JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 16 of 1965

BEFORE: The Hon. Mr. Justice Waddington - Presiding
The Hon. Mr. Justice Luckhoo J. A.
The Hon. Mr. Justice Graham-Perkins J.A. (Ag.).

B E T W E E N ALLAN GEORGE RICHARD BYFIELD - PLAINTIFF-APPELLANT

A N D EDWIN LEOPOLD ALLEN - DEFENDANT-RESPONDENT

Mr. V.O. Blake, Q.C., Mr. David Coore, Q.C., and Mr. R.N.A. Henriques for the appellant.

Dr. E.H. Watkins, Solicitor-General, Mr. W.D. Marsh, Q.C., and Mrs. E.A. Sang for the respondent.

December, 8-12, 15-16, 1969
January 12-16, 19-23, 26-27,
May 1970

GRAHAM-PERKINS J.A.(Ag.)

On the 3rd November, 1962 there appeared in the Daily Gleaner, at the instance of the Kingston School Board (hereinafter called "the Board") an advertisement inviting applications for the post of head teacher and assistant staff of the Trench Town Senior School, a new school scheduled to come into existence on the 1st January, 1963. The publication of this advertisement was the result of a letter dated 29th October 1962 addressed to the secretary of the Board by the Permanent Secretary in the Ministry of Education. Among other things this letter contained a request that the names of the applicants be submitted to the Ministry prior to the meeting of the Board for the purpose of selecting a head teacher. The Ministry also asked to be advised in advance of the date proposed for interviewing applicants so as to ensure that one of its officers would be available to advise the Board. By a letter dated the 19th November 1962, the Board advised the Ministry that applications for the post of head teacher had been received from four persons named, one of whom was the appellant.

On the 24th November 1962, the four applicants were interviewed

by the Board in the presence of officers of the Ministry who took an active part in those interviews. The Board, having concluded that the appellant was the most suitable of the applicants, on the same day wrote the Permanent Secretary advising that the appellant had been appointed "as head teacher .... subject to your approval, to assume duties in January 1963."

On the 11th December 1962 the Permanent Secretary wrote the Board as follows:

> "With reference to your letter of the 24th November 1962, I have been asked by the Minister to say that the policy he proposes to follow is to request that in the case of Heads of Senior Schools, two or three names should be submitted to him from which a selection will be made."

It would appear that the Board formed the view that this request offended against their authority and dignity, and, accordingly, resolved not to comply therewith. Instead, an interview was sought and obtained with the respondent. At this interview which took place on the 11th January 1963, the Board was represented by its Chairman, Mr.E.B. Johnson, and the Rev. Rhynie, among others. Present with the respondent were officers of his Ministry. The respondent for the first time disclosed his hope that all senior schools would in time become comprehensive schools in which event, he observed, a teacher qualified to be the head of a senior school would not necessarily be qualified to head a comprehensive school.

On the 18th January 1963, the respondent wrote to the Board as follows:

> "Dear Sir,
>
> I thank you very much for conferring with me recently on the question of the appointment of a Head for the Trench Town School. I wish to place on record that my confidence in you has always been high and has in no way diminished.
>
> I am, however, unable to accept the recommendation to appoint Mr. Byfield as Head of the Trench Town Senior School, and another offer which is in effect a promotion has been unofficially made to him.
>
> It is open to the Board to advertise again, but I would call attention to the crisis that has arisen in the Corporate Area, owing to the fact that very large numbers of children have been unable to secure admission to primary schools, and

that the very early appointment of a Head for the Trench Town Senior School would greatly assist in relieving the situation.

I therefore do not make re-advertising a requirement and if the Board agrees to submit two or three names, I will give the matter prompt consideration.

Yours truly,
E.L. Allen
Minister of Education"

This is, in part, the background against which the appellant on the 10th June 1963 commenced proceedings against the respondent. After setting out the matters hereinbefore mentioned and relating to the advertisement, his interview, and appointment by the Board, and the respondent's refusal, in purported exercise of his powers under Article 38 of the Education Code, to approve the appointment, the appellant alleged in paragraph 7 of his statement of claim that:

> "The (appellant) is, and was at all material times, known by the (respondent) to be a member of the People's National Party, and to hold political opinions appropriate to such membership."

By paragraph 8 the appellant alleged:

> "The (respondent's) refusal to approve the appointment of the (appellant) .... is attributable wholly or mainly to the (appellant's) political opinions ..., and amounts to discriminatory treatment within the meaning of section 24 of the Constitution of Jamaica."

and by paragraph 9 he alleged:

> "By virtue of the said discriminatory treatment the (appellant's) constitutional rights have been contravened."

The appellant then claimed a declaration that

> "The refusal of the (respondent) in his capacity as Minister of Education to confirm the appointment of the (appellant) as Headmaster of the Trench Town Senior School as set forth in a letter from the (respondent) ... dated the 18th day of January 1963 is in contravention of the fundamental rights and freedoms guaranteed to the individual by section 24(2) of the Constitution of Jamaica."

The appellant also claimed such further or other relief as may seem just and necessary.

In a short defence the respondent chose not to admit the allegation in paragraph 7 of the statement of claim. By paragraph 3 the respondent denied the allegation in paragraph 8 of the statement of claim and continued:

> "If, which is not admitted, the (respondent) refused to approve the appointment of the (appellant) such refusal was in lawful exercise of his powers and does not amount to discriminatory treatment within the meaning of section 24 of the Constitution of Jamaica."

And by paragraph 4 the respondent denied that the alleged or any constitutional rights of the (appellant) had been contravened by any action on his part.

In this state of pleading the matter came on for trial before the Full Court of the Supreme Court with Phillips, C.J. (as he then was) presiding. Small J. and Moody J. (as he then was) were with him. After a trial commencing on the 24th February 1964, and extending over a total of some twenty-four days, majority judgments were delivered on the 26th April 1965 by Phillips C.J. and Small, J. in favour of the respondent. Moody J. found in favour of the appellant and awarded him damages in the sum of £2,500 with costs.

The appellant now appeals against the majority judgments and asks for the declaration claimed in the statement of claim and damages in the sum of £2,500. Alternatively, he asks that judgment be entered in his favour for such reduced sum and/or other relief as to this Court seems reasonable. In the further alternative he asks for a new trial.

In his judgment Phillips C.J. expressed himself thus:

> " ..... the case now resolves itself into a main issue of fact, as to whether the main reason given by the (respondent) for refusing to approve the appointment was because he intended the school to become a comprehensive school or whether it was because of the political opinions held by the (appellant)."

Small J. thought that "the great question" was, "what is the real reason as indicated by the evidence why (the respondent) refused to sanction the appointment of (the appellant) as head of the proposed Trench Town Senior School?" An examination of the issues raised by the pleadings reveals that the question posed by Phillips C.J. and Small J. was the precise

question of fact the Full Court was required to resolve. Both these learned judges came to the conclusion that the answer to the question posed was that the substantial reason operating in the respondent's mind was that the appellant did not possess the necessary qualifications to become the head or deputy head of a comprehensive school.

The appellant has taken some nine grounds of appeal all of which seek, in one way or another, to challenge certain findings of fact in the majority judgments and certain inferences drawn therein from facts found and/or undisputed. It becomes necessary, therefore, that this court, in its approach to the several matters raised by these grounds of appeal constantly keep in mind the three propositions enunciated by Lord Thankerton in Watt v Thomas (1947) 1 A.E.R. 582 at p.587 as follows:

> " (i) Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.
>
> (ii) The appellate court might take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> (iii) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

Before I proceed to an examination of the majority judgments in relation to the matters of which the appellant complains, and more particularly on the background of the propositions above stated, it is desirable, I think, to set out certain other facts and circumstances which may be said to have been proved or admitted during the hearing.

At the material time the proposed Senior School at Trench Town was located in a constituency held by the Jamaica Labour Party (hereinafter

referred to as the J.L.P.). This Party of which the respondent is a member, formed, and indeed still forms, the Government of Jamaica. The respondent is the Minister of Education. The appellant is a member of the People's National Party (hereinafter referred to as the P.N.P.), which formed, and still does, the official Opposition in the House of Representatives. The appellant was, at all material times, known by the respondent to hold political opinions appropriate to his membership of that party. The Trench Town area had been for some time the scene of political incidents and violence involving factions of both political parties. Prior to December 1962 the respondent had seen seven instances of teachers, members of the P.N.P., applying for posts in schools in constituencies held by the J.L.P. He came to regard this exercise as a pattern of what was described as "strategic positioning." The appellant was regarded by the respondent as a politically-minded teacher whose application for the headship of the Trench Town Senior School was seen by him as another example of this strategic positioning. These last two mentioned circumstances were present to the respondent's mind when he came to decide not to approve the appellant's appointment.

On the 27th December 1962 there appeared in the Daily Gleaner a statement issued by the Central Executive of the Jamaica Union of Teachers in which fears were expressed that the appointment of teachers was being influenced by political considerations. The respondent regarded this statement as "in effect charging (him) with political bias in sanctioning appointments to schools ....." and accordingly deemed it necessary to reply thereto in a letter in which he denied the alleged charge. Subsequently the respondent made two public statements, one in the Daily Gleaner on the 23rd February 1963, and the other in the House of Representatives on the 12th March 1963. In these statements he assigned varying reasons for his refusal to sanction the appointment of the appellant. In his statement of the 23rd February 1963, the respondent indicated as the reasons for his refusal the following:

(a) He preferred a Mr. Edwards, one of the original four applicants. This gentleman was not himself qualified for the headship of a comprehensive school.

(b) Government was still considering whether the school should operate as a comprehensive school and he had reason to believe that if the school eventually became a comprehensive school the appellant would not have the necessary qualifications to be head and this could cause embarrassment.

In his statement to the House of Representatives the respondent said:

"I gave the (Board) the following reasons:-

(i) Mr. Byfield was not the best qualified, professionally;

(ii) I disliked the policy of passing over the head of the existing all-age school from which the senior children would be drawn because the head teacher and the public might regard this as a suggestion that the head teacher was not suitable, which was not so in this case;

(iii) I did not know whether in view of Government's new priorities resulting from the failure of a number of children to find places in primary schools, it would still be possible to make the school a comprehensive school, and that a final decision on that matter had not yet been taken.

I went on to say that if a decision to make the school comprehensive should in the future be taken Mr. Byfield would not be qualified to be the Head, and this would be embarrassing for obvious reasons.

Mr. Johnson, the Chairman of the Board, then asked me whether I would consider Mr. Byfield for the Junior School in case they recommended Mr. Edwards for the Senior School. I replied I would rather not. The Committee then pressed for a reason. I told them that I was unwilling to give the reason. Upon further pressure, I told them what I had to say confidentially, and charged them not to repeat it - that I understood Mr. Byfield had been a political organiser in the area and that while I felt that a man of his character would not advise his political followers to commit violence, a political murder had nevertheless occurred in the area."

It is to be noted as to (i) above that the respondent did not say that the appellant was not qualified to head a comprehensive school. What he appeared to be saying was that the appellant was not the best qualified of the four applicants. As to (ii), he appeared to be suggesting that a very important consideration involved in his refusal to approve the appointment of the appellant was the possibility of the public coming to a conclusion that Mr. Edwards was not suitable for appointment. This,

in the respondent's view, was not the fact. As I have already noted, Mr. Edwards was not qualified to head a comprehensive school. This fact was within the knowledge of the respondent.

At the trial of the action which commenced more than two years after the respondent's refusal to sanction the appellant's appointment the respondent in his evidence maintained that his "sole and solitary" reason for his refusal was the appellant's lack of qualifications to head a comprehensive school. In effect, he repudiated the other reasons which he had given between January and February 1963.

It is, at this point, desirable, for the purpose of appreciating the true purport of certain of the grounds of appeal herein, to deal with a matter which formed the basis on which certain submissions advanced by Dr. Watkins rested. That matter related to the time at which the respondent's state of mind was to be determined. The importance of this cannot be too strongly stressed as it is, in my view, perhaps the most critical facet of the evidence and must be kept sharply in focus in any attempt to resolve the complex issues of fact that arose for determination. In paragraph 6 of his statement of claim the appellant alleged that:

> "On the 18th day of January 1963 the (respondent) in purported exercise of his powers under Article 38 of the Education Code ..... refused to approve the appointment of the (appellant) to the said post."

And by paragraph 9 he claimed a declaration in the terms noted above.

Dr. Watkins argued in effect that the appellant and indeed the Full Court, were bound by the allegation in paragraph 6 of the statement of claim, and that those findings in the majority judgments which involve the respondent's state of mind must be viewed in the light of that state of mind as it existed on the 18th January 1963. In any event, says Dr. Watkins, that was the precise complaint in paragraph 6. An examination of the respondent's evidence, however, reveals that he made it abundantly clear, and indeed on more than one occasion, that he arrived at his decision not to sanction the appointment of the appellant at some time between the 24th November 1962 and the 11th December 1962. There cannot possibly be the least doubt in anyone's mind about this. It is true that he did not formally communicate this decision in writing to the Board until

the 18th January 1963. It is clear, however, that he did disclose his decision to the deputation from the Board on the 11th January 1963. Moreover it is not unfair to say that his decision was communicated to the Board, at least by implication, in the letter of the 11th December 1962 by his Permanent Secretary. There was, therefore, before the Full Court, clear, unequivocal evidence by the respondent as to the time at which he determined not to approve the appointment of the appellant. It must be noted, too, that the respondent, his Permanent Secretary, and perhaps his other senior officials, would be the only persons expected to know precisely when that decision was taken. The appellant was therefore driven, in his statement of claim, to rely on the letter of the 18th January 1963. It was not until the respondent entered the witness box that it was revealed for the first time that he had come to his decision some time prior to the 11th December 1962. In this state of the evidence it is unthinkable that the Full Court could have ignored the unmistakably clear evidence of the respondent and proceeded entirely on the basis of the allegation in paragraph 6 of the statement of claim. It may legitimately be said that at the end of the respondent's case it became the duty of counsel for the appellant to apply to amend para. 6. On counsel's failure to so apply it became, in my view, the duty of the court to invite, if not to insist upon, a proper amendment. But this is a very far cry from any proposition which involves some theory that findings of fact must be based on pleadings rather than on evidence. Suppose a case where in the course of proceedings it was proved that a deed sued upon was a forgery, and that the defendant did not plead it or did not know that it was a forgery, could a court give judgment on the deed on the basis that it was valid? See per Buckley L.J. in Re Robinson's Settlement, Gant v Hobbs (1912) 1 Ch. at pp.627 to 728, where a not dissimilar principle is considered. See also Leavey & Co. Ltd. v George H. Hirst and Co. Ltd. (1943) 2 A.E.R. 581 for the rather helpful observations of Lord Greene M.R. on the duty incumbent on a trial judge and on counsel on each side to see that proper applications for leave to amend are made, and to see that the record is kept in order and is dealt with modo et forma.

I am satisfied that the respondent's state of mind bearing on his refusal to approve the appointment of the appellant must be ascertained by reference to the period commencing on the 24th November 1962 and ending on the 11th December 1962. This does not, of course, mean that the court must exclude from its consideration all or any evidence of events subsequent to the 11th December 1962. Such evidence may well be relevant insofar as it lends any assistance in answering the vital question: What was the substantial reason operating in the respondent's mind up to the 11th December 1962 when he refused to sanction the appointment of the appellant?

The appellant's case was that the true, and indeed the only, reason why the respondent refused to sanction his appointment was because the respondent regarded him as an active and prominent member of the P.N.P. and an organiser and so did not wish to appoint him to a school in a constituency held by the J.L.P. In seeking to establish this the appellant called the Rev. Rhynie, among others, to testify as to what transpired at the interview between the deputation from the Board and the respondent on the 11th January 1963.

Rev. Rhynie's evidence was to the following effect: The respondent, having welcomed the deputation, went on to say that all senior schools may, in time, become comprehensive and that a person appointed as head of a senior school may not be appointed to head a comprehensive school and may be greatly hurt. The respondent made no specific mention of the Trench Town Senior School and his statement attracted no comment from the deputation. It was a general and quite vague statement. The respondent then continued by saying that the appellant was well known to him, and that he had the highest regard for him, and that although Mr. Edwards was a good average teacher the appellant was an outstanding teacher. The respondent, however, expressed his regret that he could not sanction the appointment of the appellant because he, the appellant, was an active participant in party politics and an organiser. The respondent did not advance as a reason for his refusal that the appellant was not the best qualified candidate. Nor did he say that Mr. Edwards, the then Head of the Trench Town All-Age School, had an equal or better claim to be considered, or that he dis-

liked the policy of passing over the head of the All-Age School. The respondent placed greater stress on the reason he advanced for his refusal, that is, the appellant's participation in party politics and his being an organiser, than he placed on his reference to the possibility of senior schools becoming comprehensive. The deputation was shocked at the introduction by the respondent of considerations of politics into the matter of sanctioning the appointment of teachers. This was because the respondent had, on previous occasions, been heard to express the view that politics should be kept out of the schoolroom. The respondent assured the deputation that if the appellant applied for the new Porus Senior School or the Papine Senior School he would give favourable consideration to such an application.

It is noteworthy that nowhere in the cross-examination of Rev. Rhynie was he challenged as to his evidence about the Porus Senior School, nor, indeed, as to his evidence about the reason given by the respondent concerning the appellant's active participation in party politics and his being an organiser. Indeed, an examination of the cross-examination of this gentleman lends itself to the conclusion that it rested to a large extent on the acceptance of these two premises.

I pass on now to examine the grounds of appeal and I propose to deal with them in the following order:

Grounds 5, 8 and 9

It will be convenient to deal with these three grounds together. During 1962 there were, in the course of construction, four schools in respect of which the respondent entertained the hope of seeing them become comprehensive schools. One of these was the Porus Senior School. On this aspect of the appellant's case Rev. Rhynie said in his examination-in-chief:

> ".... the (respondent) said that there is soon to be a position at the new Porus Senior School and there is a possibility of a position at the Papine Senior School, which is the best of all the senior schools, and if the (appellant) should apply he would give favourable consideration to it."

This vital bit of evidence was allowed to go completely unchallenged. The evidence of Mr. E.B. Johnson on this point was to the same effect. That,

too, went unchallenged. That this evidence was vital was clearly recognized by Small J. who was constrained to observe -

> "If this offer had in fact been made, it indeed defeats and destroys the suggestion that the real reason for refusing the appointment to the Trench Town Senior School was because of the lack of Mr. Byfield's educational qualifications. It is very important from Mr. Allen's standpoint, as he would know at that time, that the Porus School was among the chosen four - so why make that offer?"

Small J. appears to be using the word "offer" in a somewhat unhappy context since the respondent had no authority in law or in fact to offer the appellant the headship of the Porus, Papine, or any other school. Unhappily too, although the learned judge had directed himself to the obvious importance of that evidence he proceeded to a finding which was singularly irrelevant to the enquiry on which he had embarked, namely, an enquiry into the respondent's state of mind. The learned judge said:

> "Mr. Allen on oath in court states he did not offer Porus Senior School. On the evidence I find that he did not make any such offer."

For this finding Small J. relied on two circumstances, in addition to the respondent's denial. Firstly, "On the 16th January 1963 when Mr. Byfield attended at the Ministry in answer to a telephone call it was Papine School or an Inspectorate that was offered to him." Secondly, "In Mr. Allen's letter to the School Board dated 18th January 1963, informing it that the Byfield appointment was not being sanctioned he said that 'another offer which is in effect a promotion has been unofficially made to him Mr. Byfield' ". It was no part of the appellant's case that the respondent had offered him the Porus Senior School. Nor was any such suggestion put to the respondent. The relevant and critical question was: Did the respondent say to the deputation what Rev. Rhynie and Mr. Johnson quoted him as having said? Did the respondent tell the deputation that he would give favourable consideration to the appellant's application for the headship of the Porus Senior School? The learned judge quite unaccountably failed to address his mind to this very vital question, the answer to which would undoubtedly have been of critical importance to the appellant's case, and equally so to that of the respondent. His failure to pose that question

and arrive at a finding thereon must have contributed in no small measure to his principal finding which he expressed thus:

> "I find that what with his preoccupation with the need in Jamaica for comprehensive schools and his obvious emphasis on the need for University training for Head Teachers of schools above the level of Primary Schools and the imminent plans he entertained for the Trench Town All-Age School and Mr. Byfield's obvious and admitted lack of qualification for the headship of a comprehensive school, he refused to confirm the School Board's appointment."

In a very real sense too, this misdirection on the part of Small J. would have paved the way for his failure to appreciate the significance of the respondent's evidence that had it not been for the appellant's arrogance he would have sanctioned his appointment to the Trench Town Senior School. It would also explain why the learned judge was able to find that the dominant factor in the respondent's mind at the material time was that of qualification.

The Chief Justice nowhere in his judgment deals with this crucial aspect of the evidence, and this in spite of the fact that he regarded Rev. Rhynie as an unimpeachable witness whose evidence he accepted. Accepting as he did the evidence quoted above it is by no means an easy task to understand how the Chief Justice could have failed to appreciate its importance. But fail he quite clearly did. And having so failed I am compelled to the view that this non-direction must, to a considerable extent, have influenced his principal finding.

It was argued by Dr. Watkins that whatever significance it may have been possible to attach to the circumstances surrounding the "offer" or mention of the Porus Senior School became quite devoid of meaning in view of the respondent's evidence that that school had been removed from the list of priority touching those senior schools slated to become comprehensive. The evidence does not support this. Rather it appears that the Porus School only lost top priority but remained within the frame-work of priority. The cross-examination of the respondent on this matter of priority is not without importance.

Q. You never mentioned Porus Senior School to the deputation?

A. I don't think so, no.

Q. But we have evidence in the case from Rev. Rhynie to the effect that you mentioned Porus.

A. I don't think I mentioned Porus. Q. We have evidence.

A. I had other views about Porus at the time. I would not say someone did not mention it but I could hardly have done so because of the views I had.

Q. If the fact is, Mr. Allen, that you did mention Porus, one of the schools which you expected or thought might have become a comprehensive school, you could hardly have refused to sanction Mr. Byfield to the Trench Town Senior School because he was not qualified to head it in the event it became comprehensive?

A. Let me answer that. The position is that at first I had the idea that all these schools - senior schools - would become comprehensive. When I found the Cabinet could not spare me the money to implement that policy some were eliminated and others remained with a possibility of becoming a comprehensive school. Because of its less suitable location Porus was one of the first ones to be eliminated. Q. Eliminated?

A. Eliminated that one from the list, that if I got a few - that is what I mean - if I got a very small number Porus would not have been one because of its unsuitable location.

Q. When about was it that you eliminated Porus as one of those?

A. On the day when the Cabinet told me - I think it must have been in October. Q. October when?

A. About October 1962 when they said we must watch this population problem in the Primary Schools before we can create comprehensive schools.

Q. But then, Mr. Allen, I understood you to tell us, you know, that in November 1962 some of the schools that you thought might one day become comprehensive schools were Sav-la-Mar, Porus, Zorn, Trench Town.

A. One day. Q. Yes.

A. But there would be an order of priority if they all could not become comprehensive at the same time.

Q. I thought you were just telling me that before that day you had eliminated Porus. Did it stage a come-back?

A. Not eliminated to the extent that this school should never become a comprehensive school but putting it lower down in the order of priority. Eliminating it from the top priority. M'Lord this requires an explanation.

PHILLIPS, C.J. Yes.

A. When we were thinking first of making schools comprehensive the easiest ones to deal with would be those for whom heads had not yet been appointed. This was so because no one would have to be displaced from his job but if ever those which were functioning as senior schools came to be transformed into comprehensive schools, one would have to consider the position of the heads.

SMALL, J. Of the then heads?

A. Of the then heads Sir for it would be very embarrassing to dismiss them. For that reason M'Lord the new schools without heads had a higher priority.

Later on the cross-examination continued.

SMALL, J. I would like to ask a question before we go on too far. You just said Mr. Allen that the question of a high priority to those schools which did not have a head ranked high in deciding on which was going to become comprehensive.

A. Originally that was so. That was the original position.

Q. How do you explain the position of Trench Town.

A. Well M'Lord Trench Town was the most suitable of all the schools for many reasons, Sir.

Q. Despite the fact that you would be in danger of displacing the head that was there?

A. No, Sir, he would not be displaced. There was no head there.

Q. Oh, I see. So when you spoke of displacing heads you spoke of heads of senior schools?

A. Yes, Sir, schools that were actually running as senior schools.

SMALL, J. I see. Thank you.

I was quite disturbed by the same consideration that appears to have disturbed Small, J. Unhappily, however, it does not appear that Small J. got the answer he was seeking after. I have been unable to discover any evidence that could tend to the conclusion that the Porus Senior School was on or before the 11th January 1963 ready to commence functioning as such, or that any appointment had been made to the headship of that school. In terms of priority, was that school not therefore among those which, being without heads, had a hign priority? Although Small J. did not get an answer it does not appear that the point escaped

him. The fact that he recognized the importance of determining whether the Porus School was the subject of an "offer" or not would tend to confirm this. And it is nothing to the point that he misdirected himself as to the essential question.

I now examine this matter of the appellant's arrogance. Not only was it a matter of supreme importance since it went to the respondent's state of mind but to the equally important factor of the respondent's credit, and as well to the heart of the enquiry. The respondent was asked in cross-examination:

Q. Mr. Allen, do I understand that what you are saying is that the reason why you felt you could not have a discussion with him concerning a provisional appointment was because of his arrogance?

A. Yes.

Q. Now, when was it that you came to the conclusion that Mr. Byfield was so arrogant that you could not have a discussion with him concerning a provisional appointment?

A. Some time shortly before the 11th December 1962.

Here the respondent was saying that he had formed his conclusion as to the appellant's arrogance at some point of time during the period within which he decided not to sanction the appellant's appointment. His evidence also made it clear that he was quite pointedly telling the court that it was this arrogance in the appellant that precluded any negotiation or discussion with him on the subject of a provisional appointment, and that but for this arrogance he would have approved the appellant's appointment. To say that it was fundamental to the issues of fact between the parties generally, and to the justice of the case in particular, that this question of arrogance required the most careful examination is to state the obvious. Its importance quite inexplicably, however, appears to have escaped the attention of the Chief Justice and Small, J.

In his cross-examination as to the circumstances in which he came to form his view as to the appellant's arrogance the respondent said that he had asked one or two questions of Mr. Bent or Mr. Cousins, or both, and they told him "about things that came up to the Ministry". He also relied on "that opinion expressed by some senior officer on his (the appellant's) confidential file" to the effect that the appellant was arrogant. It does

not appear that that senior officer was either Cousins or Bent. On the respondent's evidence it is quite clear that he was alleging that his judgment as to the appellant's arrogance was a judgment founded wholly on what Bent or Cousins, or both, had told him and on the opinion of a senior officer expressed in the appellant's file. This, he swore, was prior to the 11th December 1962. Up to this date, by which time he had decided not to sanction the appellant's appointment, he had not seen the appellant's confidential file. He had, he says, only made enquiries of his officers directed to the appellant's record as a teacher. He did, however, see this file on or shortly after the 16th January 1963. He had asked for it on receiving a report as to the appellant's "strange" behaviour on the occasion of the meeting between his senior officers, Cousins and Bent, and the appellant on that date when the appellant is alleged to have described himself as the most outstanding teacher in Jamaica dead or alive. It is not a little odd that the respondent should have regarded this claim by the appellant as "strange" in view of the former's antecedent judgment as to the latter's arrogance, a characteristic that had somehow managed to escape detection by the respondent during some fifteen years of personal knowledge and acquaintance-ship, and which became manifest only shortly before the 11th December 1962 and then only as the result of answers given him by Bent and/or Cousins to "one or two questions". Be that as it may, Cousins made it clear that he entertained no thought as to the appellant's arrogance prior to the 16th January 1963. Nor does it emerge from the evidence that he saw the appellant's file before the 11th December 1962. Inferentially, therefore, it could only have been Bent that could have given any information to the respondent prior to the 11th December 1962 on the basis of which the latter could have formed any judgment as to the appellant's arrogance. And on his own evidence the respondent had not up to that time, seen any opinion by any senior officer to the effect that the appellant was arrogant. Bent was not called as a witness, nor was any senior officer other than Cousins. In these circumstances it became eminently desirable to determine whether as a matter of evidence that file contained at some time prior to the 11th December 1962 any material which could lead a reasonable

person to the view that the appellant was an arrogant man. The evidence on this point revealed that no such material appeared on that file. In his statement to the Gleaner Education Reporter published on the 23rd February 1963 the respondent began thus:

> "In order to set the record straight with regard to the appointment of a head teacher for the Trench Town Senior School, I now think it necessary and desirable to use this means of making a public statement on the matter. The facts set out below will show that as far as this issue is concerned, Mr. Byfield has no case ..."

In this attempt "to set the record straight" the respondent makes several references to the appellant's arrogance, but it is not without some significance that each of these references relates specifically to the appellant's statement on the 16th January 1963 to Bent and Cousins to the effect that he was the best teacher in Jamaica. Nowhere in this extraordinarily long statement does the respondent touch on the appellant's arrogance as his reason for not approving a provisional appointment. Surely, all these circumstances involving as they did the vital issue of the respondent's bona fides and credit call for the most searching scrutiny. Unfortunately, however, the Chief Justice thought that it was quite irrelevant to consider the question whether the respondent did in fact come to a conclusion as to the appellant's arrogance prior to the 11th December 1962, and the further question whether, assuming such a conclusion, there was on the evidence any reasonable justification therefor. Small, J. made no finding of fact on this issue and was apparently content merely to adopt the ipsi dixit of the respondent that he regarded the appellant as being so arrogant that he could not discuss a provisional appointment with him. In these circumstances it is clearly open to this court to arrive at its own conclusion on the evidence on this aspect of the case, and for myself I have not the least difficulty in holding that whatever views the respondent may have formed as to the appellant's arrogance he held no such views prior to the 16th January 1963. This is in my view a very obvious example of non-direction on the part of Small, J., and misdirection on the part of the Chief Justice, which calls for the application of Lord Thankerton's third proposition. This observation applies equally to the

misdirection and non-direction of Small, J. and the Chief Justice respectively noted earlier.

In dealing with this matter of arrogance and the question of a provisional appointment the Chief Justice appears to have assumed, in spite of the evidence, that there was no uncertainty about the Trench Town Senior School becoming comprehensive. The fact that it subsequently became so is nothing to the point. Proceeding from that assumption the Chief Justice dismissed an essential question from his mind and thereby precluded himself from examining the truthfulness and validity, or otherwise, of the reason advanced by the respondent for his decision not to discuss or to approve a provisional appointment. Small, J. for similar reasons was able to say in his ultimate finding that the respondent entertained "imminent plans" for the Trench Town All-Age School. I do not myself see or understand how Small, J. could have arrived at this particular finding.

I would observe in parenthesis that I am not by any means clear as to what is strictly involved in a provisional appointment. The Board had appointed the appellant to a senior school. This appointment was subject to approval under the Education Code. There does not appear to be anything in the Code to authorise a provisional appointment. If he had sanctioned the appellant's appointment the respondent would have sanctioned an appointment to a senior school. If thereafter that school ceased to be a senior school, certain consequential changes would have followed, but these would in no way affect the original appointment. I recognize, however, that this matter of a provisional appointment was relevant to the respondent's state of mind rather than to his authority under the Code.

Grounds 4, 6 and 7

The learned Chief Justice in assessing the evidence of the Rev. Rhynie said:

> "Rev. Rhynie, a non-partisan witness, and whose reputation is unimpeachable, was faced, as a member of the deputation, with the same apparent inconsistency. Rev. Rhynie whose evidence I accept states ...."

The Chief Justice then quoted a series of questions and answers from the evidence of the witness. I now quote two of those questions and the

answers thereto.

> Q. And he has been saying this also over the years that you have known him, you have discussed matters with him, politics shouldn't come into the schoolroom, politics shouldn't interfere with education?
>
> A. Yes, he has said that and that is what shocked us when we met as a deputation that he said one thing and now he was acting another.
>
> Q. And you think the reasons that he gave were not good enough for him to depart from this saying of his - keep politics out, keep politics out?
>
> A. I think the reasons he gave to the deputation were those he truly believed at heart or held.

The Chief Justice then arrived at a quite remarkable conclusion which he expressed thus:

> "It would seem that Rev. Rhynie believed that the Minister honestly intended to keep politics out of education and he actually thought he was doing so."

This was quite the reverse of what the witness had said and demonstrates an inexplicable failure on the part of the Chief Justice to appreciate what the witness clearly sought to convey. Rev. Rhynie had given evidence as to the reasons advanced by the respondent for his refusal to sanction the appellant's appointment. One of those reasons, the one advanced with greater stress, was the appellant's active participation in party politics and his being an organiser. The witness was shocked when the respondent introduced considerations based on politics into the matter of the appellant's appointment. In Rev. Rhynie's view there was a very real, and not merely apparent, inconsistency in the respondent's utterances. By so misunderstanding the unmistakably clear evidence of this witness the Chief Justice precluded himself from investigating the true state of the respondent's mind when the latter decided not to sanction the appellant's appointment. On this aspect of the case the Chief Justice said:

> "It is not inconceivable that Rev. Rhynie misconceived the Minister's meaning when he spoke of Mr. Byfield's 'past active participation in party politics.' He did not appreciate that the Minister meant to convey that anyone so actively participating in party politics ought not to be the head teacher of that particular school in that particular area."

There can be no doubt that in this passage the Chief Justice is saying that he accepts that the respondent told the deputation that he had refused to sanction the appellant's appointment because of the latter's participation in politics. It is important to note that nowhere in his evidence extending over some three days does the respondent admit, either directly or inferentially, that he made any mention to the deputation from the Board of the appellant's past active participation in party politics, or of his being an organiser. On the other hand, no express denial came from him. It is to be noted too, that nowhere in the several utterances made by the respondent, both before and after the 11th January 1963, did he advance the appellant's participation in party politics as the reason for his decision not to sanction the appointment. Apart from the 11th January 1963 the only other reference I have been able to trace appears in his statement to the Gleaner Education Reporter in these terms:

> "Mr. Byfield is reported to have said - 'I am no politician; what I want to do is to teach'. It is common knowledge that Mr. Byfield was in Trinidad for nearly four years in a whole-time political job. Before, during and since that time, he has been on several political platforms and his name was recently mentioned as a political organiser of the P.N.P."

With regard to the political inflammability of the Trench Town area the respondent was at pains to make it unmistakably clear in the course of his evidence that this consideration in no way influenced his decision not to approve the appellant's appointment. This also appears from his statements subsequent to the 11th of January 1963. No occasion therefore arose at any time for the respondent to offer any explanation for any reference to the appellant's active participation in party politics for the very simple reason that he did not at any time admit any such reference. In spite of this state of things, however, the Chief Justice not only accepted that the respondent did advance this question of party politics as the main reason for his decision not to sanction the appellant's appointment, but proceeded to define what the respondent meant to convey by this attributed reference to the appellant's participation in party politics. It was undoubtedly open to the Chief

Justice to find as a fact that the respondent did advance the appellant's party politics as the reason for his refusal, but I can see not the least justification on the evidence or in logic for using this finding to impose on the respondent a state of mind quite inconsistent with what the evidence before the Chief Justice disclosed. Later in his judgment the Chief Justice said:

> ".... though in his evidence the Minister denied that the political inflammability of the area had anything to do with the refusal to appoint Mr. Byfield to the senior school, nevertheless, I find as a fact that it was an operating factor in his mind at the time ..."

In his evidence the respondent had said, in rather precise terms, that the question of political inflammability entered his thoughts for the first time on the 11th January 1963, and then only with particular reference to the then non-existent Junior School at Trench Town. In equally precise terms he had said that this question was not considered by him at all in connection with the senior school. In these circumstances I do not question that it was open to the Chief Justice to reject the respondent's denial, but what I do question is whether, having accepted Rev. Rhynie's evidence, and having rejected the respondent's denial, it became open to him to substitute for that denial a state of mind defined by reference to Rev. Rhynie's evidence but involving attributes which that evidence clearly denied in terms of time, content and meaning. In my view any analysis and assessment of evidence that can bring about this result must at once be repudiated. It offends against both principle and reason and involves a serious misdirection.

In dealing with this aspect of the case Small, J. said:

> "I find that Mr. Allen did not at the interview (i.e. with the deputation from the Board) speak of political inflammability of the area in connection with the reason for refusing to approve the appointment to the senior school, though he did have it in mind in considering whether to approve or not to approve, ..."

Later in his judgment the learned Judge said:

> "I find that at the time of his refusal he did have in mind the fact that Mr. Byfield was an active participant in the People's National Party Politics and that the Trench Town area was politically inflammable."

Although Small, J. does, in an earlier part of his judgment, advert to the evidence of Rev. Rhynie and Mr. Johnson as to the respondent's reference to the appellant's participation in party politics, he does not in so many words say whether he accepts that evidence or not. It is clear, however, that his finding just quoted must have been predicated upon an acceptance of that evidence. Having accepted that evidence I find it not a little difficult to appreciate the significance of the finding as to political inflammability. Unless this finding can be construed to mean that political inflammability was a factor which influenced the respondent's refusal it adds precisely nothing to the enquiry. Small, J. appears to be saying no more than that at the time of the respondent's refusal the Trench Town area was politically inflammable. This may very well have been the fact. For myself I fail to detect its relevance. What is important, however, is that Small, J., having accepted Rev. Rhynie's evidence, found that the fact of the appellant's active participation in P.N.P. politics was present to the respondent's mind at the time of his refusal to sanction the appellant's appointment. It is quite possible that in arriving at his finding Small, J. did not overlook the following significant indicia:

(i) The respondent's evidence that he regarded the appellant's application as part of the strategic positioning of P.N.P. minded teachers in constituencies held by the J.L.P.

(ii) The knowledge of the respondent that the Trench Town Senior School was located in the constituency of South-West St. Andrew, a J.L.P. held constituency, the sitting member of which was the Hon. D.C. Tavares.

(iii) The respondent's statement concerning the disgraceful treatment meted out to his wife when the P.N.P. formed the Government of Jamaica.

Ground 1.

The complaint here is that -

"The Chief Justice and Small, J. found that the respondent refused to sanction the appellant's appointment to the Trench Town Senior School because the said school was to become a comprehensive school, and the appellant was not qualified academically for a post as head of such a school.

In coming to this conclusion, the learned judges failed to give any or any adequate consideration to the following undisputed facts and/or inferences to be drawn from the undisputed facts:-

(i) The Kingston School Board was never asked by the Ministry of Education or the respondent to select a person who could become the head of a comprehensive school.

(ii) Neither the respondent nor the Ministry advised the Board that the applicants for the post of headmaster of the Trench Town Senior School would be unsuitable to become the head or deputy head of a comprehensive school, notwithstanding the fact that a list of the applicants had at the request of the ministry been submitted by the School Board to the ministry long before the applicants were interviewed by the Board.

(iii) Although none of the persons interviewed by the Board was qualified to become the head or deputy head of a comprehensive school, the respondent after his decision not to appoint the appellant was asking the Board to submit a list of two or three names drawn from the persons interviewed from which he would make a selection for the post of headmaster of the Trench Town Senior School.

(iv) The respondent himself did not expect the Board to submit to him the name of a person who was qualified to be the head of a comprehensive school.

(v) That the respondent could not have intended to appoint a person who was qualified to be the head of a comprehensive school to the headmastership of the Trench Town Senior School before Government had made any decision concerning the future of senior schools.

(vi) That although the respondent's main reason for not appointing the appellant to the Trench Town Senior School was because he would not be qualified to head the school if and when it became comprehensive, he was prepared to appoint Mr. L.R. Pape or Mr. C.S. Edwards, neither of whom had the qualifications for a comprehensive school, on a temporary basis."

I think that the opening words at (vi) above do not accurately express the complaint there made. It seems that the appellant's real complaint here is "that although the respondent said that his main reason, etc.,". However that may be, I have not the least doubt that the complaint in this ground is substantially justified. It is perhaps somewhat trite to observe that any investigation into the state of mind of a person against whom a charge of something so subtle as discrimination is levelled, involves an exercise in the critical analysis of those circumstances, patterns of conduct, and demonstrations of intent which invariably speak so much more eloquently than mere words. These are not infrequently capable of rational explanation on some given hypothesis. At times, however, given that same hypothesis, they defy reason and rational explanation. A search must therefore be made for some other reasonable hypothesis.

In an examination of the several matters of which complaint is here made, it is important to note that although the ministry and the respondent knew the identity of the applicants and their qualifications some considerable time before they were interviewed by the Board, the fact that none of these applicants would be suitable to head a comprehensive school was kept a closely guarded secret from that Board. Indeed, it is clear from the Permanent Secretary's letter of the 11th December 1962 to the Board requesting it to submit two or three names from which a selection would be made by the respondent, that the respondent at that time demonstrated the clearest possible intention to appoint as head of the Trench Town Senior School a person known by him not to possess the qualifications necessary to head a comprehensive school. This intention in the respondent was again manifested in precise and unequivocal language when in his letter of the 18th January 1963 to the Board he spoke of the necessity for "the very early appointment of a head for the Trench Town Senior School" and advised the Board that he did not make re-advertising a requirement and would settle an immediate appointment if the Board would submit the names of two or three persons other than the appellant's.

In these circumstances I find it quite impossible to avoid the conclusion that all the matters above mentioned must have escaped the attention of the Chief Justice and Small, J. How else could these learned

judges have formed the view that the respondent's substantial reason for refusing to approve the appellant's appointment to the Trench Town Senior School was the latter's lack of qualification to head a comprehensive school? These were matters, among others, that pointed the way to a discovery of the true state of mind of the respondent at the material time. On the hypothesis that the respondent's real reason for refusing to sanction the appellant's appointment was the latter's lack of qualification, what was the rational explanation for his conduct? None was offered, certainly none was found.

I am satisfied that no due consideration, if any at all, was given these matters by either the Chief Justice or Small, J. And when these matters are viewed on the background of the appellant's alleged arrogance and the circumstances surrounding the Porus Senior School already discussed, I find it not a little difficult to appreciate the true purport of Small J's principal finding. It may well be that the respondent was at one time or another preoccupied with the need in Jamaica for comprehensive schools. It may well be that he considered it desirable that head teachers of schools above the level of Primary Schools should have University training. Certainly the appellant suffered an "obvious and admitted lack of qualification for the headship of a comprehensive school." And as to that part of the finding that the respondent entertained "imminent plans for the Trench Town All-Age School", this is, in my view, not supported by the evidence unless Small, J. is using the words "imminent" and "plans" as synonymous with "indeterminate" and "hopes", respectively. Be that as it may the evidence does not disclose that there was any dispute about these matters. It would certainly have been more to the point if Small, J. had found that the respondent was not using these matters to conceal his real motive in refusing to sanction the appointment of the appellant.

Dr. Watkins argued that the respondent's failure to disclose to the Board his requirement that the person to be appointed should possess the qualifications necessary for the headship of a comprehensive school was justified by what was described as ministerial secrecy. In my view this argument is manifestly untenable. There could have been not the least objection to the Board being told: "It is hoped that this school will be

converted into a comprehensive school at some time in the future. At the moment no final decision has been taken but you are asked to appoint a person with the qualifications necessary for such a school so as to obviate the necessity for anyone to be displaced if and when a final decision is taken in favour of a comprehensive school." Indeed, the argument based on ministerial secrecy becomes little less than fanciful when it is recalled that the respondent himself said, in his statement to the House of Representatives on the 12th March, 1963, that he had told the Board substantially what, by reason of ministerial secrecy, it is now argued he was justified in not disclosing.

I find it unnecessary to deal with the matters raised by the second and third grounds of appeal.

I have come to the clear conclusion that neither of the majority judgments can stand. After a most anxious and careful consideration of all the evidence in this case and the inferences therefrom, I am compelled to the conclusion that the real and substantial reasons that dictated the respondent's decision not to approve the appointment by the Board of the appellant were that:

(i) The appellant was an active participant in the party politics of the P.N.P., and a person who, as a member of that party, held political opinions appropriate to such membership;

(ii) The appellant was a political organiser of the P.N.P. who in the respondent's view should not be assigned to a school in a constituency held by the J.L.P.

These were, in the words of Section 24(3) of the Jamaica (Constitution) Order in Council 1962, "attributable wholly to (the appellant's) description by his political opinions". In my view this constituted an act of discrimination against the appellant by reason of his political opinions and clearly amounted to the breach of a fundamental right for which he was entitled to seek redress.

I am aware that my brothers Waddington and Luckhoo have reached the conclusion that the dominant reason which dictated the respondent's refusal to sanction the appointment of the appellant was the respondent's fear that the appellant, if appointed, might seek to use the school to further his political career or ambitions by offering himself as a candidate

against the then sitting member of the House of Representatives, D.C. Tavares. If this was, indeed, the principal reason by which the respondent's refusal was dictated I am by no means persuaded that it would be legitimate, in the context of the totality of the evidence, to conclude that such a reason was not at the very least mainly attributable to the appellant's political opinions. Nevertheless, it is said that such a reason is so attributable in part, but not mainly so. However fine an exercise in semantics and logic this conclusion may involve its validity must rest, and demonstrably so, on the proved or admitted facts and on such inferences to which those facts might reasonably lend themselves. For my part, I think it desirable to state that I have given the most anxious consideration to the conclusion at which my brothers have arrived on this aspect of the case, and that it is with a sense of sincere regret and, indeed, humility that I am constrained to record my very strong dissent therefrom. I remain unpersuaded as to the correctness of the views of my brothers because, as it seems to me, those views are predicated upon inferences for which I have been quite unable to find any evidential warrant.

It is said, in effect, that (i) the respondent's "offer" to the appellant of the headship of the Papine Senior School, and (ii) the discussion between the respondent, Mr. Seaga and Mr. Tavares, are the two circumstances that fairly justify those views.

As to (i) it appears to me that to attribute to the respondent a state of mind that is made to rest, even partly, on an "offer" of the headship of a school in Papine is to hold that the respondent, a very experienced politician, is so supremely naive as to think that the mere circumstance of "securing" the appellant a position at Papine would make the latter any the less likely or the less able to offer himself as a candidate against Tavares. So to hold is, in my view of the evidence, to do the respondent less than justice. Indeed, in cross-examination, the respondent completely repudiated any such suggestion when he said:

> "My Lords, I must say this: it should be obvious that if I offered Mr. Byfield a post at Papine, five or six miles from Trench Town, that could not prevent him from running in Trench Town if he wanted to run there."

But it is of the greatest importance to examine further, and with the utmost caution, the circumstances surrounding the "offer" of the Papine Senior School. A careful examination of these circumstances compels me to the clear conclusion that there was not at any time, prior to a day or two before the 11th January 1963, present to the respondent's mind any question of offering any alternative position to the appellant. It is true that in his statement to the Gleaner Education Reporter published on the 23rd February, 1963 the respondent said:

> "As soon as I decided not to approve Mr. Byfield for Trench Town Senior School, and long before any protest in relation to Mr. Byfield was made or even hinted at, I told the senior officers of my Ministry that I was anxious to demonstrate by action that I had no intention of victimizing Mr. Byfield or any other teacher and that a suitable offer should be made to him as early as convenient.
>
> This was to include a choice between another good school and a post as Education Officer. My Permanent Secretary was instructed to take the necessary steps."

In parenthesis I should observe that it is not a little odd that the respondent should have been so "anxious to demonstrate by action that (he) had no intention of victimizing Mr. Byfield" long before any protest in relation to the appellant "was made or even hinted at". However that may be, if this statement quoted above were the only evidence as to the respondent's state of mind up to the 11th December, 1962 - this ex post facto self-serving statement made by the respondent more than two months after the refusal to sanction the appellant's appointment, a statement not tested by cross-examination, and a statement standing in complete isolation unsupported by any objective factors - I would concede, albeit with grave and studied reservation, that it might be possible to attribute to the respondent, at the relevant time, a state of mind involving the consideration of an offer of alternative employment. But what is the picture projected by the respondent on oath in his examination-in-chief and in his cross-examination? The respondent met with the deputation on the 11th January 1963. It is here for the first time that he makes mention of alternative employment. He told the deputation that the appellant <u>would be</u> offered other employment and would not suffer in status.

Not, be it noted, that he had already instructed his senior officers to make a suitable offer to the appellant. Indeed, a careful examination of the respondent's evidence on this point reveals that at whatever point of time he instructed his senior officers to make this offer of alternative employment it was, quite clearly, not "as soon as" he had decided not to sanction the appellant's appointment. In his examination-in-chief he said that he so instructed his Permanent Secretary after he had seen the deputation. When cross-examined, however, he assumed a quite different position, and I quote:

> "A. It's a long time these things happened. What I am very clear about was that I had already instructed my officers to make that offer to him.
>
> Q. Yes. You mean before the deputation saw you, you had given your officers instructions .... A. Yes.
>
> Q. ... to make these offers to Mr. Byfield?
>
> A. Yes we discussed it.
>
> Q. All right. This is before the 11th January 1963?
>
> A. It could have been on the same day too - could have been before the deputation saw me.
>
> Q. Was it before, or after, or on the same day? Try and help me.
>
> A. I am not sure about that. I am sure it was about that time and I think it was before but I am not too sure of it."

And it is of singular importance to bear in mind that it was some time after his refusal to sanction the appellant's appointment that it came to the respondent's knowledge that allegations were being made by the teaching profession that he was pursuing a course involving the victimization of the appellant.

If it were the fact that the respondent was moved by this sense of anxiety "to demonstrate by action" that he had no intention of victimizing the appellant it would certainly not be unreasonable to expect that he would have caused the "offer" to be made to the appellant "as soon as" he had decided not to sanction his appointment. This would have been some time between the 24th of November and the 11th of December, 1962. In fact it was not until the 16th of January 1963 that the appellant attended at the Ministry in response to a telephone call received by him that day when the "offer" was made to him.

Again, in very precise language, the respondent said in cross-examination that when he decided not to approve the appellant's appointment he did not believe that the appellant was seeking an appointment to the Trench Town Senior School for political rather than professional purposes. The possibility that the appellant wanted the school for political purposes was a thought that first entered the respondent's mind when he was advised by his senior officers on or after the 16th of January 1963 that the appellant had rejected the "offer" of the Papine Senior School and the Inspectorate. This thought was somewhat strengthened, the respondent said, some eight days later when he received a report of the appellant's interview with the Prime Minister. It was subsequent to this interview that the respondent says he formed the view that the appellant wanted the school "for political purposes tending to cause commotion as disclosed in his file." It is clear that such disclosures, if any, as there were in the appellant's files did not attract the respondent's attention prior to the appellant's interview with the Prime Minister. Such enquiries, therefore, as the respondent says he made between the 24th November and the 11th December, 1962 could not in any way have related to any possible use to be made by the appellant of the school. Indeed, the respondent said that when he refused to sanction the appellant's appointment he had not yet seen the appellant's file. He "considered" the appellant's file by making "certain enquiries" which could be extracted from the file and supplied to him but these enquiries related only to the appellant's record as a teacher and were for his Ministry's purposes only. This evidence is not without significance when it is recalled that the respondent expressed the view that the question of strategic positioning of politically-minded teachers was not a relevant consideration for refusing to approve an appointment if the applicant was not otherwise suitable. The converse, of course, does not necessarily follow but may not be an unreasonable inference in view of the totality of the respondent's evidence when certain parts of that evidence are found to be unacceptable.

I now ask, how can it be that matters coming into existence subsequent to the 11th December 1962 can be used to determine the respondent's state of mind at some point of time prior to that date? I confess that any such possibility eludes me.

As to (ii), it is not without interest to observe that the respondent, a very experienced Cabinet Minister, did not himself seek to claim privilege from answering questions relating to matters discussed in the Cabinet. It was left to his counsel, who himself did not appear to know where the discussion took place, to sow the seed of privilege in the respondent's mind and to see it come to instant fruition. Nevertheless the respondent's evidence does not suggest that there was a discussion between Seaga, Tavares and himself. He does not say that when he had a discussion with Seaga, Tavares was present. Nor does he say that when he had a discussion with Tavares, Seaga was present. What he does say is that as between himself and Tavares "there was a discussion about the application that was made for Trench Town School and about my desire for the school, a comprehensive school, and about the difficulties that might arise if a man were to be told to give up to make way for somebody else, and about how many comprehensive schools could be established." If the respondent's evidence on this point is accepted then, clearly, it makes no meaningful contribution to the enquiry in view of the other principal findings of my brothers and, indeed, my own. If this evidence is rejected then, equally clearly, no inference can be drawn therefrom as to the matters in issue. This follows from a fundamental principle of the law of evidence to which due importance is frequently not attached. In any event there is certainly no evidence as to the time at which this discussion took place. It seems quite probable, however, that it took place some time during January 1963. And it must be noted further that the respondent's evidence here that it was at some indeterminate point of time <u>after</u> he had had these discussions with Seaga and Tavares that it occurred to him that the appellant might wish to seek electoral honours in South-West St. Andrew. But whatever time these discussions took place the critical question must be: What inference, if any, may be drawn from the fact of a discussion between the respondent and Seaga, or between the respondent and Tavares? In my view the answer is: precisely none.

It may very well be that at some time prior to the 11th December 1962, the respondent laboured under some real or imagined fear that the

appellant might seek to offer himself as a candidate against Tavares, notwithstanding the absence of any evidence that the appellant entertained any such thoughts or plans. It may be that the respondent feared that the appellant might use the school in some way to enhance his efforts in that direction. I observe, parenthetically, that I am by no means clear as to the nature and extent of any such user, if only because the respondent himself demonstrated a remarkable degree of confusion and indecision in his own mind as to the nature of that user. It may be that the respondent was overcome by more unreasoned fears than one. I concede all these possibilities which depend for their existence not, as I have attempted to show, on any evidential foundation, but rather, as it appears to me, on some imponderable formula of speculation. What I do not concede, however, is that it can ever be permissible to equate conclusions based on irrational speculation with those that proceed from legitimate inference, and to clothe the former with the jurisprudential sanction of the latter.

I turn now to the law. Section 25(1) of the Jamaica (Constitution) Order in Council 1962 reads:

> "Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress."

Subsection (2) reads:

> "The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such 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 provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled:
> Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

I pause here to observe that I am by no means satisfied that proceedings by a Writ of Summons were the proper proceedings by which to seek redress under the section just quoted. I say no more, however, as no point was taken before this court or before the Full Court.

Section 24(2) provides:

> "Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority."

Subsection (3) reads:

> "In this section, the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not afforded to persons of another such description".

Mr. Marsh argued that the definition of the word "discriminatory" is predicated upon the basis of a comparison of treatment between two or more persons. He also argued that the words "affording different treatment to different persons" suggest that some basis of comparison must be established by which it must be shown that one person has been treated in one way and some other person answering a different description has been treated in a different way by a third person. In this case, says Mr. Marsh, the appellant must show that some other person of a different particular description has been preferred to him and has actually got the appointment as head of the Trench Town Senior School. This the appellant has clearly failed to do. In support of these propositions Mr. Marsh relied on AKAR v ATTORNEY GENERAL OF SIERRA LEONE (1969) 3 A.E.R. 384. I am unable to regard the advice of Their Lordships in that case as involving any such propositions. In my view not only are such propositions demonstrably fallacious, but are contrary to the clear terms of the definition. It may well be that in the majority of those cases involving an allegation of discriminatory treatment a claimant will be able to show that a person of a different particular description has in fact been

preferred but I am quite unable to detect anything in section 24 that could be said to impose such an intolerable burden on the victim of any alleged discrimination. Assume a case in which three Roman Catholics with the special qualifications required for a particular post apply therefor. They are each told: "True you have the qualifications necessary but you cannot be appointed because you are Roman Catholics". Some time later the post is abolished because no non-catholics with the required qualifications can be found. Can it be that in these circumstances the applicants are without a remedy because they are unable to show that a non-catholic has secured the appointment? Clearly the inescapable inference must be that had they not been Catholics one or other would have been appointed. Would it not reduce the Constitution to a meaningless farce to hold otherwise?

Mr. Marsh argued further that assuming a discriminatory act on the part of the respondent there are no remedies open to the appellant by way of a declaration or damages. Citing from the 1962 Edition of Zamir's The Declaratory Judgment, he submitted that no court will pursue the futile exercise of making a declaration in respect of a purely hypothetical and academic question:

> "It is a principle of our jurisprudence - and, it is to be supposed, of most systems of law - that courts will not entertain purely hypothetical questions." (Allen, Law and Orders (2nd ed.),266)

I accept this as an accurate statement of principle. But I find it impossible, in the context of the circumstances of this case, to regard as hypothetical or academic an act in clear contravention of section 24(2). The fact that the Trench Town Senior School never came into existence as such is in my view quite irrelevant in this connection. I may add that I derive no real assistance from JAUNDOO v THE ATTORNEY GENERAL 12 W.I.R. 221.

As to damages Mr. Marsh argued that it was not open to the court below to consider this matter. The record shows that (i) no damages were claimed in the statement of claim, (ii) the appellant gave no evidence that he suffered any damage, and (iii) no senior school was ever established at Trench Town. For my part I do not regard these

factors as fatal to the appellant's case or as involving any insuperable difficulty. The observations made earlier in connection with the desirability of causing proper amendments to be made apply equally here. In the ultimate analysis the court's overriding concern must be to do what is just between the parties and it is not to be impeded in achieving that end by technical questions of procedure. See LONDON, CHATHAM AND DOVER RLY.CO. v. S.E.RLY.CO. (1892) 1 Ch. 120 at p.152 per Kay, L.J.

I do not find it necessary to deal with the other arguments advanced by Mr. Marsh.

I would allow the appeal and award the appellant the sum of $5000 by way of damages and his costs both here and in the court below.

I would also grant the Declaration sought by the appellant.