JAMAICA

8-06-81
Reported

IN THE COURT OF APPEAL

CAYMAN ISLANDS CIVIL APPEAL NO. 4/79

BEFORE: THE HON. MR. JUSTICE LEACROFT ROBINSON - PRESIDENT
THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE CARBERRY, J.A.

BETWEEN: MARIA AUDREY SMITH - APPELLANT

AND THE COMMISSIONER OF POLICE - RESPONDENT

Mr. R.D. Alberga, Q.C. and Mr. Steve Mc Field for the appellant.

Mr. John Martin for the respondent.

June 28 and 29, 1979 June 8 1981.

CARBERRY, J.A.

This is an appeal from the decision of the acting Chief Justice of the Cayman Islands, His Honour Mr. Justice Hercules, given by him on the 17th November, 1978, sitting in Chambers: he refused an application made by the appellant, ex parte, for leave to apply to the Grand Court for the issue of an Order of certiorari against the acting Commissioner of Police of the Cayman Islands to quash an Order made by the acting Commissioner communicated by letter dated the 26th October, 1978, revoking the Taxi Driver's Licence of the applicant under the provisions of Section 43(2) of the Traffic Law of the Cayman Islands. The applicant also sought an Order of Prohibition against the acting Commissioner from further hearing and determining any objection of the applicant against the revocation of the applicant's licence: this too was refused, at least by clear implication, though the Notes of Evidence dealing with the application do not expressly set this out. Presumably, if certiorari was refused the question of who should hear the applicant's objection to the cancellation of his licence would not arise: it had already been heard and determined against her.

The matter arises in this way: the appellant, Maria Audrey Smith of West Bay held a Taxi Driver's Licence No. 0038 issued under the Traffic Law, C.I. Law 16 of 1973, issued on 10th February, 1978. It was valid until December 31, 1978, when presumably application could have been made for renewal in the ordinary course of affairs.

However, on the 11th September, 1978, the appellant was convicted for the possession of ganja before His Hon. Mr. Hercules, then sitting in the Summary Court at George Town, Grand Cayman, and she was fined the sum of $300 and sentenced to one day in Jail. We have no other information about the details of this offence: but having regard to the severity with which the Misuse of Drugs Law (C.I. Law 13 of 1973) is usually administered, (imprisonment is mandatory) it may be that this particular offence was not regarded as very serious, and we were told by the appellant's counsel that it involved the finding of a paper bag with traces of ganja in it.

At that time no appeal was filed against this conviction but we were advised by the appellant's counsel that on the 26th January, 1979, (possibly as a result of the decision of the acting Commissioner to revoke the appellant's Taxi Driver's Licence on the strength of the conviction), an application was made to the Grand Court, to whom such an appeal would lie, for leave to appeal out of time, and that this application was heard on the 14th March, 1979, and leave to appeal out of time was granted. When the present appeal on the certiorari application was heard before us on the 28th and 29th June, 1979, the appeal in the criminal case had not yet come on for hearing: had it been heard and had the appellant succeeded in securing the quashing of her conviction then the Order of the acting Commissioner revoking the appellant's Taxi Driver's Licence would have determined, and the certiorari proceedings and the appeal in it would become unnecessary. That too would have been the position, regardless of our judgment, had the hearing of the criminal appeal occurred thereafter and resulted in the

quashing of the conviction. We have had no clear intimation to this date as to whether that appeal has been heard, or abandoned and it is therefore necessary to give this certiorari appeal our full consideration, and on the basis that the criminal conviction stands.

By letter dated 26th October, 1978, after the normal time for appealing against conviction would have expired, and at a time when no appeal or application for leave to appeal out of time had been filed, The acting Commissioner of Police wrote to the appellant as follows:-

> "Maria Audrey Smith,
> Mt. Pleasant,
> West Bay.
>
> Dear Madam,
>
> Taxi Driver's Licence No. 0038
>
> I am to advise that under the provisions of Section 43(2) of the Traffic Law, Law 16 of 1973, your Taxi Driver's Licence No. 0038 is hereby revoked following your conviction for possession of ganja on the 11th September, 1978, by the Summary Court at George Town.
>
> The Licence should be surrendered forthwith to the O i/c Traffic Department at Police Headquarters, George Town.
>
> Yours faithfully,
> (sgd.)
> Roy St. Aubyn Archer
> Acting Commissioner of Police."

The appellant complains that she got no prior notice of the intention of the acting Commissioner (or the Commissioner) to revoke her licence, and that she had no opportunity whatever of making any representations to him, whether orally or in writing, with a view to persuading him not to revoke her licence. She concedes that under the section cited the Commissioner did have the power to revoke her licence, but contends that he should not have done so without first hearing her on the matter. To do so was contrary to "natural justice."

For the respondent, the acting Commissioner, it is contended that there was no need to hear the appellant on the matter; his discretion was administrative, and gave the appellant no right to be heard; and indeed it was, I think, contended that it was almost automatic: granted the conviction there was a duty to revoke and that the word "may" in the section meant "shall."

The arguments, canvassed with great vigor on both sides, involve (a) consideration of the procedural aspects of the certiorari hearing, and (b) consideration of the extent to which the common law rules as to natural justice, and particularly the rule "audi alteram partem", may be imported into the construction of this Statute, The Traffic Law, Law 16 of 1973, and Section 43(2) thereof.

Before turning to consider the construction of Section 43 of the Traffic Law in the light of the authorities cited to us, it is necessary to consider the conduct of the certiorari proceedings before the learned Judge.

The procedure to be followed in applying for an Order of Certiorari, or of Prohibition, is laid down in The Grand Court (Applications for Orders of Mandamus, Prohibition, Certiorari and Habeas Corpus) Rules, made in March 1977.

Those rules were modelled on the corresponding rules in the United Kingdom Supreme Court Rules, Order 53: Applications for Orders of Mandamus, Prohibition Certiorari etc. (The U.K. Rules have recently been altered into Applications for judicial review, enabling applicants to seek in one and the same application one or more claims for relief).

These rules in effect provide for two stages in the making of such an application: (a) an application for leave to make the application, and, if leave is given, (b) the actual application before the Grand Court. The first stage is ex parte, and is conducted before the Judge in Chambers. At this stage all that it is necessary to show is that there is some arguable case or claim which is not obviously untenable, vexatious or frivolous. The original application

is supported by a short statement setting out the bare grounds on which the relief is sought, with an affidavit verifying the facts relied on. (Useful reference can be made to the pre 1979 White Book. e.g. see the 1970 or 1976 White Book: note 53/1/7).

It ought normally to be rare for the application to be refused at this stage, unless it is obviously untenable. Any defence or answer to the application is to be made at the second stage, when leave having been granted, the applicant proceeds to file a Notice of Motion and to serve the parties against whom he see seeks relief, with copies of the Notice of Motion (or summons), the Statement, and any affidavits accompanying the original application for leave, together with any other additional material. The respondent in his turn may file affidavits in reply etcetera.

We share the astonishment of the applicant's counsel Mr. Alberga, at the discovery from the Notes of Evidence made by the learned Judge in Chambers, that the respondent - The Commissioner of Police - was present in the person of Mr. R. Donaldson, then acting Attorney General, and that, without any recorded objection from the applicant's junior counsel Mr. Mc Field, he proceeded to canvass the merits of the application for certiorari (and prohibition) and to address the learned Judge on the substantive application as if this were the motion which should have been heard in open Court.

We know of only one recorded instance where something like this has happened, and that was in the case of Bazie v Attorney General of Trinidad and Tobago (1971) 18 W.I.R. 113 where on an application for leave to apply for issue of a writ of Prohibition, the Registrar of the Court, acting on a mistaken notion of the Constitution, took it upon himself to serve the Attorney General with notice of the first stage ex parte hearing, with the result that the Attorney appeared and vigorously contested the application for leave though he had no right of audience at that stage of the matter.

There the learned Judge in Chambers entertained the Attorney's objections and argument despite the protests of the applicant's counsel. The Court of Appeal of Trinidad and Tobago, (after a little difficulty in sorting out some of the constitutional implications of the application which had prompted the Registrar to send his own notice of the application to the Attorney General), had little difficulty in finding that at this stage the application was an ex parte one, and that the Attorney had no right to be there; he should have waited for the second stage, the actual application in Court to make his intervention: See Mc Shine C.J. at page 122 E - G; Phillips, J.A. at page 125 H; Fraser, J.A. dubitante because of the constitutional implications, agreed eventually in allowing the applicant's appeal.

In our view Mr. Donaldson had no right of audience at this stage of the application: it was ex parte, and unlike Bazie's case, supra, we have no idea how he came to be there.

In our view there was sufficient material before the learned Judge in Chambers for leave to have been granted to proceed with the application in the normal way.

Mr. John Martin, appearing for the respondent - Commissioner of Police before us, conceded this; what he suggested was that in these circumstances this Court should not itself decide the merits of the substantive application for certiorari, but should send it back to the Grand Court for the substantive argument to be heard and dealt with. He pointed out that the acting Commissioner had not enjoyed the opportunity of answering the affidavits and Statement. That may be true, but two answers can be made to that point: first that having taken the bit between his teeth through his counsel and argued the matter below on points of law, he praetermitted any opportunity he might have had for canvassing the facts; and secondly, we have not been told of anything that he might wish to say as to the facts themselves that could effect the situation. As we understand it the acting Commissioner acted on the reported conviction when

he purported to revoke the applicant's licence, and he did not give the applicant any notice of his intended action nor any opportunity of being heard prior to his revoking the licence. Further it is to be observed that the substantive law dealing with this matter was canvassed at great length before us by both sides: we have given much anxious thought to the issues raised, and it would seem to be a shirking of our responsibility merely to send the matter back to the Grand Court to be canvassed on the basis that leave to make the application should have been granted and they should now proceed to hear it. This problem, in a rather different context, has been canvassed in England.

It has arisen when and where the Divisional Court has itself refused (after an unsuccessful ex parte application to the Judge in Chambers) to grant leave to make the application: i.e. it has itself refused leave in ex parte proceedings before it, and the applicant has then appealed to the Court of Appeal which has given leave. In such a situation does the Court of Appeal proceed to the second stage, hear the substantive application and order the issue of certiorari itself? Or does it send the matter back to the Divisional Court for that Court to hear the substantive application? There are precedents for both courses of action:

R. v Industrial Injuries Commissioner, ex parte Amalgamated Engineering Union: (1) 1966 2 Q.B. 21; (2) (1966) 2 Q.B. 31: At issue was whether a worker smoking in the gangway of a factory (instead of a permitted smoking booth) long after the tea break had ended was entitled to industrial injuries benefit (workmen's compensation). His union sought by certiorari to set aside the refusal of an award by the Industrial Injuries Commissioner. The Divisional Court having regused this ex parte application for leave, the Court of Appeal itself granted leave, and then canvassed the question whether the existing practice, whereby the Court which grants leave to apply for certiorari hears the application, was lawful within the existing rules. It was suggested that only the

could
Divisional Court/entertain the original motion for certiorari, and that the Court of Appeal in hearing the substantive motion was being asked to exercise an original jurisdiction which it does not have, and that the Court of Appeal could only give leave to apply to the Divisional Court. The Court of Appeal decided that in such a case it had the jurisdiction to itself hear and determine the substantive question should certiorari issue, observing that in refusing leave to make the application the Divisional Court had in effect ruled that it was so plain that certiorari did not lie that they had refused leave to even apply for it. In such a situation Lord Denning, M.R. expressed the view that "It would be absurd for us to send it back to them." Salmon, L.J. observed: "In refusing the rule nisi, The Divisional Court were in effect saying: 'There is so little in this that it is not necessary to call upon the respondents to show cause.' " In this situation, the rules being silent on the point, he too thought that there was jurisdiction for the Court of Appeal to hear the case. Davies L.J. gave judgment to like effect. They relied on Section 32 of the Supreme Court of Judicature (Consolidation) Act 1925, which contains provisions very similar to the C.I. Court of Appeal Law, Section 3. (In point of fact, when the Court of Appeal heard the substantive motion, it too refused to issue certiorari, holding that the Commissioner was not in fact guilty of any error in law, the claimant's injury was not one "arising out of and in the course of his employment".)

On the otherhand in R. v Hull Prison Board of Visitors, ex parte St. Germain et al (1) (1978) Q.B. 678 Divisional Court; (2) (1979) Q.B. 425 (C.A.); (3) (1979) 1 W.L.R. 1401. A different course was pursued.

In this case following a riot in a prison the Board of visitorsheard disciplinary charges against a number of inmates. As a consequence those found guilty were deprived of remissions of their sentences etcetera. The Divisional Court, following certain

dicta of Goddard L.C.J. in R v Metropolitan Police Commissioner, ex parte Parker (1953) 1 W.L.R. 1150 and ex parte Fry (1954) 1 W.L.R. 730 refused the issue of certiorari, holding that the writ would not lie against the Board in these circumstances: (see (1978) Q.B. 678).

The Court of Appeal upset that decision and held that certiorari would lie against the Board: it was a body, quod hunc, exercising judicial functions and, refusing to follow Lord Goddard's dicta, they remitted the application to the Divisional Court for re-consideration of the merits of the individual cases: (see (1979) 1 Q.B. 425). The prisoners were entitled to a proper opportunity of presenting their cases before the Board, the outcome of which could affect their rights and liberties. That reconsideration duly took place: see (1979) 1 W.L.R. 1401; (1979) 3 All E.R. 545 and the Divisional Court gave detailed instructions to the Board as to the hearings of the charges.

This was not a case of refusal of an ex parte application followed by its reversal by the Court of Appeal, but it does show that in some cases the Court of Appeal will remit the hearing to the Divisional Court.

Granted that that could be done here, we observe that before us both sides treated the appeal as the hearing not only of an application for leave but of the substantive application, in arguments that lasted for two very full days, and we therefore think that in all the circumstances here it would be the better course to proceed to deal with the substantive question as well, should certiorari issue? and if so, with what consequences?

The substantial problem on the merits then is whether the common law rule with regard to "audi alteram partem" is to be imported into the construction of the Commissioner's powers to revoke a licence under Section 43(2) of the C.I. Traffic Law (Law 16/1973).

Section 43 reads thus:-

"Special provision for licences for omnibus and taxi drivers.

43. (1) No person shall drive an omnibus or a taxi for hire or reward unless licensed in that behalf by the Commissioner who, if satisfied that an applicant for such a licence -

(a) is over the age of twenty-one years;

(b) has been licensed to drive a motorcar for at least one year; and

(c) has not during the past five years been convicted in any court for -

(i) an offence under paragraphs (a) or (b) of section 61;

(ii) any offence connected with dangerous drugs; or

(iii) any offence involving fraud or dishonesty; or

(iv) any offence against the person; or

(v) dangerous driving, whether or not causing death.

shall, on production by the applicant of a photograph of himself in duplicate, of the prescribed form and dimensions, an application in the prescribed form and a receipt by the Authority for the prescribed fee, issue to the applicant an omnibus or taxi driver's licence in the prescribed form.

(2) The Commissioner may revoke any licence issued under subsection (1) on being satisfied that any person to whom such a licence has been issued has been convicted of any of the offences mentioned in subsection (1)(c)."

Section 43 (1)(C)(i) refers to Section 61, which reads thus:-

"Driving motor Vehicle when intoxicated etc.

61. Whoever drives or attempts to drive or is in charge of a vehicle on or in a road when -

(a) he is under the influence of drugs to such an extent that his efficiency as a driver is impaired; or

(b) he has consumed alcohol in such a quantity that the proportion thereof in his blood exceeds 100 milligrams of alcohol in 100 millilitres of blood shall be guilty of an offence and liable -

(i) on summary conviction to a fine not exceeding $200 or to imprisonment for a term not exceeding six months or both;

(ii) on a second or subsequent conviction to a fine not exceeding $500 or to imprisonment for a term not exceeding twelve months or both;

> and a person convicted of an offence against this section shall, unless the court for special reasons thinks fit to order a longer period of suspension, be disqualified for a period of twelve months from the date of conviction or the expiry of any sentence of imprisonment from holding or obtaining a driver's licence or driving any vehicle on the road."

Mr. Martin for the Commissioner argues that the word "may" in the phrase "The Commissioner may revoke any licence issued under subsection (1)" means "shall". Alternatively, he argues that even if there is a discretion, its exercise is an "administrative" matter, not subject to review or enquiry by the Courts, and that it lies outside the scope of the Court's jurisdiction to issue certiorari.

Mr. Alberga for the applicant argues that the word "may" in its natural meaning, and in the context of this statute imports a discretion; and further that in accordance with the common law principles of statutory interpretation as developed over the last hundred and fifty years, not only is there a discretion, but it must be exercised in accordance with the rules of "natural justice".

We note the provisions of Section 46 with respect to the renewal of drivers' licences: it implies automatic renewal provided that there has been no intervention by the Courts (see Section 49) or by the Commissioner under Section 43(2) supra. Further the Courts have been given ample power to suspend or disqualify any person convicted before them of serious driving offences, and are in many cases obliged so to do, where the sentence is mandatory: see Sections 49 - 61 - 64 - 65(b), 70 - 71 - 78.

The power of the Commissioner under Section 43(2) must therefore be considered in the context of those powers that have been given to the Courts with regard to the suspension or inflicting of disqualifications from driving. As regards Taxi or omnibus Drivers' Licences, the Commissioner appears to have been given wider powers than those enjoyed by the Courts, in that he may revoke licences on being satisfied that the licensee has been convicted of any of the

offences mentioned in subsection 1(c) of Section 43. These include some of the very offences in which the Courts have also been given powers: see "(v) dangerous driving, whether or not causing death"; and "(i) an offence under paragraphs (a) or (b) of Section 61."

The Commissioner appears to have in these instances over-lapping powers with those of the Court: he may revoke, though the Court did not. There is of course one important difference - the Court's power to disqualify or suspend a driving licence will stop the licensee from driving altogether - Sections 30, 31, 69(1) and 70(4) and he must surrender his licence to the Court. The Commissioner's power to revoke a taxi or omnibus driver's licence is limited to the special permission he gave to a licenced driver to drive for hire or reward. He can only revoke what he granted - his revocation will stop the licensee driving for hire or reward - but will not affect his driving othewise. The Court, exercising its powers, would have been obliged to hear the evidence, and to hear the accused driver's representations, but, it is argued, the Commissioner, exercising his powers under Section 43(2) need do neither. But over and beyond this the Commissioner "may" revoke licences in a wide category of offences where the Courts have no such powers, and this in our opinion is the real rationale of the Commissioner's powers. He is given a power to suspend the licences of those who drive public passenger vehicles for offences outside of those in the Traffic Law, where such offences may relate to the licensee's fitness to drive the public for hire or reward. No particular period is fixed during which the Commissioner's revocation is to last, but the joint effect of Section 43(1) and Section 43(2): where the Commissioner revokes under Section 43(2) may very well be that the licensee will not be eligible for a new licence until five years has elapsed since the date of conviction so as to comply with Section 43(1).

Finally we would wish in these preliminary remarks to note the vast span of offences covered in Section 43(1)(c) e.g. - "(iii) any offence involving fraud or dishonesty; "(iv) any offence against the person." There is no requirement that any of these offences should relate in any way to the licensee's conduct or ability as a taxi driver. They may be totally disconnected with them. They may range from punching his brother's nose in a family argument to rape or murder. This vast range of offences, coupled with what we deem to be the real purpose of law, i.e. to give to the Commissioner power to suspend the licences of persons permitted to drive the public for hire or reward, points irresistably to the view that this power prima facie is discretionary, not automatic, in operation, and that the Commissioner is to decide in each case whether to use it or not, primarily for the protection of the public.

Taking therefore a preliminary view of the matter, without benefit of authority, we do not see how (i) the words "may revoke any licence" can be read as "shall revoke any licence" or (ii) be read as giving the Commissioner the power, without any sort of hearing whatever, to do what a Judge could not do, i.e. revoke that licensee's taxi or omnibus driver's licence, without ever having heard any representations from him, or even giving him notice of any intention so to do. And that without any benefit of appeal. Had the Legislature intended such a result, or intended that it should be automatic upon proof of a conviction, it surely would have used the word "shall" instead of the word "may."

While it is clear that a different and higher standard of behaviour may properly be required of drivers exercising a public calling, driving passengers for reward, it would seem prima facie that there has been conferred upon the Commissioner of Police a discretion in the matter, and that he would and should in exercising it take into consideration a wide area of matters, such as the seriousness of the offence, the mitigating factors, if any, the extent to which the offence affected the character or fitness

of the driver to exercise his calling, the previous character and conduct of the particular driver and possibly the effect which disqualification or revocation may have upon the character and conduct of other public passenger vehicle drivers. The Commissioner could not possibly exercise this discretion without hearing some evidence on the matter and considering any representations that the licensee might wish to offer. It has been said that this rule has a venerable history: "God did not pass sentence upon Adam before he was called on to make his defence." (See Rex v Cambridge University - (Dr. Bentley's case) - (1718) 93 E.R. 698 at p. 704). One further point may be noticed at this stage: Section 43(1) dealing with initial grant of such licences states no one "shall" drive a taxi etcetera unless the Commissioner is satisfied, inter alia, that he is not disqualified by reason of a conviction of the offences in (c); 43(2) dealing with persons already licensed provides the Commissioner "may" revoke the licence if satisfied that the licences has committed one of the scheduled offences.

It seems reasonable to make a distinction between an existing licensee and one who has not yet obtained a licence, and to give a discretion with regard to the latter which has been denied to the former.

Mr. Alberga suggested, correctly in our view, that the root question in this case was to what extent is the Commissioner of Police bound by the rules of natural justice when exercising his discretion to revoke a taxi-driver's licence under Section 43(2). He submitted that the audi alteram partem rule applied, that there was a duty to conduct "a hearing" and to receive representations from the person whose licence he contemplates revoking. This meant that the Commissioner should have given notice that he proposed to consider revocation and stated the charges or grounds for revocation and should have invited representations from the licensee or given him an opportunity to answer those charges. Admittedly no notice had been given or representations invited or considered. No charges or grounds

for revocation were preferred before revocation, and no opportunity to answer them was afforded. Alternatively, Mr. Alberga submitted that even if Section 43(2) conferred an administrative rather than a judicial or quasi judicial discretion, there was still, on the modern cases, a "duty to act fairly" (i.e. to observe what Garner terms "mini-natural justice" at page 128). This duty to act fairly would involve equally an obligation to give notice of charges or grounds for proposed revocation and to entertain representations from the licensee, before revocation.

Mr. Martin, for the Commissioner, argued not only that the word "may" in the section meant "shall", and that revocation followed automatically therefore on conviction, but that even if there was a "discretion" in the Commissioner as to whether he would revoke or not, that did not necessarily imply a "hearing", or any right to be heard. He observed that the statute did not suggest that the Commissioner was to act "judicially" in exercising this discretion: there was no "suit" before him in which he played the role of Judge or arbiter. He suggested that the failure of the legislature to make any such provision carried with it the clear implication that "natural justice" rules were excluded.

Ultimately Mr. Martin relied on three cases which we will have to examine most carefully: Nakkuda Ali v Jayaratne (1951) A.C. 66 R v Metropolitan Police Commissioner, ex parte Parker (1953) 1 W.L.R. 1150; (1953) 2 All E.R. 717; and Ex parte Fry (1954) 1 W.L.R. 730. These cases suggest that a licence may be simply revoked by the grantor as an "administrative matter", and that "disciplinary situations" and their sanctions are also "administrative" and that in neither is there scope for the issue of certiorari, the Courts have no jurisdiction to intervene in such matters. He also observed that the gravamen of the natural justice cases was the need to formulate and give to the applicant an opportunity to answer "charges". In the instant case however that had already been done: the applicant had had her day in Court, had answered the charges and had failed

before the Court. Once the Commissioner was satisfied that this was so, and there had been a conviction his power to revoke came into play and was properly exercised. The applicant had no right to be heard by the Commissioner when once she had been convicted.

We are indebted to both counsel for the pains that they have taken to refer us to the works of eminent Text Book writers, as well as to many if not all of the considerable volume of cases on this problem. We were referred to two books by the late Professor S.A. deSmith, "Constitutional and Administrative Law" (now in its 3rd Edition 1977) and "Judicial Review of Administrative Action" (3rd Edition 1973). In the former, in dealing with the rule "audi alteram partem" (2nd Edition p. 578, 3rd Edition p. 564) Professor deSmith observes "The many ramifications of the rule are indicated by the fact that this chapter (in the second cited work) is over eighty pages long". We were also referred to Garner's "Administrative Law," (4th Edition 1974) and have since the argument had the opportunity of reading Paul Jackson's "Natural Justice" (2nd Edition 1979), a most useful treatment of a difficult topic.

A convenient point of departure is to consider the dicta in the earliest of the cases cited to us: Cooper v Wandsworth Board of Works (1863) 14 C.B. N.S. 180; 143 E.R. 414.

In this case, the then equivalent of modern building laws empowered the local authority to alter or demolish houses built within their area where the builder/owner had not first given notice of his intention to build. Seven days notice should have been given before the builder laid or dug his foundations. No such notice had been given here, and the local authority, without itself giving any notice of its intention to rely on its statutory powers, entered on the plaintiff's land and razed his building which had by then reached the second story. Plaintiff suing in trespass, argued that the local authority should not have done this without first giving him the opportunity to be heard. The local authority for its part

argued that they were acting ministerially and not judicially, and were under no obligation to give any notice or invite any such representations once the plaintiff had broken the law and regulations, as he apparently had. The statute was silent and prescribed no procedure regulating the exercise of the local authority's demolition powers under the Act. The Court of Common Pleas upheld judgment in favour of the plaintiff. Erle, C.J. remarked that:-

> "..... although the words in the statute taken in their literal sense, without any qualification at all, would create a justification for the act which the district board has done, the powers granted by that statute are subject to a qualification which has been repeatedly recognized, that no man is to be deprived of his property without his having an opportunity of being heard." (Accepting that principle, he saw no reason to limit it to "judicial" proceedings.) "I take that to be principle of very wide application, and applicable to the present case." 143 (E.R. p. 417 & 418).

Willes,J:

> "I apprehend that a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds: and that that rule is of universal application, and founded upon the plainest principles of justice." (E.R. 418).
>
> (He went on in effect to find that the local authority were a tribunal when exercising such a power.)

Byles, J:

> "It seems to me that the board are wrong, <u>whether they acted judicially or ministerially</u>. I conceive they acted judicially, because they had to determine the offence, and they had to apportion the punishment as well as the remedy. That being so, a long course of decisions .... establish that, although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature." (He then examined the position if the board's action was deemed "ministerial" and concluded.) "<u>whether the board acted</u> judicially or <u>ministerially</u>, they have acted against the whole current of authorities, and have omitted to do that which justice requires....."
>
> (emphasis supplied).

Keating, J. gave judgment to like effect.

deSmith, in his Constitutional and Administrative Law, (2nd Edition 579; 3rd Edition 569) observes of this case:-

> "This decision was followed in a number of cases of a similar nature. Three points need to be noted. First, the act or decision in question was not that of a court of justice, nor would it normally be characterized as a "judicial act". Secondly, the duty to act judicially (in accordance with natural justice) was inferred from the impact of an act or decision on individual rights; there was no pre-existing statutory duty to follow a judicial type procedure. Thirdly, the decision making body was not determining a "triangular situation; there were but two 'parties' itself and the person affected by its conduct."

In a case then in which the statute was silent, and a discretion in the broadest terms had been conferred upon the local authority to pull down the plaintiff's house, he not having complied with the statute in giving them notice of building, it was held that nevertheless the common law would supply the omission of the legislature and require notice and an opportunity to be heard to be given to the party affected before the statutory discretion was exercised against him. The Privy Council considered and applied the principles in Cooper's case recently in Durayappah v Fernando (1967) 2 A.C. 337; (1967) 2 All E.R. 152 - per Lord Upjohn at 155/156A/B.

Cooper v Wandsworth was not unique. There are any number of similar cases of judicial intervention in which the Courts intervened to insist that the audi alteram partem rule should be observed. We mention a few:

R. v Cambridge University (Dr. Bentley's case) (1718) 93 E.R. 698. In this case the Court granted mandamus to restore Dr. Bentley to his academic degree and status in the University, it being shown that the University had condemned him in his absence and without notice to attend. Fortescue, J:

> "Besides, the objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any ....."

R. v Archbishop of Canterbury (1859) 120 E.R. 1014; 1 E. & E. 545. Held that mandamus would lie to the Archbishop to compel him to hear a curate before revoking his licence, or rather confirming his Bishop's revocation of the licence. The Archbishop had purported to confirm the Bishop's action on the basis of having read the written material placed before him, the Bishop's comments, and the curate's request for an oral interview. The action had been taken on the basis of some complaints by female members of the congregation, and the curate had never been shown these letters or had a chance to answer them. Held that the "hearing" on the written documents was no "hearing."

Lord Campbell, C.J:

> "No doubt the Archbishop acted most conscientiously and with a sincere desire to promote the interests of the Church: but ... He was bound to hear the appellant, and he has not heard him. It is one of the first principles of justice, that no man should be condemned without heing heard.....
>
> Without any communication with him, his judge decides against him. That was not a hearing. The appellant should have had an opportunity of arguing before the Archbishop, that the Bishop's decision was not correct upon the facts....."

Wightman, J:

> "..... The mode of hearing was and is, no doubt, in the discretion of the Archbishop. But here there has been no hearing."

Crompton and Hill JJ. to like effect.

Of particular interest and significance is a Privy Council decision, Smith v The Queen (1878) L.R. 3 App. Cas 614. An appeal from Queensland, Australia. The government was trying to open up the country, and offering to settlers crown leases (licences) to occupy the land for a given period of time on the expiration of which they would have the opportunity to buy it outright. To secure actual occupation, the leases were forfeitable on the report of the Commissioner that it was unoccupied. In this case the Commissioner reported that the appellant was not in occupation, on the basis of his investigation, refusing to accept as evidence to the contrary

a statutory declaration by the appellant that he was in occupation. The Commissioner did not reveal the evidence produced by his own investigation, and so the appellant had no opportunity to answer it. The Privy Council Judgment at p. 623 et seq reads:

> "Their Lordships are of opinion that the inquiry to be made by the Commissioners under Section 51 subsection 5, is in the nature of a judicial inquiry.
>
> They do not desire to be understood as laying it down that the Commissioner, in conducting such an inquiry, is bound by technical rules relating to the admission of evidence, or by any form of procedure, provided the enquiry is conducted according to the requirements of substantial justice. These requirements are well known to our law, and have been enunciated in many cases bearing some resemblance to, though not identical with, the present ....."
>
> (The judgment then cited Capel v Child (1832) 2 C. & J. 558; R. v Archbishop of Canterbury (supra); Cooper v Wandsworth (supra) ... and continued at page 625:)
>
> "It appears to them that the Defendant has not been heard in the sense in which "a hearing" has been used in the cases which have been quoted in many others, and in the sense required by the elementary principles of natural justice. The Commissioner doubtless acted with perfect good faith, but apparently without being aware that he was performing a judicial function, or even a function of a judicial nature. He has not stated upon what evidence he formed his opinion, whether written, or viva voce, whether direct or hearsay. ..... (after observing that the Commissioner had not told the solicitor of the Defendant any information as to who were the witnesses or what was the general character of their evidence, the judgment continues...).
>
> The Defendant could not answer or explain testimony of which he was kept in ignorance, and therefore was not heard in his defence in any proper sense of that term.
>
> It is true he was summoned to answer general charges of non-residence and abandonment, but a summons to answer charges the evidence in support of which is withheld appears to their Lordships illusory.
>
> Their Lordships are for these reasons of opinion that the Crown failed to establish that there was such a hearing in this case as would enable the Crown to assert that it was proved to the satisfaction of the Commissioner within the meaning of the Act, that the Defendant had abandoned his selection, or had failed in regard to the performance of the conditions of residence, and that consequently the governor had no jurisdiction to issue the proclamation of forfeiture....."

In a case in which the Commissioner was to be "satisfied" that the lease or licence should be revoked, their Lordships, though the Act was completely silent as to how he should be so "satisfied," implied into it that it should be on the basis of an inquiry which was "judicial" in nature, and which gave the defendant an opportunity to be heard and to answer whatever evidence had already been given against him.

Smith's case carries further the point made in the case of Archbishop of Canterbury, there can not be said to be a "hearing" unless there has been a meaningful opportunity to answer, and further that these matters are not to be decided on a consideration merely of already acquired written information, and that where the statute is silent on how the person is to be "satisfied" and come to his decision, the law will imply that it must be on the basis of a "hearing" at which an opportunity to answer specific charges or evidence has been given. It will also be noted that both by way of indicating the Court's jurisdiction to intervene and the type of situation in which it will intervene, the situation is described as "judicial" or "quasi judicial."

This approach, and the width of the circumstances in which the Courts deemed it proper to intervene is illustrated in another case of this period: Spackman v Plumstead Board of Works, (1885) L.R. 10 App. Cas 229. In that case the relevant statute had given to the superintending architect of the Metropolitan Board of Works the power to fix the "building line" to be observed by persons building, and to fix line beyond which their houses should not extend. Projections of houses beyond that line were liable to have the projecting portions demolished. The Statute was completely silent on how the line was to be fixed: was it only by consideration of the line set by the immediately adjoining houses, or should it be by considering the general line set by most houses on the street? In the House of Lords, Earl Selbourne L.Ch. at page 240 answered:

> "No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirement of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter, and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law....."
>
> (emphasis supplied).

Finally, in dealing with this section of the history of the Courts' intervention it is appropriate to refer to two cases before the House of Lords:

Board of Education v Rice (1911) A.C. 179; (1911 - 13) All E. Rep. 36; where at page 38 Lord Loreburn, L.Ch. said:

> "Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes up for determination is a matter to be settled by discretion, involving no law. It will, I suppose usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and listen fairly to both sides, for that is a duty lying upon everyone who decides anything. But I do not think that they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way that they think best, always giving a fair opportunity to those who are parties to the controversy of correcting or contradicting any relevant statement prejudicial to their view....."
>
> (emphasis supplied)

In Local Government Board v Arlidge (1915) A.C. 120, Viscount Haldane, L.Ch. at page 132 observed:-

> "My Lords, when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same ....."
>
> (emphasis supplied).

The Lord Chancellor went on to observe that many bodies have been entrusted by Parliament with the duty of hearing appeals in matters which really pertain to administration rather than to the exercise of the judicial functions of an ordinary Court, and that such bodies were administrative rather than "judicial" in the ordinary sense. Nevertheless in deciding such matters those bodies were subject to the audi alteram partem rule as set out in Board of Education v Rice (ante).

Lord Parmoor, in Arlidge's case at page 140 said:

> "The power of obtaining a writ of certiorari is not limited to judicial acts or orders in a strict sense, that is to say, acts or orders of a Court of law sitting in a judicial capacity. It extends to the acts and orders of a competent authority which has power to impose a liability or to give a decision which determines rights of property of the affected parties. Where, however, the question of the propriety of procedure is raised in a hearing before some tribunal other than a Court of law, there is no obligation to adopt the regular forms of legal procedure. It is sufficient that the case has been heard in a judicial spirit and in accordance with the principles of substantial justice....."

He went on to indicate that the principles of "substantial justice" were the audi alteram partem and freedom from bias rules indicated in Spackman v Plumstead Board of Works (ante) and Board of Education v Rice (ante).

There had of course been cases in which it had been held that certiorari or mandamus would not lie: for example Julius v Bishop of Oxford (1880) 5 App. Cas 214 where the House of Lords refused the issue of mandamus to compel the Bishop of Oxford to set up a commission to inquire into the alleged ecceliastical offences of a priest in his diocese; the Bishop had a discretion as to whether to initiate such process. There were also cases in which it was held that there had been a sufficient hearing and the rules satisfied: Osgood v Nelson (1872) L.R. 5 H.L. 636. The Courts had also indicated that their role was a supervisory and not appellate one. They were concerned with whether "substantial justice" had been done, rather than the actual merits of the decision made: Walsall Overseers v

London & North Western Railway (1878) 4 App. Cas 30; Sharp v Wakefield (1891) A.C. 173, (referred to again below).

It was easier to see that the audi alteram partem rule applied in a case where there were more than one party, or a contest of some sort, before the deciding body which had to decide between their respective merits. But there were not lacking cases where the decision involved one party only, or perhaps a situation in which the deciding body was itself involved in the issue, as in Cooper v Wandsworth Board of Works (ante); Smith v The Queen (ante) or Sharp v Wakefield (ante) or the matter was of a disciplinary nature as in R v Archbishop of Canterbury (ante). One of the situations frequently arising which involved only a protesting party and the body that decided the issue were the cases in which bias on the part of the deciding body was alleged, as for example in R v Sunderland Justices (1901) 2 K.B. 357, and Leeson v General Medical Council (1889) 43 Ch. D. 366 (medical disciplinary tribunal in which it was contended that the "prosecutors" sat with the Judges, and Fry L.J. (diss) would have allowed certiorari).

It is also clear that when the Courts were minded to intervene because of breach of the audi alteram partem rule on the part of the "decider" or deciding body whose judgment was challenged, they tended to describe the situation as one in which the deciding body was exercising a "judicial" discretion, or one that should be exercised judicially. No test of what was "judicial" was ever worked out, and the cases proceeded from situation to situation, not unlike the development of the law with regard to negligence in its early stages. It would be fair to say that the deciding factor appeared to be public policy, a feeling that because of the impact of the situation upon the person claiming relief the deciding body should have given him a "hearing", though what was involved in a "hearing" varied from situation to situation. Clearly there were (and are) situations where the deciding body had the power to make decisions whether or not those affected by the decision were heard: Parliament is one obvious example.

Further it was clear that by appropriate wording in a statute Parliament could give a similar unfettered discretion to some body of its choice. However to achieve this it had to be made very clear that Parliament had in fact excluded all possible review by the Court, and that the prima facie rule was that such review should be"interpolated" into the legislation if this were at all possible. See for example R v Tribunal of Appeal under the Housing Act (1920) 3 K.B. 334 where the Courts, though willing to allow great latitude to such deciding bodies as to the manner in which they conducted their affairs, issued certiorari where the deciding body had empowered itself to decide appeals summarily on the written papers alone, and in a manner which in effect meant that the party affected never got the chance to reply to the Local Authority which had decided that he should not be allowed to build a cinema as this might use up materials said to be needed to build dwelling houses locally.

> "There must be a hearing, although not necessarily an oral one. I cannot conceive that where the Legislature has given a right of appeal against an order affecting the property of one of the King's subjects a mere consideration of the written statement of his grounds of appeal together with the reply in writing of the respondent can without more be regarded as sufficient to constitute a hearing..."
>
> Per Lord Reading C.J. at page 340, and see page 341-2.

It was against this background that Atkin L.J. (as he then was) in R v Electricity Commissioners (1924) 1 K.B. 171 at page 205 stated:-

> "But the operation of the writs (prohibition and certiorari) has been extended to control the proceedings of bodies which do not claim to be, and would not be recognized as, Courts of Justice. Wherever any body of persons having legal authority to determine questions affecting rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs...."

Atkin L.J. did not suggest any test as to when it could be said that such a body had a duty to act judicially: instead he was content to give a number of examples of where certiorari lay, including, interestingly enough, "justices acting under the Licensing Act." Unfortunately in subsequent cases the "duty to act judicially" has been seized upon as a test, and seen as importing a three-cornered situation, in which there exists a deciding body and at least two other parties, whereas in truth it was originally only a result, or the label applied when the Courts had decided that there ought to be intervention. This has had the unintended result for sometime of inhibiting intervention where before it used to be readily obtainable.

"Licensing" situations for example are frequently "three-cornered" in the sense that there may be many applicants competing inter se for a limited number of licences. But they are just as often likely to be cases in which a single applicant is applying, as in R v Housing Appeal Tribunal (ante). It is clear that certiorari, in appropriate cases, may apply to this situation, though it is not a three-cornered one.

"Disciplinary situations" also do not involve a three-cornered situation: they usually involve the defendant, and the disciplinary body alone (though sometimes there may be an accuser who may or may not be a party), yet it is clear that certiorari may issue in appropriate cases: Daemar v Hall (1978) 2 N.Z.L.R. 594; R v Hull Prison Board of Visitors (1979) Q.B. 425.

Further, the "duty to act judicially" applies not only to civil law, where there will be contesting parties and a "Judge", but equally to criminal cases, where there is a defendant and a prosecutor who represents the community as much as the Judge does; and there may be cases in which there is no prosecutor at all, and the "decider", representing the community, has the duty of not only deciding, but sometimes of being the initiator as well of the proceedings, as happens when the local Council or Board of Health is

deciding whether or not a building should be condemned as unfit for habitation. The situation also arises when a licensing authority has the duty of deciding whether a licence that it has issued ought to be revoked or suspended. It is clear that a duty to act "judicially" is as applicable here as when it was engaged in granting the licence.

It is of course clear that if the situation involves only a preliminary stage, or is one in which the body whose decision is attacked is only giving advice to some other body, and is not deciding anything itself, certiorari will not issue; R v Legislative Committee of the Church Assembly (1928) 1 K.B. 411; Wiseman v Borneman (1971) A.C. 297.

Lord Reid in Ridge v Baldwin (1964) A.C. 40, at pages 74 to 76 discusses Lord Atkin's dictum in R v Electricity Commissioners (ante) and shows how it has been misunderstood in subsequent cases, and he concludes that the "duty to act judicially" is one which the Courts infer from the nature of the power, (see page 76). He observed:

> "There is not a word in Atkin, L.J.'s judgment to suggest disapproval of the earlier line of authority which I have cited. On the contrary he goes further than those authorities. I have already stated my view that it is more difficult for the courts to control an exercise of power on a large scale where the treatment meted out to a particular individual is only one of many matters to be considered. This was a case of that kind, and, if Akin, L.J. was prepared to infer a judicial element from the nature of the power in this case, he could hardly disapprove such an inference when the power relates solely to the treatment of a particular individual...."

On the otherhand, where the Courts have decided that certiorari ought not to issue, because it is not warranted by the situation, the Courts have termed the decision "administrative," which, with respect, is as much a label attached to the result, as is the label "judicial." For examples of cases in which the Courts have termed the exercise of a discretion as "administrative" and have refused to intervene, see: Associated Provincial Picture Houses Ltd.

v Wednesbury Corporation (1948) 1 K.B. 223; Franklyn v Minister of Town and Country Planning (1948) A.C. 87 (the Stevenage satellite town case) and see also the cases concerning the admission of aliens to the United Kingdom.

Professor deSmith in his "Judicial review of Administrative Action" (3rd Edition 1973 Chap. 4) traces the history and development of the audi alteram partem rule and its extension to a number of situations too numerous to mention. Of some interest in connection with our instant case is the application of the rules of natural justice to a number of "Licensing" cases: see for example: Sharp v Wakefield (1891) A.C. 173 where the licensee disappointed in his application for renewal failed, the House of Lords holding that the licensing justices possessed the same wide discretion over renewals that they did over original grants of spirit licenses, but Halsbury L.Ch. at page 179 at least observed that the power to licence should be exercised "according to the rules of reason and justice, not according to private opinion, according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular."

Again R v L.C.C. ex parte Akkersdyke et al (1892) 1 Q.B. 190 where the applicant disappointed in his application for renewal of his entertainment licence succeeded in his application for a re-hearing, on the grounds of bias, and the argument that what was being exercised was an administrative discretion was brushed away and it was held that the L.C.C. were exercising a "judicial" discretion, i.e. were subject to the rules of "natural justice" (following dicta in Sharp v Wakefield supra). See too R v Woodhouse Licensing Justices, (1906) 2 K.B. 501 (certiorari lies to licensing justices); R v Brighton Corporation, ex parte Tilling (1916) 114 L.T. 800; 85 L.J. K.B. 1552 (certiorari lies to road licensing authorities considering the grant of stage carriage licences: "Persons who are called upon to exercise the functions of granting licences for carriages and omnibuses are, to a great extent, exercising judicial functions, and although they are not bound by the strict rules of evidence and procedure which must be observed in a court of law, they are nevertheless bound to act

judicially. It is their duty to hear and determine according to law, and they must bring to that task an open and unbiased mind...." per Sankey, J. He went on to observe " .... it is the duty of this court to see that the methods which they have adopted and acted upon are correct, and not to criticise the conclusions at which they have arrived.") See too R v Electricity Commissioners, ex parte London Electricity (1924) 1 K.B. 171 (Licensing of electricity companies, and the famous dictum of Lord Atkin); and Associated Provincial Picture Houses Ltd. v Wednesbury Corporation (1948) 1 K.B. 223; (1947) 2 All E.R. 680 (C.A.) (Licensing of cinemas under the Sunday Entertainments Act: and the extent to which the local authority could legitimately attach conditions to licences granted, followed in Padfield v Minister of Agriculture, Fisheries and Food (1968) A.C. 997; (1968) 1 All E.R. 680).

Between 1951 and 1954 there occurred the three cases on which Martin for the Commissioner of Police relied and in which the Courts decided not to intervene. Mr. Martin argued (1) that the Commissioner's discretion is purely "administrative" and is not a "judicial" one, and that this Court should follow the three cases on which he relied and ought not therefore to intervene. He points out (2) that the jurisdiction to "revoke" arises on the licensee being convicted of one of the specified offences, and argues that once this is shown, revocation by the Commissioner automatically follows. The fact of conviction, he submits, is not challengeable before the Commissioner; and (3) that the clear intent of the Legislature was to exclude the common law rules developed in cases such as Cooper v Wandsworth Board of Works (supra).

The first of this trio of cases is Nakkuda Ali v M.F. de S. Jayaratne (1951) A.C. 66: a decision of the Privy Council in an appeal from Ceylon.

Under the powers conferred by the Defence Regulations made during the last war, the then Government of Ceylon had introduced a scheme under which dealings in regulated or controlled textiles

were restricted to persons holding textile licences granted by the Controller of Textiles (the respondent). The appellant had obtained such a licence, and enjoyed it for some four years. The relevant regulations contained a regulation to the effect:-

> "Where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer, the Controller may cancel the textile licence or textile licences issued to that dealer."

In exercise of this power the Controller cancelled the appellant's licence. The effect of this was to put him out of business. It appears that the Controller took this action because of the discovery of what in effect was a massive falsification of accounts with respect to textile coupons in the appellant's accounts with the Textile Coupon Bank operated by the Controller's staff. The Controller had called for the appellant's explanations but had not accepted them, as he did not believe them. So far as one can judge, the falsification must have occurred either in the returns as prepared by the appellant's staff, or in the returns after they were lodged by the Controller's staff, and if the latter most likely with the connivance of the appellant's staff, and in either event would have been to the substantial benefit of the appellant if they went undetected.

On the cancellation of his licence the appellant took out certiorari proceedings against the Controller, in which he argued that the revocation order should be set aside as he had not had a hearing. In point of fact he had had notice of the proposed revocation, and opportunities had been given to him to explain the falsification of the returns: his explanations pointed to the guilt of the receiving or Government staff, not his own, but failed to allege any convincing reason for that, if he and his own staff were not implicated. His complaint as to "natural justice" seems to have been based on the failure of the Controller to give him and his legal advisers an opportunity to cross examine the Government staff, and he

also alleged that he did not know what they had told the Controller about these falsifications, and so he suggested he had been hampered in his ability to reply and satisfactorily explain them.

Apart from the "natural justice" complaint the other point argued related to Liversidge v Anderson (1942) A.C. 206, as to whether the Controller had to show that he had been reasonably satisfied, i.e. prove that reasonable grounds did in fact exist.

In response the Controller through his counsel argued that this was an "administrative" discretion, and that he was not amenable to certiorari; in any event he argued that he did honestly believe the appellant was "unfit" to be allowed to hold a licence, and that was sufficient; furtherhe added that he did so on reasonable grounds. Finally he pointed out that in fact there had been an inquiry and the appellant had been told of the charges, and had a chance to make representations (though not to cross-examine the staff of the Textile Coupon Bank).

It would appear that there were from the point of "natural justice" three complicating factors: (1) their Lordships were concerned to place the decision within Lord Atkin's dissenting judgment in Liversidge v Anderson, and to find that not only was there honest belief, but that it was reasonably held, and they so found; (2) there was a problem as to the extent to which Roman Dutch Law principles could be equated with those of the common law as regards the issue of certiorari, and their Lordships found them sufficiently similar to allow them to apply the common law principles of the prerogative writs; (3) in doing so however they were faced with the application of these principles in the context of "war time" and the Defence Regulations. It was in the context of these complicating factors, that relying on the dictum of Lord Atkin in R v Electricity Commissioners (supra) their Lordships decided that though the Controller was required to act reasonably, he was not required to act "judicially". They said, per Lord Radcliffe, at page 78:

> "In truth, when he (the Controller) cancels a licence he is not determining a question: he is taking executive action to withdraw a privilege because he believes, and has reasonable grounds to believe, that the holder is unfit to retain it."

Accordingly their Lordships in this case held that certiorari would not lie. They went on to add, however, that on the facts even if it had been held to lie there had been a sufficient hearing. The appellant had in fact had, with his counsel, an interview with the Controller at which submissions had been made, there had been an inquiry into the discrepancies etcetera, and they concluded "It is impossible to see in this any departure from natural justice..... nor did the procedure adopted fail to give the appellant the essentials that justice would require. .... The appellant was informed in precise terms what it was he was suspected of: and he was given a proper opportunity of dissipating the suspicion and having such representations as might aid him put forward by counsel on his behalf...."

The dictum that a licence is a privilege, and that in withdrawing it there is no duty to apply the principles of audi alteram partem or natural justice has, with respect, not only not been well received, but has invited criticism from several quarters. See for example D.M. Gordon (1954) 70 L.Q.R. at page 206 et seq. (part of an article criticising ex parte Parker, the second case on which Mr. Martin relies, see post).

It is pointed out that the dictum was in a sense obiter, because there had in fact been a hearing. Further that none of the "licensing" cases were cited in argument or judgment, though they have clearly established that the "licensing situation" does require the licensor to act "judicially" and is normally susceptable to certiorari.

Other and even earlier criticism of Nakkuda's case is to be found in (1951), 67 L.Q.R. p. 103: "The twilight of natural justice" by Professor H.W.R. Wade who contrasts the earlier Privy Council

decision in Smith v R (1878) 3 App. Cas 624 (cancellation of a Crown Lease) in which the Privy Council had held that certiorari did lie in very similar circumstances. This case though not binding on the Privy Council, which is not bound by its own previous decisions, is also a Privy Council decision and is not reconcilable with the dictum in Nakkuda's case. See also Professor Wade's remarks in (1962) 78 L.Q.R. 188 at pages 198, 199n, and his book "Administrative Law" at p. 198-199. deSmith in his "Judicial review of Administrative action" (op. cit.) at pages 149-150 discusses Nakkuda Ali's case as falling within a period when there was a temporary deviation in the development of the audi alteram partem rule and suggested that since the remarks made by Lord Reid in Ridge v Baldwin (1964) A.C. 40 at page 77 et seq. that case has now little weight, at least upon this point.

The second case on which Mr. Martin relies is the decision of the Divisional Court in R v Metropolitan Police Commissioner ex parte Parker (1953) 1 W.L.R. 1150; (1953) 2 All E.R. 717.

In this case the Police Commissioner became satisfied that by reason of circumstances coming to his notice, the applicant, a licensed cab driver, was not a fit person to hold such a licence, and apparently he determined to revoke it, but accepted a proposal by the Assistant Commissioner that the licensee should be brought before a departmental licensing committee and confronted with the two policemen who had made complaints about him. This with a view to seeing if anything emerged that might lead him to reconsider the decision. This was done. The policemen read statements made by them to the effect that the licensee had been allowing his taxi cab to be used by prostitutes to entertain their clientele. The licensee admitted having been parked at the place where he was observed, at the relevant time, but said he was there waiting for a person who had engaged him. He denied that prostitutes had used his cab, and asked for permission to call the fare for whom he had been waiting. This was refused. It does not appear that he cross-examined the constables,

but it is not shown whether he asked to or not, and he was not legally represented. The committee held that nothing that had transpired warranted the Commissioner in reconsidering his decision, and the Assistant Commissioner informed the licensee that his cab licence was revoked. The cab driver applied for certiorari to bring in and quash the revocation of the licence, on the ground that there had been a denial of justice in the refusal to allow him to call his witness.

The Divisional Court refused the application for certiorari. It is not altogether clear what were the exact terms of the relevant statutes or regulations. Lord Goddard's judgment sets out the provisions relating to the grant of such licences: it appears that some of them provided that no grant should be made to a person under 21, and that the Commissioner might in his discretion refuse to grant a licence to a person who had been convicted of a felony, misdemeanour, or of cruelty to animals, or who had had his licence revoked or suspended. As to the revocation of the cab driver's licence, the relevant section reads:

> "A cab-driver's licence shall be liable to revocation or suspension by the Commissioner of Police, if he is satisfied, by reason of any circumstances arising or coming to his knowledge after the licence was granted, that the licensee is not a fit person to hold such a licence."

It appears that, mirabile dictu, counsel for the applicant conceded (very properly says Lord Goddard) that if the Commissioner had simply said "I withdraw your licence" he would not have been able to argue that the Commissioner was bound to hold an inquiry or hear evidence or anything else."

> "The wording of the paragraph seems to me to make it clear that it is not intended that there should be anything in the nature of a judicial inquiry, or that the Commissioner should be put in the position of a judge or quasi judge. The Commissioner can withdraw the licence or suspend it by reason of any circumstances which come to his knowledge. In other words he can act on hear-say if he likes.....

> ".... it is impossible to say that the Commissioner - in fact it is not said - if he acted alone was in a judicial or quasi-judicial position. He was exercising what I may call a disciplinary authority, and where a person, whether he is a military officer, a police officer, or any other person whose duty it is to act in matters of discipline, is exercising disciplinary powers, it is most undesirable, in my opinion, that he should be fettered by threats of orders of certiorari and so forth ....." per Lord Goddard, C.J. (at p. 720-721; emphasis supplied).

Parker, J. endorsed Lord Goddard's opinion, though Donovan, J. was less enthusiastic and prepared to concede that there might be situations in which such an inquiry might be regarded as "judicial".

Though Nakkuda Ali's case was not cited, a remark made by Lord Goddard echoes it. He said, en passant:

> "... the very fact that a licence is granted to a person would seem to imply that the person granting the licence can also revoke it. A licence is nothing but a permission, and, if a man is given permission to do something, it is natural that the person who gives the permission will be able to withdraw the permission. As a rule, where a licence is granted, the licensor does not have to state why he withdraws his permission....."

With respect, though Lord Goddard was at some pains to explain the differences between mandamus and certiorari, this view of this licence does not seem consistent with Ex parte Holloway (1911) 2 K.B. 1131 which showed entitlement to such licences save for cause.

The third case relied on by Mr. Martin was Ex parte Fry: (1954) 2 All E.R. 118 (Divisional Court); (1954) 1 W.L.R. 730 (C.A.). In this case a fireman was ordered to clean the uniform of a senior officer in his force. He refused to do so and was put on a charge for disobedience. The chief officer of his brigade heard the charge and found him guilty and punished him. He took out certiorari to set aside the finding and punishment, claiming that he had not had a fair trial: his brother officer who appeared for him had pointed out that the National Fire Service Instructions prohibited firemen being employed as personal servants of officers and precluded officers from having uniforms looked after by firemen except as a purely private

arrangement, but had been summarily silenced by the Chief Officer interrupting and telling him the order was lawful.

Before the Divisional Court Lord Goddard repeated his remarks in Parker's case cited above, with respect to persons exercising disciplinary authority and the undesirability of fettering their discretion with threats of orders of certiorari; such persons were not acting either "judicially or quasi-judicially" any more than a school master exercising disciplinary powers over his pupils. He once more referred to Lord Atkins's dictum in R v Electricity Commissioners, cited earlier, and concluded by saying that the Courts ought not to interfere -

> "with the discipline of police forces, fire brigades, or similar bodies which in their nature, are disciplined services, where the Chief Officer is simply acting as an officer in the matter of discipline. In such cases this Court ought not, in my opinion, to exercise control by means of an order of certiorari ..." (At page 732).

Hallett, J. supported these remarks and -

> "the distinction Lord Goddard, C.J. has drawn in the present case, as he did in Parker's case between a purely disciplinary proceeding which is not the proper subject of review by this court and a judicial proceeding which is." (At page 732: emphasis supplied).

In the Court of Appeal Singleton, L.J. giving the judgment of the Court expressed the view that the applicant has been guilty of extraordinarily foolish conduct: he should have obeyed the order and challenged its validity afterwards, instead of disobeying it and asking for trouble. He observed that certiorari as a remedy was discretionary, and having referred to Lord Goddard's remarks in Parker's case and the instant one, he expressly rested the confirmation of Fry's case on the ground of the discretionary nature of the remedy: the applicant should have carried out the order and challenged it after instead of disobeying it and "making difficulties for himself and for the whole of the service".

Parker's case appears to have rested on two grounds, both of which involved the finding that the "decider" was not exercising a "judicial" discretion, but an administrative one, and so was not

vulnerable to certiorari: the two grounds being (a) the fact that what was revoked was a licence, and (b) that the proceedings were "disciplinary" in nature. With respect to ground (b) it does not appear that a taxi driver being disciplined in this way by the Commissioner is undergoing an experience that differs in quality from a similar experience before a Traffic Court for a traffic offence for which disqualification or suspension of his licence may be ordered. The effect of both orders would be the same, save that a Judge would fix a time limit for the disqualification and would decide the matter after a review of the evidence on both sides.

The entirety of the administration of the criminal law may be said to be "disciplinary" in nature, yet this does not import that it is "not judicial" but "administrative". Is there any reason why the Police Commissioner's review of a licensee's misconduct which might lead to forfeiture of his licence should differ from that of the Traffic Court Judge?

While it may be that services such as the army, navy, police and fire services may be "disciplined forces" and that the ordinary administration of service discipline may be a matter with which a civil Court would not lightly interfere, it is not impossible to forsee that occasions for such interference may arise, and as to Parker's case it seems, with respect, that there is no reason why a taxi cab driver should be treated as a member of a "disciplined force".

Both Parker's case and Fry's case, decided within months of each other, seem to have at once attracted adverse criticism: see "The cab Driver's case" (1954) 70 L.Q.R. 203-13 by D.M. Gordon (attacking both Parker's case and that of Nakkuda Ali as inconsistent with the whole trend of previous cases); "Discipline and Fireman Fry" (1954) 17 M.L.R. 375-9 by S.A. deSmith (attacking Parker's case and that of Fry).

Both cases have been the subject of criticism in academic text books: see Judicial review of Administrative action by S.A. deSmith, 3rd Edition (1973) pages 150 and 151 and Wade's Administrative Law, 3rd Edition (1971) at page 200.

Of more significance has been the criticism of Lord Goddard's dicta in a series of English Court of Appeal decisions: See for example Merricks v Nott-Bower (1965) 1 Q.B. 57 per Lord Denning, M.R. during the argument in the Court of Appeal at page 61 (disapproving Parker's case); Ridge v Baldwin (1964) A.C. 40, Lord Reid at pages 77-79 (dealing with Nakkuda Ali's case); Lord Denning, M.R. in R v Gaming Board, ex parte Benaim (1970) 2 Q.B. 417 - at 430:

> "At another time it was said that the principles (of natural justice) do not apply to the grant or revocation of licences. That too is wrong. Reg. v Metropolitan Police Commissioner, ex parte Parker and Nakkuda Ali v Jayaratne are no longer authority for any such proposition. See what Lord Reid and Lord Hodson said about them in Ridge v Baldwin...."

Lord Denning, M.R. in Buckoke v Greater London Council (1971) Ch. 655 at page 669:

> "The judge devoted a considerable part of his judgment to Ex parte Fry, but that case was not canvassed before us. It does not warrant the proposition that the rules of natural justice do not apply to disciplinary bodies. They must act fairly just the same as any one else: and are just as subject to control by the courts. If the firemen's disciplinary tribunal were to hold an order to be a lawful order, when it was not, I am sure that the courts could interfere; or, if it proceeded contrary to the rules of natural justice in a matter of serious import, so also the courts could interfere....."

In R v Board of Visitors, Hull Prison, ex parte St. Germain et al already mentioned (a case decided since our own Cayman case) Lord Goddard's dicta in Re Parker and Ex parte Fry were both expressly rejected by the Court of Appeal.

Megaw, L.J. dealt with them - see (1979) Q.B. 425 at pages 446, 447 et seq., remarking of ex parte Parker:

> "In my view, it would be unsafe to treat that decision as still being good law, having regard to what was said in the speeches in Ridge v Baldwin and the observations of Lord Denning M.R. in a judgment concurred in by Lord Wilberforce and Phillimore L.J. in R v Gaming Board, ex parte Benaim. So far as ex parte Fry itself is concerned, its authority, in relation to the question of jurisdiction, is at any rate rendered doubtful by the observations of Lord Denning M.R. obiter dicta, in Buckoke v Greater London Council....."

And see Shaw, L.J. at pages 457-8 and Waller, L.J. at page 462.

That the problem of judicial review of maintaining discipline in institutions such as the prisons will continue to present problems is clear from the reservations made in the Hull Prison case with respect to the position of the Governor of the Prison exercising his authority in respect of minor infractions. See too in other Commonwealth jurisdictions cases such as Daemar v Hall (1978) 2 N.Z.L.R. 594 (Mc Mullin, J. criticising ex parte Parker and ex parte Fry at pages 600-601 et seq. - and holding certiorari would lie); R v Head of Beaver Creek Correctional Camp (1968) 2 D.L.R. (3d) 545; but contrast the long series of cases Martineau v Matsqui Institution Inmate Disciplinary Board (1976) 2 Fed. Court Rep. 198; (1977) 74 D.L.R. (3d) 1; (1978) 1 Fed. Court Rep. 312; (1978) 2 Fed. Court Rep. 647.

Be that as it may, it is clear that in England Ex parte Parker and Ex parte Fry are no longer considered good law and that the Privy Council case of Nakkuda Ali so far as it concerns certiorari not lying for the revocation of Licences is no longer considered an acceptable authority of general application: at best it can be regarded as a decision given on a war time statute or defence regulations.

Thus in Ridge v Baldwin (1964) A.C. at pages 78-79 Lord Reid said:

> "No case older than 1911 was cited in Nakkuda's case on this question, and this question was only one of several difficult questions which were argued and decided. So I am forced to the conclusion that this part of the judgment in Nakkuda's case was given under a serious misapprehension of the effect of the older authorities and therefore cannot be regarded as authoritative."

Should the Court of Appeal of the Cayman Islands follow these three cases? Before giving a final answer to this question it seems necessary to consider three more aspects of this matter:

The basic problem is whether or not the audi alteram rule ought to be imported into Section 43(2) of the C.I. Traffic Law. The attempt of Atkin, L.J. in the Electricity Authority case to find a general formula has not succeeded, though it has given some guidelines, but to ask whether the "decider" has "the duty to act "judicially" is really only to pose the basic problem again, and not to solve it.

What the common law has done in this situation, as it did in the development of negligence as an independent tort, is to decide that the duty to act judicially applied in a number of situations, and these have grown or been expanded from time to time, though here and there limits have been set in that Courts have on occasion ruled out some situation and said that in this situation no duty to "act judicially" arises.

In Ridge v Baldwin their Lordships and particularly Lord Reid made no attempt to categorize all the situations in which the duty to act judicially would be implied. They decided that it applied in that case, a case of deprivation of office, and they noted a number of other occasions or situations in which the duty applied, as for example deprivation of property rights and privileges, deprivation of membership of a professional or social body; they also noted some situations in which it did not apply, as for example dismissal of a servant, deprivation of an office held at pleasure, war time legislation (or some aspects of it). It is clear that both before and after, cases of deprivation of licences or privileges fell within the audi alteram partem rule, and that in so far as Nakkuda Ali's case and that of Ex parte Parker is concerned, they would on this point no longer be regarded as binding, though in Durayappah v Fernando (1967) 2 A.E.R. 152; (1967) 2 A.C. 337, Lord Upjohn giving the Privy Council judgment in a case from Ceylon (as it then was)

indicated that their Lordships still had some reservations as to Lord Reid's criticisms of Nakkuda Ali's case. (See page 156E).

Since Ridge v Baldwin there have been in the United Kingdom jurisdiction a number of cases involving the "licensing" situation, and it is proposed to look briefly at these; and then to look at a number of relevant Commonwealth decisions on this situation; and also at a more recent development of what some Text writers refer to a "mini natural justice" a duty to act fairly if not judicially.

In so far as the United Kingdom is concerned, the cases subsequent to Nakkuda Ali (1951) and to Ridge v Baldwin (1963) continued to show the Courts intervening the licensing situations despite the suggestion in Nakkuda Ali's case, and that of Re Parker that a licence could be simply withdrawn at will without an inquiry. See for example R v Barnsley Licensing Justices (1959) 2 Q.B. 276 (Divisional Court); (1960) 2 Q.B. 167 (Court of Appeal): here certiorari was used to testthe decision of Justices granting a spirit licence to a co-operative on the ground of possible bias, in that some justices were members of the co-operative.

The attack failed, but there was no suggestion that this was not a situation in which certiorari would lie.

Nagle v Feilden (1966) 2 Q.B. 633 (C.A.). Here the Court of Appeal declined to strike out a Statement of Claim in which the plaintiff sought a declaration attacking the refusal of the Jockey Club, (a private body) to grant licences to women as race horse trainers.

Pett v Grehound Racing Association (1969) 1 Q.B. 125 (C.A.) and (1970) 1 Q.B. 46: Here the Courts were concerned with whether a greyhound trainer who had been summoned to appear before the Greyhound Racing Association, (a private body) with a view to having his licence revoked was entitled to have legal representation, when he appeared before them. What was at issue in this inconclusive series of cases was the extent of his right to a hearing. There was no question of

his not having a right to any hearing at all because the licence could be revoked at will by those who granted it.

R v Gaming Board for Great Britain, ex parte Benaim (1970) 2 Q.B. 417; (1970) 2 A.E.R. 528 (C.A.). Here the applicants to a statutory Board complained that their application to take over an existing licensed business had been refused for reasons that had not been sufficiently communicated to them to enable them to answer and satisfy the Board as to their suitability.

Both Nakkuda Ali and Ex parte Parker were cited for the proposition that the principles of natural justice did not apply to the grant or revocation of licences. They were rejected. Giving the judgment of the Court of Appeal (Lord Denning, M.R., Lord Wilberforce and Phillimore, L.J.) Lord Denning said at page 430D:

> "At one time it was said that the principles only apply to judicial proceedings and not to administrative proceedings. That heresy was scotched in Ridge v Baldwin (1964) A.C. 40. At another time it was said that the principles do not apply to the grant or revocation of licences. That too is wrong. Reg. v Metropolitan Police Commissioner, Ex parte Parker (1953) 1 W.L.R. 1150 and Nakkuda Ali v Jayaratne (1951) A.C. 66 are no longer authority for any such proposition. See what Lord Reid and Lord Hodson said about them in Ridge v Baldwin (1964) A.C. 40, 77-79, 133."

So far as persons making applications for the gaming licence were concerned, Lord Denning equated their position with that of immigrants to the United Kingdom: "They have no right to come in, but they have a right to be heard". He reviewed some of the immigrant cases, such as In re H.K. (an infant) (1967) 2 Q.B. 617 and observed eventually that the duty on the Gaming Board was a "duty to act fairly". This involved a hearing, and an opportunity of attempting to satisfy the Board on matters that were troubling them, but did not involve the Board in revealing sources of information or details from which the sources could be discovered, contrasting this with the position obtaining in cases such as Ridge v Baldwin where the natural justice rule applies in full force. This case shows that there is a right to a hearing in all licence cases, but that the

principles do not apply to the full extent in all situations: in cases of applications, those applying may be entitled only to "mini-natural justice" the right to be dealt with fairly, but, by clear implication, in cases of revocation those being dealt with are entitled to the full extent of the rules, not only a hearing, but formulation of charges and a full opportunity to answer them and the evidence on which they are based.

Re Liverpool Taxi Owners Association (1972) 2 All E.R. 589 (C.A.) again saw the Courts intervening in a licensing situation in response to writs of certiorari and mandamus. Roskill, L.J. in his judgment, at page 596d, observed:

> "The power of the court to intervene is not limited, as once was thought, to those cases where the function is judicial or quasi-judicial. The modern cases show that this court will intervene more widely than in the past. Even where the function is said to be administrative, the court will not hesitate to intervene in a suitable case if it is necessary in order to secure fairness....."

R v Barnsley Metropolitan Borough Council, ex parte Hook (1976) 3 All E.R. 452 (C.A.) again saw the Courts intervening in a licensing situation, this time of a stall holder in a Council market who had had his licence revoked by the local authority for having urinated in the adjoining street at a time when the public lavatories had been closed for the night. In this case of revocation it was held that the local authority had been in breach of the rules of natural justice, which applied fully, within Atkin's dictum in the Electricity Commissioners case, in that they had heard evidence from the complainant in the absence of the licensee and had also allowed the complainant to sit with them when arriving at their decision. Further the Court of Appeal claimed the right to intervene when the punishment inflicted was altogether excessive and out of proportion to the occasion. The Court once again applied to what was termed the exercise of an administrative discretion all the principles of natural justice, observing that "certiorari will lie to quash not only judicial but administrative decisions", (per Lord Denning, M.R. at

page 457b). It might perhaps be remarked that Mr. Hook's right to trade in the market was a public right of some sort: but then so too is that of a taxi driver: see R v Metropolitan Police Commissioner, Ex parte Holloway (1911) 2 K.B. 1131.

It should also be observed that in Hook's case Scarman, L.J. (as he then was) approved ex parte Benaim (the gaming Board case cited earlier), but distinguished it, and held that in cases of revocation the rules of natural justice applied fully; he observed at page 460:

> "In the present case the corporation was considering something very like dismissing a man from his office, very like depriving him of his property and it was charging him with doing something wrong. It was the revocatiom of a licence because of misconduct that it had under consideration not merely the man's fitness or capacity for the grant of a licence. There was, therefore, a situation here in which (using the terms broadly) Mr. Hook was on trial, and on trial for his livelihood..... If ever there was a case in which it was imperative that the complainant or the prosecutor should not participate in the adjudication, I should have thought it was this one: and that is why I would distinguish it from Benaim's case....."

Mc Innes v Onslow Fane (1978) 3 All E.R. 211 saw a renewed attempt by the Courts to carry further the analysis of situations in which the Courts will import the rules of natural justice. This was a case in which the applicant for a declaration complained of the refusal by the British Boxing Board of Control to grant him a manager's licence. A result similar to that in Benaim's case was reached. Megarry, V.C. distinguished three types of situation in the licensing area: First, the forfeiture cases where there is a right decision which takes away some existing/or position, as where a member of an organisation is expelled or a licence revoked. Second, at the other extreme, what may be called the application cases, where the decision merely refuses to grant the applicant the right or position that he seeks; Third, an intermediate category which he calls the "expectation" cases which differ from the application cases in that the applicant has some legitimate expectation from what has already happened that his application will be granted; as

for example where he seeks renewal of his licence, or a person already elected seeks confirmation from some confirming authority. He then observes at page 218d:

> "It seems plain that there is a substantial distinction between the forfeiture cases and the application cases. In the forfeiture cases, there is a threat to take something away for some reason; and in such cases, the right to an unbiased tribunal, the right to notice of the charges and the right to be heard in answer to the charges (which, in Ridge v Baldwin, Lord Hodson said were three features of natural justice which stood out) are plainly apt. In the application cases, on the other hand, nothing is being taken away, and in all normal circumstances there are no charges, and so no requirement of an opportunity of being heard in answer to the charges.....
>
> The distinction is well recognised, for in general it is clear that the courts will require natural justice to be observed for expulsion from a social club, but not on an application for admission to it.
>
> The intermediate category, that of the expectation cases, may at least in some respects be regarded as being more akin to the forfeiture cases than the application cases; for although in form there is no forfeiture but merely an attempt at acquisition that fails, the legitimate expectation of a renewal of the licence or confirmation of the membership is one which raises the question of what it is that has happened to make the applicant unsuitable for the membership or licence for which he was previously thought suitable..."

Meggary V.C. then continued to discuss the extent to which the natural justice rules applied in the several situations and more particularly to the application cases, that being the one with which he was principally concerned: "'Natural justice' is a flexible term which imposes different requirements in different cases, it is capable of applying appropriately to the whole range of situations indicated by such terms as 'judicial' 'quasi-judicial' and 'administrative'...." (at page 219).

It is clear that in the revocation cases, such as this one before us is, the rules of natural justice indicated above: the right to notice of the charges and the right to be heard in answer to these charges, would be accorded to the applicant in our case on the authorities in the United Kingdom as they now stand. And that her application for renewal of her licence when made will import the same considerations.

It is also clear that even on those cases that deal with "mini-natural justice" there would have been a right to be heard or to make representations or to be dealt with "fairly".

We turn now to see how other Commonwealth jurisdiction have dealt with this situation. Only one such case was actually cited to us, from the High Court of Australia, but deSmith has referred to a number of Canadian cases which we have had an opportunity of reading and which we will also mention. They point in the same direction.

In Banks v Transport Regulation Board (1968) 119 C.L.R. 222 the High Court of Australia had occasion to consider the same problem. The Transport Licensing Board for Victoria purported to revoke (or rather to recommend to the Governor the revocation of) the licence of a taxi driver, for allegedly failing to observe the conditions of his licence: he had failed to promptly notify his change of address, and had allowed other persons to use his taxi. The taxi driver took out certiorari to set aside the revocation on the ground that the breaches alleged did not in law form adequate reasons for the revocation. The Board took the point that certiorari would not lie in respect of the revocation of the licence, relying on Ex parte Parker. The High Court refused to follow that case, preferring to rely instead on the observations of Lord Reid in Ridge v Baldwin, and Barwick, C.J. observed that he could not accept Ex parte Parker in its treatment of a taxi driver's licence as a mere privilege: he regarded it as a species of property, once granted, and as to Nakkuda Ali he regarded "that case as no more than a decision as to the true meaning of the Defence (Control of Textiles) Regulations, 1945 of Ceylon..... In my opinion, at most, this decision would bind this Court in the case of a statutory provision made in wartime in like terms and with respect to comparable subject matter. The Court is not bound by the process of reasoning followed by their Lordships and in this respect is entitled to observe that its basis in a radical respect was erroneous: see Ridge v Baldwin. Consequently, I do not feel constrained by Nakkuda Ali v Jayaratne to hold either that

certiorari is not available in this case or that the licence is a mere privilege and not property.

> "The nature of the power given to the Board and the consequences of its exercise combine, in my mind, to make it certain that the Board is bound to act judicially and that its proceedings are subject to the prerogative writs."

He went on to observe that the Board was bound to give notice of specified charges, and that the notice of the charges given here was inadequate to ground revocation, and the decision of the Board to revoke was void. There had been an excess of jurisdiction on the face of the record. The Court then went on to deal with the added complication that the revocation had to be approved by the Governor in Council. The other Judges, with one dissentient, expressed the same views as to the nature of the Board's duty, and its vulnerability to certiorari. In as much as the Australian High Court then regarded itself as bound by Privy Council decisions, it is of interest to see how they treated Nakkuda Ali's case, above.

As to New Zealand, two cases have come to our notice. In Daemar v Hall (1978) 2 N.Z.L.R. 594, already mentioned (and cited with approval by Me Gaw, L.J. in the U.K. case of R v Hull Prison Board of Visitors (1979) 1 Q.B. at 449), McMullin, J. was reviewing a case of certiorari brought by a prisoner in respect of the finding and sentence of four days loss of remission by a visiting justice in respect of an alleged breach of prison rules, in which the prisoner challenged the finding on the ground that his witnesses were not heard. After referring to ex parte Parker and ex parte Fry, and their critical reception in the United Kingdom, McMullin, J. declined to follow them, and held that as a matter of statutory interpretation the discretion to be exercised by the visiting justice was "judicial" and that certiorari would lie to review it. He treated Nakkuda Ali's case as a particular instance of statutory interpretation, and not generally applicable.

The other case is Stininato v Auckland Boxing Association (1978) 1 N.Z.L.R. 1, a decision of the Court of Appeal of New Zealand. In this case a Jamaican born professional boxer, once ranked number eight in the world in the light heavy weight division, had settled with his New Zealand born wife in New Zealand, and had acquired a licence as a boxer from the New Zealand Boxing Board. He was apparently a troublesome person, always complaining about the size of his purses, and involved in "spats" with local boxing authorities who had to sponsor his applications for renewal of his licence. It appears that the New Zealand Boxing Board summoned him to answer certain charges: with the advice of his solicitor he sent a written reply but did not attend. At the hearing fresh charges of which he had not been notified were brought up and considered. The Board decided not to cancel or revoke his licence which had a few months to go before renewal, but that when he applied for renewal they would not grant it. They simply notified him that they had decided not to revoke his licence, and when he applied for renewal refused to renew it. As to the renewal, this would have been one of the "expectation" cases referred to by Meggary, V.C. in McInnes v Onslow Fane, mentioned earlier. Clearly there had been a breach of "natural justice" in that the Board had acted upon charges against him of which he had never been notified, and to which he had had no opportunity to reply. The question of his right to canvas the situation by certiorari was discussed at great length, and involving as it did the right to work, it was decided that a refusal of renewal of his licence for misconduct in respect of which he had never had the opportunity to be heard would be a breach of natural justice, and that the natural justice rules applied, but relief was in fact refused, the Court being unwilling to upset the trial Judge's exercise of discretion against granting relief on the grounds, inter alia, of the applicant's delay in seeking it. Of interest is the ruling that the New Zealand Boxing Association's Council, though a private domestic body, was obliged in a situation of this sort to observe the audi alteram partem rule.

Also of interest is the fact that the suggestion that a boxer's licence was a privilege liable to revocation at will was never even canvassed. Also of interest is that one of the Judges of the New Zealand Court of Appeal was prepared to grant him at least a declaration. The case is of interest in its review of the authorities dealing with the licences and controls exercised by sport licensing authorities there and elsewhere. It is curious that it should have been heard and decided on somewhat similar grounds to McInnes v Onslow Fane within weeks of each other, and approaching a very similar situation from somewhat different starting places, as the New Zealand Courts were primarily interested in the United Kingdom line of cases concerning the right to work, such as Nagle v Fielden etcetera. It is also of importance in that the Court treated the device of not revoking but deciding not to renew in the same way as they would have treated an outright revocation: both were subject to the audi alteram partem rule.

The Canadian cases are on the whole perhaps the most helpful, in that several of them deal with Traffic laws which permit the licensing authority to revoke driving (or other licences) though the grounds of revocation have been subjected to review by the Courts, without the Court revoking the licence. That is to say the Licensing Authority has been given an independent right to revoke in respect of traffic offences that have been considered by the Courts.

One of the earliest brought to our attention was Board of Health of Saltfleet Township v Knapman (1954) 3 D.L.R. 760 (Gale, J.) (1955) 3 D.L.R. 248 (Ontario C.A.) (1956) 6 D.L.R. (2D) 81 (Supreme Court of Canada) which held that a decision by local Board of Health officials to issue closing notices in respect of a series of cottages for immigrant workers as unfit for habitation was the exercise of a "judicial discretion" and required that notice be given to the owner of the complaints and an opportunity of being heard as to them.

In Fairbairn v Highway Traffic Board of Saskatchewan (1957) 11 D.L.R. (2D) 708, the licensee had been convicted of "impaired driving" and the Magistrate disqualified him from driving for one month. The Highway Traffic Board, acting under a section of the Law which provided that the Board "may revoke any licence issued under (the) Act when the holder thereof has been convicted of an infraction of the Criminal Cole", peremptorily, and without notice or hearing, sent the licensee a letter revoking his licence for an additional two months. On an application for certiorari Graham, J. observed:

> "It will, of course, be noted that the words used in s. 90 referred to are permissive: the Board "may", not "shall", exercise the power of revocation or suspension. The power thus conferred is a discretionary one. The Board may, in its discretion, having regard to all the circumstances, decide to revoke or suspend, or not to revoke or suspend."

After dealing with the argument that this amounted to providing a double penalty for the same offence, which he rejected, he went on to hold:

> "Nevertheless, it is, I think apparent that in the exercise of the power given to the Highway Traffic Board, which may in some cases seriously affect the individual whose licence is being dealt with, the Board should recognize and apply the well settled principles governing the exercise of such discretionary power....
>
> The seriousness and degree of blameworthiness connected with the commission of an offence under s. 223 of the Criminal Code may differ in the cases that are being dealt with and the Board should, in the exercise of its discretionary power, give consideration to these in determining the measure of penalty that should be imposed as a result."

Having slated the then practice of the Board in awarding an automatic suspension of two months, regardless of circumstances, Graham, J. went on to cite Wood v Woad (1978) L.R. 9 Exch. 190 at 196, and to observe that the common law imported the audi alteram partem rule into this situation, and that nothing in the Act took away this fundamental right of a person affected by its provisions, following Knapman's case (above).

The licensee was entitled to a real and effective opportunity of meeting any relevant allegation made against him:

> "I have no doubt that the duty of the Highway Traffic Board in dealing with the suspension or revocation of a licence is a judicial or quasi-judicial one rather than an administrative one and that the authorities which I have referred to herein have application to the discharge of its powers by such a Board.....
>
> In my opinion, where the revocation or suspension of a licence is under consideration, the person affected by the decision to be reached should be given an opportunity to appear before the Board and to be informed of the allegations with which he is faced and given an opportunity to reply thereto or to plead circumstances that might influence the Board in the exercise of the power which it proposes to exercise. Such an opportunity was not given the applicant Fairbairn and as a result certiorari is available as a remedy."

He then quashed the order of the Board.
The passages cited above from Fairbairn's case appear to be directly applicable to the case before us, both as to the duty to consider the matter and all the circumstances, and as to the duty to give notice to and allow the licensee to appear and be heard.

Fairbairn's case was followed in Manitoba, in Re Watt and Registrar of Motor Vehicles (1958) 13 D.L.R. (2D) 124. There the Registrar exercised his power to revoke the licensee's licence because he felt that this licensee had been involved in too many accidents, albeit on the occasion of the last accident there had been no conviction or indeed any prosecution. Once again the Registrar had simply written to the licensee concelling his licence: there had been no notice of charges, and no opportunity to be heard. It is interesting to note that in this case Freedman, J. dealt with Nakkuda Ali's case, by asking what was the nature of the process at which the decision to revoke was to be arrived at, and answering that it was a "judicial" process in this case.

> "Manifestly the Registrar - or in this case his deputy - was engaged in weighing and considering evidence for the purposes of determining whether the applicant was or was not liable to a penalty. That is precisely what Judges regularly and juries invariably do. In their case however they hear both sides, for that is the essence of the judicial process. Here the Registrar, engaged in a quasi-judicial function, presumed to arrive at a decision

> without hearing the person who would be adversely affected thereby, and without notice to him. Such a decision cannot stand. It does violence to a fundamental requirement of justice - that every person has a right to be heard before judgment is pronounced against him.
>
> The good faith of the Registrar is not in question. It may well be his view that both the public and departmental interest are best served by unilateral action under s. 134 without the delay incident to a notice and hearing. But considerations of public expediency and of administrative convenience are and must be subordinate to the rights of the individual. One of such rights is the right to notice. In the present case that right was denied the applicant, and he is entitled to redress....."

The learned Judge went on to observe:

> "Clearly, therefore, the mere silence of the Legislature on the subject of notice will not suffice to abrogate the common law right of the applicant to notice. If the Legislature wishes to empower the Registrar to suspend or cancel driving licences without notice to the holders thereof, it must confer such power in clear and express terms. This it has not done....."

Once again these observations made on the exercise of powers very similar, in fact perhaps more extensive, to the powers of the Commissioner in the instant case seem both relevant and pertinent.

Korytko v City of Calgary (1963) 42 D.L.R. (2D) 717 concerned the condemnation of buildings and the city's right to make a demolition order: what was at issue here was the nature of the hearing afforded by the Councillors to the applicant and his lawyer on their appearance at City Hall. They were not allowed to challenge the Building Inspector by cross-examination. This was held not to be a breach following Board of Education v Rice, and Local Government Board v Arlidge, but the refusal of the Councillors to permit any reply at all to the Building Inspector was held to be in breach of matural justice rules, and certiorari issued.

Klymnchuk v Cowan (1964) 45 D.L.R. (2D) 457, a decision from the Manitoba Court of Queen's Bench by Smith, J. dealt with the summary cancellation of an automobile dealer's licence to sell used cars, following on complaints to the Registrar of Motor Vehicles that the dealer had cheated a client by giving him a bad cheque for his

car. Smith, J. observed, at page 598:

> ".... it is my view that though the duties of the defendant, as Registrar of Motor Vehicles, are primarily administrative, yet in matters involving the suspension or cancellation of a dealer's permit he acts in a quasi-judicial capacity. I see no distinction in this respect between a decision to cancel or suspend a driving licence and a decision to cancel or suspend a dealer's permit....."

Having cited Watt's case, above, he continued:

> "..... even if the statute does not expressly require notice, as is the case here, the demands of justice will insist that notice be given.....
>
> "The requirement of notice and an opportunity to be heard need not involve anything in the nature of formal proceedings. All that is required is that reasonable notice be given, with grounds of complaint, and that a reasonable opportunity to answer the allegations against him be afforded...."

When the Registrar acted in breach of this, the learned Judge following Ridge v Baldwin held that the order of cancellation was void, not voidable. As the licence had in fact expired in any event, he gave a declaration to that effect, and left it open to the Licensee and the Registrar to settle their differences if and when the licensee now applied for renewal of the licence. He refused to grant damages against the Registrar.

In both R v Minister of Labour, ex parte General Supplies Co. Ltd. (1964) 47 D.L.R. (2D) 189 (preliminary stages of certifying a labour dispute) and in R v City of Calgary, ex parte Sanderson, (1966) 53 D.L.R. (2D) 477, Milvain, J. of the Alberta Supreme Court held that the "hearing" involved in these cases carried with it the right to cross-examine the workers alleging a dispute existed, and the city Police moving to have the applicant's store licence cancelled.

In Re Halliwell and Welfare Institutions Board (1966) 56 D.L.R. (2D) 754 Munroe, J. in the British Columbia Supreme Court followed Knapman's case, and the Fairbairn, Watt, and Klymchuk cases and held that where the Board had cancelled the licence of the applicant to run a private rest home:

> "..... without having given her an opportunity to know wherein she is alleged to have violated any provision of the Act or of the Regulations, or to make answer to such allegations. In making the decision to cancel the licence the Board was under a duty to act judicially. It failed to do so. Such failure constituted a denial of natural justice, and rendered the Board's order reviewable by the Court. Application granted, The order of the Board cancelling the licence is quashed."

In Reg. v Superintendant of Motor Vehicles, ex parte Bower (1967) 63 D.L.R. (2D) 286, suspension of the applicant's licence on the ground that he was an alcoholic, the British Columbia Supreme Court followed the cases cited above and reached a similar conclusion.

A similar conclusion was reached in Hlookoff v City of Vancouver (1968) 67 D.L.R. (2D) 119 where the city fathers sought to use the provisions with respect to the licensing of business premises to close down the publication of a magazine which the Mayor regarded as salacious. After dealing with the question of whether the city by-law was within the competence of the provincial government or whether it infringed constitutional provisions relating to freedom of the press, (it did not), Verchere, J. considered the validity of the revocation made without notice or hearing, cited Ridge v Baldwin, and adopted Lord Reid's view of Nakkuda Ali's case and followed the Canadian decisions referred to above, and held the cancellation, albeit temporarily, of the applicant business licence was an invalid act. However he distinguished Roncarelli v Duplessis (1959) 16 D.L.R. (2D) 89 and refused to award damages.

It may be of interest to know that where the traffic statute expressly provides for automatic disqualification of the driving licence of a driver convicted of certain offences instead of providing that the licensing authority "may" disqualify, the Canadian Courts have upheld the disqualification and refused to hold such a statute ultra vires the powers of Canadian provincial legislatures: in such a case the legislature has expressly ruled out the application of the audi alteram partem rule. See Bell v Attorney

General, Prince Edward Island, (1973) 35 D.L.R. (3D) 265, a decision of the Prince Edward Island Supreme Court sitting en banc (three Judges).

The cases subsequent to Ridge v Baldwin both in the United Kingdom and in other Commonwealth jurisdictions show that Ex parte Parker and Ex parte Fry would no longer be accepted as correct expositions of the common law, and that so far as Nakkuda Ali's case is concerned it is generally regarded as limited to its special facts and as being a decision on the interpretation of the special war time legislation with which it dealt. It is however a Privy Council decision and as to these decisions this Court has for guidance the observations of Lord Diplock, giving the majority decision in Baker v The Queen (1975) A.C. 774; (1975) 13 J.L.R. 170. At page 788D Lord Diplock said:

> "Although the Judicial Committee is not itself strictly bound by the ratio decidendi of its own previous decisions, courts in Jamaica are bound as a general rule to follow every part of the ratio decidendi of a decision of this Board in an appeal from Jamaica that bears the authority of the Board itself. To this general rule there is an obvious exception, viz. where the rationes decidendi of two decisions of the Board conflict with one another and the later decision does not purport to overrule the earlier. Here the Jamaican Courts may choose which ratio decidendi they will follow and in doing so they may act on their own opinion as to which is the more convincing....."

Lord Diplock also commented on the per incuriam rule at 788G:

> "Strictly speaking the per incuriam rule as such, while it justifies a court which is bound by precedent in refusing to follow one of its own previous decisions (Young v Bristol Aeroplane Co. Ltd. (1944) K.B. 718) does not apply to decisions of courts of appellate jurisdiction superior to that of the court in which the rule is sought to be invoked: Broome v Cassell & Co. Ltd. (1972) A.C. 1027.
>
> To permit this use of the per incuriam rule would open the door to disregard of precedent by the court of inferior jurisdiction by the simple device of holding the decisions of superior courts with which it disagreed must have been given per incuriam."

In Baker's case the Privy Council found that in fact there were two previous inconsistent decisions and that the Court in Jamaica was not bound to follow the more recent decision.

In the instant case we have contrasted the reasoning expressed in Nakkuda Ali's case with the dicta and decisions of English Courts, including some Privy Council decisions made before Nakkuda Ali's case was decided: see for example Smith v The Queen (1878) L.R. 3 App. Cas 614 mentioned earlier, and the famous decision from Canada, Lapointe v L'Asscciation de Bienfaisance etc. de la police de Montreal (1906) A.C. 535.

Further, it does not strain the case unduly to regard the Privy Council's decision in DeVerteill v Knaggs (1918) A.C. 557 as one turning on the privilege or licence of a Trinidadian land owner to use East Indian indentured labour on his estate.

We think that within the guidelines indicated by Lord Diplock there are prior decisions expressing principles that appear inconsistent with that advanced in Nakkuda Ali's case and we would respectfully adopt Lord Reid's analysis of it in Ridge v Baldwin, and that of Barwick, C.J. in the High Court of Australia in Banks v Transport Regulation Board (1968) 119 C.L.R. 222, both of which have been referred to earlier.

We are of opinion that, both on the ordinary rules of statutory interpretation and on authority, Section 43(2) of the C.I. Traffic Law, Law 16 of 1973, vests in the Commissioner a discretion as to whether he will revoke a taxi driver's licence or not: the vast range of offences which may give rise to the occasion to exercise that discretion point unerringly to the conclusion that the power to revoke is not intended to be automatic but discretionary. It is primarily intended to cover cases in which the Court does not have the power to revoke, but considerations of the need to protect those who use public transport make it desirable that the original grantor of the licence should have the power to revoke the taxi driver's licence, as for example in the case of a taxi driver who is convicted of rape of a female passenger.

We are further of opinion that the statute being silent on the matter, the common law imports into the exercise of the Commissioner's powers in this respect the need to observe the tenets of natural Justice, and in particular the three features which stand out:

> "(1) the right to be heard by an unbiased tribunal;
>
> (2) the right to have notice of charges of misconduct;
>
> (3) the right to be heard in answer to those charges."

Per Lord Hodson in Ridge v Baldwin (1964) A.C. at page 132.

The Commissioner's powers are clearly to be exercised in a "judicial" manner. The licensee ought to have had notice of his intention to invoke Section 43(2) of the Act, and of the reasons or charges, in this case it would be conviction for the possession of ganja on a given date, time and place. The licensee ought also to have had the opportunity of appearing before the Commissioner and answering those charges, or putting forward circumstances in mitigation of the offence. As we do not know the details of the original case it is not easy to forecast what these might be.

As the passages that we have cited from various judgments indicate, there is considerable latitude as to the way in which the hearing before the Commissioner is carried through. It is not another trial, but there is no reason why counsel should not be permitted to attend on behalf of the licensee and to make representations. The notes of evidence of the trial that grounded the exercise of the Commissionerer's powers under Section 43(2) ought to be made available to him, and are prima facie evidence upon which he may act. They are not however conclusive, nor do they prevent the licensee from attempting to offer other evidence not tendered at the original trial. This point arose very clearly in General Medical Council v Spackman (1943) A.C. 627, a case in which the Council was considering the striking off of a doctor who had

been found guilty in a divorce Court of having committed adultery with a patient. At the hearing before the Council the Council refused to hear such additional evidence. The House of Lords held that it was bound to hear such evidence if offered by the doctor, and refusal to hear it rendered the hearing and decision bad.

The Commissioner "may" revoke, on being satisfied of the conviction, but the licensee has the opportunity of attempting to show by other evidence if it can be got, that there ought not to be a revocation. Naturally such evidence may be viewed with great suspicion but it may prove useful. In Spackman's case Viscount Simon, L.C. observed at page 636:

> "What matters is that the accused should not be condemned without being given a fair chance of exculpation. This does not mean that the Council has to rehear the whole case by endeavouring to get the previous witnesses to appear before it, though in special circumstances the recalling of a particular witness, in the light of what the accused or his witnesses assert, may, if feasible, be desirable. The council will primarily rely on the sworn evidence already given at the trial...."

The licensee may of course admit the conviction and attempt to advance mitigating factors only; in any event there seems to be no reason why the Commissioner's own inquiry should be unduly onerous or burdensome, provided that the licensee gets a fair opportunity of putting forward his case or any mitigating aspects that he may wish to urge.

In the circumstances then, this Court feels bound to set aside the revocation order made against the licensee by the Acting Commissioner of Police on the 26th October, 1978. As usual costs will follow the event, such costs to be taxed if not agreed.