

IN THE SUPREME COURT OF BELIZE, A.D. 2003

ACTION NO. 488

	(DARREL SMITH	
	(BENEDICT PALACIO	
	(VICTOR RECINOS	
	(EGBERT FLOWERS	Applicants
	(
	(
BETWEEN	(AND	
	(
	(
	(THE ATTORNEY GENERAL	Respondent

—

BEFORE the Honourable Abdulai Conteh, Chief Justice.

Mr. Dean Barrow S.C. for the Applicants.
Mr. Derek Courtenay S.C. for the Respondent.

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JUDGMENT

Background

Mr. Darrel Smith and his co-applicants in these proceedings were all career public officers in the Customs Department. In the case of Mr. Smith, he first joined the public service in 1973 as a technician in the then Lands and Survey Department and seven years later in 1980, he was transferred to the Customs Department as a tally clerk. From that position, he gained promotions with the Department and, in 1991, he was promoted to the rank of Senior Customs Examiner.

2. It is not however, clear how long the other three applicants, Messrs. **Benedict Palacio**, **Victor Recinos** and **Egbert Flowers**, have been with the Customs Department. But it is not in doubt that they, like Mr. Smith, had spent a substantial part of their working lives in that Department and at the time of his action, they were all senior officers in that Department, at least, up until 18 September 2003, when they were required to proceed on retirement by the Public Services Commission in the public interest. Both Messrs. Palacio and Flowers held the position of

Senior Customs Examiners, while Mr. Recinos held the position of Collector of Customs.

3. On 8th August 2003, all the applicants received identically worded letters from the Office of the Services Commission (which, for ease of reference, will be referred to as the Public Services Commission, PSC for short), to the effect that it was desirable that they be retired in the public interest from the public service.
4. It is helpful, I think, to reproduce here the letter to Mr. Darrel Smith which is, as I have said, identical with the letters to the other three applicants. This letter states:

“OFFICE OF THE SERVICES COMMISSION

Plaza Building, Bliss Parade, Belmopan

Telephone Nos.: 822-2230/0929 Fax: 822-0927 E-mail: pscjob@btl.net

Belize:

Please Quote

POS/3/02/03 Vol. VI (87)

8th August, 2003

*Mr. Darrel Smith,
Smith Customs Examiner,
Thru' Comptroller of Customs,
Customs and Excise Department,
BELIZE CITY.*

Dear Mr. Smith,

The Public Services Commission is considering a recommendation that, having regard to the present needs of the Customs Department and your usefulness thereto, together with all other circumstances, it is desirable that you be retired in the public interest under Regulation 20 of the Services Commissions Regulations, 2001 (S.I. No. 159 of 2001), with all pensions benefits payable in accordance with section 6 (1) (a) (v) of the Pensions Act and the applicable Regulations.

*Before the Commission takes a decision on the matter, you are hereby given an opportunity to make any submissions to the Commission, should you wish to do so. Any such response should reach the Commission's office **no later than ten (10) days of the date of this letter.***

Please feel free to call the undersigned should you need any further information or clarification.

Best wishes.

Sincerely,

J A Palacio

(JUSTIN A. PALACIO)

Director

OFFICE OF THE SERVICES COMMISSION

*c: Financial Secretary
CEO – Ministry of Finance (Revenue)”*

5. All the applicants by substantially similar letters, dated 15th August 2003, wrote to the Director of the Office of the Services Commission in terms protesting their imminent retirement from the public service, and requesting to know about the recommendation to retire them and asking for a meeting with the Public Services Commission. Again, I think it would be helpful to reproduce the letters from the applicants to the Director, Office of the Services Commission. I reproduce here the letter of Mr. Smith, the first applicant, which is similar to the letters from the other three applicants. It states:

*“Mr. Justin A. Palacio
Director
Office of the Services Commission
Belmopan City*

*Thru’ Comptroller of Customs,
Customs and Excise Department
Belize City*

15th August 2003.

Sir,

In reference to The Commission’s letter POS/3/02/03 Vol. VI (87) dated 8th August 2003. It has been brought to my attention that the Commission is considering my early retirement based on a recommendation.

Prior to the receipt of this letter, I was never aware of any official recommendation, either written or verbal, relating to my status in the Customs Department. This is a highly irregular situation since I was unaware of the content or basis on which this recommendation was formulated. I have never partaken in any discussion or debate in reference to the future of the

department concerning “its needs” my personal contribution or “usefulness thereto.” This recommendation could contain a wide variety of implications which could mar an otherwise exemplary career and do further damage to a once efficient and effective department.

I was not contemplating an early retirement, considering my age and time invested in Local and International Training for my office and duties. Over the years I have executed my duties diligently, without fear or favor in accordance with the Public service regulation and the laws of Belize. I have an impeccable record which can be substantiated by appraisals and evaluations consistently over the years of my career, and as recently as my last evaluation for 31st December 2002. These evaluations, have never suggested that my performance, conduct or character was in anyway detrimental to the development of the department.

At this point, it would be fool hardly of me to consider any type of retirement without knowledge of the contents of this recommendation. I am hereby protesting the consideration of any such recommendation until disclosure of the contents is afforded me. Attached is a copy of a request submitted to the Comptroller of Customs dated 1st August 2003, which is self explanatory and to which there has been no response to date.

To be desired that I’ll be “Retired in the public interest” gives credence to the notion of being sanctioned for wrongdoing. This can cause irreparable damage to my illustrious career and family image.

I am humbly requesting an audience with the Public Service Commission, in the presence of my legal representation and the author(s) of the recommendation. This would be desirable for full disclosure of the source basis of the recommendation. Such a forum would facilitate the making of a responsible decision in the best interest of the Department and other stakeholders.

I await your urgent response.

Respectfully,

*D Smith
Darrel Smith
Senior Custom Examiner
Customs and Excise Department*

*c: Chairman – Office of the Services Commission
Financial Secretary
CEO – Ministry of Finance (Revenue)
CEO – Ministry of the Public Service
Office of the Ombudsman
President – Public Service Union”*

6. I think, it is fair to say that the facts of this case are, in the main, not in dispute and they are substantially set out in the several affidavits of the applicants. In this regard, I reproduce also the first affidavit of Mr. Smith

dated 1st October 2003 and note that the other three applicants also expressly refer to this affidavit and rely on the propositions stated in it.

7. Mr. Smith's first affidavit states:

“AFFIDAVIT

“I, DARREL SMITH of 3559 Sanker Street, Belize City, Belize, MAKE OATH AND SAY as follows:

1. *I am 49 years old and was, up until 18th September 2003, a Public Officer and a Senior Customs Examiner in the Customs Department.*
2. *I jointed (sic) the Public Service January 6th 1973 as a Technician, Lands & Survey Department. I went to the Customs Department in 1980 as a Tally Clerk. I was promoted, eventually, to Senior Customs Examiner in 1991.*
3. *On the 8th August 2003, the Public Services Commission wrote me concerning a recommendation (which the Financial Secretary had earlier confirmed had been made by the Comptroller of Customs) “that having regard to the present needs of the Customs Department and your usefulness thereto ... it is desirable that you be retired in the public interest ...” I attach hereto and mark **D.S. 1** a copy of the letter.*
4. *On the 15th August 2003 I wrote back to the Commission requesting disclosure of the contents of the recommendation that had triggered the Commissioner's letter of 8th August 2003, and asking for an audience with the Commission. I protested, in that letter, the idea of my early retirement. I attached hereto and mark **D.S. 2** a copy of my letter of 15th August 2003.*
5. *The Commission replied to me on 22nd August 2003, stating that my proposed retirement in the public interest was never intended to cast any aspersions on my performance as a Customs Officer, and that it did not involve any element of disciplinary action for misconduct or other wrongdoing. The letter also granted me an audience with the Commission, and scheduled it for Thursday, 28th August 2003 at 9:00 a.m. I attach hereto and mark **D.S. 3** a copy of the letter of 22nd August 2003.*
6. *I attended the Commission meeting on August 28th, 2003, and the Commission then made clear to me that the Comptroller of Customs had indicated he could no longer work with me as I had lost his confidence and trust.*
7. *The Commission had never, in answer to my request, given me formal disclosure of the Comptroller's recommendation that had initiated the*

proceedings for my early retirement. At the meeting I pointed out that all my appraisal reports were positive, I had not ever been accused of non-performance, I had regularly received my increments, and there could be no valid reason for any loss or trust in me as a Customs Officer.

8. *I in fact asked the Commission for the Comptroller's reasons for his supposed loss of confidence in me. The Commission would not and did not give me same and I was able to do no more than reiterate that any such reasons, whatever they were, could not be valid in view of my record and the lack of any departmental complaints.*
9. *At no time during my interview with the Commission was there any suggestion or discussion of my position or skills not being needed by the Customs Department, or of any lack of usefulness to the Department. It thus became apparent to me that what had been offered in D.S. 1 as the basis for the proposal to retire me was not the true basis; and that the true basis was the unspecified charges and/or animus of the Comptroller against me.*
10. *This was later confirmed when I was able to obtain a copy of the minutes of a meeting of Thursday 21st August, 2003 of the Commission at which the Comptroller made grave allegations of criminal misconduct against me and the other Applicants herein whom the Commission also proposed to retire. I attach hereto and mark **D.S. 4** a copy of the said minutes.*
11. *I obtained the minutes subsequent to the formal decision of the Commission to retire me, which decision was confirmed to me in a letter from the Commission dated 16th September 2003; and thus never had a chance to rebut the damaging allegations, all of which are false and all of which admittedly could not be substantiated by the Comptroller. I attach hereto and mark **D.S. 5** a copy of the letter of 16th September 2003.*
12. *I therefore contend that the decision of the Commission of the 16th September 2003 to retire me in the interest of the service and having regard to the needs of the Customs Department and my usefulness thereto, was for reasons and based upon considerations other than what was stated; and that they were never put to me and against which I was never given an opportunity to defend myself. I say as a consequence that the Commission's decision to retire me is in breach of natural justice, is without jurisdiction, and is null and void.*
13. *I refer to D.S. 5 and point out that the Commission purported to retire me in accordance with the Pensions Act. I say that the Commission has no power to retire me in accordance with the Pensions Act, but only in accordance with Section 106 of the Constitution and the Services Commissions Regulations (S.I. No. 159 of 2001) made thereunder. I therefore say that my purported retirement was for that reason also null and void.*
14. *I say further that in accordance with the Scheme of the Services Commissions Regulations and in particular Regulations 20, 22(1)*

11. Material Facts

From the evidence in this case, the material facts which have agitated the issues in contention between the parties (which I will state shortly) can be stated as follows:

Firstly, all the applicants received similarly worded letters dated 8th August 2003 from the Public Services Commission telling them that it had received recommendations to retire them “in the public interest”

Secondly, all the applicants by similar letters dated 15th August 2003, wrote to the Public Services Commission protesting the recommendations to retire them and requesting a meeting with the Commission

Thirdly, on 22nd August 2003, the Public Services Commission wrote to all the applicants stating that their proposed retirement “in the public interest” was not intended to cast aspersion on their performance as Customs Officers and that their retirement in the public interest under Regulation 20 of the Services Commissions Regulations did not involve any element of disciplinary action for misconduct or other wrong doing on their part and that they must dispel the notion that by their retirement they were being “sanctioned for wrong doing”. With this explanation, the Commission hoped that the need for any personal interview with the applicants would be obviated, but that if they still wished, they should report to the Public Services Commission’s office on Thursday 28 August 2003, at 9 a.m. for audience with the Commission.

Fourthly, all the applicants attended the meeting with the Public Services Commission on Thursday 28 August 2003. At this meeting, it was made clear to the applicants that the Comptroller of Customs had indicated to the Public Services Commission that he could no longer work with them as he had lost confidence in the applicants. The applicants were not however, told the reason or cause for the loss of confidence by the Comptroller of Customs. Also, they were not given any disclosure of any complaints against them by either the Comptroller of Customs or any one, even though they asserted their unblemished record of service as contained in their annual appraisal reports. The applicants’ request for the reason for the loss of confidence by the Comptroller of Customs was also unanswered.

Finally, all the applicants later received similarly worded letters dated 16th September 2003, retiring them from the Public Service with effect from 18th September 2003.

12. The only material evidence from the respondent however, is the affidavit of the Director of the Office of the Services Commission, which I have already referred to earlier. On this the respondent has pitched its tent and contends that in virtue of Regulation 20 of the Services Commissions Regulations, the applicants were validly retired from the Public Service.

Issues in contention

13. What is in contention between the parties can therefore be stated thus: Was the Public Services Commission entitled and correct in the circumstances of this case, to retire the applicants “in the public interest” under Regulation 20 of the Services Commissions Regulations contained in S.I. 159 of 2001?
14. In effect, the applicants contend that the decision of the Public Services Commission to retire them in the public interest was for reasons and, based upon considerations, other than what was stated and, that these were never put to them and, against which they were never given an opportunity to defend themselves. They contend further that, in accordance with the scheme of the Services Commissions Regulations in particular Regulations 20, 22(1) and 36, retirement in the public interest at the instance of the Public Services Commission could only be for cause, namely, misconduct, non-performance or some infraction against discipline. They aver therefore, that their retirement by the Public Services Commission amounts to illegal deprivation of their property and salary rights in their jobs as Senior Customs Officers and a denial of their opportunity and right to continue to gain their living by work and occupation that have freely chosen and accepted, and that they had a right to continue in their jobs until they reach the age of 55. They have therefore, sought refuge in the protective cover of section 20(1) of the Belize Constitution against what they perceive as breaches of their constitutional rights.
15. I should point out that in Belize, the mandatory age of retirement for public officers is 55 years. Regulation 18 of the Services Commissions Regulations, so far as is material, states in terms:

“All Public Officers without exception shall retire on reaching the compulsory age of retirement (55 years) and shall not be re-employed except ...”

Also, under **Part VI** of the Regulation dealing with **Pensions, Gratuities and Other Retirement Benefits**, Regulation 50 expressly provides:

“All Public Officers, without exception, shall retire on reaching the compulsory retirement age of fifty-five (55)”.

16. At the material time, that is 18th September 2003, which the Public Services Commission wrote to the applicants as the effective date of their retirement “in the public interest”, the first applicant, Mr. Smith was 49 years old; the second applicant, Mr. Benedict Palacio, was 39 years old; the third applicant, Mr. Egbert Flowers, was 41 years and, the fourth applicant, Mr. Victor Recinos, was 42 years old.
17. The applicants had also contended that their retirement in the public interest under section 6 (1) (a) (v) of the Pensions Act – Chapter 30 of the Laws of Belize 2000, Revised Edition, was unconstitutional. Mr. Derek Courtenay S.C. for the respondent however quite properly in keeping with his usual candour, conceded this and, the Director of the Office of the Services Commissions, in his affidavit (mentioned at paragraph 6 above) at paragraph 6 states that this was an inadvertence, but that all the applicants were in fact retired by the Public Services Commission under Regulation 20, although their pension benefits were approved in accordance with section 6 (1) (a) (v) of the Pensions Act. So the issue as to whether the applicants were properly retired under section 6(1)(a)(v) of the Pensions Act is now of no moment.
18. But, in answer to a query from the Court as to whether it was the position that even though the applicants were retired by the Public Services Commission they were nonetheless entitled to pensions as if they had worked up to the retirement age of 55 years, Mr. Courtenay S.C. upon instructions, informed the Court that they would be paid pensions only for the period of their respective service and not as if they had worked up to the age of 55.
19. On behalf of the respondent, on the other hand, it is vigorously contended that the applicants were retired by the Public Services Commission “in the public interest”, under Regulation 20 of the Services Commissions

Regulations. This regulation, which is at the heart of these proceedings expressly states:

”20. *Public Officers may be permitted or called upon to retire, before attaining the age of fifty-five (55) years, in the public interest.*”

20. Therefore, the issues in contention between the parties, turn to be decided, in my view, as whether, in the circumstances of this case, the Public Services Commission had authority under Regulation 20, to retire the applicants in the public interest.

The Constitutional and Legal Framework

21. The Services Commissions Regulations 2001 contained in S.I. No. 159 of 2001 were made pursuant to section 106(3) of the Constitution of Belize. So far as it is material to these proceedings, this subsection provides that, **subject to the provisions of the Constitution**, regulations may be made relating to:

“(a) ...

(b) ...

(c) ...

(d) ...

(e) *measures to ensure discipline, and to govern **the dismissal and retirement of public officers, including the procedures to be followed***. (emphasis added)

Subsection (4) of the Constitution states that the Public Services Commission, in exercise of its functions under section 106 of the Constitution (relating to the appointment, exercising of disciplinary control and the removal of public officers) shall be governed by the regulations made under subsection (3).

22. Regulation 20 which is at the heart of these proceedings, appears in **Part III** of the Services Commissions Regulations headed, **Appointment, Promotion and Retirement**. It may be noticed that this regulation states or contains no procedure: it simply states that public officers may

be permitted or called upon to retire, before attaining the age of fifty-five (55) years in the public interest.

23. However, Regulation 22(1) goes to some length in spelling out the modes by which a public officer may leave the public service and gives ten instances of these. This is in stark contrast to Regulation 20 which merely says that a public officer may be called upon, before the age of 55 years, to retire in the public interest.
24. However, it is to be noted that the category, if indeed there is one such, of being "called upon to retire before attaining the age of fifty-five years in the public interest" is not included as such in Regulation 22(1). But permitting a public officer to retire before attaining the age of fifty-five years is recognized and provided for as one of the specified modes by which a public officer may leave the Public Service – this is provided for in Regulation 22(1)(c) and is termed "voluntary retirement". And Regulation 19 on premature retirement (which is really voluntary retirement) sets out the procedure for this, at least for public officers who have attained the age of fifty years but before the prescribed age of fifty-five years for mandatory retirement. Moreover, paragraph (a) of Regulation 22(1) provides for and recognizes as a mode by which a public officer may leave the public service "on dismissal or removal in consequence of disciplinary proceedings". This can only logically refer to an officer who has yet to attain the mandatory age of 55 years for retirement.
25. It would therefore be seen that the two strands of Regulation 20, that is: (i) permitting a public officer to retire before attaining the age of fifty-five years and, (ii) calling upon a public officer to retire before attaining the age of fifty-five years, are provided for and comprehended within paragraphs (c) and (a) respectively of Regulation 22(1). Of course, in the case of paragraph (a), that is, the dismissal or removal in consequence of disciplinary proceedings, it would, I think, be in the public interest that such an officer was not in the public service.
26. Therefore, the limb of Regulation 20 that provides that a public officer may be called upon to retire in the public interest before attaining fifty-five years is only meaningful and relevant and given life in the context of disciplinary proceedings. Indeed, Part IV of the Services Commissions Regulations is headed and devoted to the Discipline of Public Officers. It is in this

part, in my view, that the provision that a public officer may be called upon to retire before fifty-five in the public interest more properly belongs. This imports all the necessary safeguards to ensure that removal or dismissal from the public service is for cause, that is, as a consequence of disciplinary proceedings. Moreover, Regulations 26, 27, 28 and 29 under Part IV deal with how public officers are to be treated in cases of disciplinary proceedings. And Regulation 30 provides the standard of proof in such cases. And Regulation 36 provides that if disciplinary proceedings disclose grounds for so doing, the Public Services Commission may require the officer to retire in the public interest.

27. Moreover, it is now generally accepted that the Constitutions of Commonwealth Caribbean States limit the arbitrary power that had previously been exercised by the Crown in the colonial era in relation to the Public Service, in particular, by abolishing the concept of dismissal at pleasure and by giving public officers a security of tenure that is superintended by autonomous Public Services Commissions – see Thomas v Attorney General (1982) A.C. 113 where Lord Diplock at pp. 123 – 124 discussed how the concept of dismissal at pleasure of public officers was given the quietus; also, the decision of the OECS Court of Appeal in Duncan v Attorney General (1998) 3 LRC 1128.
28. I dare say that the demise of the concept of dismissal at pleasure or will of public officers is recognized and affirmed in both the Constitution of Belize and the regulations governing the public service made pursuant to the Constitution.

Therefore, notwithstanding the terse and laconic provisions of Regulation 20 stating that public officers may be called upon to retire before attaining the age of fifty-five years “in the public interest”, I am of the considered view that if this were so, without more, it would be no more than (to paraphrase, with respect, Lord Diplock in Thomas supra at p. 123) to use a lawyer’s metaphor to cloak what in this instance would be dismissal or removal of public officers at will or pleasure.

This cannot be right, correct or fair. It would run against the grain of the Services Commissions Regulations themselves. As Lord Diplock again stated in Thomas supra at page 126:

“To ‘remove’ from office ... embraces every means by which (an) ...officer’s contract of employment (not being a contract for a specific period), is

terminated against his own free will, by whatever euphemism the termination may be described, as, for example, being required to accept early retirement". (emphasis added apropos the position of the applicants in these proceedings).

Is Regulation 20 Free-Standing?

29. Regulation 11(1) speaks of the tenure of public officers; Regulations 22 speaks of the modes of leaving the public service; Regulation 29(1) speaks of the dismissal or retirement of public officers in cases of serious inefficiency or misconduct and the procedures to apply; and Regulation 36 provides that if disciplinary proceedings disclose grounds for so doing, the Public Services Commission may require a public officer to retire in the public interest. It is only Regulation 20 that starkly states that a public officer may be called upon to retire before 55 years in the public interest, yet it sets out no procedure to be followed for this purpose, contrary to, I believe, what is stated in section 106(3)(e) of the Constitution.

I am therefore of the settled view that Regulation 20 cannot and is not intended to be free-standing in so far as it talks of a public officer being called upon to retire before fifty-five; otherwise it would seriously undercut the tenure of public officers and be indistinguishable from the now disavowed concept of the dismissal of public officers at will or pleasure.

30. I find that it would be unsatisfactory, insupportable and unwarranted to read Regulation 20 in isolation, separate and apart from the other regulations – it should and must be read in the context of the other relevant regulations and, when it is so read, it would be reasonable to hold and, I do hold that, there are qualifications which necessarily must affect or inform its use by the Public Services Commission.

I find that the qualifications which must inform the exercise of Regulation 20 powers by the Public Services Commission to call upon a public officer to retire before attaining the age of fifty-five years in the public interest, include the obligation to act for reasonable cause, and not to act whimsically or arbitrarily, to observe and apply the Constitutional provisions (to which the regulations are always subject), to conform to the rules and regulations which the Public Services Commission administers and to observe the rules of natural justice – see Dennis Byron C.J. in Duncan supra at page 1137. This must be so when it is realized that, in reality, calling upon a public officer to take early retirement is nothing less

than an euphemistic exercise of removing him in fact from office, albeit, with anodyne intention or consequences sometimes, such as the grant of some pension benefits.

31. Retirement of course, is different from dismissal, the latter often entails harsh consequences for the person involved. But where retirement is occasioned by circumstances outside the operation of Regulations 18(1), 22(1)(b) and 50 (compulsory retirement on attaining the age of fifty-five years), and Regulations 19 and 22(1)(c) (on voluntary retirement), to be justified, it must be for cause, such as any one of the instances specified in Regulation 22(1) and elaborated upon in Regulations 26, 27, 28, 29 and 36, for example. Otherwise, the retirement would be outside the Regulations.
32. I am fortified also in my conviction on Regulation 20 from a perusal of the Public Service Regulations 1996 (S.I. No. 153 of 1996), the precursor of **Public Service Regulations 2001 – S.I. No. 160 of 2001**. The latter were issued on 15 November 2001 and came into force the same day, repealing the 1996 Regulations.

However, under Regulation 63 of the 1996 Regulations, relating to **compulsory retirement**, the following provisions appear:

*“63. Notwithstanding anything to the contrary in these Regulations, if the Commission considers that it is desirable **in the public interest** that any officer should be required to retire from the Public Service on grounds which cannot suitably be dealt with by the procedure laid down in Regulation 62 above, **it shall call for a full report from the Heads of Departments under whom the officer previously served and presently serves. The officer shall be given an opportunity of submitting a reply to the complaints by reason of which his retirement is contemplated. The Commission, if satisfied, having regard to the usefulness of the officer and all the other circumstances of the case, that it is desirable in the public interest so to do, may require the officer to retire, and the officer’s service shall accordingly terminate on such date as the Commission shall specify.** In every such case the question of*

pension shall be dealt with under the laws and regulations governing pensions in the Public Service". (emphasis added)

It is manifest that this Regulation recognized and affirmed the rules of natural justice, in particular, in allowing the officer who its "desirable in the public interest should be required to retire from the public service", to submit a reply to the complaints (of which she would have been informed) by reason of which her retirement is contemplated.

Regrettably, perhaps due to an oversight, no similar provision is to be found in either the 2001 Public Service Regulations (S.I. No. 160 of 2001) or the Services Commissions Regulations 2001 other than the terse statement in Regulation 20 of the latter.

I say regrettably because, it could not have been intended by a side wind, as it were, to reintroduce the now disavowed practice of dismissing public officers at will, as was the case in colonial times; for that is what, in effect, Regulation 20, in so far as it can be used to call upon public officers at anytime to retire in the public interest, without cause, would amount to, in flagrant disregard of the rules of natural justice and fair play, which were recognized and affirmed by Regulation 63 of the 1996 Public Services Regulations. These rules are so entrenched and well recognized principles today that they cannot be swept away by the side wind of their omission in replacement Regulations. Therefore to the extent that Regulation 20 can be used to call upon a public officer to retire without cause, in evident disregard of the rules of natural justice, it is odd and irreconcilable with the rest of the Regulations.

33. I therefore, do not think that Regulation 20 in and by itself, empowers the Public Services Commission to retire a public officer before she reaches the age of 55 years in the public interest without some cause, such as part of or the result of some disciplinary proceedings, or the illness of the public officer such as to disable her from further carrying out her public duties, or the unsuitability of the public officer through temperament – see **Jones and Others v Solomon (1989) 41 WIR 299.**

What is to retire in the public interest?

34. The expression "in the public interest" is nowhere defined. This perhaps, would be an invidious if not impossible exercise. And I shall advisedly, refrain from venturing a definition of this concept which can, it must be said, prove to be protean. But, surely, it must be in the interest of the

public that public officers are insulated from removal, dismissal or retirement or by whatever euphemism their employment may be involuntarily terminated, without cause: a secure public service is conducive to a more efficient and dedicated service which should redound to the interest of the public in the round.

35. The power to retire a public officer in the public interest, is, in my view, necessarily subject to the requirements of natural justice. Therefore, any exercise of this power without observing these rules, such as, for example, letting the officer concerned know why she is being retired, and the cause or reason for such retirement, and being afforded the opportunity to rebut or explain the causes alleged against her, would, in my view, be untenable and unfair. To hold otherwise would, I think, make every public officer removable at a whim as it were, without any cause or reason being alleged or any explanation given, other than the bland and inscrutable averment, "in the public interest". This would hardly be distinguishable from liability to dismissal or removal from the public service at pleasure or will, even with the innocuous designation "retirement".
36. I do not believe that Regulation 20 can be a warrant to remove, or retire public officers at will. I will read into it the requirements of natural justice which are so clearly etched into other regulations concerning the removal or dismissal or retirement of public officers, such as for example, Regulation 29 which spells out the procedures to be followed in case of serious inefficiency or misconduct by a public officer warranting dismissal or retirement; or Regulation 36, which provides that if disciplinary proceedings disclose grounds for so doing the Public Services Commission may require a public officer to retire in the public interest.

Determination

37. I had in a preliminary ruling in these proceedings on 11 December 2003 held that the applicants' motion could proceed, primarily because of its constitutional implications. I want to reiterate that the mere fact that a person alleges that his constitutional rights have been, or are being or are likely to be contravened is not, of itself, sufficient to entitle that person to invoke the jurisdiction of the Court under section 20(1) of the Constitution – **Kemrajh Harrikissoon v Attorney General (1979) 31 WIR 348** per Lord Diplock at page 349.

38. But in this case before me, at the heart of it is Regulation 20 which is made pursuant to powers conferred by the Constitution in section 106(3) and (4). The use of these powers by the Public Services Commission has resulted in the claim by Mr. Smith and his colleagues that their constitutional rights are thereby violated, that is to say, their right to work and their right to property, in this case, their entitlement to their salaries.
39. Moreover, this case is unlike the case of Thakur Persad Jaroo v Attorney General (2002) 59 WIR 519. I am clear in my mind that the present proceeding are amenable to redress by a constitutional motion. In the Jaroo case supra, after the constitutional motion was launched claiming breach of the right to possession and enjoyment of the car in question in that case, the Privy Council found at page 534 of the judgment that, the case was no longer suitable for a constitutional motion after the police sergeant had put forward an affidavit (which was not challenged), averring that the car was needed for purposes of investigation and material evidence. In the present proceedings, however, Mr. Smith and company, claim that their constitutional right to work and to their salaries was infringed by their unlawful retirement by the Public Services Commission. And the Public Services Commission for its part, perseveres in its claim that it could retire them in virtue of Regulation 20.
40. I must say that as a matter of fact, I find the way the applicants were treated and required to retire unsatisfactory. To its credit, however, the Public Services Commission afforded them the opportunity to be heard after its letters to them of 8th August 2003, that it was considering a recommendation that it was desirable to retire them. But this was granted, it would seem, because the applicants insisted to meet with the Public Services Commission. However, at the meeting with the Public Services Commission, the situation became even more exasperating for all the applicants as they were each told that the Comptroller of Customs (their head of Department and boss) had lost confidence in them – see paragraphs 4, 6, 7, 8 and 9 of Mr. Smith's first affidavit, and the respective paragraph 4 of the affidavits of Messrs. Palacio, Recinos and Flowers. This was quite contrary to what had been represented to the applicants in the letter of the Public Services Commission to them of 8th August 2003 as the basis for the recommendation to retire them.

But the reasons or details or specifics of this claimed loss of confidence were never communicated to or made known to the applicants.

41. In effect, the result of the hearing with the Public Services Commission must have left the applicants with the clear but disturbing feeling that there was much more afoot in their proposed retirement other than the public interest: they were being railroaded, as it were, to go under the cloud of unspecified, and unstated allegations, without the opportunity to refute those allegations. The applicants were only told that the Comptroller of Customs had lost confidence in them. Surely, it cannot in the circumstances, be right, fair or just, that, on the authority of Regulation 20, the Public Services Commission could therefore require the applicants to retire "in the public interest".
42. To hold, as Mr. Courtenay S.C. so plausibly argued for the respondent, that Regulation 20 empowered the Public Services Commission to retire the applicants in the circumstances of this case, would, in my view, make this Regulation a veritable sword of Damocles. As it stands, and as it is contended for by the respondent, Regulation 20 would be a naked sword dangling perilously over the head of every public officer. I find that reason, fair play and common sense would require that this sword should be put back in its sheath and deployed only for cause, in the context of disciplinary proceedings. I find as well that, in the circumstances of this case, this sword was improperly wielded, especially so when the applicants were first told that it was recommended that they be retired having regard to the needs of the Customs Department and their usefulness thereto and, then, at their meeting with the Public Services Commission, it became apparent that the real reason for wanting to retire them was the loss of confidence in them by the Comptroller of Customs, but the reasons for the Comptroller's loss of confidence were never disclosed to the applicants.

If the applicants had been told the reasons for the loss of confidence and were afforded the opportunity to refute or explain, of course, in those circumstances, the Public Services Commission itself would then be the sole judge, if in the light of the reasons and the explanations of the applicants, it was still in the public interest that they should be retired. But this was not done.

43. It is for these reasons that in the circumstances of this case, I find that it was wrong for the Public Services Commission to have sent the applicants on retirement based on the authority of Regulation 20.

Consistently with the indeterminate tenure granted to public officers by Regulation 11, Regulation 20 cannot be used, absent fault or cause,

established in the context of disciplinary proceedings, to retire, in effect remove, or terminate against his will, the employment of a public officer before she reaches the age of 55. Therefore, I find that Regulation 20, in so far as it provides that a public officer may, before she reaches the age of fifty-five years, be called upon to retire in the public interest, is, necessarily informed and conditioned by Regulation 36.

44. I find therefore that the power of the Public Services Commission to call upon a public officer to retire in the public interest in the second limb of Regulation 20, must be for cause, which cause is made known to the officer concerned, by which she is given an opportunity to respond. Absent these elements – that is, the cause, its intimation to the officer concerned with a view to making representation, any use of Regulation 20 to retire a public officer would at best be questionable and may well offend the Constitution and the Services Commissions Regulations. This I find, was what happened in this case.

Reliefs sought by the Applicants

45. The applicants have, in these proceedings, sought several reliefs by way of Declarations and an Order restoring them to their positions in the Customs Department. They have brought their case by way of Constitutional Motion pursuant to section 20(1) of the Constitution of Belize. They claim that the circumstances of their retirement constituted a denial of their right to work as a violation of section 15(1) of the Constitution; they claim as well that the circumstances of their retirement constituted an unlawful deprivation of their property rights in their jobs and emoluments contrary to section 17(1) of the Constitution.
46. Let me first say that in relation to the **First Declaration** sought, that is, the retirement of the applicants in the public interest with effect from 18 September 2003, was contrary to section 106(4) of the Constitution and the Regulations made thereunder, in view of my findings on Regulation 20 as the authority for their retirement, **I declare** that their retirement was null and void.

The **Second Declaration** sought, that is, the retirement of the applicants in accordance with section 6(1)(a)(v) of the Pensions Act, I need not pronounce upon as this point has been, in keeping with his usual frankness, conceded by Mr. Derek Courtenay S.C. for the respondent and

the Director of the Office of the Services Commission in his affidavit admits that this was an inadvertence.

The **Third Declaration** sought to the effect that in the circumstances the applicants could only have been retired if they had been found guilty of some dereliction of duty, or offence against discipline or some similar infraction or otherwise for reasonable cause, I grant, in view of my findings on the use of Regulation 20 by the Public Services Commission in this case and, so **declare**.

This necessarily includes the **Fourth Declaration** sought to the effect that the retirement of the applicants was in the circumstances, a breach of the rules of natural justice and I so **declare**.

The Retirement of the Applicants and the Impact on Fundamental Rights Provisions of the Constitution

47. The applicants have also averred that the circumstances of their retirement constituted a violation of their fundamental rights as provided for in sections 15(1) and 17(1) of the Constitution.
48. **First** section 15(1) of the Constitution. This provides in terms:

“(1) No person shall be denied the opportunity to gain his living by work which he freely chooses or accepts, whether by pursuing a profession or occupation or engaging in a trade or business, or otherwise.”

Though not an absolute right as certain limitations are expressly stated in subsection (3) of section 15, it is clear that this section protects the right to work.

All the applicants were career public officers who at the moment of their retirement gained their livelihood by work which they freely chose as customs officers.

49. Exclusion from the performance of employment by being ordered to go on retirement before the mandatory age of retirement for public officers, in circumstances outside of disciplinary process, and for no reason given other than the nebulous loss of confidence by an officer's superior, without stating the reasons for such loss of confidence and without an opportunity

to the officer to refute or explain, would in effect, be a removal from office, however it is described. This is what happened in the applicants' case. This, I find, denied them the opportunity to gain (or in their case continuing to gain) their livelihood by work as customs officers, contrary to section 15(1) of the Constitution. I accordingly so **declare**.

50. I should add that the right to work which is constitutionally guaranteed today in Belize is now finding universal acceptance. As Lord Hoffman succinctly put in **Johnson v Unisys Ltd. (2001) UKHL 123; (2001) 2 All E.R. 801; (2001) 2 WLR 1076**, at page 20:

“It has been recognized that a person’s employment is usually one of the most important things in his or her life. It gives not only livelihood but an occupation, an identity and a sense of self-esteem”.

In the same case Lord Millet re-echoed the principle when he stated at page 34:

“It is generally recognized today that ‘work is one of the defining features of people’s lives’; that ‘loss of one’s job is always a traumatic event’, and that it can be ‘especially devastating’ when dismissal is accompanied by bad faith”.

51. Moreover, I find that the retirement of the applicants before the prescribed retirement age though tempered by the award to them of some pensions benefits under section 6(1)(a)(v) of the Pensions Act, is however unsatisfactory. It denies them **full** pensions benefits as if they had worked to age fifty-five. Though of course, the power to grant any award under any pensions law is, by section 113 of the Constitution, vested in the Governor-General acting in accordance with the advice of the Public Services Commission; but for their untimely retirement, it is reasonable to suppose that all the applicants would work right up to the age of retirement and thereby expect full pensions benefits. And they aver as much in their affidavits.

Moreover, the retirement of a public officer “in the public interest” before the prescribed age of retirement is, it is reasonable to assume, bound to have other impact on that officer. This may range from loss of reputation (as family and friends and others are bound to wonder what exactly in the public interest has occasioned the retirement, thereby giving rise to unfounded speculation!). Such retirement may also involve the loss of

the satisfaction of discharging duties, and the loss of the opportunity for promotion. This does not include the financial loss entailed in the cessation of salary and emoluments on the retirement.

I must add that the potential losses are not relieved or lightened by the consideration that the officer is being asked to retire “in the public interest” when he is not even told what and why the inscrutable expression “public interest” has been brought into play and being given the opportunity to explain and possibly refute.

Also, a statement that a person’s head of Department has lost confidence in her and could not longer work with her, as all the applicants say happened in this case at their meeting with the Public Services Commission on 28th August 2003 (see paragraphs 6 and 7 of Mr. Smith’s first affidavit; and paragraph 4 of the respective affidavits of the other applicants), is, to my mind, very grave, and in the circumstances of the applicants, senior officers in a vital and sensitive department of the revenue of the State, this is a worrisome allegation that may have serious disciplinary if not criminal considerations or overtones, notwithstanding the assurances of the Director in the Office of the Services Commissions that no aspersion was intended to be cast on the applicants.

And not to be afforded information on, or details for the said loss of confidence and, be given an opportunity to explain and if possible correct or refute, but instead, to be asked to go on early retirement is, I find, well short of fair treatment and, not in accordance with natural justice and in the present circumstances, entails as well a denial of the right to work to gain a livelihood as provided for in section 15(1) of the Constitution.

52. **Secondly**, on the applicants’ claim in relation to section 17(1) of the Constitution. This section provides:

“17(1) No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under a law that ...”

It then proceeds to describe what such law must provide for.

It cannot seriously be argued that the applicants had proprietary right and interests in their jobs and the accompanying salaries and emoluments attached thereto. Nor for that matter, can it be argued that enforced retirement necessarily involves a cesser of those salaries and

emoluments. But equally also, I don't think, that this result can be described as compulsory taking or acquisition of those salaries and emoluments by the respondent or anyone else for that matter, within the meaning and contemplation of section 17(1) of the Constitution. The applicants were, as a result of their improper retirement, deprived of their salaries and emoluments. But their right to these salaries and emoluments and their undoubted interest in their jobs were neither compulsorily taken nor compulsorily acquired, I find, within the meaning and contemplation of section 17(1) by the respondent.

53. I am therefore unable to grant the Declaration the applicants seek on this score.
54. **Finally**, on the constitutional basis of the reliefs sought by the applicants. Section 20(2) of the Constitution empowers this Court to make such declarations and orders, issue such writs and give such directions as it may consider **appropriate** for the purpose of enforcing or securing the enforcement of any of the fundamental rights provision an applicant alleges was violated. Therefore, in the light of my findings on section 15(1) and the retirement of the applicants, I **order**, consistent with the seventh prayer in the motion, that all the applicants be reinstated in the Customs Department.
55. Also, even though I am unable to find for the applicants in relation to their claim regarding section 17(1) of the Constitution, I think, consistent with the thrust of my findings on the motion as a whole, it would be appropriate in the circumstances that, their salaries and emoluments to which, but for their enforced retirement on 18th September 2003, they were entitled, be restored. Accordingly, I **order** that these be paid to the applicants forthwith.

Conclusion

56. In the light of the foregoing, I accordingly **declare** and **order** as follows:

i) *The retirement of the applicants as Customs Officers in the “public interest” with effect from 18th September 2003 was contrary to section 106(4) of the Constitution of Belize and the Services Commissions Regulations (S.I. 159 of 2001) made thereunder and was therefore null and void;*

- ii) *the retirement of the applicants by the Public Services Commission “in the public interest” could only lawfully have been done if the applicants had been found guilty of some dereliction of duty, or offence against discipline, or some similar infraction or otherwise for reasonable cause and, in the circumstances of the applicants, Regulation 20 of the Services Commissions Regulations 2001, was not a valid basis or authority to have retired them, and that their said retirement was in the circumstances, a breach of the rules of natural justice and therefore void;*
- iii) *the retirement of the applicants in the circumstances was not in consonance with section 15(1) of the Constitution as it constituted a violation of their right to work guaranteed by the said section of the Constitution;*
- iv) *I order that the applicants be paid forthwith their salaries and emoluments which, but for their improper termination from 18th September 2003, they were otherwise entitled to.*
- v) *Accordingly, I order that all the applicants be reinstated to their positions as Customs Officers from which they were terminated on 18th September 2003.*
- vi) *I award costs of these proceedings to each applicant, to be taxed if not agreed.*

A. O. CONTEH
Chief Justice

DATED: 24th February, 2004.