1974 *Present :* **Tennekoon, C.J., Perera, J., and Sharvananda, J.**

E. B. P. FERNANDO, Petitioner, and B. C. F. JAYARATNE, Respondent

S. C. 267/72—Application for a Writ of Certiorari on B. C. F. Jayaratne

Writ of Certiorari—Commissioner appointed under the Commissions of Inquiry Act (Cap. 393)—Failure to observe the rules of natural justice—Power only to inquire and make recommendations—Availability of the Writ.

Where an application for a Mandate in the nature of a Writ of Certiorari is made to quash the findings in a report made by a Commissioner appointed by the Governor-General under the Commissions of Inquiry Act (Cap. 393).

Held : the Writ does not lie inasmuch as an examination of the provisions of the Commissions of Inquiry Act does not show that the report of the Commissioner was intended to be a step in a process which may in law have the effect of altering the legal rights or liabilities of persons named in the report.

"The only power that the Commissioner has is to inquire and make a report and embody therein his recommendations. He has no power of adjudication in the sense of passing an order which can be enforced *proprio vigore*, nor does he make a judicial decision. The report of the respondent has no binding force ; it is not a step in consequence of which legally enforceable rights may be created or extinguished."

Obiter—".....I am constrained to add that while there may be no duty to act judicially, it does not follow that there is no duty to act fairly by observing the principles of natural justice..... Reason and justice require that the person concerned against whom the Commissioner may feel inclined to make an adverse report should be heard before a finding is reached against him."

APPLICATION for a writ of Certiorari.

M. Tiruchelvam, with *D. C. Amerasinghe* and *N. Tiruchelvam,* for the petitioner.

K. M. M. B. Kulatunga, Senior State Counsel, with *Jayaweera Bandara,* State Counsel, for the respondent.

Cur. adv. vult.

July 30, 1974. SHARVANANDA, J.—

The petitioner was at all dates material to this application holding the office of Chief Civil Engineer in the Ceylon Fisheries Corporation which was set up by virtue of an order made under Section 2 of the State Industrial Corporation Act, No. 49 of 1957. On 17th August, 1970 His Excellency the Governor-General acting under the authority of the powers vested in him by the Commissions of Inquiry Act No. 17 of 1948 appointed the respondent Bellange Cyril Fernando Jayaratne to be Commissioner for the purpose of inquiring into and reporting to His Excellency,

inter alia :

(1) Whether during the period commencing on 1st April, 1965 and ending 31st May, 1970, any member of the Board of Directors or any officer or employee of the Ceylon Fisheries Corporation has directly or indirectly by any act, omission, neglect of duty, impropriety, misconduct or otherwise misdirected the activities of the Corporation from the aims and objects for which it was formed or otherwise impeded the work of the Corporation ;

(2) Whether during the aforesaid period any member of the Board of Directors or any officer or employee of the Ceylon Fisheries Corporation has directly or indirectly by any act, omission, neglect of duty, impropriety, or misconduct caused any loss to the Ceylon Fisheries Corporation and, if so, the extent of the loss so caused.

and to make recommendations in respect of the matters investigated by the Respondent. The Respondent was authorised and empowered by the warrant of his appointment " to hold all such inquiries and make all such investigations into the matters set out in the warrant as may appear to be necessary ". The respondent was required to transmit to the Governor-General a report under his hand setting out the results of his inquiries and investigations and his recommendations. The petitioner was requested to attend the sittings of the Commission but he was at no time informed by the respondent of the matters on which his evidence would be required or that his conduct was the subject of inquiry by the Commission. The petitioner attended the sitting of the Commission and gave his evidence on 17.1.1971. The respondent continued his sitting thereafter and in the absence of the petitioner heard the evidence of vital witnesses implicating the petitioner and attributing to him responsibliity for the shortfall in the storage capacity of the cold room at the Fishery Harbour at Galle. It is common ground that no opportunity was afforded to the petitioner to contradict or controvert the allegations or evidence of the said witnesses. The respondent submitted his report to the Governor-General on 31.5.1971. In his report he made certain adverse findings against the petitioner in respect of his work as an employee of the Ceylon Fisheries Corporation and held that " the responsibility for the loss to the Corporation on the basis of further construction of the cold room or rooms to make up for the shortfall which might exceed Rs. 500,000 would have to be shared between Mr. Eric Fernando (the petitioner) and Mr. Dias Abeysinghe ". The petitioner states that following the respondent's report to the Governor-General, he received a letter dated

27.3.72 from the Ceylon Fisheries Corporation informing him that his contract of employment with the Corporation would be terminated as from 31.3.1972, " in as much as the Board of Directors of the Corproation have, in view of the adverse findings contained in the respondent's report lost confidence in the petitioner ". The petitioner states that though in terms of his letter of appointment his employment under the Corporation was terminable on the payment of three months' salary in lieu of three months' notice and that in terms of his contract, he had been paid Rs. 6,000 representing three months' salary and his services have been terminated according to the terms of his contract, the findings of the respondent against him contained in his report constituted the cause of his unjustifiable premature termination of services. The petitioner further complains that the circumstances of the termination of his services induced by respondent's report have deprived him of his right to enjoy the pension to which he was entitled. The petitioner states that the respondent was under a duty to act judicially and inform the petitioner of the nature of the charge or allegations against him and afford him an opportunity of defending himself and explaining his conduct and that the respondent was bound to observe the rules of natural justice before coming to the said findings against the petitioner. The petitioner moves this Court by way of this application for a Mandate in the nature of a Writ of Certiorari to quash the said findings of the respondent against the petitioner.

Though the petitioner, in the circumstances, has a real grievance and has been affected grievously by the respondent's admitted failure to observe the principles of natural justice by affording the petitioner an opportunity of contradicting or controverting the allegations against him before he made his finding against the petitioner, the question arises whether a writ of certiorari is available to quash the findings of the respondent arrived by him in the performance of his functions under the Commissions of Inquiry Act. This question was considered in the case of *De Mel* vs. *M. W. H. de Silva*, 51 N.L.R. 105. There the Court held that as the Commissioner did not make an order affecting the legal rights of persons, his functions could not be properly described as judicial or quasi-judicial and that hence, no writ could lie against him. This case was followed in *Dias* vs. *Abeygunawardena*, 68 N.L.R. 409. This view of the position of the Commissioner was further affirmed in *R.* vs. *Ratnagopal* 70 N.L.R. 409 where the Court held that in an inquiry under the Commissions of Inquiry Act the Commissioner does not act judicially or quasi-judicially and that his findings did not determine or affect the rights of persons whose conduct is the subject of inquiry or report by a Commission. Mr. Tiruchelvam appearing for the petitioner questioned the correctness of the above decisions and

stated that sufficient consideration had not been given to the significance of the Commissioner's report and its capacity to injure persons named in his report. The burden of his argument was that the Commissioner was acting judically in making his report or recommendation and hence was subject to the supervisory jurisdiction of this Court.

One of the fundamental principles in regard to the issuing of a writ of prohibition or certiorari is that the writ can be availed of only to remove or adjudicate on the validity of judicial acts. The expression "judicial acts" includes the exercise of quasi-judicial functions by administrative bodies or other authorities or persons obliged to exercise such functions and is used in contrast with what are purely ministerial acts. The classic definition of the scope of the writ is that of Atkin L. J. in *Rex v. Electricity Commissioner* when he said that :

> "Whenever a body or persons having legal auhority to determine questions affecting the 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".

This decision has been consistently followed by the Courts. It is absolutely essential that the person or body to whom these writs are to go must be a judicial body in the sense that it has the power to determine and decide questions affecting the rights of subjects. That this requirement is fundamental has been emphasised in the leading cases of *Nakkuda Ali* v. *M. F. S. Jayaratne,* 51 N.L.R. 457 and *Ridge* v. *Baldwin* (1963) 2 A.E.R. 66. The primary condition for the issue of these writs is that the body in question must be capable of giving a definitive order conclusive and binding without confirmation by any other authority. Certiorari has been refused for instance, to quash a report of hospital visitors to the Board of Control that a person ought to be kept in detention as a mental defective—*R.* vs. *St. Lawrence's Hospital* (1953) 1 W.L.R. 1158. The Court there held that the visitors were not a tribunal and had no power to give a decision. In the course of his judgment Lord Goddard stated that, "The visitors have to form an opinion and report to the Board and this report is intended for the guidance of the Board in considering whether the Board is going to make an order for the detention of the patient under this Act. I have never heard of a case in which the Court has ever granted certiorari to bring up a report and it is abundantly clear tht the visitors are not a body to whom certiorari will lie in this respect because they have no power to come to a decision". The visitors were clearly not performing a judicial function in making their report. Thus a body exercising powers which are of a merely advisory, deliberative, investigatory or conciliatory character or which do

not have legal effect until confirmed by another body or involve only the making of a preliminary decision will not be amenable to a writ of certiorari. By its judgment reported in *Jayawardena* vs. *Silva*. 73 N.L.R. 289 the Privy Council while affirming the judgment of this Court reported in 72 N.L.R. 25 held that the functions of the Principal Collector of Customs under Section 130 of the Customs Ordinance (chapter 235) were to decide as a preliminary matter whether an offence has been committed, whether the appellant was concerned in it and whether he should exercise his discretion to impose a forfeiture or a penalty, and since his was a preliminary decision which only became enforceable when and if the Attorney-General took proceedings under Section 145 of the Customs Ordinance and the Court decided against the appellant, it could not be said at that stage that the Collector had made any determination or decision which can be described as quasi-judicial and that accordingly writ of certiorari did not lie to quash the order of forfeiture. Thus it would appear that a person conducting an inquiry culminating in nothing more than an advisory report or recommendation is hardly making a determination of a question affecting the rights of subjects. However, if the report or recommendations form an integral and necessary part of a statutory process or scheme which may terminate in action adverse or prejudicial to the rights or interests of individuals the writ of prohibiton or certiorari will lie against it. In the case of *Rex* vs. *Electricity Commissioners* (1924) 1 K.B. 171 the Commissioners were prohibited from proceeding with an inquiry into a matter outside their province, in spite of the fact that no scheme that the Commissioners were empowered to make could take effect until confirmed by the Minister of Transport and then approved by both Houses of Parliament. In objecting to the issue of prohibition the Attorney-General contended that the Commissioners came to no decision at all and that they acted as advisers and merely recommended an order embodying a scheme to the Minister of Transport who might confirm it with or without modification and then the Minister had to submit the order so confirmed or modified by him to the Houses of Parliament which may approve it with or without modifications and that until the order is so approved nothing is decided. Atkin L. J. in rejecting that argument said : "In the provision that the final decision of the Commissioners is not to be operative until it has been approved by the two Houses of Parliament I find nothing inconsistent with the view that in arriving at that decision the Commissioners themselves are to act judicially and within the limits prescribed by Act of Parliament and that the Courts have powers to keep them within those limits. It is to be noted that

it is the order of the Commissioners that eventually takes effect; neither the Minister of Transport who confirms, nor the Houses of Parliament who approve can, under the statute, make an order which, in respect of matters in question, has any operation. I know of no authority which compels me to hold that a proceeding cannot be a judicial proceeding subject to prohibition or certiorari because it is subject to confirmation or approval even where the approval has to be that of both Houses of Parliament". The Privy Council in *Estates and Trust Agencies Ltd.* v. *Singapore Improvement Trust* (1937) A.C. 898 at 917 has quoted with approval that statement of the law that: "a proceeding is none the less a judicial proceeding subject to prohibition or certiorari because it is subject to confirmation or approval by some other authority."

In *R. vs. Boycott ex parte Keasley* (1939) 2 A. E. R. 626, the quashable order took the form of a medical certificate describing a boy as an imbecile within the meaning of the Mental Deficiency Act of 1913. In resisting the argument that the decision of the medical officer embodied in that certificate was an administrative act and not a judicial act, Humphreys, J. at page 632 stated that: "that document, in my opinion, was a document of the highest possible importance in the life of this lad of 11 years of age. It purported to class him as an imbecile within the meaning of that term as used in the Mental Deficiency Act 1913. It was in fact one of the steps necessary in his case, and was intended to be an early stage in a chain of circumstances which would ultimately result in an order being made in regard to that boy under Section 6 of the Act, an order which would be made truly by a judicial authority, and the order would be one ordering that child to be sent to an institution". In deciding whether in making his report in terms of the Commission issued to him the respondent was acting judicially, the test appears to be whether according to the statutory scheme the report has the probability or potentiality in law of affecting prejudicially the rights of individuals, by reason of the statutory scheme itself making it possible for the report to be the basis of action affecting the rights of any person. If the report is not a step in a process which in law may have the effect of affecting the legal rights or liabilities of a person to whom it relates, then the remedy of a writ is not available, as then the duty to act judicially is wanting. Counsel for the petitioner relied heavily on the case of *R. Vs. Criminal Inquiries Compensation Board ex parte, Lain* (1967) 2 A. E. R. 770 in support of his proposition that as the respondent's report in fact was responsible for his employer i.e. the Fisheries Corporation terminating the services of the petitioner, and it thus affected him adversely he was entitled to a writ of certiorari quashing the respondent's report. In that case, a Criminal

Inquiries Compensation Board which was required to follow a judicial type of procedure and to apply legal norms or standards was appointed under the prerogative of the Crown to determine claims for compensation. It was held there that though a claimant had no legally enforceable right to any compensation he was entitled to obtain certiorari to quash a determination of the Board if the proceedings or determination were tainted by defects that would warrant the issue of certiorari to quash a determination of a statutory tribunal. In determining what compensation if any was to be awarded to an applicant the Board was held to be performing a quasi-judicial function affecting the public, lawful authority for which was derived from the prerogative and not from statute. The determination of the Board was held to affect the legal rights and liabilities of persons to whom it related. In that case Ashworth, J, wanted to introduce a gloss on the well known definition (which I have quoted earlier) of Atkin L. J. in *R. vs. Electricity Commissioners* (1924) 1 K. B. at 205, by omitting the words " the rights of " so that the phrase in which these words occur would read " questions affecting subjects ". Petitioner's Counsel invited me to accept the amendment suggested by Ashworth, J. It is to be noted that the other two judges i.e. Lord Parker and Diplock L. J. did not associate themselves with Ashworth, J. in the suggested revision but went into the question whether the rights of subjects, predicated in Atkin L. J.'s definition were legally enforceable or justiciable rights or not. Ashworth J. has not analysed the necessity for the suggested alteration of a definition which has been approved in its entirety by the House of Lords, the Privy Council, and by our Supreme Court. In my view the suggested amendment is not warranted in law. Though on the facts of this case it could be said that the report of the respondent has untowardly affected the petitioner, an examination of the provisions of the Commissions of Inquiry Act (Chapter 395) does not show that the report of the Commissioner was intended to be a step in a process which may in law have the effect of altering the legal rights or liabilities of persons named in that report. The only power that the Commissioner has is to inquire and make a report and embody therein his recommendations. He has no power of adjudication in the sense of passing an order which can be enforced *proprio vigore,* nor does he make a judicial decision. The report of the respondent has no binding force ; it is not a step in consequence of which legally enforceable rights may be created or extinguished. It is left to the discretion of the Governor-General to act or not on the recommendations contained in it. The inquiry held by the respondent is not a judicial inquiry and

does not eventuate in anything in the nature of a judicial determination. His report will not be evidence in any Court or Tribunal of the existence of any fact mentioned in it. The whole process begins and ends with the inquiry and report. The respondent has no legal authority to determine questions affecting the rights of individuals and hence was not exercising judicial or quasi-judicial functions ; the judicial element which must be present before he can be subjected to the supervisory jurisdiction of this court through the writ of certiorari is lacking. Hence this application cannot be sustained. The petitioner will have to seek the appropriate remedy in another forum to have his grievance ventilated.

What I have said so far is sufficient to dispose of this application ; but I am constrained to add that while there may be no duty to act judicially, it does not follow that there is no duty to act fairly by observing the principles of natural justice. It is true that the Commissioner is not a Court of Law and proceedings before him are not judicial or quasi-judicial for he decides or determines nothing. But as was said by Lord Denning in *R. vs. Pergamon Press Ltd.*, (1970) 3 A. E. R. 535 at 539, with reference to the report, under the provisions of section 165 of the English Companies Act of 1948, of inspectors the proceedings before whom were only administrative and not judicial or quasi-judicial, in that they only investigate and report. " But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may make findings of fact which are very damaging to those whom they name. They may accuse some ; they may condemn others. They may ruin reputations or careers. Seeing that their work and their report may lead to such consequences I am clearly of opinion that they must act fairly ". These observations are apposite to the report of a Commissioner appointed under the Commissions of Inquiry, Act. He must come to his conclusions by a process consistent with rules of natural justice after informing the party of the case against him. The aim of the rules of natural justice is to secure justice or to put it negatively to prevent a miscarriage of justice. If the purpose of the rules of natural justice is to prevent miscarriage of justice, it cannot be appreciated why these rules should not apply to administrative inquiries. Arriving at a just decision is the aim of all inquiries, of whatever nature. An unjust decision in an administrative inquiry in the context of a welfare state may have greater far-reaching effect than a decision in a quasi-judicial inquiry. Before he condemns or criticises a person the Commissioner who is appointed to investigate an alleged public scandal or for any of the purposes set out in Section 2 of the Commission of Inquiries

Act, should act fairly and give the party against whom he proposes to make a report a fair opportunity of correcting or contradicting what is said against him. The purpose of the benefit of legal representation vouched by section 16 of the Act to a party implicated in the inquiry will be rendered nugatory if this elementary principle of natural justice 'audi alteram partem' is not observed. From the provision of Section 16 stipulating legal representation, an obligation to act with fairness can be implied. Further, the concept of rule of law would lose its vitality if the agencies of the State are not charged with the duty of discharging their functions in a fair and just manner. The concept of a duty to act fairly irrespective of whether the body is acting judicially or quasi-judicially or administratively has been stressed in recent decisions of the Courts in England. Lord Parker C. J. in *R. vs. H. K.* (an infant) (1967) 1 A.E.R. 226 at 231 enunciated that principle as follows :—

> " Even if an immigration officer is not acting in a judicial or quasi-judicial capacity he must, at any rate, give the immigrant an opportunity of satisfying of the matters in the subsection and for that purpose, let the immigrant know what his immediate impression is, so that the immigrant can disabuse him. That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly. Good, administration and an honest or bona fide decision must, as it seems to me reqiure not merely impartiality but of acting fairly ". In the same context Salmon L. J. said at page 223 : " the authorities in exercising these powers and making decisions must act fairly in accordance with the principles of natural justice ".

Lord Denning in *R. vs. Gaming Board* (1970) 2 A. E. R. at 533 observed that :

> " At one time it was said that the principles of natural justice only apply to judicial proceedings and not to administrative proceedings. That heresy was scotched in *Ridge v. Baldwin* (1964) A. C. 40 ".

Lord Wilberforce and Phillimore L. J. agreed with this proposition of Lord Denning M. R.

> " Natural justice is but fairness writ large and juridically. It has been described as ' fair play in action '. Nor is it a leaven to be associated only with judicial or quasi-judicial occasions ".

per Lord Morris in giving the majority judgment of the Privy Council in *Furnell v. Whangarai High Schools Board* (1973) I A. E. R. 400 at 412. In his dissenting judgment with which Lord Reid agreed, Viscount Dilhorne was also of the same view (at page 42).

> "It is not in this case necessary to decide whether the function of the sub-committee is to be described as judicial, quasi-judicial or administrative, but if it be administrative, it was the duty of such committee before they condemned or criticised the appellant to give him a fair opportunity of commenting or contradicting what is said against him".

These recent decisions have thus advanced the frontiers of natural justice. To prevent abuse of power by administrative bodies, Courts are gradually evolving guidelines based on principles of natural justice for the just exercise of their power. Reason and justice require that the person concerned against whom the Commissioner may feel inclined to make an adverse report should be heard before a fiinding is reached against him.

Observance of principles of natural justice serves a two-fold purpose. It satisfies the requirement of fairness and also helps the administrator or commissioner to take a better and more informed decision.

In the light of the above observations, in my opinion, the respondent has not acted fairly, according to law. He has failed to give the petitioner notice of the allegations against him and an opportunity of answering the case against him, before he reported him to the Governor-General. There was no due inquiry as far as the petitioner was concerned and hence the report made by the Respondent against the petitioner cannot have any value.

However as indicated in the earlier part of this judgment the remedy of certiorari cannot be availed of by the petitioner. The petitioner's application for a writ of certiorari is refused. The respondent will however not be entitled, in the circumstances to any costs.

TENNEKOON, C.J.—I agree.

PERERA, J.—I agree.

Application dismissed.