law of Sarawak.
Refers to certificate in Supplemental Record
of Appeal.

Malaysia Act, section 76, section 14 (2).

Definition of "Government", p. 89.

If action, Law of Sarawak, vol. 2, 120,
vol. 1, 17.

Definition of "sovereign".

Definition of "Sarawak" - p.14.

10

Definition of "Secretary of State".

Words "sovereign" and "Secretary of State".
Attorney-General says: No aggrieved party here,
but see p. 15 of record.

C.A.V. (Sgd.) ISMAIL KHAN

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IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUCHING

No.12(c)

(APPELLATE JURISDICTION)

Notes of Mr.
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FEDERAL COURT CIVIL APPEAL NO. X.8 of 1965

B E T W E E N:

M.N. GUHA MAJUMDER Appellant

- and -

THE ATTORNEY-GENERAL OF SARAWAK Respondent

10 (In the matter of Civil Suit No. C/122/63
in the High Court in Borneo at Kuching

B E T W E E N:

M.N. GUHA MAJUMDER Plaintiff

- and -

THE ATTORNEY-GENERAL OF SARAWAK Defendant)

NOTES OF GILL, J.

20th June, 1966

In Open Court

20 Coram: Harley, Ag. C.J.
Dato Ismail Khan, J.
Gill, J.

Mr. T.O. Thomas for the Appellant.
Mr. Tan Chiaw Thong for Respondent.

Thomas addresses Court:

30 First four grounds of appeal. Pages 76 to 80
of appeal record. Advertisement at page 16 of
record. Refer to McClelland v. N. Ireland Health
Board (1957) 2 A.E.R. 129, 130, 133. Read page 77.
Application form at page 19 of record. No ambiguity
about what the applicant was asking for. Read page
78. Memorandum attached to letter of appointment
at page 145. Refer to G.O. 7.

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Ground 5. Refer to Curtis v. Chemical Cleaning
and Dyeing Co. (1951) 1 K.B. 805.

Ground 6. Refer to Pyx Granite Co. v. Ministry
of Housing (1959) 3 A.E.R. 1, 6; Munnich v.
Godstone Rural District Council (1966) 1 A.E.R.
930.

Ground 7. Page 131 of record. Appellant's
petition at page 168. Refer to Wigg and Another
v. Attorney-General for the Irish Free State
(1927) A.C. 674, 681. 10

Ground 8. Refer to judgment at page 160. Why
was appellant appointed a member of Her Majesty's
Overseas Civil Service if he was not to be paid
inducement pay? (Ground 9).

Grounds 10 and 11. Refer to pages 128 and 129
of record.

Ground 12. Refer to page 74 of record. Refer
to Price v. Humphries (1958) 2 A.E.R. 725, 727.

Ground 13. Refer to Memorandum at page 147;
John Lee v. Railway Executive (1949) 2 A.E.R. 581,
583; Chitty on Contracts (22nd edition) paragraph 136. 20

Ground 14. Not a question of termination of
service, but a question of declaration as to
rights of appellant. Refer to Dyson v. Attorney-
General (1911) 1 K.B. 410. Refer to page 121
of record, page 127 and page 131 of record.

Ground 15. Refer to pages 132 and 134 of record.

Ground 16. Refer to Order of Court at page 134.

Ground 17. Respondent conceded that appellant
was entitled to first declaration asked for. 30

Tan Chiaw Thong addresses Court:

First point I would make is that by virtue
of being an expatriate officer a member of
H.M.O.S. is a person entitled or eligible to
expatriation pay. So far as Sarawak was
concerned position governed by G.O. 192. When
appellant was engaged the emoluments consisted
of certain elements.

Contrary to the laws of evidence to bring in extraneous matter to interpret a contract. Advertisement should not be treated as part of contract, refer to Section 93 of Evidence Ordinance (Cap. 54). Section 95 of the Evidence Ordinance. Offer and memorandum attached not ambiguous.

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10 Advertisement at page 16 of record. Salary and other privileges are stated separately. Application by appellant. Refer to letter of appointment at page 142. If appellant was to be paid expatriation pay it would have been so stated in the letter. Expatriation pay deliberately omitted. Memorandum at page 145. Mention of outfit allowance. Outfit allowance paid because it was mentioned in the offer. Exhibit 33.

20 Mention in memorandum (page 146) of applicability of General Orders. General Order 7 does not make General Orders a secret document. Appellant took no steps to find out what General Orders they were. No evidence that General Orders would have been available to him if he asked for them. Refer to Thomas v. London, Midland and Scottish Railway Company (1930) 1 K.B. 41, 46.

30 Appellant says that G.O. 47 applies to him yet says that G.O. 192 does not apply to him. He cannot have it both ways. Payment of expatriation pay in Sarawak government entirely by G.O. 192 (i) (a), (b) and (c).

Refer to page 147 of record, paragraph 8 of memorandum G.O. 227. But appellant given a tour of four years. That shows that appellant was not an officer in receipt of inducement pay. Refer to exhibit 33 about leave for expatriate officers. Refer to page 173 of record, on the question of whether appellant habitually resided in the United Kingdom.

40 In reference of ground 6, we are taking the point that the Court has no jurisdiction to make a declaration but that it should not make a declaration.

General Orders intended to govern terms and conditions of service. General order 4. Nothing to prevent appellant from applying to the Governor.

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As regards ground 8, membership of H.M.O.S. does not entitle an officer to expatriation pay. No evidence that officers recruited at the same time as plaintiff were given inducement pay. Refer to page 56 of record. Evidence of Williams.

Appellant's story that he thought that his salary included expatriation pay. Refer to page 110 of record (Judge's finding).

Ground 12, no question of applicability of maxim here. All documents exclude inducement pay. 10
As regards ground no ambiguity in the contract here.

As regards correction of staff list, refer to page 111. Nothing improper about referring the matter to the Colonial Office while Sarawak was still a British Colony.

Trial Judge right in refusing to make the third declaration asked for. He would have been right in refusing to make the declaration because membership of H.M.O.S. did not carry with it entitlement or eligibility to expatriation pay. 20

Adjourned until 2.30 p.m.

Signed (S.S. Gill).

Resumed at 2.30 p.m.

Mr. Tan Chiaw Thong (continuing):

Principle in Wigg's case not applicable here. Claim of appellant here not based on any legal right.

Ground 16. Even if appellant is a "designated officer" that does not entitle him to expatriation pay. No such thing as a "designated officer" before the Overseas Service Ordinance, 1961. Refer to Section 3 of Ordinance. 30

Ground 17. A general ground. On the evidence plaintiff not entitled to third declaration. Not disputed that from the date of his appointment appellant was a member of His Majesty's Civil Service. Learned Judge right in not making the first declaration sought. Refer to page 114.

Action brought against Sarawak Government before Malaysia. Declaration affect Her Majesty's Government.

In the Federal Court of Malaysia

Refer to Nixon v. Attorney-General (1930) 1 Ch. 567, 573, 574, 594; Cox v. Green (1966) 1 A.E.R. 268. No question of a declaration of legal right in this case.

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Notes of Mr. Justice Gill
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(Contd.)

Cross Appeal

10 First ground. Second declaration sought set out at page 100. Refer to Overseas Service Ordinance, 1961. Definition of "designated officer". Secretary of State must designate, even if person satisfies the conditions (i) and (ii) in definition. Discretion in the Secretary of State. Declaration cannot be made without Her Majesty's Government being made a party. The Court does not make an order, in vain. All interested parties must be fore the Court. London Passenger Transport Board v. Moscrop (1942) A.C. 344, 351. Financial burden on Her Majesty's Government on a person being declared a "designated officer". Thomas v. Attorney-General (1936) 2 A.E.R. 1325, 1330, 1332. Howard v. Pickford Tool Company (1951) 1 K.B. 417. No steps have been taken to have himself declared a "designated officer". Vienit Ltd. v. W. William & Son (Bread St.) Ltd. (1958) 1 W.L.R. 1267; Buck v. Attorney-General (1965) 1 Ch. 745, 768; Guarantee Trust Co. of New York v. Hannay & Co. (1955) 2 K.B. 536.

20
30 Trial Court should not have made second declaration. (sic)

Second ground. Effectiveness of the declaration made. Refer to Barraclough v. Brown and Others (1897) A.C.615, 622; Francis v. Municipal Councillors of Kuala Lumpur (1962) 3 A.E.R. 633; Grand Junction Waterworks Co. v. Hampton U.D.C. (1898) 2 Ch. 331 345; Attorney-General v. Colchester Corporation (1955) 2 Q.B. 207.

40 Second declaration in effect directed against the Secretary of State. Chop Chuah Seong Joo v. Teh Chooi Nai & Others (1963)M.L.J. 96, 99.

Mr. Thomas replies:

G.O. 47 is not the basis of the appellant's case. Refer to page 81 on "pensionable emoluments".

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Definition of emoluments in Jowitt.

On ground 14 (1) refer to page 125 (judgment).

As to third declaration refer to Judicial
Review of Administrative Actions by S.A. De
Smith, page 374.

Question of termination of service does
not arise.

Nixon's case nothing to do with the present
case. Chitty on Contracts (22nd edition) page
484.

10

Barraclough's case distinguished in Pyx
Granite case.

Cross Appeal

Refer to pages 85 to 95 of record. Writ
issued in the name of Her Majesty the Queen.
Respondent gave the impression that he was
representing the Government of Sarawak and Her
Majesty's Government.

Refer again to Wigg's case.

Crown Proceedings Ordinance (Cap. 47).
Definition of "Government". Section 34. Refer
to Interpretation Ordinance (Cap. 1). Definition
of "Sovereign" in Section 3 (7).

20

Not correct to say that there is no aggrieved
party here. Refer to page 15 of record.

Judgment reserved.

Signed (S.S. Gill).

JUDGMENT OF HARLEY, ACTING CHIEF JUSTICE
BORNEONo.13Judgment
9th September
1966

10 The appellant claimed in the High Court three declarations. The first declaration was not granted because there was no question of fact in dispute. The Court granted the second declaration and refused the third. The appellant has appealed against the Court's refusal to grant declarations 1 and 3. The respondent has filed a cross-appeal on the grounds that the learned trial judge erred in law in granting the second declaration.

20 The first declaration of Court claimed by the appellant was that "he is and has always been a member of Her Majesty's Overseas Civil Service with effect from the first day of December 1958". To this the defence pleaded that this question "is a matter solely within the discretion of Her Majesty's Government and is not a matter over which the Government of Sarawak has any power or control and that the first claim of the Plaintiff is not justifiable in this Honourable Court and is not within its jurisdiction. The defendant will however regard the plaintiff for the purposes of these proceedings as if he had been enrolled in Her Majesty's Overseas Civil Service on the 1st day of December, 1958". As
30 to this first declaration claimed, I will at once say that in any event the learned trial Judge's discretion cannot have been exercised wrongly if he refused to declare something not in dispute. Moreover, the first declaration would not assist in determining the Appellant's rights to extra pay, that is if he has any such rights. (see Cox. v. Green 1966 CL. p. 216).

40 The Second declaration of Court claimed by the Appellant was that he "is eligible for designation as a 'designated officer' within the meaning of that phrase as defined in the Schedule to the Overseas Service Ordinance (No.15 of 1961)". To this, paragraph 16 of the Defence replies, "..... designation is a matter wholly within the competence and discretion of one of Her Majesty's principal Secretaries of

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State and is not within the competence of the Sarawak Government. The Defendant will further contend that under section 1 of the Overseas Service Act 1961 the Plaintiff cannot be designated under the Overseas Service (Sarawak) Agreement 1961 without the consent of the United Kingdom Treasury; and the Defendant will further object that the Overseas Service (Sarawak) Agreement, 1961, is an agreement made between the Sarawak Government and Her Majesty's Government in the United Kingdom to which the Plaintiff is not a party, and that for this reason the issue of designation under the said Agreement is not justiciable in any proceedings in this Honourable Court." 10

The Third and last declaration of Court claimed by the appellant was "that it would be unlawful to refuse to the plaintiff (appellant) benefits such as inducement pay". It may be noted in passing that the phrase "benefit such as induce pay" gives an impression of loose phraseology. One asks oneself at once whether, for instance, subsistence allowances are benefits "such as inducement pay". However, to this claim the defence in paragraph 17 was: "The Defendant will contend that the third claim of the Plaintiff is vague and based on a false premise and is not sustainable ... and denies that the documents referred to in the Statement of Claim created any legally enforceable obligation upon the Government of Sarawak." Also in answer to the third claim it was pleaded in paragraph 15 that "In respect of his claim to entitlement to inducement pay the Plaintiff is, by the terms of his appointment, bound to accept as final the decision of the Government in Council in accordance with General Order 192 and that that course is still open to the Plaintiff." 20 30 40

The claims are founded on contract. As for the part played in the contract by the British Government, this be commented on later in the Judgment. What really interests the appellant is the figure for his pay and allowances. The contract was introduced to the appellant by an advertisement. The advertisement stated

that a medical officer was required in Sarawak for general medical duties and the advertisement set out the salary scale. The passage in the advertisement to which the decision of the Court is drawn by the appellant reads as follows:

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10 "In addition expatriation pay (pensionable) is payable varying from £252 to £336 a year, education allowance of £140 a year for up to two children between ages of 15 & 17 educated outside Sarawak, and a child allowance of 7½% of basic salary ... Free passages provided in both directions for officer, wife and up to three children under 18 years of age. Income tax at low local rates. Tour of service 30 to 36 months."

20 Taking the advertisement by itself for what it is worth - and its worth will be discussed later - does it imply that the appointment carries extra pay regardless of entitlement? Ground 3 of the Memorandum of Appeal states that "the Appellant was applying for employment in an office which had been stated in the advertisement without any words of qualification to attract 'expatriation pay', in addition to salary, on a pensionable basis." Does the appellant seriously ask the Court to find that expatriation pay was to be payable even to candidates who were not expatriates?

30 To put a similar question in another form, could a candidate claim "family allowances" regardless of the fact that he had no family? The appellant urges that the word "expatriate" should be interpreted in its dictionary sense. In that sense, an expatriate is one who is banished or withdraws from his own country. An Englishman living in England is not an expatriate. Was the advertisement addressed to him? It is true that he would be an expatriate if he went to Sarawak. Is a citizen of Sarawak living in Sarawak an expatriate? Is such a citizen an expatriate when he lives in London? Even at the advertisement stage, and certainly later on, it becomes impossible to give any meaning to the terms "expatriate" and "expatriation pay" unless one refers to the context in which such terms are used. In other words, one is almost forced to the conclusion from the start that the word "expatriate" has a particular technical meaning and that its definition may be found in some

40

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Government Regulations or Orders. In so far as one can define legally expatriation or nationality, appellant was not an expatriate. (See Earl Jowitt's "Dictionary of English Law", p.764). At one stage the appellant himself pleaded that he "was never informed that his nationality .. had anything to do with terms and conditions of his service." (Paragraph 12 of Statement of Claim). How is this to be reconciled with the appellant's claim that he was entitled to classification as an expatriate?

10

Next let us consider the subsequent steps to completion of the contract. On the 2nd of May, 1958, the appellant was provisionally selected for appointment as Medical Officer, Sarawak, and was informed by the Colonial Office: "a formal offer of appointment will be sent to you as early as possible". On the 12th of June, 1958, the Colonial Office did offer an appointment "on the conditions set out in this letter and in the enclosed memorandum". The following passages are quoted from that letter of 12th June, 1958:-

20

(sic)

"The salary scale of the appointment is at the rate of \$870 a month for the first year; \$930 a month for the second year, rising by annual increments of £30 a month to \$1050 a month; then \$1085 a month rising by annual increments of \$35 a month to \$1260 a month; then \$1300 a month rising by annual increments of \$40 a month to \$1420 a month. There is an efficiency bar at \$1260 a month.

30

In view of your professional experience and qualifications you would enter the salary scale at \$1155 a month."

At this point one would have thought that it would be abundantly clear to a man of average intelligence that he was entering the salary scale at a point above the minimum because of his "professional experience and qualifications". The evidence of the appellant himself was: "I thought inducement pay was included because the salary scale starts at \$930 while I get \$1,155."

40

To continue the quotations from this letter of 12th June, 1958, attention should be drawn

to the following passages:

"In addition to basic salary, allowances are payable at the rates shown in the memorandum.

4. If you are prepared to accept the appointment on these conditions you should inform the United Kingdom High Commissioner in Calcutta."

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10 The letter also promised an "outfit allowance of £60 as a means of assistance towards the purchase of essential tropical kit".

20 The offer was that the appellant would receive allowance payable at the rates shown in the memorandum. The appellant said in evidence that up to August 1961 he thought that expatriation pay was included in his salary. During the period of negotiations there is no evidence that the appellant ever made any enquiries as to expatriation pay or as to the amount payable. The allowances to which appellant was entitled were set out in the memorandum attached to the letter of 12th June, 1958. The memorandum promised education allowance, child allowance and outfit allowance (£60). The appellant picked on this promise of outfit allowance and on the fact that it was indeed paid to him as an argument that he must have been selected as an expatriate or induced officer. There is no suggestion that the term "induced officer" was known to the appellant at the time of entering into the contract. However, there is a General Order (No.47) - and General Orders will be referred to again later on - which lays down that "outfit allowance shall be payable to induced officers". Clearly it does not follow, if a man is paid outfit allowance, that therefore he is an induced officer.

40 The memorandum forming part of the offer to the appellant also laid down general conditions of service "An officer is subject to the General Orders of the Government in which he is serving, and to the Colonial Regulations for the time being in force in so far as the same are applicable." It is to be observed that neither the letter of 12th June, 1958, nor the memorandum attached to it made any explicit offer of, or gave any figure

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for, expatriation pay. It is also to be noted that the offer of employment made the offence subject the General Orders. It is hardly conceivable that the appellant would have been refused permission to read General Orders if he had asked to see them. He has claimed that he would not be bound by General Orders when he was ignorant of their terms. Since 1st August, 1957, General Order 192 excluded from entitlement to inducement (expatriation) pay those habitually resident in India. This appellant had given an address in India as his permanent address. In paragraph 5 of the defence it was pleaded "that the Plaintiff was at all material times habitually resident in India". To this, paragraph 6 of the reply stated that even if this was true, it was irrelevant.

10

Attention has already been drawn to the fact that the memorandum gave details of certain allowances but made no mention of expatriation pay. Now, if we are to believe the statement of the Chief Secretary, Sarawak, contained in a letter dated 31st January, 1962, mention of expatriation pay was a deliberate omission from the offer and contract with the appellant. In this letter it is stated that Sarawak General Order 192 excluded India for the purpose of inducement pay as from August 1957 and therefore "the clause about inducement pay was excluded in your terms and conditions of service". It may be unwise to assume that whenever expatriation pay was payable, a clause to that effect was invariably included under the heading "ALLOWANCES". We have, however, the evidence of one witness, a Mr. Murthy who was a Forest Conservator in Sarawak and came originally from India. He signed the contract for service in Sarawak in 1955 or 1956 (i.e. before August 1957). He said evidence, "It was specifically stated that I would get expatriation pay. Reason: Because I was recruited in U.K. I am an Indian".

20

30

40

In the record before this Court there is no letter included of any rate between 12th June, 1958, and 6th December, 1958, but the offer of 12th June was presumably accepted without qualification by the appellant in a letter dated 10th October, 1958. It is not explained why the letter of acceptance

50

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1966
(Contd.)

January, 1962.

Now, either General Order 192 applies to the appellant's contract or it does not. If it does apply to him, he would be excluded from any claim for inducement pay because he was habitually resident in India. This General Order also sets out "(ii) if any time any question arises whether any officer or class of officers is eligible for inducement pay, the decision of the Governor-in-Council shall be final." Therefore, if General Order 192 does apply to appellant, his eligibility for inducement pay is for the decision of the Governor-in-Council. On the other hand, if General Orders, including General 192, do not apply to the appellant, his claim to inducement pay must depend on his contract, and on the wording of the official letters already quoted and of the appellant's own replies. 10

It may be helpful at this stage to see how the learned Judge in the Court below dealt with the claim for "benefits such as inducement pay". The following is an extract from his judgment: 20

"Plaintiff stated that until August, 1961 he was all the time under the impression that his salary included inducement pay. When he realised that it was not so he submitted a petition dated 19th August, 1961, to the Governor-in-Council asking for inducement pay retrospectively from the date of his first appointment. The petition appeared to have been sent to the Secretary of State who agreed with Government of Sarawak that plaintiff was not entitled to inducement pay. Thus the Chief Secretary replied to the petition that plaintiff's claim for inducement pay could not be admitted. There is no clear evidence whether this petition did go to the Governor-in-Council as it should have gone for under the Sarawak Government General Orders the decision of the Governor-in-Council is deemed to be final". 30 40

As already stated, General Order 192 lays down that some officers are entitled to inducement pay, others not. As regards the appellant's entitlement, if the Governor-in-Council has given a decision, it must be final. If,

however, as it would appear, he has not yet decided the petition, then it is not for this Court to anticipate the decision. The appellant's argument that other officers of Her Majesty's Overseas Civil Service get inducement pay can carry no weight, nor does the fact that the appellant was for a short period listed (mistakenly) in the official staff list as an induced officer. The learned trial Judge undoubtedly took the right view with regard to the evidential value of the Staff List.

In the Federal
Court of
Malaysia

No.13

Judgment
9th September
1966
(Contd.)

Clearly the appellant cannot claim inducement pay by reference to General Orders. He must stand or fall, as already stated, by the terms of his contract as contained in the letters. The learned trial Judge very properly held that the advertisement could not be incorporated into the contract and was in fact merely "an invitation to treat".

I now propose to deal with the second declaration claimed, and granted by the Court. The claim was that the appellant "is eligible for designation as a designated officer." In order to give any meaning to the term "designated officer", one must turn to the Sarawak Overseas Service Ordinance No.15 of 1961, in which we find that "designated officer" means "an officer designated as such by a Secretary of State". In the context, "Secretary of State" means "one of Her Majesty's Principal Secretaries of State in the United Kingdom". It is plain on the face of it that no person can claim to be a designated officer unless he has been so designated by Her Majesty's Secretary of State. It is true that the appellant does not claim that he is a designated officer but that he is "eligible for designation as a designated officer". This phrasing again is perhaps deliberately loose and "vague" as pleaded in the Defence. One cannot normally come to Court and claim, as it were in the abstract, that one is "eligible" for the office of, say, Prime Minister or Archbishop. It cannot have any practical effect to rule that the appellant could be designated if the Secretary of State chose to designate him. Moreover, to be a designated officer, one must also be an expatriate officer. Mention of expatriate or induced officers in this context seems to imply officers who are entitled to expatriation pay or inducement pay. If we are to find that the appellant is an expatriate officer, we are concerned once more

In the Federal
Court of
Malaysia

No.13

Judgment
9th September
1966
(Contd.)

with the question of inducement pay. In fact ground 16 of the appeal claims that designation as a designated officer would entitle the appellant to inducement pay. That question of inducement pay brings us back in a circle to the contract and/or to General Order 192. It has already been stated that this Court cannot rule on any question giving rise to claims for inducement pay without impinging on the authority of the Governor-in-Council. The authority of the Governor-in-Council is concerned with both the second and the third declarations because entitlement of inducement pay is tied in to both declarations.

10

Finally, as regards the appellant's eligibility for designation, it is outside the discretion of the Court to grant such a declaration for reasons germanely set out in the cross-appeal as follows:

"(1) That the learned trial judge erred in law in making a declaration affecting a person not a party to the action, namely, Her Majesty's Government of Great Britain and Northern Ireland who had an interest in the subject matter of the declaration.

20

(2) That the learned trial judge should have refused to make the second declaration as in the circumstances such (sic) as a declaration was not effectual and enforceable."

30

It seems to me that these grounds of appeal are incontestable. The Courts should not make declarations which concern persons interested but not joined as parties (London Passenger Transport Board v. Moscrop H.L. 1942 A.C. 332 and Thomas v. Attorney-General 1936 2 All E.R. 1325). It is impossible for the defence through the Attorney-General of Sarawak to represent, still less to bind, Her Majesty's Government in Britain. I am not unmindful of the fact that by Article 48 of the Constitution of the State of Sarawak the Government of Sarawak may inherit certain rights, liabilities and obligations of Her Majesty. The point in the instant case is that no rights, liabilities or obligations concerning "designation" can arise

40

until a designated officer has been designated as such by a Secretary of State and on this point there is express agreement between the two Governments contained in the Overseas Service Ordinance No.15 of 1961.

In the Federal
Court of
Malaysia

No.13

In the event the appeal is dismissed and the cross appeal is allowed. Appellant must pay the costs of the appeal and of the Court below.

Judgment
9th September
1966
(Contd.)

10 Dated this 9th day of September 1966

(Signed) E.R. Harley
(E.R. Harley)
Acting Chief Justice,
Borneo.

I concur. (Signed) Ismail Khan
(Ismail Khan)
Judge.

I concur. (Signed) S.S. Gill
(S.S. Gill)
Judge.

20

All 3 Judgments delivered this day at Kuching by me.

(Signed) E.R. Harley.
18/10/66.

Mr. T.O. Thomas of Messrs. Thomas & Co., Kuching,
for Appellant.

Mr. Tan Chiaw Thong, Attorney-General of Sarawak,
Respondent, in person.

In the Federal
Court of
Malaysia

NO. 14

ORDER ON APPEAL

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUCHING

No.14

(APPELLATE JURISDICTION)

Order on
Appeal
18th October
1966

FEDERAL COURT CIVIL APPEAL NO.X.8 OF 1965

B E T W E E N: M.N. GUHA MAJUMDER Appellant

- and -

THE ATTORNEY-GENERAL OF SARAWAK
Respondent

(In the matter of Civil Suit No. C/122 of 1963
in the High Court in Borneo at Kuching.

10

B E T W E E N: M.N. GUHA MAJUMDER Plaintiff

- and -

THE ATTORNEY-GENERAL OF SARAWAK
Defendant)

Coram: Harley, Acting Chief Justice, High Court in
Borneo;
Ismail Khan, Judge, High Court in Malaya:

- and -

Gill, Judge, High Court in Malaya.

In Open Court

20

This 18th day of October, 1966

O R D E R

THIS APPEAL coming on for hearing on the 20th
of June, 1966 in the presence of Mr. T.O. Thomas of
Counsel for the above named Appellant and Mr. Tan
Chiau Thong, the State Attorney-General of Sarawak
for the Respondent AND UPON READING the Record
of Appeal and Notice of Cross-Appeal filed herein
AND UPON HEARING Counsel as aforesaid IT WAS
ORDERED that this Appeal do stand for judgment
and the same coming for judgment this day in
the presence of Counsel for the Appellant and
the State Attorney-General as aforesaid IT IS
ORDERED that this Appeal be and is hereby
dismissed and the Cross-Appeal be allowed
AND IT IS FURTHER ORDERED that the costs of

30

this Appeal and the costs in the Court below be paid by the Appellant to the Respondent as taxed by proper officer of this Court.

GIVEN under my hand and the seal of the Court this 18th day of October, 1966.

Sgd. Hamzah bin Dato' Abu Samah

Chief Registrar,
Federal Court of Malaysia.

(L.S.)

10 To: The Hon'ble the Attorney-General,
Attorney-General's Chambers,
Kuching.

And To: The Chief Registrar, Kuala Lumpur.

In the Federal
Court of
Malaysia

No.14

Order on
Appeal
18th October
1966
(Contd.)

In the Federal
Court of
Malaysia

No.15

Order granting
final leave to
appeal to His
Majesty the
Yang di-
Pertuan Agong
11th September
1967

ORDER GRANTING FINAL LEAVE TO
APPEAL TO HIS MAJESTY THE YANG
DI-PERTUAN AGONG

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUCHING

(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO.X.8 OF 1965

B E T W E E N: M.N. GUHA MAJUMDER Appellant

- and -

THE ATTORNEY-GENERAL OF SARAWAK
Respondent

10

(In the matter of Civil Suit No.C/122 of 1963
in the High Court in Borneo at Kuching.

B E T W E E N: M.N. GUHA MAJUMDER Plaintiff

- and -

THE ATTORNEY-GENERAL OF SARAWAK
Defendant)

CORAM: Pike, Chief Justice, High Court in Borneo;
Gill, Judge, High Court in Malaya;

- and -

20

Chang Min Tat, Judge, High Court in Malaya.

IN OPEN COURT

This 11th day of September 1967

O R D E R

UPON MOTION made unto Court this day by Mr.
T.O. Thomas of Counsel for the above-named
Appellant and Mr. Tan Chiaw Thong, the State
Attorney-General of Sarawak, of Counsel for the
above-named Respondent AND UPON READING the
Notice of Motion dated the 14th day of August,
1967 and the Affidavit of Theempalengad Ouseph
Thomas sworn on the 13th day of June, 1967 AND
UPON HEARING Counsel as aforesaid for the parties

30

IT IS ORDERED that final leave to appeal to His Majesty the Yang di-Pertuan Agong be and is hereby granted to the above named Appellant AND IT IS FURTHER ORDERED that the costs of this application be costs in the cause.

GIVEN under my hand and the seal of the Court this 11th day of September 1967.

(L.S.)

Sd. N.G. MANN SAU

DEPUTY REGISTRAR,
FEDERAL COURT, MALAYSIA.

10

To: The Hon'ble the Attorney-General,
Attorney-General's Chambers,
Kuching.

And To: The Chief Registrar,
Kuala Lumpur.

In the Federal
Court of
Malaysia

No.15

Order granting
final leave to
appeal to His
Majesty the
Yang di-
Pertuan Agong
11th September
1967
(Contd.)

Exhibits

Exhibit "A"
Application
by
Plaintiff
to Colonial
Office
29th January
1958

EXHIBITS

EXHIBIT "A" - Application by Plaintiff
to Colonial Office.

APPLICATION FORM

1. With the exceptions mentioned in the succeeding paragraphs candidates should return the form by post to THE DIRECTOR OF RECRUITMENT, OVERSEA SERVICE DIVISION, COLONIAL OFFICE, SANCTUARY BUILDING, GREAT SMITH STREET, S.W.1.
2. A Candidate who at the time of application is serving in a Government department in either a permanent or temporary capacity should submit his application through his Establishment Officer to the Director of Recruitment. 10
3. Applications from members of the Home Police Forces should be sent through their Chief Constables.
4. A Candidate serving in the Royal Navy, the Army, or Royal Air Force at the time of applying must submit the form to his Commanding Officer for transmission through the usual channels to the Colonial Office. 20
5. Normally a Candidate should not call at the Colonial Office unless he receives a written invitation to do so. The Director of Recruitment cannot undertake to see anyone who calls with such an invitation.

This Form should be filled by the applicant
in his own handwriting.

-
1. Name in full GUHA MAJUMDER, MANINDRA NATH
(in block capitals, surname first) 30

Nationality Indian
(if a naturalised British subject, give particulars)

Date of birth 1st January 1926 Age 32 yrs

(A birth certificate must be furnished; it will be returned. Neither a certificate of registry of birth not a baptismal certificate is sufficient)
Birth certificate not available. Original

121.

Certificate showing the exact age may be furnished if requested.

Exhibits

Place of birth India (Telephone Number Rochford 56471)

Present address c/o General Hospital, Rochford, Essex.

Permanent address (if different from above)
c/o Mr. K.C. Bose,
7, Central Road,
Jadavper, CALCUTTA-32,
INDIA.

Exhibit "A"
Application
by
Plaintiff
to Colonial
Office
29th January
1958
(Contd.)

10

(N.B. Any change of address must be notified immediately).

2. Whether single, married, or widowed Married

Wife's maiden name (in full) Ruby Bose
,, nationality at birth, and place of birth
Indian,
India.

20

Number of children nil sons Aged respectively .
one daughter ,, ,,
3 years

3. Father's name (in full) Late Narendra Nath Guha MAJUMDER.

,, Profession or occupation Inspector of Police

,, Nationality at birth, and place of birth
Indian,
India.

30

(If dead the above questions should be answered nevertheless; if living, his address should be given below).

Address: N.A.

4. Mother's maiden name (in full) Suvity Baha Roy

,, Nationality at birth, and place of birth
Indian, India.

Exhibits

Exhibit "A"
Application
by
Plaintiff
to Colonial
Office
29th January
1958
(Contd.)

5. (a) Type of appointment desired. Medical Officer in Sarawak in Her Majesty's Overseas Civil Service for public health or general medical duties. (Reference BCD 117/24/01) 10
- (If application for more than one branch of the service is made, an order of (sic) (performance should be given)
- (b) If you have a preference for service in any particular territory or territories it should be stated here.
-
6. About when would you be available to go overseas (if selected). About middle of May 1958.
-
- /TURN OVER
7. Give particulars of any physical or mental impairment from which you may have suffered. It is particularly important that any nervous breakdown, neurasthenia or similar/ however (trouble/) slight should be mentioned. None 20
-
8. State here whether you possess special knowledge of any language other than English. a) Can read write and speak Bengali. 30
b) Can read and speak Hindi.
-
9. Schools in order, giving dates of entry and leaving. Mention any public examination passed, any distinction gained in school work, games, school societies, etc., and positions of responsibilities held. Give the names of your Head or House Masters. Zilla School, From To
Rangpur, (Month (Month
and and
Bengal, Year) Year)
India Jan. March
1934 1941 40
Pass Matriculation Examination in 1941.
-

- | 10. University (or other similar Institution). | <u>(Month & Year)</u> & <u>(Month & Year)</u> | <u>Exhibits</u> |
|---|---|---|
| State | | Exhibit "A"
Application
by Plaintiff
to Colonial
Office
29th January
1958
(Contd.) |
| (a) Any scholarships held or prizes won. | Calcutta University
May 1941 August 1948 | |
| (b) Subject or subjects read in degree or diploma course. | London School of Hygiene & Tropical Medicine (London University | |
| 10 (c) Athletic and other non-academic distinctions. | Oct. 1955 June 1956 | |
| (d) The name of your college Tutor, or of the Professor or lecturer who knew you best. | - do -
Dr. H.G. Maule,
Senior lecturer of occupational Psychology, at the above school. | |
| 20 (e) Whether you receive, or have at any time received, a training grant from public funds, and if so, whether you have any obligation to undertake public (e.g. teaching) service in the United Kingdom. | Oct. 1956 Feb. 1957. | |
| <hr/> | | |
| 30 11. Degree, Diploma, or Professional Qualifications and the date at which each was obtained. | M.B., B.S. (Cal.) - 1948 (August)
D.P.H. (Lond.) 1956 (June)
D.I.H. (Eng.) - 1956
D.T.M. & H. (Eng.) - 1957 (February) | |
| The result or class obtained in each part of your course must be clearly shown here, if not completed at the time of application, give particulars and date of final examination. | | |
| <hr/> | | |

Exhibits
 Exhibit "A"
 Application
 by Plaintiff
 to Colonial
 Office
 29th January
 1958
 (Contd.)

12. Civil employment or occupation, up to the present time. (Any period spent under articles should be included).
 Mention in chronological order each position held by you, the dates between which you held it, and the cause of leaving: also, any dates between which you were not employed. The name of each employer should be stated here, and his address should also be given, unless it is stated in Section 15.

	<u>(Month & Year)</u>	<u>(Month & Year)</u>	
Junior House physician, Medical, in R.G. Kar Medical College Hospital, Calcutta	May 1949	Nov. 1949	10
Senior House Physician, Medicine, in the same hospital as above.	Nov. 1949	May 1950	
Served with the Indian Army Medical Corps (see Section 13).	May 1950	Aug. 1955	20
Post Graduate Medical Studies.	Oct. 1955	Feb. 1957	
At present serving as Senior House Officer, General Hospital, Rochford, Essex.	Mar. up to date 1957		30

State present employment salary you are now receiving

Present salary £819 p.a.

13. Navy, Army or Air Force service, if any.

	<u>From</u>	<u>To</u>	
(i) Give rank held and service number and any decorations, mentions, etc. obtained.			40
Medical Officer, with the rank of Captain in the Army Medical Corps, Indian Army.			
Personal No. MS-5213	14th May 1950	8th Aug 1955	

(ii) If not commissioned your service and Release papers should be enclosed: they will be returned.

(iii) Give the names (with initials, rank and regiment) of any senior officers under whom you have served who would be able to speak for you from personal knowledge.

10

(v) State total length of service (exact dates should be given.

If you have not yet undertaken National Service, the circumstances should be explained here.

Exhibits

Exhibit "A"
Application
by Plaintiff
to Colonial
Office
29th January
1958
(Contd.)

Lt-Col. J.N.GHOSH
M.C., A.M.C.
c/o M.P.R.S. (o),
Medical
Directorate,
Army Headquarters,
D.H.Q., P.O. New
Delhi, 11, India.

20

14. Personal Referees.
Give the names addresses of two referees. They must be responsible persons who know you well, and one at least should be well acquainted with you in private life.
The names of relatives must not be given, nor those of distinguished persons unless they know you well
Testimonials from your personal referees should not be sent.

30

1. Name Dr. S.Cieman
Address: General
Hospital, Rochford,
Essex.
Occupation: Geriatric
Physician

Period during March
which he has 1957
known you to
Jan
1958.

2. Name: Dr. R.Ford
Thedre.
Address: Ross
Institute,
London School
of Hygiene
and Tropical
Medicine,
Kepple Street,
W.C.1.

40

Occupation: Deputy
Director,
Ross Institute.

Period during Oct.
which he has 1955 to
known you Feb.1957

Exhibits

Exhibit "A"
Application
by Plaintiff
to Colonial
Office
29th January
1958
(Contd.)

15. Testimonials

(i) The Secretary of State will not be able to consider a candidate unless, so far as possible, every stage of his career (including his education) is covered. Reports will be obtained direct from those persons whom you have named in Sections 9-14; but if you have any testimonials from previous employers (Section 12) you should enclose them. The originals and one copy of each should be sent; the former will be returned to you.

10

(ii) If you do not wish your present employers to be approached for a report at this stage please say so. Such a report will be required before a final decision on your application can be made, but it will not be sought without first obtaining your permission.

(iii) The names and addresses of other persons to whom reference can be made for any particular period may be added here, if desired.

Testimonials from:-

20

- (a) Superintendent,
R.G. Kar Medical College Hospitals,
Calcutta, India.
- (b) Director General Armed Forces
Medical Services, India.
- (c) Prof. W.S. Walton,
Professor of Public Health,
University of London.

(TURN OVER

16. Mention here any
application for
employment under any
other Government
Department which you
have made previously
or are now making.

None

30

17. Candidates for Police appointments should state their (1) height, (2) weight, and (3) chest measurement (expanded).

<u>Height</u>		<u>Weight</u>		<u>Chest measurement</u>
				(expanded)
ft.	in.	st.	lb.	<u>inches</u>

Exhibits
Exhibit "A"
Application
by Plaintiff
to Colonial
Office
29th January
1958
(Contd.)

10

You are requested to paste below an unmounted photograph of yourself (Any photograph of recent date which provides a good likeness is sufficient).

Signature of Candidate

Sgd. M.N.G. Majumder
Date 29th Jan., 1958

EXHIBIT "B" - ADVERTISEMENT IN
BRITISH MEDICAL
JOURNAL

HER MAJESTY'S OVERSEAS CIVIL SERVICE
SARAWAK

Exhibit "B"
Advertisement
in British
Medical
Journal

20

MEDICAL OFFICER

30

required in Sarawak for general medical duties. Candidates must possess medical qualifications registerable in United Kingdom. Appointment on permanent basis with pension (non-contributory) at age 55, or a short-term contract with gratuity (taxable) assessed at the rate of 12½% of salary including expatriation pay for each completed period of one month payable on completion of satisfactory service. Candidates from the National Health Service may retain their superannuation rights (up to six years) and receive a gratuity (taxable) of 20% of the aggregate of their salary at the end of their engagement. Basic salary scale ranges from £870 to £1,420 a month i.e. £1,218 to £1,988 a year starting salary determined according to qualifications

Exhibits
Exhibit "B"
Advertisement
in British
Medical
Journal
(Contd.)

and experience. In addition expatriation pay (pensionable) is payable varying from £252 to £336 a year, education allowance of £140 a year for up to two children between ages of 15 & 17 educated outside Sarawak, and a child allowance of $7\frac{1}{2}\%$ of basic salary (maximum £140 a year) for married officers with dependent children under age 18. Partially furnished quarters provided at low rental. Free passages provided in both directions for officer, wife and up to three children under 18 years of age. Income tax at low local rates. Tour service 30 to 36 months. Local leave permitted and generous home leave granted. Application forms from Director of Recruitment, Colonial Office, London, S.W.1.

10

(quoting reference BCD 117/24/01.

(5547)

AGREED CORRESPONDENCE

Exhibit E.1.

Letter Colonial Office to Plaintiff

20th March, 1958.

BCD/P.13847

Sir,

10 With reference to your application for an appointment in the Overseas Civil Service I am directed by Mr. Secretary Lennox-Boyd to invite you to attend at this Office at 3.0 p.m. on Monday the 21st of April for an interview with the Medical Appointments Committee.

I am to request you to inform the Director of Recruitment as soon as possible whether you will be able to attend at the time stated, quoting the above reference number.

This letter should be brought with you when you call for an interview.

I am, Sir,

Your obedient servant,

20

M.N.G. Majumder, Esq.

Agreed
Correspondence

Exhibit E.1
Letter
Colonial Office
to Plaintiff
20th March
1958

Agreed
Correspondence

Exhibit E.2
Letter -
Plaintiff to
Colonial
Office -
29th March 1958

AGREED CORRESPONDENCE

Exhibit E.2.

Letter Plaintiff to Colonial Office

From: Dr. M.N. Guha Majumder
General Hospital,
Rochford, Essex.

Dated 29th March, 1958.

To: The Director of Recruitment
(Overseas Service Division)

COLONIAL OFFICE,
Sanctuary Buildings,
Great Smith Street,
London, S.W.1.

10

Reference:- No.BCD/P 13847, dated 20th March 1958.

Sir,

With reference to my application for an appointment in the Overseas Civil Service and my interview with the Medical Appointments Committee on 27th March 1958 I beg to state that if selected for the said appointment I shall be pleased to accept it on permanent basis with pension (Non-contributory).

20

I beg to mention here that all future communications on this subject may please be directed to the following address where I am proceeding shortly.

Address:- C/O Mr. K.C. BOSE,
7, Central Road, Jadavpur,
CALCUTTA, 32, INDIA.

Yours faithfully,

30

(Sgd) M.N.G. MAJUMDER.

131.

AGREED CORRESPONDENCE

Exhibit E.3

Letter Colonial Office to Plaintiff

Agreed
Correspondence

Exhibit E.3
Letter -
Colonial Office
to Plaintiff -
2nd May 1958

Communications on this
subject should be addressed
to:

The DIRECTOR of RECRUITMENT
(Overseas Service Division)

10 COLONIAL OFFICE,
SANCTUARY BUILDINGS,
GREAT SMITH STREET,
LONDON, S.W.1.

COLONIAL OFFICE
SANCTUARY BUILDINGS
GREAT SMITH STREET
LONDON, S.W.1.

and the following Number
quoted BCD/P13847

2nd May, 1958.

Tel: ABB 1266 Ext.

Dear Dr. Guha Majumder,

I am glad to inform you that you have been
provisionally selected for appointment as Medical
Officer, SARAWAK.

20 A formal offer of appointment will be sent to
you as early as possible.

30 It will be necessary for you to be
examined by the Consulting Physician to this
Department and you may care to make arrangements
for this in the meantime. The necessary forms
are enclosed and you should yourself arrange
an appointment with the Consulting Physician.
His report will be made in confidence to the
Secretary of State and will not be communicated
to you (except in so far as may be necessary
in informing you of any treatment required)
or anyone else except the Government concerned.
You will not be required to pay a fee for the
examination.

Yours truly,
Sgd. illegible

Dr. M.N. Guha Majumder.

Agreed
Correspondence

Exhibit E.5
Letter -
Colonial
Office to
Plaintiff -
12th June 1958

AGREED CORRESPONDENCE

Exhibit E.5

Letter Colonial Office to Plaintiff

COLONIAL OFFICE,
Sanctuary Buildings,
Great Smith Street,
LONDON, S.W.1.

BCD/P 13847

12th June 1958

Sir,

I am directed by Mr. Secretary Lennox-Boyd to say that he has pleasure in offering you appointment on probation for three years as a Medical Officer in Sarawak on the conditions set out in this letter and in the enclosed memorandum. 10

2. The salary scale of the appointment is at the rate of \$870 a month for the first year; \$930 a month for the second year, rising by annual increments of \$30 a month to \$1050 a month; then \$1085 a month rising by annual increments of \$35 a month to \$1260 a month; then \$1300 a month rising by annual increments of \$40 a month to \$1420 a month. There is an efficiency bar at \$1260 a month. 20

3. In view of your professional experience and qualifications you would enter the salary scale at \$1155 a month. This would not, of course, result in any reduction in the period of probation which has to be served. In addition to basic salary, allowances are payable at the rates shown in the memorandum. 30

4. If you are prepared to accept the appointment on these conditions you should inform the United Kingdom High Commissioner in Calcutta, through whom this offer is being sent, in order that arrangement may be made for you to be medically examined.

5. Your services are required as soon as possible in the territory and in the event of your selection being confirmed, you should arrange your own passage to Sarawak and those of your family if you wish them to accompany 40

10 you, travelling by air by the most direct route. Your passage entitlement is that of first class air passages. You should then notify the United Kingdom High Commissioner in order that he may make arrangements to meet the cost of the passages and to present the passage agreement which it will be necessary for you to sign in respect of the cost. He will also issue to you an outfit allowance of £60 (sixty pounds sterling) as a means of assistance towards the purchase of essential tropical kit.

6. Your appointment would take effect from the date of your embarkation for the journey to Sarawak and you may expect to receive a formal letter of appointment from the Governor of Sarawak on your arrival in the territory.

20 7. At the time of your departure for Sarawak you and your family should be in possession of valid certificates of vaccination against smallpox and cholera. You are also advised to be vaccinated against the enteric fevers.

8. If you are not prepared to accept this offer of appointment, would you be good enough to return the enclosures to this letter to the United Kingdom High Commissioner in New Delhi.

I am, Sir,

Your obedient servant,

30 (Sgd) S.A. Pilbeam.

Dr. M.N.G. MAJUMDER.

Agreed
Correspondence

Exhibit E.5
Letter -
Colonial
Office to
Plaintiff -
12th June 1958
(Contd.)

Agreed
Correspondence

Exhibit E.5A
Memorandum
Attached to
Letter -
Colonial Office
to Plaintiff
dated 12th
June 1958

AGREED CORRESPONDENCE

Exhibit E.5A
Memorandum attached to letter - Colonial
Office to Plaintiff dated 12th June 1958

MEMORANDUM

Conditions of Service in Sarawak

1. Appointment

The probationary period is three years from the date of arrival in Sarawak. On completion of this period an officer is eligible, provided that he has passed the examinations prescribed by local regulations, for confirmation in his appointment.

10

2. Half salary will be payable for the period of the voyage from the country of engagement to Sarawak on first appointment. For purposes of exchange with sterling one Sarawak dollar equals 2s. 4d.

3. Allowances

(i) Education Allowance Married officers dependent children may receive an allowance in respect of the expense to them of educating their children, up to a maximum of two in number, outside the colony. The allowance would be payable at \$100 a month for children between the ages of 5 and 17 years.

20

(ii) Child Allowance Married officers with one or more dependent children will receive an allowance at the rate of $7\frac{1}{2}\%$ of salary with a maximum of \$100 a month. The allowance will be payable in respect of a child or children under the age of 17 years only; provided that if the child or children are between 17 and 21 years, the allowance shall still be payable for as long as the child is receiving full time education.

30

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- (iii) Outfit Allowance An allowance of £60 is payable to officers on first appointment as a means of assistance towards the purchase of essential tropical kit.

Agreed
Correspondence
Exhibit E.5A
Memorandum
Attached to
Letter -
Colonial Office
to Plaintiff
dated 12th
June 1958
(Contd.)

4. General conditions of service

10 An officer is subject to the General Orders of the Government in which he is serving, and to the Colonial Regulations for the time being in force in so far as the same are applicable. A copy of the current edition of the Colonial Regulations (Part I) is attached. The officer will be required to serve anywhere in Sarawak or in the State of Brunei.

5. Security

20 The holders of certain appointments are required to furnish security for the faithful discharge of their duties. Normally all premiums payable in respect of such security may be deducted from an officer's salary.

6. Pensions

30 Pensions are granted in accordance with provisions of the Sarawak pensions legislation. The rate of pension in Sarawak is 1/600th either of pensionable emoluments or retirement, or of pensionable emoluments average over the last three years of service for each completed month of pensionable service. Pensions are payable subject to the completion of 10 years' continuous public service and to retirement on the grounds of age or ill-health. Pension may be converted, subject to option exercisable on or before the date of retirement, into a reduced pension (3/4 of full pension) plus lump sum ($12\frac{1}{2} \times \frac{1}{4}$ of full pension). Officers may retire or be called upon to retire at any time after attaining the age of 45 subject, except where officers submitting an application to retire have attained the age of 50, to six months' notice.

40 7. Widows' and Orphans' Pensions

In accordance with the provisions of the Sarawak Widows' and Orphans' Pensions Legislation, male officers under the age of 54 and whether married or single are required

Agreed
Correspondence
 Exhibit E.5A
 Memorandum
 Attached to
 Letter -
 Colonial Office
 to Plaintiff
 dated 12th
 June 1958
 (Contd.)

to contribute to the Sarawak Widows' and Orphans' Pensions Fund. The rate of contribution is 5% of salary plus inducement pay, subject to a maximum of \$50 a month.

8. Vacation Leave

Officers will normally be required to serve, subject to the exigencies of the service, a tour of duty of four years. Leave is granted at the rate of 34 days a year.

In addition to the leave thus earned, voyage leave is granted for the period of the voyage by an approved direct route to and from the officer's country of domicile.

10

9. Quarters

Simply furnished Government quarters will be provided when available and rent will be charged at 10% of basic salary with a minimum of \$10 and a maximum of \$120 a month. Single officers may be required to share quarters as a temporary measure. Reduced rates will be payable for quarters declared to be institutional quarters and a reduction will be made in respect of quarters declared by the Chief Secretary to be sub-standard.

20

10. Passages

"Passages" in this memorandum means such passage by land sea or air as the Government may direct. A free passage will be provided to Sarawak in the grade for which the officer is eligible which will be determined by the class and salary of his office. A free passage is subject to a maximum which may be expended from Government funds, and an officer will not normally be provided with a passage the cost of which exceeds the appropriate maximum. If an officer requests the provisions of a passage on a particular vessel or makes his own passage arrangements and the cost exceeds the maximum amount normally expendable on his passage, he will be required to pay the excess cost. Free passage are normally granted on similar conditions once each way in respect of leave granted after each tour of service.

30

40

Married officers may have their wives and children with them subject to the limitations of shipping conditions. Free passages to and from Sarawak will be granted to an officer once in respect of each tour, on the same terms as the officer himself, for his wife and up to three children under eighteen years of age, provided that when a child has been granted a free passage to the Colony a free return passage will be granted irrespective of his or her age.

Agreed
Correspondence
Exhibit E.5A
Memorandum
Attached to
Letter -
Colonial Office
to Plaintiff
dated 12th
June 1958
(Contd.)

NOTE: An officer who fails to take up the post to which he is appointed or leaves or resigns from the service before completion of a tour of service, or who is dismissed for any reason other than ill-health not due to his own default before completing a tour of service will be required to refund to the Government:-

- (a) The cost to Government of passages to the territory for himself and his family (if any).
- (b) An outfit allowance, or outstanding balance of any recoverable advances, which he may have received.

Officers may be required to travel by air when travelling on duty or when proceeding on or returning from leave; charges for excess baggage up to 20 lbs will be paid by the Government provided that the officer concerned is travelling by air to suit the convenience of the Government.

11. Taxation

Officers are subject to taxation imposed by local enactment.

12. Medical Attendance

Medical attendance whilst in the territory is free for an officer, his wife and children, but should it be necessary to enter hospital for treatment a charge is made for maintenance.

13. Courses of instruction

Officers may be required before taking up

10

20

30

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Agreed
Correspondence

Exhibit E.5A
Memorandum
Attached to
Letter -
Colonial Office
to Plaintiff
dated 12th
June 1958
(Contd.)

their appointments or at any time during their service, to attend prescribed courses of instruction.

14. Examinations

Officers will be required to pass examinations in simple Malay language, the Colonial Regulations, the Financial Regulations and General Orders issued by the Government of Sarawak before completing the first three years of services.

15. Firearms

10

Owing to the danger of them falling into the wrong hands, restrictions are being placed on the import by private persons of rifles revolvers and pistols. Officers appointed to permanent posts in the Senior Service to the territory will, however, be permitted to import one rifle and one revolver or pistol. No restriction is at present placed on the import of shotguns.

Under Section 3(3) of the Arms and Explosives Ordinance (Chapter 105 of the Revised Edition of the Laws of Sarawak) though Senior Service Officers permitted to carry revolvers or pistols are not required to pay a licence fee in respect of one such weapon, permission is necessary before an officer may possess or carry such weapon; this permission will normally be given only when the weapon is considered necessary for the efficient performance of the officer's duties.

20

16. General Information

A pamphlet containing information about the general conditions and cost of living in Sarawak is enclosed. Officers are strongly advised to arrange for the insurance of their baggage, for the period of its transshipment to Sarawak.

30

COLONIAL OFFICE.

AGREED CORRESPONDENCE

Exhibit E.9

Letter - Chief Secretary to Plaintiff

22/P/728

6th December, 1958.

Dr. M.N.G. Majumder,
Through Director of
Medical Services.

Agreed
Correspondence

Exhibit E.9
Letter -
Chief Secretary
to Plaintiff
6th December
1958

KUCHING

Sir,

10 I am directed to inform you that His Excellency the Governor has been pleased to appoint you to be a Medical Officer in Sarawak in Her Majesty's Overseas Civil Service with effect from 1st December, 1958 on the conditions embodied in the Secretary of State's letter to you reference BCD/P-13847 dated 12th June, 1958.

20 2. The appointment is on the permanent and pensionable establishment and the salary of the post is in Division II, Scale A \$870; 930x30-1050x35-1260/BAR/1300x40-1420 a month. Child allowance is payable at the rates laid down in Secretariat Circular No.10/1956; vacation leave, local leave, leave passages, travelling allowances and other privileges will be granted in accordance with the Sarawak General Orders.

30 3. You will enter the salary scale at \$1,155 a month, and your incremental date would be 4th December.

4. I have to request that if you accept the appointment you send an undertaking to this office in the form attached hereto together with a declaration of secrecy in accordance with G.O. 570.

I am, Sir,
Your obedient Servant,
(sgd) Lo Suan Hian
for Acting Chief Secretary

40 Copy to Accountant-General
Director of Medical Services.

140.

Agreed
Correspondence

Exhibit E.10
Acceptance of
appointment
11th December
1958

AGREED CORRESPONDENCE

Exhibit E.10
Acceptance of Appointment

Dated 11th December, 1958.

Sir,

With reference to my appointment as Medical Officer in Sarawak, I hereby undertake to accept such appointment subject to rules and regulations of Her Majesty's Overseas Civil Service now in force, and to any alterations or amendments there- 10 to which may be made from time to time.

I have the honour to be,

Sir,

Your obedient servant,

(Sgd) M.N. GUHA MAJUMDER.

The Honourable,
The Chief Secretary,
(Establishment Office),
KUCHING.

AGREED CORRESPONDENCE

Exhibit E.11

Declaration of Secrecy

B.14

DECLARATION OF SECRECY

Agreed
Correspondence

Exhibit E.11
Declaration of
Secrecy
11th December
1958

10 I, THE UNDERSIGNED, being a Civil Servant
in the employ of the Sarawak Government, do
hereby pledge myself on my honour to observe
a strict secrecy respecting all matters of a
confidential nature which may come to my
knowledge in the discharge of my official duties.

20 AND I FURTHER PLEDGE MYSELF, on my honour,
not to reveal to anyone contrary to my duty
any matters which may come to my knowledge in
the discharge of my official duties, and also
not to supply to anyone any information
respecting any such matters, except as and when
required so to do by law, or by the regulations
of the Service, or by my superior officers, or
except as my official duty shall otherwise
require.

Witness my hand at Kuching,

this 11th day of December, 1958

Signature of Officer.

(Sgd) M.N. GUHA MAJUMDER.

Before me

(sgd)

Signature of Officer.

Agreed
Correspondence

AGREED CORRESPONDENCE

Exhibit E.12

Exhibit E.12
Letter-
Plaintiff to
Chief Secretary
17th July 1963

Letter - Plaintiff to Chief Secretary

M.N. Guha Majumder,
c/o Medical Headquarters,
Kuching,
Sarawak.

Dated 17th July, 1963.

To: The Honourable Chief Secretary,
through the Director of
Medical Services, Kuching,
Sarawak.

10

Sir,

Since the publication of the Report of the Inter-Governmental Committee, 1962, as Sessional Paper No. 1, of 1963 officers of Her Majesty's Overseas Civil Service serving in Sarawak have been informed whether they will continue to be employed in the pensionable service of the Government and if so for what minimum period according to the scheme of retirement benefits included in the report.

20

It is therefore surprising to me Sir, that although I am a member of Her Majesty's Overseas Civil Service, (your formal letter of appointment No. 22/P/728 dated 6th December, 1958 refers) recruited by the Secretary of State for Colonies on the permanent and pensionable establishment I have not been informed so far whether I will continue to be employed in the pensionable service of the Government and if so for what minimum period under the above-mentioned scheme.

30

You would appreciate Sir, that when officers in similar position as me, have been informed about the future of their service and that the change of sovereignty of the country is imminent I am naturally anxious to know the future of my service.

In the circumstances Sir, I shall be grateful if you would inform me whether I will continue to be employed in the pensionable service of the Government and if so for what

40

minimum period under the scheme of retirement benefits for members of Her Majesty's Overseas Civil Service as laid down in the Report of the Inter-Governmental Committee, 1962.

Agreed
Correspondence

Exhibit E.12
Letter --
Plaintiff to
Chief Secretary
17th July 1963
(Contd.)

I am, Sir,

Your obedient Servant,

(Sgd) M.N. Guha Majumder

AGREED CORRESPONDENCE

Exhibit E.13

Letter - Plaintiff to Chief Secretary

Exhibit E.13
Letter -
Plaintiff to
Chief Secretary
16th August
1963

10

c/o Medical
Headquarters,
Kuching,
Sarawak.

Dated 16th August 1963

To:
The Honourable Chief Secretary,
through the Director of Medical Services,
Kuching, Sarawak.

Sir,

20

I have the honour to refer to your letter Ref: 80/P/728 dated the 31st January, 1962 (on the question of my eligibility for Inducement pay) and also to your letter Ref: 129/P/728 dated 6th August, 1963 (about retirement benefits for members of Her Majesty's Overseas Civil Service) and, to request that the matter be treated as very urgent because "after Malaysia Day the Secretary of State will no longer have responsibility for the affairs of Sarawak" due to expected change of sovereignty on 31st August, 1963.

30

2. I regret to say that I am not satisfied with the answer to my claim for Inducement pay. While there are, indeed, several officers who are not in Her Majesty's Overseas Civil Service receiving Inducement pay I seem to be the only officer in Her Majesty's Overseas Civil Service who has been refused Inducement pay. I am advised that such discrimination is unjust and inequitable.

Agreed
Correspondence
 Exhibit E.13
 Letter -
 Plaintiff to
 Chief Secretary
 16th August
 1963
 (Contd.)

It cannot be disputed that I hold an appointment in Her Majesty's Overseas Civil Service, for there is not only the letter of appointment which expressly says so but also the announcement from the Colonial Office as published in periodicals such as the British Medical Journal. And, I should certainly come within the phrase "designated officer" as that phrase is defined in the Schedule to the Overseas Service Ordinance (No. 15 of 1961). There is no justification whatsoever for not having sent to me the Secretariat Circular letter (Ref: 42/C/5047/61/1) sent to all designated officers of the Government of Sarawak under Her Majesty's Overseas Service Aid Scheme. 10

3. In the circumstances, having regard to the urgency of the matter I will have to institute Court proceedings for determination of my disputed rights if I do not receive satisfactory answer by Monday, the 26th instant. I assume that if the authorities consider my claims inadmissible the Government should have no objection to getting the matters settled through the good offices of Her Majesty's Judges. 20

4. As the Hon'ble the Attorney-General will have to be a party to the proceedings if the matter is to be taken to the Court a copy of this communication is being sent to him for information.

I am, Sir, 30

Your obedient servant,
 (Sgd) M.N. Guha Majumder.

c.c. to: The Hon'ble the Attorney-General,
 Kuching.

145.

AGREED CORRESPONDENCE

Exhibit E.14

Letter.Chief Secretary to Plaintiff

17th August, 1963

Dr. M.N.G. Majumder,
Through the Director of Medical Services,
Kuching.

Agreed
Correspondence

Exhibit E.14
Letter -
Chief Secretary
to Plaintiff
17th August
1963

Sir,

10 I am directed to reply to your letter dated 17th July, 1963, and to say that I have consulted the Secretary of State for the Colonies who has replied that you are not a member of H.M.O.C.S.

2. Paragraphs 3, 4, 11 and 27 of Annex B to the Inter-Governmental Committee report set out the conditions under which you will continue in the Sarawak service since you do not qualify as an 'entitled officer' under the Malaysia Retirement Scheme.

20

I am, Sir,

Your obedient servant,

(Sgd)

f. Chief Secretary.

c.c. Director of Medical Services.

146.

Agreed
Correspondence

AGREED CORRESPONDENCE

Exhibit E.15
Letter -
Defendant
to Plaintiff
15th November
1963

Exhibit E.15

Letter Defendant to Plaintiff

ATTORNEY-GENERAL'S
CHAMBERS,
KUCHING,
SARAWAK.

In reply please
quote Ref: AG.CC1/166

15th November, 1963

Dear Thomas,

10

Majumder v. Attorney-General

I refer to our telephone conversation this morning when you kindly consented to an extension of time for filing the defence by two weeks in view of my difficulties in communicating with my true clients in London. I am most grateful for this facility and would ask that you confirm in writing in order to comply with Order 64, Rule 8 of the Rules of the Supreme Court, 1957 as applied to Sarawak by an Order made by the Chief Justice.

20

Should I be able to file the defence any earlier you have my assurance that it will be done.

Yours sincerely,

Sgd. P.E.H. Pike.

T.O. Thomas, Esq.,
Messrs. Thomas & Co.,
9, India Street,
Kuching.

AGREED CORRESPONDENCE

Exhibit E.16

Letter Defendant to Plaintiff

ATTORNEY-GENERAL'S CHAMBERS,
KUCHING,
SARAWAK.

Agreed
Correspondence

Exhibit E.16
Letter -
Defendant to
Plaintiff
16th December
1963

In reply please
quote Ref: AG.CC1/166 16th December, 1963.

Gentlemen,

10 Dr. M.N.G. Majumder v. Attorney-
General

20 With reference to your letter of the 9th
December, 1963 and to my conversations with your
Mr. Thomas between that date and today, I would be
grateful if you would agree to my having until the
9th February, 1964 in which to apply to the Court
for leave to file a Rejoinder. The reason for this
request is that certain points raised in your
letter will make it necessary for me to obtain
information from London and there may be a delay
in obtaining the information particularly in view
of the Christmas holidays.

2. Naturally, if I am in a position to make
the application earlier than the 9th February I
shall most certainly do so.

I have the honour to be,

Gentlemen,

Your obedient servant,

Sgd. G.V.C. Young.

30 Ag. State Attorney General.

Messrs. Thomas & Co.,
9, India Street,
Kuching.

cc. Deputy Registrar, High Court, Kuching.

AGREED CORRESPONDENCE

Exhibit E.23

Letter Defendant to Plaintiff's Counsel

Agreed
Correspondence

Exhibit E.23
Letter -
Defendant
to Plaintiff's
Counsel
24th February
1964

ATTORNEY-GENERAL'S
CHAMBERS,
KUCHING,
SARAWAK.

In reply please quote
Ref: CCl/166

24th February, 1964

Dear Thomas,

10

Dr. M.N.G. Majumder v. Attorney General

With reference to our telephone conversation of 22nd February, 1964 regarding the above case. I am afraid I will again have to ask for a further extension of time in which to file the application for leave to file a rejoinder. The reason for this is that there are at present top level discussions going on in connection with the case between the Malaysian and British Governments.

2. I would accordingly ask for an adjournment without prejudice to the legal merits of the case for, let us say four weeks. I hope that this matter can be sorted out before that, but you will appreciate it is very difficult for me to give any precise date. 20

3. I am sorry to have to again make a request of this nature but I feel that in the circumstances it is the proper course to adopt.

Yours very sincerely,

Sgd. G.V.C. Young

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T.O. Thomas, Esq.,
Messrs. Thomas & Company,
9, India Street,
Kuching.

AGREED CORRESPONDENCE

Exhibit E.24

Letter Thomas & Co. to Defendant

THOMAS & CO.,
Advocates

9 India Street,
Kuching,
Sarawak.

6th May, 1965.

Agreed
Correspondence

Exhibit E.24
Letter -
Thomas & Co.
to Defendant
6th May 1965

The Hon'ble the State Attorney-General,
Attorney-General's Chambers,
Kuching.

10

Sir,

Dr. M.N.G. Majumder v. Attorney General

On the 15th January, 1964, you wrote to us (in paragraph 2 of your letter CC.1/166): "I am sorry that your client has not received any communication from the Accountant-General as I am instructed that a letter was sent to him by the Treasury on the 30th December, 1963, but it has not been possible for me to check what the messenger did with the letter as he is at present on sick leave".

20

2. Our client never received the said letter of the 30th December, 1963, as our Mr. Thomas informed you on the 'phone several times, and Dr. Majumder is still in the dark as to the basis on which the sum of \$8,571.43 was arrived at, even though a second instalment also has been paid into his account this year. Are we to assume that the Treasury does not have a copy of that mysterious letter even if the messenger disappeared with it?

30

3. By payment of compensation you have admitted that our client is an "entitled officer" within the meaning of the Compensation and Retiring Benefits Order-in-Council, 1963, but you have not yet complied with the clause in that Order-in-Council which requires that "the Government shall notify every entitled officer whether he will continue to be employed in the pensionable service of the Government and if so for what minimum period", in spite of the fact that our Mr. Thomas raised this matter with the Asst. Attorney-General Mr. Tan

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150.

Agreed
Correspondence

Exhibit E.24
Letter -
Thomas & Co.
to Defendant
6th May 1965
(Contd.)

several times and particularly on the 22nd
December, 1964.

4. Furthermore, we would ask you to be pleased
to look at the CORRIGENDUM about which our Mr.
Thomas spoke to you yesterday and which reads:

CORRIGENDUM

Sarawak Government Staff List 1964 (Part I)
page 69 "Majumder, M.N.G. (m) (D)"
should read "Majumder, M.N.G. (m)"

SIMON LAO KIING HENG,

10

for State Secretary

6th January, 1965.

CMO/709.

We shall be grateful for your explanation as to
this correction made by the Chief Secretary which
shows our client as induced officer when you
contend that he is not.

5. No one should blame our client, in the
circumstances, for having gained the impression
that the authorities concerned have not been
honest/frank in dealing with his case, and that
the provisions of the Compensation and Retiring
Benefits Order-in-Council have been treated
with contempt as far as they apply to Dr.
Majumder.

20

Yours faithfully,

(Sgd) Thomas & Co.

AGREED CORRESPONDENCE

Exhibit E.25

Letter Defendant to Thomas & Co.

CC.1/166

8th May, 65.

Agreed
Correspondence

Exhibit E.25
Letter -
Defendant to
Thomas & Co.
8th May 1965

Gentlemen,

Dr. M.N.G. Majumder v. Attorney-General

We are in receipt of your letter of the 6th May, 1965 and would say as follows -

- 10 2. With regard to the letter sent to Dr. Majumder from the Accountant-General, it appears that your client did receive this letter, for an acknowledgment of the receipt of the letter was sent to the Treasury, dated 18th January, 1964. I am enclosing a copy of this letter for your information. This was sent apparently at the same time as the compensation benefits were paid to the bank, but for some reason or other it was despatched later than it should have been.
- 20 3. As far as the continued employment of Dr. Majumder is concerned, I am informed by the Establishment Branch that this is being considered by the Federal authorities and that your client will be receiving a letter in a day or two with regard to their decision.
- 30 4. So far as the corrigendum correction in the Staff List is concerned, I am not responsible for what is put in this List, but it is quite clearly wrong in the circumstances that Dr. Majumder should have been shown as an induced officer.

I have the honour to be,
Gentlemen,

Your obedient servant,

(Sgd) D.M. Goodbody
for State Attorney-General.

Messrs. Thomas & Company,
9, India Street,
Kuching.

152.

PETITION

Petition
Plaintiff to
Governor-in-
Council
16th September
1961

Plaintiff to Governor-in-Council
(Re Inducement Pay)

From: M.N. Guha Majumder,
c/o Medical Headquarters,
Kuching, Sarawak.

To: His Excellency the Governor in Council,
Kuching, Sarawak
through the Director of Medical Service.

Your Excellency,

10

INDUCEMENT PAY

1. I beg leave to request that I be granted inducement pay with retrospective effect from the date of my appointment in Her Majesty's Overseas Civil Service:

2. The grounds of my appeal are:-

(i) On the date of my appointment in the Sarawak Government Service I did satisfy the requirements of the Colony of Sarawak General Order No. 192.

(ii) At the time of acceptance of offer as a Medical Officer under the Sarawak Government I was already on the register of the General Medical Council as a general practitioner and, was serving as a medical staff under the Southend-on-Sea Hospital Management Committee, Essex, England, and would have continued to stay and serve in the United Kingdom but for the offer from the Secretary of State of appointment in Sarawak.

20

(iii) When I was interviewed by the Selection Board at the Colonial Office, London, in connection with my appointment in Her Majesty's Overseas Civil Service I informed the Board of my intention of going on a holiday to India before returning to England to continue in my employment under the National Health Service, but that if I were to be selected for appointment I would be prepared to proceed direct to Sarawak from India. I was then told by the Selection Board that

30

40

it would be in order for me to do so. On selection; therefore, I came to Sarawak direct from India with the only difference that the Government of Sarawak did not have to pay for my postage from England to India. If the fact that I came to Sarawak from India to take up my first appointment in Her Majesty's Overseas Civil Service was interpreted as though I was recruited from India and hence I am not entitled to inducement pay, I submit that this contention is entirely unjustifiable. My stay in India, during the material time, was purely of a temporary nature and had it not been for the selection for appointment in Sarawak I would have returned to England to serve there.

Petition
Plaintiff to
Governor-in-
Council
16th September
1961
(Contd.)

(iv) It is true that I gave my address care of Mr. K.C. Bose, 7, Central Road, Calcutta 32, India, but it was purely accidental. I am a refugee from Pakistan since 1946 and because at the time of submitting my application I was planning to visit my wife, who was staying with her father the said Mr. Bose, it was thought convenient to give that address then and for no other reason.

(v) While officers in receipt of inducement pay are allowed free return passages home after each 24 to 30 months of service, I am allowed return passages home only after 4 years of service. Being an expatriate officer not having a home in any nearby territory to which I could afford to pay passages, I am forced to wait 4 years before I can take my earned leave. I am perhaps the only officer in my category/grade who suffers from this disability through no fault of mine.

3. I have been without an address in India since 1946 and, I own no property in that country. I would, therefore, humbly submit that the fact of my Indian/Asian descent should not be held against my receiving inducement pay. There are several expatriate officers in the Sarawak Civil Service who are Indians/Asians like myself, but enjoying the privileges of officers in receipt of inducement pay. This discrimination against me is wholly unjust and places me in financial and leave disadvantages. My appointment in the Sarawak Government Service has caused dislocation

154.

Petition
Plaintiff to
Governor-in-
Council.
16th September
1961
(Contd.)

and disturbance to a material degree just as such factors have affected any other expatriate officer in receipt of inducement pay and, there is no apparent justification why I should be denied the rights and privileges enjoyed by my brother officers.

4. Trusting that this representation will receive sympathetic consideration of Your Excellency in Council.

I beg to remain,

10

Your Excellency's obedient servant,

(Sgd) M.N. GUHA MAJUMDER

Dated 16th September, 1961

Letter -
Governor-in-
Council to
Plaintiff
(in Reply to
Petition)
31st January
1962

Letter Governor-in-Council to
Plaintiff (in Reply to Petition)

THE SECRETARIAT,
KUCHING, SARAWAK.

31st January, 1962.

Telegraphic Address:
"GOVSEC KUCHING"

20

Ref: 80/P/728
Dr. M.N.G. Majumder,
through the Director of Medical Services, Kuching.

Sir,

On 2nd October 1961, the Director of Medical Services was requested to inform you that your petition, on the question of your eligibility for Inducement Pay, was being submitted to the Secretary of State.

2. A communication was subsequently sent to the Secretary of State enclosing your petition together with the following remarks by this Government, -

30

(a) In your application form for appointment dated 29.1.1958 submitted to the Director of recruitment,

Oversea Service Division, Colonial Office, you clearly stated that your permanent address was in India.

Letter -
Governor-in-
Council to
Plaintiff
(in reply to
Petition)
31st January
1962
(Contd.)

10 (b) Because of this, and because Sarawak General Order 192 which excluded India for the purpose of Inducement Pay had been in force since August, 1957, the clause about Inducement Pay was excluded in your terms and conditions of service. This exclusion had not been challenged until the date of your petition, a period of nearly three years afterwards.

20 (c) It appeared, from your application form mentioned above, that you were a resident in India from 1934 until you went for higher studies to England in 1955, and that the only period you resided in England was between 1955 and 1958.

30 3. The Secretary of State has now replied saying that he has given careful consideration to your petition but agrees that your claim to receive Inducement Pay cannot be admitted. He adds that in reaching this decision, he has been influenced not only by the points made by this Government, but by the fact that you applied for, and received, the refund of all your contributions to the National Health Service Superannuation Scheme in April, 1958; a step unlikely to be taken by a person merely proceeding on holiday to another country and proposing to resume work in the National Health Service at its conclusion.

4. In view of the foregoing, I regret that your claim to receive Inducement Pay cannot be approved.

I am, Sir,
Your obedient servant,
Sgd. Chin Shin Sen
for Chief Secretary.

Supplemental
Exhibits

SUPPLEMENTAL EXHIBITS

Exhibit "A"

Exhibit "A"
Letter U.K.
High
Commissioner
Calcutta to
Plaintiff
1st October
1958

Letter U.K. High Commissioner Calcutta
to Plaintiff

Registered Post

Ref: GEN. C/2

1st October, 1958.

Dear Sir,

I am directed by the Deputy High Commissioner to forward to you the enclosed letter from the United Kingdom Colonial Office, offering an appointment as a Medical Officer in Sarawak. I should be grateful if you would forward your reply through this office. 10

As soon as I receive confirmation from you of your acceptance of the terms of appointment, it is proposed that you should undergo a medical and X-ray examination by a doctor in Calcutta whom we shall appoint.

Yours faithfully,

(M. REITH)

Dr. M.N.A. Majumder,
c/o E.C. Bose Esq.,
7, Central Road,
Madavpur,
CALCUTTA, 32

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SUPPLEMENTAL EXHIBITS

Exhibit "B"

Letter Plaintiff to U.K. High
Commissioner

Dr. M.N. Guha Majumder,
c/o Mr. K.C. Bose,
7 Central Road,
Jadavpur,
CALCUTTA, 32.

Supplemental
Exhibits

Exhibit "B"
Letter
Plaintiff to
U.K. High
Commissioner
10th October
1958

10

10th October, 1958.

To: The High Commissioner
for the United Kingdom,
1, Harington Street,
CALCUTTA, 16.

Sir,

Kindly refer to your letter No: GEN.C/2
dated 1st October, 1958.

20

I beg to convey my grateful thanks for
kindly offering me an appointment as a Medical
Officer, under the Sarawak Government and I
have great pleasure in accepting the offer,
under the terms and conditions set out in the
United Kingdom Colonial Office letter No:
BCD/P.13847 dated 12th June 1958 and in the
enclosed memorandum.

Yours faithfully,

Sgd./- M.N. Guha Majumder.

158.

SUPPLEMENTAL EXHIBITS

Exhibit "C"

Supplemental
Exhibits

Exhibit "C"
Letter -
State
Attorney-
General to
Thomas & Co.
2nd December
1963

Letter State Attorney-General to Messrs.
Thomas & Co.

Gentlemen,

Dr. M.N.G. Majumder v. Attorney General

I enclose herewith Defence in the above mentioned case together with copy of a certificate by the Attorney General of the Federation under section 76 of the Malaysia Act. You will note that I have not pleaded 10 to your proposed paragraph 11(a) of your Statement of Claim as it has not yet been formally incorporated in your Statement of Claim. If leave to so amend is granted by the Court, I will then plead to it.

I have the honour to be,

Gentlemen,

Your obedient servant,

(Sgd) P.E.H. Pike

State Attorney General.

Messrs. T.O. Thomas,
9 India Street,
Kuching.

20

cc. The Deputy Registrar, Supreme Court.

SUPPLEMENTAL EXHIBITS

Exhibit "D"

Certificate of Federal Attorney General

IN THE HIGH COURT OF SARAWAK,
NORTH BORNEO AND BRUNEI

(HOLDEN AT KUCHING)

B E T W E E N:

H.N. GUHA MAJUMDER

Plaintiff

- and -

10

THE ATTORNEY-GENERAL OF SARAWAK
KUCHING

Defendant

Certificate of the Attorney-General,
Malaysia, under section 76(3) of the
Malaysia Act, 1963

20

I, Abdul Kadir bin Yusof, Attorney-General of Malaysia, hereby certify that the right and liability or obligation in the above mentioned civil suit is by virtue of section 76 of the Malaysia Act, 1963, the right, liability or obligation of the State of Sarawak.

Given under my hand this 25th day of November, 1963.

(Sgd) ABDUL KADIR BIN YUSOF

Attorney-General,
Malaysia.

Supplemental
Exhibits

Exhibit "D"
Certificate of
Federal Attorney
General
25th November
1963

IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL

No. 28 of 1967

ON APPEAL FROM
THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

M. N. GUHA MAJUMDER

Appellant

- and -

THE ATTORNEY GENERAL OF SARAWAK

Respondent

RECORD OF PROCEEDINGS

HATCHETT JONES & CO.,
90 Fenchurch Street,
London, E.C.3.

Solicitors for the
Appellant.

STEPHENSON HARWOOD & TATHAM,
Saddlers' Hall,
Gutter Lane,
London, E.C.2.

Solicitors for the
Respondent.