JAYAWARDENA

v.

DHARANI WIJAYATILAKE, SECRETARY, MINISTRY OF JUSTICE AND CONSTITUTIONAL AFFAIRS AND OTHERS

SUPREME COURT
FERNANDO, J.
DHEERARATNE, J. AND
WIJETUNGA, J.
SC APPLICATION 186/95
14TH JULY, 1995

Fundamental rights - Cancellation of appointment of an Inquirer into Sudden Deaths - Making of a new appointment - Section 108 of the Code of Criminal Procedure Act - Removal of persons holding office which is public in character - Rule of Law - Article 12(1) of the Constitution.

The petitioner was an Inquirer into Sudden Deaths, Gampaha, appointed to that office by the then Minister of Justice by his letter dated 13.12.1993 for a period of 3 years from 01.12.1993. He complained that the 1st respondent (Secretary, Ministry of Justice) purported to cancel his appointment with effect from 31.05.1995 by a letter dated 26.5.1995 written by the 1st respondent; that by another letter dated 26.5.1995 the 1st respondent informed the 3rd respondent that the 2nd respondent (Minister of Justice) had appointed the 3rd respondent as the Inquirer into Sudden Deaths for the area, effective 01.06.1995.

The petitioner alleged that the 1st respondent had no power to cancel his appointment and that in any event the cancellation was without cause or inquiry and hence invalid; that the appointment of the 3rd respondent was also a nullity and that the respondents thereby infringed the petitioner's rights under Article 12(1) of the Constitution.

By a letter dated 13.12.1990 the petitioner was first appointed as Inquirer into Sudden Deaths by the Minister of Justice for 3 years from 01.12.1990 in terms of section 108 of the Code of Criminal Procedure Act.

The notice calling for applications in 1990 gave the closing date for applications as 02.04.1990 and stated that applications, inter alia, from employees of Goverment Departments and Co-operative establishments would not be entertained. As on 02.04.1990 the petitioner was a Co-operative Inspector but by a letter dated 17.03.1990 he had opted to retire in terms of P.A. Circular No. 30 of 1990. By letter dated 14.05.1990 the

petitioner's retirement was approved with effect from 02.05.1990. The petitioner made this fact known to the interview board on 15.05.1990. The board considered him eligible and recommended him as the most suitable and placed the 3rd respondent as the second in order of merit.

After the expiry of the 1990 appointment the Minister of Justice gave him the aforesaid second appointment for a further period of 3 years from 01.12.1993. The 3rd respondent did not attempt to challange either the 1990 or the 1993 appointment by way of a fundamental rights application or otherwise and so the petitioner functioned as Inquirer without any legal challenge from December 1990 until May 1995.

After the change of Government, the 3rd respondent wrote a letter dated 25.10.1994 to the 2nd respondent (new Minister of Justice) questioning the appointment of the petitioner on the ground that on 02.04.1990 the petitioner was not eligible for the post; further that his appointment was made at the behest of a powerful Member of Parliament. The petitioner also learnt that the 3rd respondent had been given an interview by the 2nd respondent. But the petitioner was not informed of the allegations. As such, the petitioner by a letter dated 03.05.1995 requested the 2nd respondent to grant him an interview. There was no reply to that letter. But without any notice or reasons the 1st respondent purported to cancel the petitioner's appointment and further informed the 3rd respondent that the 2nd respondent had appointed him as Inquirer into Sudden Deaths effective 01.06.1995.

The 1st respondent produced with her affidavit a notification under Article 46(2) of the Constitution whereby, with effect from 01.12.1994 the 2nd respondent had delegated to the Deputy Minister of Justice, inter alia, his powers and duties in respect of the appointment of Inquirers under section 108. The 1st respondent pleaded that the Deputy Minister determined that the petitioner's appointment in the first instance was wrong and directed that steps be taken to rectify the same by cancellation. This was not supported by the production of any minute or document from the official files. It was submitted that in view of the delegation it should be presumed that the appointment of the 3rd respondent was also made by the Deputy Minister. However, in view of Article 157 of the Constitution, the Deputy Solicitor General presented his case on the basis that the 2nd respondent made the appointment.

Held :

1. It was the 1st respondent who cancelled the petitioner's appointment. This is supported by the clear language of the 1st respondent's letter

and the failure to produce documentary evidence from official files. She had no legal authority to cancel the appointment. Nor was she competent to do so on a directive of the Deputy Minister: that would be an unauthorised sub-delegation.

Per Fernando, J.

"Respect for the Rule of Law requires the observence of minimum standards of openness, fairness and accountability in administration and this means - in relation to appointments to and removal from, offices involving powers, functions and duties which are public in nature - that the process of making a decison should not be shrouded in secrecy....."

2. The office of Inquirer involves functions of a public nature and in particular not stated to be held at pleasure - so that the Executive does not have an unfettered discretion in respect of termination. The petitioner cannot therefore be dismissed without cause and a hearing. Hence the cancellation of the petitioner's appointment was in breach of principles of natural justice and must be quashed.

Per Fernando, J.

"In my view, while each and every breach of the law does not amount to a denial of the protection of the law, yet some fundamental breaches will result in denying the protection of the law."

Per Fernando, J.

"It is accepted today that powers of appointment and dismissal are conferred on various authorities in the public interest, and not for private benefit, that they are held in trust for the public and that the exercise of these powers must be governed by reason and not caprice."

3. It was the 2nd respondent, the Minister who purported to appoint the 3rd respondent in place of the petitioner who would otherwise have held office until 30.11.1996. Since the cancellation of the petitioner's appointment was illegal and a nullity the 3rd respondent's appointment was also a nullity.

4. By the cancellation of the petitioner's appointment and the appointment of the 3rd respondent the petitioner's fundamental right under Article 12(1) has been infringed by the 1st and 2nd respondents.

Cases referred to :

1. *Bandara v. Premachandra* (1994) 1 Sri L R 301
2. *Migultenne v. Attorney-General* (1996) 1 Sri L R 408
3. *Malloch v. Aberdeen Corporation* (1971) 1 WLR 1578
4. *Cooper v. Wandsworth Board of Works* (1863) 14 CB (NS) 180
5. *Board of Education v. Rice* (1911) AC 179
6. *R.V. Universty of Cambridge* (1723) 1 Str 557
7. *De Mel v. De Silva* (1949) 51 NLR 282, 285 - 6
8. *General Medical Council v. Spackman* (1943) AC - 627
9. *John v. Rees* (1970) Ch 345. 402
10. *Ridge v. Baldwin* (1960) AC 40, 47
11. *Abeywickrema v. Pathirana* (1986) 1 Sri LR 120
12. *Perera v. Jayawickrema* (1985) 1 Sri LR 285
13. *Wijesinghe v. A.G.* (1978-79-80) 1 Sri LR 102; 1 FRD 40
14. *State of Jammu and Kashmir v. Rasool* AIR 1961 SC 1301
15. *W.B. v. Anwar Ali Sarkar* (1952) SCR 284

APPLICATION for relief for infringement of fundamental rights.

R.K.W. Goonesekera with J.C. Weliamuna for petitioner

Asoka de Silva, Deputy Solicitor General for 1st, 2nd and 4th respondents

Miss Marina Fernando for 3rd respondent.

Cur. adv. vult.

July 27, 1995
FERNANDO, J.

The Petitioner complains that his fundamental rights under Articles 12(1) and(2) of the Constitution were infringed by the purported cancellation (with effect from 31. 5. 95) of his appointment as Inquirer into Sudden Deaths, Gampaha, by letter dated 26. 5. 95, written by the 1st Respondent, the Secretary, Ministry of Justice; and by appointment of the 3rd Respondent as Inquirer into Sudden Deaths, Gampaha (with effect from 1. 6. 95) by another letter dated 26. 5. 95, written by the 1st Respondent, in which she stated that this appointment was by the Minister of Justice. This appointment was made without prior advertisement and interview.

Section 108 of the Code of Criminal Procedure Act, No 15 of 1979, vests the power of appointment in the Minister of Justice:

> "The Minister may appoint any person by name or office to be an inquirer for any area the limits of which shall be specified in such appointment."

Our attention has not been drawn to any stautory or other provision prescribing the qualifications or the procedure for such appointments.

Section 14(f) of the Interpretation Ordinance (Cap. 2) provides that "for the purpose of conferring power to dismiss, suspend or re-instate any officer, it shall be deemed to have been, and to be sufficient to confer power to appoint him." Accordingly, the Minister had the power to dismiss, suspend or re-instate an Inquirer. The Respondents have not referred to any other power of removal or cancellation.

FACTS

By a notice dated 15. 2. 90, published in the Gazette of 2. 3. 90, the Government Agent, Gampaha, called for applications

for the post of Inquirer into Sudden Deaths, Gampaha. The closing date for applications was 2. 4. 90. That notice stated that applications from employees, inter alia, of Government Departments and Co-operative establishments would not be entertained. The Petitioner and the 3rd Respondent were among the applicants. The Petitioner was then a Co-operative Inspector.

By his letter dated 17. 3. 90 to the Assistant Commissioner of Co-operative Development, copied to the Director of Pensions, the Petitioner stated that he wished to retire from service under the provisions of Public Administration Circular No. 30 of 1988 with effect from "1st June 1990;" he went on to request that his retirement be approved with effect from "1st *June* 1990" ("June" having been originally typed). He appears to have delivered (and not posted) the original as well as a carbon copy to the Assistant Commissioner, who seems to have returned the carbon copy to him -- because the carbon copy which he has produced has the Assistant Commissioner's date stamp ("19. 3. 90") and handwritten endorsement to the Commissioner: "Recommended and forwarded for necessary action." In that carbon copy, the requested date of approval has been altered: "June" has been scored off, and "April" written in its place. Although learned Counsel for the Petitioner was not relying on that date, when the case was called on 6. 7. 95 to consider the grant of interim relief, the relevance of this alteration was pointed out to the learned Deputy Solicitor-General, who appeared for the 1st, 2nd and 4th Respondents. However, the Respondents did not produce the original or the copy sent to the Director of Pensions, both of which must have been in the custody of the State. Immediately after judgment was reserved, the Deputy Solicitor-General sought and was granted permission to produce that original and that copy.

The Learned Deputy Solicitor-General thereafter tendered the original (but not the copy sent to the Director of Pensions, as, he had been told, that could not be traced). "June" had been altered to "May". It is therefore clear that the Petitioner did alter the date "1st June 1990" when delivering the original, but it is

not clear why "May" was inserted in the original, and "April" in his carbon copy. I must take 1st May 1990 as the date of retirement stipulated by the Petitioner.

PA Circular No 30/88 provides that "a public officer has the right to exercise his option of retirement after 20 (twenty) years of service," and the Petitioner satisfied that requirement.

By letter dated 14. 5. 90 the Petitioner was informed that his retirement had been approved with effect from 2. 5. 90. It is not disputed that he made this fact known to the interview board on 15. 5. 90, when the applicants were interviewed by the Government Agent, Gampaha, and two other public officers. The interview board considered that the petitioner was eligible, and recommended him as the most suitable, and the 3rd Respondent as the second in order of merit.

A question arose as to whether the Petitioner was still a Co-operative Inspector on 2. 4. 90, and therefore ineligible to apply and to be appointed. This was brought to the notice of the then Minister by a minute dated 17. 7. 90 in which the Petitioner was stated to be ineligible; this view was shared by the then Secretary to the Ministry who recommended the appointment of the 3rd Respondent.

There was considerable delay in making an appointment. The 3rd Respondent submitted appeals and protests to the then Minister as well as the then President; his only complaint then was that the Petitioner was not eligible, and he did not suggest either that he was being discriminated against, or that the Petitioner was being favoured, for political reasons. There were several petitions, and a question was asked in Parliament regarding the Petitioner's disqualification. The then Secretary submitted a report dated 12. 11. 90, maintaining his previous recommendation. The minute of 17. 7. 90, the report of 12. 11. 90, and one explanatory letter dated 25. 9. 90 from the Government Agent, have been produced, but not other relevant documents: including several of the documents mentioned in

the report dated 12. 11. 90, such as certain other letters from the Government Agent, the Ministry reply in respect of the petition sent to the then President, the question asked in Parliament and the reply thereto.

The then Minister decided to appoint the Petitioner. Accordingly, by letter dated 23. 11. 90, the then Secretary informed the Petitioner that the Minister had appointed him Inquirer into Sudden Deaths, Gampaha, for three years with effect from 1. 12. 90. Upon the expiry of that three-year period, the then Secretary informed him by letter dated 13. 12. 93 that "the Minister had extended his period of service by three years from 1. 12. 93 in order that he could continue to serve as Inquirer." The 3rd Respondent did not attempt to challenge either the 1990 appointment or the 1993 appointment, by means of a fundamental rights application, certiorari, declaration, or other legal proceedings, and so the petitioner functioned as Inquirer, without any legal challenge, from December 1990 until May 1995.

After the Parliamentary General Election of August 1994, the 2nd Respondent assumed office as the new Minister of Justice. The 3rd Respondent wrote to him on 25.10.94, questioning the Petitioner's appointment. Neither he nor the 2nd Respondent sent the Petitioner a copy of that letter or informed him of its contents. In that letter the 3rd Respondent requested that he be appointed Inquirer, not only questioning the Petitioner's eligibility, but making new allegations: that disciplinary inquiries had been pending against the Petitioner at the time he sought to retire, and that the Government Agent, Gampaha, had been induced to call the Petitioner for the interview, despite ineligibility, because of political pressure exerted on the Government Agent by a powerful Member of Parliament of the Government.

The Petitioner says that he received a copy of that letter on or about 2. 5. 95 (how or from whom. he does not say): and that, realising that his appointment was in jeopardy, he wrote

to the 2nd Respondent on 3. 5. 95. In his letter he claimed that, on the pretext of political victimization, the 3rd Respondent had obtained an interview with the 2nd Respondent, at which the 3rd Respondent had made false allegations against the Petitioner, and that the 2nd Respondent had orally assured the 3rd Respondent that the Petitioner would be removed and the 3rd Respondent appointed in his place; in the exercise of his rights as a citizen, he requested the 2nd Respondent to grant him an interview.

The 2nd Respondent did not reply to that letter; neither he nor anyone dealing with the matter granted the Petitioner an interview; and he did not file an affidavit in these proceedings. Thus we have no denial of the receipt of that letter or the allegations therein; and no reason why the Petitioner was not granted an interview to defend himself. In her affidavit, which she says was based on the official records and documents of the Ministry, the 1st Respondent admits the receipt of the 3rd Respondent's letter dated 25. 10. 94, but says nothing about the Petitioner's letter of 3. 5. 95. If it was the position of the 1st or the 2nd Respondent that no such letter had been received, this should have been categorically stated. The 3rd Respondent would not have known of that letter. In his affidavit, while he denies "the allegations made" against him in that letter, he does not deny that the 2nd Respondent did give him an interview and assurances as claimed by the Petitioner. On the material before us, the Petitioner's version, that he did write to the 2nd Respondent, and that the 2nd Respondent had given an interview and assurances to the 3rd Respondent, is therefore both credible and probable.

Neither the 2nd Respondent nor anyone dealing with the matter, gave the Petitioner prior notice of the reason for his proposed removal from office or an opportunity of being heard in defence. In the absence of an affidavit from the 2nd Respondent, and in the absence of an explanation from the 1st Respondent, based on the official records, there is neither a reason nor an explanation for this want of administrative due process. In the meantime, in order to fortify himself

for the anticipated interview with the Minister, the Petitioner obtained a letter dated 23. 5. 95 from the High Court Judge of Gampaha certifying that he had discharged his duties as Inquirer conscientiously, efficiently and without delay; this has not been questioned. No material has been placed before the Court as to any disciplinary proceedings or politiçal pressure as alleged in the 3rd Respondent's letter dated 25. 10. 94.

It was in that background that by the first impugned letter, dated 26. 5. 95, the 1st Respondent informed the Petitioner:

"Effective 31. 5. 95. I cancel the **appointment** of Inquirer into Sudden Deaths given to you by letter dated 13. 12. 1993 . . ."

This letter was signed by her as Secretary to the Ministry. It did not purport to be written by her on the directions of the Minister or the Deputy Minister, or to be signed by her for or on their behalf.

By the second impugned letter, also dated 26. 5. 95. the 1st Respondent informed the 3rd Respondent:

"As directed by **the Minister** of Justice, I hereby inform you that, under the provisions of section 108 of the Code of Criminal Procedure Act . . . . ., **he** has appointed you as Inquirer into Sudden Deaths for the area . . . effective 1. 6. 1995."

SUBMISSIONS

The case for the Petitioner is that he was holding an appointment valid until 30. 11. 96; that the 1st Respondent had no power to terminate that appointment; that although the Minister had the power to terminate that appointment, it was not an appointment held at the pleasure of the Minister, and could be terminated only for cause and in compliance with natural justice; that the Petitioner had not been informed of any reason for termination and had not been given an opportunity of being heard in his defence, so that any

cancellation of the appointment even by the Minister would have been flawed; and that even if there had been cause for termination of the original (1990) appointment, there was no reason to terminate the 1993 appointment. Learned Counsel for the Petitioner submitted that, having regard to the law and the administrative practice in such matters, this was in violation of Article 12; that the cancellation of his own appointment being bad, that the Petitioner should be restored to office. The Petitioner was not granted interim relief, and hence did not function while the matter was pending. He claimed compensation in a sum of one million rupees.

The learned Deputy Solicitor-General, on behalf of the 1st, 2nd and 4th Respondents, contended that the Petitioner's original (1990) appointment was fatally flawed, because his retirement had not been approved on or before 2. 4. 90; that therefore he was not eligible to apply or to be appointed; that the Petitioner's 1993 appointment was not a fresh appointment, but only an "extension" of the original appointment, and so was vitiated by the original flaw; and that the 1st Respondent's letter of 26. 5. 95 merely conveyed a Ministerial order, although it did not say so. He contended that there was no obligation to inform the Petitioner of any reason or to give him an opportunity of being heard before cancelling his appointment, because what was done was only the rectification of an injustice done to the 3rd Respondent in 1990, when the then Minister failed to appoint him; that in any event, that defect was obvious, and known to the Petitioner, so that such notice and hearing, prior to cancellation, was unnecessary; and that even if a hearing had wrongfully been denied, yet that could only be remedied by way of writ, as it did not involve any infringement of fundamental rights.

Learned Counsel for the 3rd Respondent contended that the Petitioner and the 3rd Respondent were not similarly circumstanced; that they were therefore not in the same class; and that Article 12 did not require that they be treated equally.

REMOVAL FROM OFFICE

The 1st Respondent produced with her affidavit a notification under Article 46(2) of the Constitution whereby, with effect from 1. 12. 94, the 2nd Respondent had delegated to the Deputy Minister of Justice, ***inter alia,*** his powers and duties in respect of the appointment of Inquirers under section 108.

The learned Deputy Solicitor-General submitted that the cancellation of the Petitioner's appointment, though seemingly effected by the 1st Respondent, must be regarded as having been done on the directions of the Minister or the Deputy Minister, because, he asserted, it must be presumed that the Secretary acts on the orders of her Ministerial superior. In regard to the appointment of the 3rd Respondent, he submitted that in view of the delegation to the Deputy Minister, the Court should treat the appointment as having been made by the Deputy, and not by the Minister. None of the official minutes and documents, relevant to these acts and orders, were produced.

We asked the Deputy Solicitor-General why it should be presumed, simply because of that delegation, that it was the Deputy Minister - and not the Minister - who had made the appointment, because Article 157 of the Constitution permitted the Minister, notwithstanding that delegation, to exercise the power of appointment himself. His reply was that in that event he would present his case on the basis that the 2nd Respondent had made the appointment.

Respect for the Rule of Law requires the observance of minimum standards of openness, fairness, and accontability, in administration; and this means - in relation to appointments to, and removal from, offices involving powers, functions and duties which are public in nature - that the process of making a decision should not be shrouded in secrecy, and that there should be no obscurity as to what the decision is and who is responsible for making it.

It is therefore necessary to scrutinize the affidavits of the Petitioner and the 1st Respondent. The Petitioner averred:

9. . . . I received on 1.6.95 letter of the 1st Respondent dated 26.5.95 [i.e. P9] cancelling my appointment reflected in the extension letter dated 13.12.93. . . . .

10. . . . the 3rd Respondent has been appointed as coroner on. . . 26.5.95 by the 1st Respondent and a copy of the letter of appointment is . . . marked P10.

13. . . . the sudden cancellation of my appointment/extension and removal from office as aforesaid is arbitrary and thus discriminatory in violation of Article 12(1) . . . inasmuch as:

(a) There was absolutely no reason for such cancellation of my appointment and/or removal from office;

(b) The appointment of the 3rd Respondent without calling for fresh applications was arbitrary, unreasonable and capricious, and showed bias on the part of the 1st and 2nd Respondents;

(c) My removal without any inquiry and the appointment of the 3rd Respondent as aforesaid were contrary to all norms of public administration and the Establishments Code.

(14) . . . my removal and the appointment of the 3rd Respondent as aforesaid is politically motivated to favour the 3rd Respondent, who was a supporter of the SLFP, contrary to Article 12(2).

15. [contained averments in respect of interim relief]

16. The 2nd Respondent is the Minister of Justice. . . . who has appointed the 3rd Respondent as the Coroner in terms of P10. The 1st Respondent is the Secretary of the said Ministry who has issued the letter P9 cancelling my appointment. . ."

The 1st Respondent in her affidavit denied paragraphs 13 and 14, referring in some detail to the Petitioner's disqualification, and the delegation to the Deputy Minister, and went on to say:

"8. Answering Paragraphs 9 and 10 . . . . . I only admit the documents P9 and P10.

12. Answering Paragraph 16 . . . the Deputy Minister acting under the said authority determined after inquiry, that the appointment of the Petitioner had in fact been wrong in the first instance and that the wrong appointment could not be permitted to continue, and directed that *steps be taken* to rectify the same by its cancellation.

13. Answering paragraph 15 . . . . it would be absolutely improper to permit the Petitioner to continue in service since the Petitioner's appointment in the first instance was wrong.

14 . . . . the duty of the present appointing authority is to remedy the wrong appointment. The failure to do so in the face of clear evidence that the impugned appointment was wrong would amount to permitting continuing discrimination."

In respect of the allegation that it was she who cancelled the Petitioner's appointment, the 1st Respondent's reply is in paragraphs 8 and 12; she did not attempt to explain that the words "*I* cancel" in her letter were a mistake, and that she was merely communicating an order made by the Minister or Deputy Minister. Nor did she say, clearly and directly, in paragraph 12, that the Deputy Minister "cancelled the Petitioner's appointment"; instead she said that he "directed that steps be taken to rectify same by its cancellation" - that steps be taken by whom? By him, or by her? What steps? This shows that for some unexplained reason the Deputy Minister did not himself cancel the appointment (making, at least, a minute on the file), but left it to the 1st Respondent to effect the cancellation, which she then purported to do by means of the impugned letter. Her averment in paragraph 14 is vague: "the duty of the present

appointing authority is to remedy the wrong appointment." The primary function of an affidavit is to affirm to the facts, and not to advance submissions of law. If the "Present appointing authority" did "remedy the wrong appointment", the affidavit should have been communicative as to *who* remedied it and how; and it was quite insufficient, instead, to assert that there was a legal duty, and to leave it to be inferred that that duty had been duly performed. The 1st Respondent's affidavit is wholly insufficient to contradict the contents of her letter.

The 1st Respondent's letter to the Petitioner quite clearly states that it was she who was cancelling the appointment; it referred not to a cancellation already made, but to a cancellation being effected by that letter itself; and that is confirmed by the lack of any contrary averment in her affidavit, as well as the failure to produce any minute or document from the official files. I hold that the 1st Respondent cancelled the Petitioner's appointment; that she had no legal authority to do so; and that even if she had done so on the direction of the Deputy Minister, that would have been an unauthorised sub-delegation, because it is axiomatic that *delegatus non protest delegare*. The cancellation was illegal and a nullity.

Leaving aside the Deputy Solicitor-General's offer to argue the case on the basis that it was the Minister who had appointed the 3rd Respondent, I must now examine the affidavits in relation to that aspect. Having first said that the 1st Respondent appointed the 3rd Respondent, the Petitioner went on to say in paragraph 16 that it was the 2nd Respondent who had appointed the 3rd Respondent - which was what the official letter of appointment disclosed. Here again the 1st Respondent refrained from making a clear and unambiguous statement that it was the Deputy Minister who was responsible. In paragraph 8 of her affidavit, she was content to "only admit the document" suggesting thereby that the letter spoke for itself, and that it was the Minister who made the appointment. In paragraphs 12, 13 and 14, she merely refers to the Deputy Minister, his "inquiry", and his directions in respect of the wrong

appointment, but does not say a word about the new appointment or any directions concerning it. It can hardly be inferred that to "remedy the wrong appointment" included the making of a new appointment, particularly as no reference was made to the views of the Deputy Minister, or of the "present appointing authority", regarding the suitability of the 3rd Respondent and the making of an appointment without public advertisement. If what happened was that "the Deputy Minister cancelled the Petitioner's appointment, appointed the 3rd Respondent in his place, and directed the 1st Respondent to convey those decisions", the 1st Respondent could and should have said so. Here, too, no attempt has been made to clarify the matter by producing the official records. There is no reason to reject what the letter of appointment plainly states.

I hold that it was the 2nd Respondent, the Minister, who purported to appoint the 3rd Respondent. This was in place of the Petitioner, and was for the balance period of the Petitioner's term, i. e. until 30.11.96; it was not intended to be an additional appointment. Since the cancellation of the Petitioner's appointment was illegal and a nullity, the 3rd Respondent's appointment was also a nullity.

CANCELLATION OF THE 1990 APPOINTMENT

The 1st Respondent avers that the Deputy Minister determined after inquiry that the appointment of the Petitioner had in fact been wrong **in the first instance**, i. e. when first made in 1990. The learned Deputy Solicitor-General strenuously contended that the impugned letter of cancellation related to the 1990 appointment. This contention fails both on the law and the facts. Even if it was legally possible to cancel the 1990 appointment, it is plain, beyond argument, that the 1st Respondent cancelled "the appointment **given by letter dated** 13.12.93", and nothing else; and she cancelled it prospectively, with effect from 31.5.95, and not retrospectively, from 1993, or 1990. In law, the Minister's power under section 108, read with section 14 (f) of the Interpretation Ordinance, is

to dismiss, namely to terminate prospectively, and not to cancel or annul an appointment with retrospective effect (apart, perhaps, from exceptions such as fraud), particularly after it has expired.

It was then submitted that there was really only one appointment, namely the 1990 appointment; that the letter dated 13.12.93 referred to an "extension"; that the 1990 appointment was continued from 1993; and therefore, it was urged, that what was cancelled was the appointment as extended and not just the "extension". Although the letter dated 13.12.93 referred to an extension, it was in law a distinct appointment under section 108, because section 108 confers only a power of appointment, and there is no power to "extend" or renew a previous appointment. And that was obviously how the 1st Respondent understood it, for by her letter of 26.5.95 she did not cancel the "extension", but the "appointment"; and she specified the appointment given by letter dated 13.12.93, and not the appointment given in 1990. An examination of the letter of 13.12.93 shows that the then Minister intended that the Petitioner should function as Inquirer for three years from 1.12.93: section 108 gave him the power to bring about that result; and in that context, what was termed "extension" was a re-appointment or a further appointment. Whatever disqualification he might have been subject to in 1990, the Petitioner was eligible for appointment in 1993, and a distinct and severable appointment was made in 1993. Hence, even if the 1990 appointment had been flawed, there was no flaw in respect of the 1993 appointment; and the "cause" relied on by the Respondents for the cancellation of that appointment was therefore irrelevant.

DENIAL OF NATURAL JUSTICE

Even if it had been possible to overlook the flaws in the impugned letters as being mere irregularities, and also to assume that it was the 1990 appointment which had been cancelled, a further question arises whether the cancellation of the

Petitioners's appointment was a nullity, because he had not been given prior notice of the reason why it was proposed to remove him and an opportunity of being heard in his defence.

The office of Inquirer involves functions of a public nature; they are quasi-judicial, though probably not judicial. Whatever its functions, the office is not one stated to be held at the pleasure of the Executive or the appointing authority. Even though public officers appointed in terms of chapter IX of the Constitution hold office "at pleasure", this is subject to other provisions of the Constitution - in particular, the fundamental rights - so that the Executive does not have an unfettered and/or unreviewable discretion in respect of termination (see *Bandara v Premachandra,*[1] *Migultenne v Attorney General.*[2] *A fortiori,* a person appointed under an ordinary law, which does not stipulate that the office is held at pleasure, cannot be dismissed without cause; a hearing is obviously required. Indeed in *Malloch v Aberdeen Corporation,*[3] even though, by statute, he held his appointment at pleasure, it was held that the Plaintiff could not be validly dismissed without a hearing.

The learned Deputy Solicitor-General relied heavily on the "inquiry" held by the Deputy Minister, in support of his submission that there was no breach of natural justice. When asked what that inquiry involved, his reply was that the Deputy Minister would have perused the Ministry file and taken a decision. He surmised that the 3rd Respondent's letter dated 25.10.94 and the Petitioner's letter dated 3.5.95 would have been considered. But in her affidavit the 1st Respondent did not admit that the Petitioner's letter had been received, or that it was in the file, or that it had been brought to the notice of the Deputy Minister. Since the 1st Respondent did not say when the "inquiry" was concluded, it is even possible that the letter was received *after* that "inquiry." The need for a hearing became more important as the 3rd Respondent appears to have been given an oral hearing by the 2nd Respondent, by which time the scope of the allegations made by the 3rd Respondent had extended far beyond ineligibility, into the realm of disciplinary

proceedings and improper political pressure; and we have not been told what view the Deputy Minister took of these allegations.

The legal principles are clear. In *Cooper v. Wandsworth Board of Works*[4] it was, laid down 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." In a passage which has repeatedly been cited with approval, Lord Loreburn, LC, referred to the duty of public bodies and officers when called upon to decide questions, even involving discretion:

> "In the present instance, as in many others, what comes 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 on matter of law alone.** In such cases [they] 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 every one who decides anything.** But I do not think 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 they think best, **always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view."** *Board of Education v Rice,* [1911] AC 179.[5]

Professor Wade (Administrative Law, 5th ed, p 444) refers to the picturesque judicial dictum in *R. v. University of Cambridge,*[6]

> "I remember to have heard it observed by a very learned man upon such an occasion, that even God himeself did not pass sentence upon Adam, before he was called upon to make his defence." Adam, says God, where art thou? Hast thou not eaten of the tree, whereof I commanded thee that

thou shouldst not eat?, And the same question was put to Eve also."

Wade's observations (p 442) are apposite:

"As the authorities will show, the courts took their stand several centuries ago on the broad principle that bodies entrusted with legal power **could not validly exercise it without first hearing the person who was going ro suffer.** This principle was applied very widely to administrative as well as to judicial acts, and to the acts of individual ministers and officials as well as to the acts of collective bodies such as justices and committees. The hypothesis on which the courts built up their jurisdiction was that **the duty to give every victim a fair hearing was just as much a canon of good administration as of good legal procedure**. Even where an order or determination is unchallengeable as regards its substance, the court can at least control the preliminary procedure so as to require fair consideration of both sides of the case. **Nothing is more likely to conduce to good administration**.

Since the courts have been enforcing this for centuries and since it is self-evidently desirable, it might be thought that no trained professional, whether judge or administrator, would be likely to overlook it. But the stream of cases that come before the British and Commonwealth courts shows that overlooking it is one of the most common legal errors to which human nature is prone. When a Lord Chief Justice. an Archbishop of Canterbury and a three - judge Court of Appeal, have strayed from the path of rectitude, it is not surprising that it is one of the more frequent mistakes of ordinary mortals."

The same principles have applied in Sri Lanka for many years. Gratiaen, J, in *de Mel v de Silva*,[7] expressly approved of the following observations in *General Medical Council v Spackman*[8]

". . . . in the absence of special provisions as to how the tribunal is to proceed, the law will imply no more than that **the substantial requirements of justice shall not be violated**. It must give the party who may be affected by its decision an opportunity of being heard and of stating his case. It must give him notice when it will proceed with the matter and it must act honestly and impartially, and not under the dictation of some person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of the sort done contrary to the **essence of justice**."

In other words, **"the essential requirements of justice and fair play"** must be observed.

In these circumstances, I have no hesitation in holding that the Petitioner was denied a hearing. He was entitled to be told what exactly was being alleged against him, and then given an opportunity to state his case in relation to those allegations. It was hardly enough for the Deputy Minister to take a decision after reading the file, even if it did include the Petitioner's letter. I hold that the cancellation of the Petitioner's appointment was in breach of the principles of natural justice, and must be quashed.

It was suggested that a hearing was unnecessary because the Petitioner's ineligibility was obvious. The reason why this excuse cannot be entertained has been compellingly stated thus:

"As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determination that, by discussion, suffered a change." (*John v. Rees* [1970] ch 345, 402)[9]

This is not one of the rare exceptions to the rule.

As Wade points out (PP 476-7), the basic principle is that fair procedure comes first, and it is only after hearing both sides that the merits can be properly considered; and hearing the case may bring about a change of views (as happened in *Ridge v. Baldwin*[10]) or soften the heart of the authority to reduce the punishment, e.g. from summary termination to termination with reasonable notice or a negotiated resignation. "This is the essence of good and considerate administration, and the law should take care to preserve it."

THE FINDING THAT THE PETITIONER WAS NOT ELIGIBLE IN 1990.

Learned Counsel for the Petitioner was content to present his case on the basis that his retirement was effective only from 2. 5. 90, the date from which retirement was approved. The Respondents contended that the Petitioner was ineligible to apply, because he was still in public service on 2. 4. 90. The question thus arose as to when the petitioner's retirement took effect. PA circular 30/88 gave the Petitioner the "right" to retire, and did not provide that retirement would be effective or operative only upon approval (unlike the provisions of the Establishments Code regarding resignation, which were considered in *Abeywickrema c Pathirana*[11]). If the Petitioner had specified "1. 4. 90" as the desired date of retirement, it is arguable that his retirement would have been effective from that date. However, the original of his letter dated 17. 3. 90 stipulates 1. 5. 90 as the date of retirement.

Learned Counsel for the petitioner submitted that the facts had been fully disclosed to the interview board; that the board took the view that he was eligible; that even if there had been a technical defect, the 3rd Respondent had failed to challenge the 1990 appointment in the proper way, by appropriate legal proceedings; and that thus, with full knowledge, there was waiver and acquiescence by all concerned.

Interesting questions arise in relation to the Petitoner's eligibility in 1990. Does "*entertaining* an application" refer to its physical receipt on the closing date (2. 4. 90), or to its consideration by the interview board (i. e. on a date after 2. 5. 90)? Was there waiver or acquiescence? Can the question of eligibility be raised after the expiration of the whole term of office? It is not necessary to decide these questions in this case in view of my finding that it was the 1993 appointment which was terminated, prospectively on 31. 5. 95, and not the 1990 appointment; that the 1993 appointment was a distinct appointment; and that the Minister had no power to terminate the 1990 appointment after it had expired by affluxion of time.

In any event questions of this sort could not have been decided without due inquiry, conforming to natural justice. Justice requires that an injustice be put right in a just manner; if not, what we have is not justice, but two injustices.

VIOLATION ARTICLE 12(1)

The Deputy Solicitor-General contended that no relief should be granted to the Petitioner for three reasons.

Firstly, he submitted that the Petitioner had deliberately altered the date - from "June" to "April" - in the carbon copy of his letter dated 17. 3. 90, and thereby attempted to mislead this Court. This is quite unjustified and unfounded. The Petitioner did not rely on this date in this Petition, and his Counsel did not seem even to have noticed the altered date: in fact, Counsel declined to pursue the line of argument that retirement might have been effective from 1. 4. 90, despite surmise from the bench, and consistently contended that retirement took effect only on 2. 5. 90, upon approval. There has not been the slightest attempt to mislead the Court. This submission fails.

His second argument was that *certiorari* was the proper remedy for a breach of natural justice, and not a fundamental

rights application. That is a grave over-simplification of the facts. In this case there was a total failure of natural justice, because there was not even the semblance of a hearing; and not merely a defective hearing. This happened in relation to an office whose functions are such that the public interest demands that the independence of its incumbent be safeguarded, by permitting removal only for cause, and by precluding arbitrary, capricious or summary termination. Further, the alleged cause for removal pertained not to the relevant appointment, but to a distinct prior appointment, which had long expired. And that removal was by an official devoid of legal authority. Simultaneously, another appointment was made without prior advertisement. As I will endeavour to show, such a case is plainly covered by the language of Article 12(1), without the need for any amendment or expansion under the guise of "activist" interpretation.

His third submission (as well as the contention of the 3rd Respondent) is based on *Perera v. Jayawickreme,*[12] and observations in *Wijesinghe v. A.G,*[13] *In Wijesinghe v. A.G.* the Petitioner had been appointed sub-postmistress in 1975, in preference to a rival applicant, who - after the change of government in 1977 - complained to a Political Victimization Committee ("the Committee"). Without giving the Petitioner a hearing, the Committee held that there had been political victimization, and recommended that the Petitioner's appointment be cancelled and the rival applicant appointed. The Cabinet considered the matter and decided accordingly. Thereafter, the notice of termination due under the contract was given to the Petitioner, and the rival applicant was then appointed. All three judges agreed in dismissing the Petitioner's complaint of the infringement of Article 12, but for differing reasons - so that the *ratio decidendi* is by no means clear. Ismail, J, held that political victimization had been established, and that the Petitioner had no status before the Committee - which implies that there was no breach of natural justice. With much respect, the precedents I have cited persuade me that Ismail, J, was in error: a view shared by the other two Judges. Wanasundera, J,observed that the absence of a hearing -

". . . is one of the unfortunate aspects of this case, and there is very little we can do in the matter if we were to hold that the action taken by the state falls within its competence and can be justified by the law, except perhaps to observe that an appeal by her to the executive for relief deserves some consideration. This Court is undoubtedly the guardian and protector of the fundamental rights secured for the people and our powers are given in very wide terms; but our authority is not absolute for these powers are subject to certain well defined principles and we have to concede that there are limits which we cannot transgress, however hard and unfortunate a case may be. We have to take cognizance of the distinction between ordinary rights that calls for our intervention.

Every wrong decision or breach of law does not attract the constitutional remedies relating to fundamental rights. Where a transgression of the law takes place, due solely to some corruption [sic], negligence or error of judgment, I do not think a person can be allowed to come under Article 126 and allege that there had been a violation of constitutional guarantees. There may also be other instances where mistakes or wrongful acts are done in the course of proceedings for which ordinarily there are built-in safeguards or adequate procedures for obtaining relief....

[citing foreign decisions] . . . . what may superficially appear to be an unequal application of the law may not necessarily amount to a denial of equal protection of law **unless there is shown to be present in it an element of intentional and purposeful discrimination. . . .**

The Cabinet cannot be expected, in the course of its multifarious duties, to give its mind to intricate and technical questions of law in the same manner as a Court of law. The termination of the Petitioner's services under clause 11 of the contract was a course of action available to the Cabinet and it was *prima facie* lawful."

Sharvananda, J, (as he then was) had no hesitation in holding that:

> "the entire proceeding [before the Committee] is vitiated by the fact that the Petitioner, who was the person most concerned, was not even noticed, and recommendations prejudicial to the Petitioner have been made behind her back. . . . . .
>
> . . . the proceedings and recommendations of the [Committee] are a nullity . . . and such a recommendation can never form the basis for termination of services on good ground. Since the Cabinet decision to discontinue the Petitioner is grounded on such a recommendation, the termination of the Petitioner's services is not based on any good ground. . ."

With those obervations, I am in respectful agreement.

Ultimately, that case rests on the ruling is *State of Jammu and Kashmir V Rasool,*[14]:

> ". . . the respondent [contended that he] was entitled to have the procedure prescribed by the Kashmir Civil Service Rules followed before the order demoting him could be made, and as that procedure was not followed, [he] had been denied the equal protection of the laws. . . . all that can be said to have happened is that the appellant acted in breach of the law. But that does not amount to a violation of the right to the equal protection of the laws. Otherwise every breach of law by a Government would amount to a denial of the equal protection of the laws. . . . it is not the respondent's case that other servants of the appellant had been given the benefit of those Rules and such benefit has been **designedly** denied only to him. . ."

Seervai (Constitutional Law of India, 3rd ed, vol 1,PP 285, 287, 288) points out that it is not proper to import into the

Indian Constitution any requirement of hostile, intentional, or purposeful discrimination adopted by the American Courts: because there is no reference to intention in the Article and the gravamen of the equality provision is equality of treatment, so that it would be dangerous to introduce a subjective test, when the Article itself lays down a clear and objective test (citing *W.B. v. Anwar Ali Sarkar*[15].)

In my view, while each and every breach of the law does not amount to a denial of the protection of the law, yet some fundamental breaches of the law will result in denying the protection of the law. Thus where Constitutional safeguards which amount to the "protection of the law" - permit removal from office only on specified grounds or after following a particular procedure, a breach of any such provision would be a denial of the protection of the law - whatever the intention. It is no answer that intricate or complex questions may be involved, because the administrative system ensures that those charged with important duties and functions may not only delegate their powers, where necessary, but may also utilise the services of persons with the requisite expertise and experience to assist in making such decisions.

The further question whether, in order to establish a denial of the **"equal"** protection of the law, there must be proof that others were differently treated, was considered in *Perera v. Jayawickreme*[12]. There the Petitioner's complaint was that he had been denied the equal protection of the law because a wrong procedure (laid down in a Circular) was applied to him, instead of the Establishments Code, in attempting to retire him for general inefficiency. The majority of a bench of nine Judges held that he failed because his petition failed to disclose at least one instance of another public officer, of a similar category, who had been compulsorily retired after following the correct procedure (*per* Sharvananda, CJ, 299-300).

That case is distinguishable. Here the Petitioner's removal was accompanied by the simultaneous appointment, without

advertisement and interview, of the 3rd Respondent who had been assessed as being less suitable for that post. Hence if a comparison is essential, it was available. Further, in that case some attempt was made to give notice of allegations and an opportunity to answer them, whereas here there was none.

However, I must point out that Sharvananda, CJ, did not consider an important question relating to proof. While dismissing the application on the ground that there was no *evidence*, and that the maxim *omnia praesumuntur rite esse acta* could not be invoked, he did not consider whether in some circumstances judicial notice could and should be taken of the fact that certain fundamental safeguards are generally observed. Thus if it is ever urged that an accused had been denied the equal protection of the law in a criminal trial because he was informed of the charge only after the verdict was given, could it be said that in order to prove the denial of equal protection evidence should have been led of other trials in which the charge had been disclosed at the outset? Must not the Court take judicial notice of the fact that in criminal trials an accused is made aware of the charge before the trial commences? It is accepted today that powers of appointment and dismissal are conferred on various authorities in the public interest, and not for private benefit, that they are held in trust for the public and that the exercise of these powers must be governed by reason and not caprice: *Bandara v. Premachandra,(supra)* I am of the view that this Court can, and indeed must, take judicial notice of the fact that, generally, a person holding an office which is public in character, is not removed without legal authority without cause, without complying with the *audi alteram partem* rule, and without notice. Since the Petitioner was not treated in accordance with "these essential requirements of justice and fair play," he was denied the equal protection of the law.

VIOLATION OF ARTICLE 12(2)

The Petitioner averred that the 3rd Respondent was a supporter of the Sri Lanka Freedom Party. Like every citizen he

is entitled to his political views, and the petition he sent to the then President in 1990 does not suggest that there was any political hostility or ill-will because of his opinions. Certainly, they did not stand in the way of his being appointed a member of the Gampaha Mediation Board in September 1991. Learned Counsel for the Petitioner submitted that it was an Opposition Member of Parliament who had asked a question in Parliament in 1990, but in my view from that it is not a necessary inference that either the question, or the action taken after the change of government, was politically motivated. The mere fact that the 3rd Respondent was a supporter of the SLFP does not mean that he was favoured. On the other hand, the Petitioner has not shown that he was removed because of his political views, as to which we have no evidence.

The alligation of political discrimination fails.

RELIEF

I hold that, by the cancellation of the Petitioner's appointment and the appointment of the 3rd Respondent, the Petitioner's fundamental right under Article 12(1) has been infringed by the 1st and 2nd Respondents. This infringement was set in motion by the 3rd Respondent, who made serious allegations which he did not even attempt to prove. The cancellation of the Petitioner's appointment, and the appointment of the 3rd Respondent are illegal, and null and void, and are quashed. The Petitioner is entitled to function as Inquirer until 30. 11. 96. Although the 1st and 2nd Respondents have acted in total disregard of "the essential requirements of justice and fairplay," this was not because of malice or spite against the Petitioner; an order to pay compensation personally is not called for. In the circumstances, I consider it equitable to award the Petitioner a sum of Rs 25,000 as compensation and Rs 10,000 as costs, payable by the State.

DHEERARATNE, J. - I agree.

WIJETUNGA, J. - I agree.

Relief granted.