J. B. TEXTILES INDUSTRIES LTD.

v.

MINISTER OF FINANCE AND PLANNING

COURT OF APPEAL.
RANASINGHE, J. AND H. A. G. DE SILVA, J.
C.A. 1137–40/79.
MAY 27, 28, 29; JUNE 1, 11, 12, 15, 16, 18, 19, 22, 23, 1981.

Business Undertakings (Acquisition) Act, No. 35 of 1971, sections 2(1) and 7(1)—Acquisition by primary Vesting Order—Duty of Minister to observe rules of natural justice before making such order—Effect of words "final and conclusive" in section 2(4)—Effect of approval by Parliament of primary Vesting Order—Whether reports of speeches made in Parliament can be considered by Court—Is Minister "a person" within meaning of paragraph (b) of first proviso to section 22 of Interpretation Ordinance as amended by Act No. 18 of 1972—Appeal to Minister referred to Advisory Board—Functions of Board—Section 7(3) of Act No. 35 of 1971—Exercise of discretion according to law as distinct from power coupled with duty—Effect of failure to state proper basis in claim for relief—Writs of certiorari and mandamus.

On 29th December, 1976, the Acting Minister of Finance acting under the powers conferred on the Minister by section 2(1)*(b)* of the Business Undertakings (Acquisition) Act, No. 35 of 1971, made a primary Vesting Order (P2) vesting the business undertakings of the petitioner-company in the Government. No opportunity was afforded to the petitioner of being heard before this was done. The said Vesting Order was not laid before the National State Assembly within 60 days of its publication in the Gazette as specified in sub-section 2(3) of the Act but a Competent Authority said to have been appointed under section 3 took possession of the business undertakings of the petitioner and thereafter continued to manage and administer the same. On 5th September, 1977, the present respondent in his capacity as Minister of Finance revoked the primary Vesting Order P2 and made a fresh primary Vesting Order P7 in respect of the same business undertakings, which said order was published in the Gazette. The petitioner was not granted an opportunity of being heard before the said Order P7 also was made. The said Vesting Order P7 was subsequently laid before the National State Assembly and approved by resolution.

The National State Assembly was dissolved on 18.5.77 and after a General Election at which the Government in which the Minister who had made the original Order P2,

had held office, was defeated, another political party assumed office. The second primary Vesting Order P7 was made thereafter.

The petitioner appealed against the said primary Vesting Order P7 to the respondent as provided for under section 7(1) of the said Act and the said appeal was referred by the respondent to the Advisory Board established under the provisions of section 7(2), as provided for therein. At the hearing before the Advisory Board evidence was led *inter alia* to establish that the original primary Vesting Order P2 had been made *mala fide* and to achieve certain political objectives of the then Member of Parliament for the area and though the Attorney-General was represented no evidence was led to controvert or contradict such allegations. The Advisory Board advised the respondent that inasmuch as there were reasons other than economic reasons which had prompted the earlier Order P2, the second Order P7 was unjustified. The respondent did not in pursuance of this advice revoke the primary Vesting Order P7 although there was provision for doing so under section 7(3).

The petitioner thereafter applied for a writ of certiorari quashing the said primary Vesting Order P7 and for a writ of mandamus directing the respondent to revoke the said primary Vesting Order. The above facts applied to two companies both of which made similar applications to Court so that there were four applications pending at the instance of two petitioners. At the hearing it was agreed that the submissions in the 4 applications would be consolidated and the Court should deliver one judgment thereafter and make appropriate orders in each of the applications on the basis of the conclusions arrived at in the said judgment.

Held

(1) Where a Statute empowers a Minister to make orders which interfere with the rights of property enjoyed by a citizen, the Minister is, in the absence of clear and express provision to the contrary set out in the Statute concerned, ordinarily under a duty to observe the principles of natural justice and/or to act fairly before he exercises such powers, even though the said Statute itself is silent in regard to the adoption of such a procedure. This the respondent had failed to do in the present case and such failure had caused considerable prejudice to the petitioners.

(2) A primary Vesting Order which is an order made by the Minister of Finance under section 2(1) of the Business Undertakings (Acquisitions) Act, No. 35 of 1971, is an Order made by "a person" within the meaning of paragraph *(b)* of the first proviso to section 22 of the Interpretation Ordinance (Cap. 2) as amended by Act No. 18 of 1972 and approval by Parliament of such an order under section 2(3) of the Act, does not elevate the said order to the position of an Act of Parliament. Accordingly, the first proviso to section 22 of the Interpretation Ordinance, as amended, operated to make such an order amenable to review by the Courts despite section 2(4) of Act, No. 35 of 1971 which provides that such an order shall be final and conclusive and shall not be called in question in any Court whether by way of writ or otherwise.

(3) Accordingly the petitioners were entitled to the issue of a writ of certiorari as prayed for.

Held further

(4) Speeches made in Parliament cannot be taken into consideration in order to determine whether the primary Vesting Order P7, was made merely in order to get over certain defects which affected the earlier Vesting Order P2 as contended by counsel for the petitioner.

(5) The provisions of section 7(3) of the Act vested in the Minister a discretion whether or not to accept advice tendered by the Advisory Board appointed under section 7(2), which discretion however the Minister had to exercise according to law, such as by

observing the principles of natural justice which he had failed to do in the instant case. However, the petitioners were not entitled to relief by way of mandamus as this basis has not been expressly set out in the petition. The petitioners' claim for relief by way of mandamus was on the basis that section 7(3) conferred not a discretion but a power which the Minister was obliged to exercise in accordance with the advice tendered by the Advisory Board.

Per Ranasinghe, J. "If, as is clear, a Court cannot take into consideration anything said or done in Parliament to aid it in the construction of a provision of a statute passed by Parliament itself, still less legitimate would it be for the Court to take into consideration anything so said and done for any other purpose."

Cases referred to

(1) *Johnson & Co. (Builders) Ltd. v. The Minister of Health, (1947) 2 All E.R. 395; 177 L.T. 455.*

(2) *Miller v. Minister of Health, (1946) K.B. 626; 62 T.L.R. 611; (1947) L.J.R. 146.*

(3) *Bushell and another v. Secretary of State for the Environment, (1980) 2 All E.R. 608.*

(4) *Padfield v. The Minister of Agriculture, (1968) 1 All E.R. 694; (1968) 2 W.L.R. 936; (1968) A.C. 997.*

(5) *Congreve v. Home Office, (1976) 1 All E.R. 697; (1976) 2 W.L. R. 291; (1976) Q.B. 629.*

(6) *Laker Airways Ltd. v. Department of Trade, (1977) 2 All E.R. 182; (1977) Q.B. 643; (1977) 2 W.L.R. 234.*

(7) *Secretary of State v. Tameside, (1976) 3 All E.R. 665; (1976) 3 W.L.R. 641; (1977) A.C. 1014.*

(8) *Liversidge v. Anderson, (1941) 3 All E.R. 338; (1942) A.C. 206; 116 L.T. 1.*

(9) *Re Liverpool Taxi Owners Association, (1972) 2 All E.R. 589; (1972) 2 W.L.R. 1262.*

(10) *Fernandopulle v. Minister of Lands and Agriculture, (1978) 79 (2) N.L.R. 119.*

(11) *F. Hoffmann—La Roche and Co., A.C. and others v. Secretary of State for Trade and Industry, (1974) 2 All E.R. 1128; (1975) A.C. 295; (1974) 3 W.L.R. 104.*

(12) *Church of Scientology of California v. Johnson-Smith, (1972) 1 All E.R. 378; (1972) 1 Q.B. 522; (1971) 3 W.L.R. 434.*

(13) *Davis v. Johnson, (1978) 1 All E.R. 1132.*

(14) *British Railway v. Pickin, (1974) 1 All E.R. 609; (1974) 2 W.L.R. 208; (1974) A.C. 765.*

(15) *Bagg's case, (1615) 11 Co. Rep. 93b.*

(16) *Wood v. Wood (1874) L.R. Ex. 190.*

(17) *Cooper v. Wandsworth Board of Works, (1863) 14 C.B. (NS) 180.*

(18) *Board of Education v. Rice, (1911) A.C. 179.*

(19) *Local Government Board v. Arlidge (1915) A.C. 120.*

(20) *Ridge v. Baldwin, (1963) 2 All E.R. 66; (1964) A.C. 40; (1963) 2 W.L.R. 935; 127 J.P. 295.*

(20A) *Ridge v. Baldwin, (1963) 1 Q.B. 530; (1962) 2 W.L.R. 716; (1962) 1 All E.R. 834; 126 J.P. 196.*

(21) *Durayappah v. Fernando, (1967) 69 N.L.R. 265; (1967) 2 A.C. 337; (1967) 2 All E.R. 152; (1967) 3 W.L.R. 289.*

(22) *Pearlberg v. Varty, (1972) 2 All E.R. 6; (1972) 1 W.L.R. 534.*

(23) *Fairmount Investments Ltd. v. Secretary of State for the Environment, (1976) 2 All E.R. 865; (1976) 1 W.L.R. 1255.*

(24) *H. R. Ameradasa et. al. v. The Land Reform Commission et. al. (1977) 79 (1) N.L.R. 505.*

(25) *Wiseman v. Borneman, (1969) 3 All E.R. 275; (1969) 3 W.L.R. 706; (1971) A.C. 297.*

(26) *Shareef v. Commissioner for Registration of Indian and Pakistani Residents, (1965) 67 N.L.R. 433 (P.C.); (1966) A.C. 47; (1965) 3 W.L.R. 704.*

(27) *General Medical Council v. Spackman, (1943) A.C. 627.*

(28) *Annamunthodo v. Oilfields Workers' Trade Union, (1961) A.C. 945; 60 C.L.W. 36; (1961) 3 All E.R. 621; (1961) 3 W.L.R. 650.*

(29) *Anisminic v. Foreign Compensation Commission, (1969) 1 All E.R. 208; (1969) 2 A.C. 147; (1969) 2 W.L.R. 163.*

(30) *Re H. K. (an infant), (1967) 2 Q.B. 617.*

(31) *R. v. Gaming Board for Great Britain, ex parte Benaim and another, (1970) 2 All E.R. 528; (1970) 2 W.L.R. 1009; (1970) 2 Q.B. 417.*

(32) *In Re Pergamon Press Ltd. (1970) 3 All E.R. 535; (1970) 3 W.L.R. 792; (1971) Ch. 388.*

(33) *Leary v. National Union of Vehicle Buildings, (1970) 2 All E.R. 713; (1970) 3 W.L.R. 434; (1971) Ch. 34.*

(34) *Julius v. Lord Bishop of Oxford, (1880) 5 A.C. 214.*

(35) *Reg. v. Tithe Commissioner, (1850) 14 Q.B. 474; 19 L.J.Q.B. 177.*

APPLICATION for Writs of Certiorari and Mandamus.

H. L. de Silva, with *Ranjit Abeysuriya* and *Gomin Dayasiri,* for the petitioners.
K. N. Choksy, with *B. Eliyatamby* and *Lakshman de Alwis,* for the respondents.

Cur. adv. vult.

August 31, 1981.

RANASINGHE, J.

The petitioner-company, which has filed this application to obtain a writ of mandamus directing the respondent to revoke, in terms of the provisions of section 7 (3) of the Business Undertakings (Acquisition) Act, No. 35 of 1971 (hereinafter referred to as the "said Act"), and in accordance with the advice tendered to him by the Advisory Board constituted under the provisions of section 7 (2) of the said Act, the primary Vesting Order, made by the respondent, on 6.9.77, vesting in the Government of Sri Lanka. The petitioner-company, has also filed in this Court, on the same day, application bearing No. 1139/79 also against respondent, praying for a writ of certiorari quashing the aforesaid primary Vesting Order made by the respondent on 6.9.77. Along with these two applications filed by the petitioner-company were also filed in this Court, also against the respondent, two further applications by an allied company of the petitioner-company called and known as the J. B. Fishing Industries Ltd., bearing Nos. 1138/79 and 1140/79, praying for similar writs of

mandamus and certiorari respectively. The basis for each of these applications is also the same as that upon which the petitioner-company itself has prayed, in the corresponding application, for relief by way of writs of mandamus and certiorari.

When these applications were taken up for inquiry, whilst one group of counsel appeared for the petitioner in each one of the four applications, another group appeared for the respondent in each of the four said applications; and both Mr. H. L. de Silva, who led for the petitioners, and Mr. K. N. Choksy, who led for the respondents, consolidated the submissions each of them had to make in respect of all four applications and they both agreed that this Court should consider their respective submissions made in respect of the applications for both mandamus and certiorari, in the course of the judgment of this Court in any of the four applications and thereafter make appropriate orders in each of the other three applications on the basis of the conclusions arrived at in the said judgment. In these circumstances, this Court has decided to consider the submissions made by both counsel in regard to relief by way of both mandamus and certiorari covering all four applications, in the judgment in this application No. 1137/79—made by the petitioner-company for a writ of mandamus, and thereafter make appropriate orders in the other three applications referred to above—for certiorari made by the petitioner-company in application No. 1139/79, and for writs of mandamus and certiorari made by J. B. Fishing Industries Ltd. in application Nos. 1138/79 and 1140/79 respectively.

I shall at this stage set out the facts and circumstances which are relevant in the several applications referred to above—for both writs of mandamus and certiorari: that J. B. Textiles Industries Ltd. is a public limited liability Company duly incorporated under the provisions of the Companies Ordinance (Cap. 145) and was, at times material to these applications, the owner of the business undertaking which carried on the manufacture of synthetic textiles at premises No. 133, Meetotamulla Road, Wellampitiya: that J. B. Fishing Industries Ltd. is also a public limited liability company duly incorporated under the provisions of the said Companies Ordinance (Cap. 145) and was, at times material to these applications, the owner of the business undertaking for the manufacture of fishing nets which was also carried on at the aforesaid premises bearing No. 133, Meetotamulla Road: that the shareholders of both petitioner-

companies, referred to above, are citizens of Sri Lanka and are domiciled in Sri Lanka: that the Business Undertakings (Acquisition) Act, No. 35, of 1971, the preamble to which states that it is an Act to provide for the acquisition for the Government, whether by agreement or compulsorily, of any business undertaking, for the requisitioning or compulsory acquisition of any property necessary for the purposes of that undertaking and for matters connected therewith or incidental thereto, became operative as from 1.10.1971: that on 29.12.1976 the Acting Minister of Finance made a primary Vesting Order, under the provisions of section 2 (1) (*b*) of the said Act, which was published in Government Gazette No. 245/7A of the same date, 29.12.1976, and an extract of which is P2, vesting the aforesaid business undertakings of both petitioners: that the said primary Vesting Order, P2, was made without affording either of the petitioners any opportunity of being heard as to why the said business undertakings should not be so vested in the Government: that the petitioners appealed from the said primary Vesting Order, P2, to the respondent, in terms of the provisions of section 7 (1) of the said Act, copies of which said appeals are marked "P3": that the said primary Vesting Order, P2, was not laid before the National State Assembly within the period specified in sub-section (3) of section 2 of the said Act: that a Competent Authority, said to have been appointed under the provisions of section 3 of the said Act, took possession of the aforesaid business undertakings of both petitioners, together with the property of the said business undertakings, on 29.12.1976 and has continued to manage and administer the said business undertakings: that no Advisory Board, as set out in the provisions of section 7 (2) of the said Act, was appointed: that the said National State Assembly was prorogued on 5.2.1977 and later dissolved on 18.5.1977: that on 5.7.1977 the petitioners instituted actions in the District Court of Colombo praying for a declaration that the said primary Vesting Order, P2, was null and void and that the said business undertakings and their respective property be returned to the petitioners: that P4 and P5 are respectively copies of the plaints filed by the petitioners and the answers filed by the Attorney-General in the said actions: that, on 5.9.1977, the respondent in his capacity as Minister of Finance, revoked the said primary Vesting Order, P2, a copy of which said order of revocation published in the Government Gazette is "P6": that on the following day, on 6.9.1977, the respondent made a fresh primary Vesting Order, P7, in respect of the same business

undertakings referred to above, and which was published in the Government Gazette: that the petitioners were not granted an opportunity of being heard before the said primary Vesting Order, P7, was made: that the petitioners did on 29.1.1977, file appeals, copies of which are marked as P8, against the said primary Vesting Order, P7, to the respondent in terms of section 7 (1) of the said Act: that a motion for the approval of the said primary Vesting Order, P7, was laid before Parliament on 4.10.1977: that Parliament by a resolution, did as is evidenced by P9, approve the said primary Vesting Order, P7 on 20.10.1977: that the Prime Minister appointed an Advisory Board in terms of section 7 (2) of the said Act: that the said appeals of the petitioners, P8 were referred by the respondent to the said Advisory Board in terms of section 7 (2) of the said Act: that at the hearing before the said Advisory Board, which commenced on 23.12.1977 and was concluded on 2.3.1978, the petitioner led evidence, *inter alia,* to establish that the first primary Vesting Order, P2 had been made by the then Acting Minister of Finance *mala fide* and for extraneous reasons and to achieve certain partisan political objectives of the then Member of Parliament for Kolonnawa in which electorate the petitioners' business undertakings referred to above were situate: that although at the said hearing a Deputy Solicitor-General represented the Attorney-General, no evidence whatever was led to controvert or contradict the allegations of *mala fide* made by the petitioners: that, on 16.2.1978, the said Deputy Solicitor General in fact expressly informed the said Advisory Board that the Attorney-General had been in consultation with the respondent and that he (the Deputy Solicitor-General) has to announce that the respondent has stated that there is no material which could be placed before the said Advisory Board to controvert or contradict the material which had been already placed before the said Advisory Board by the petitioners and that he, the Deputy Solicitor-General, is also not possessed of any material with which to cross-examine the witnesses who had given evidence for the petitioners: that thereafter, on 15.3.1978, the said Advisory Board submitted a report to the respondent tendering its advice to the respondent in terms of section 7 (2) of the said Act: that, according to the said report, dated 15.3.1978, submitted by the said Advisory Board to the respondent, a copy of which was marked before this Court, on 11.6.1981, by learned counsel appearing for the respondent as "X", the said Advisory Board has advised the respondent that the members of the said Board are of the view that there were reasons

other than economic reasons which had prompted the original take-over of the business undertakings (i. e. P2) of the petitioners and that the vesting of the said business undertakings of the petitioners was unjustified: that no communication has been received by the petitioners from the respondent in regard to either the advice so rendered to the respondent by the said Advisory Board or the action the respondent has taken or proposes to take upon such advice: that the petitioners by letter dated 19.2.1979 (P12) requested the respondent to revoke the said primary Vesting Order, P7: that the respondent has not yet revoked the said primary Vesting Order, P7: that the Government has thereafter invited the petitioners to participate in a joint venture with 51% of the shares in the said undertaking to be held by the Government and the balance 49% to be held by the petitioners: that the petitioners have declined to accept the said proposal.

The position taken up by learned counsel on behalf of the petitioners in respect of the petitioners' claims for relief in the form of a writ of mandamus is: that the power vested in the respondent by the provisions of section 7 (3) of the said Act is one vested in the respondent for the purpose of being used for the benefit of persons in the position of the petitioners in respect of whose business undertakings the Advisory Board advises that the primary Vesting Orders be revoked: that the object of vesting such power in the respondent is to effectuate a legal right: that an undertaking was given in Parliament by the Prime Minister to act in accordance with the advice of the Advisory Board: that, therefore, the petitioners are entitled to call upon the respondent to exercise the said power of revocation, and the respondent is under a legal duty to revoke the said primary Vesting Order when called upon to do so by the petitioners: that the undertaking given by the Prime Minister on the floor of the House on behalf of the Government, as is evidenced by the document P9 which is a copy of the Hansard of 20.10.1977, is one which is compatible with the respondent's duty and is accordingly binding on the respondent and must be honoured: that, although the provisions of section 7 (3) of the said Act are couched in permissive language, they nevertheless do vest in the respondent a power coupled with a duty to exercise such power: that the respondent is vested with an enabling power which the respondent is under a duty to exercise upon receipt of advice from the Advisory Board that the primary Vesting Order be revoked, and the exercise of which said power the petitioners have a right to demand of the respondent.

I shall first consider the petitioners' application for relief by way of certiorari.

A mandate in the nature of a writ of certiorari is sought for by the petitioners only against the aforesaid primary Vesting Order P7 made by the Respondent on 6.9.1977. The grounds upon which the petitioners seek to have P7 quashed are: that P7 was made without affording the petitioners an opportunity of being heard: that P7 has, therefore, been made in violation of the rules of natural justice: that the fact that the petitioners did have an opportunity of making representation to an Advisory Board did not dispense with the requirement to observe the principles of natural justice even before a primary Vesting Order is made: that P7 was made without jurisdiction in that it was made for a collateral purpose and not for a purpose for which the power was conferred: that it was made ultra vires and in excess of the authority vested in the respondent by the said Act: that it was made merely to cure a procedural irregularity which affected the validity of the earlier primary Vesting Order P2 and not upon any independent ground or reason for vesting the said business undertakings of the petitioners: that the *mala fides* which attached to P2 and vitiated P2 also affects P7 and renders it null and void: that the subsequent approval of P7 by a resolution of Parliament does not in law cure it of its earlier infirmities.

The position put forward on behalf of the respondent to resist the petitioners' claims for both writs of mandamus and certiorari is: that, according to the official documents and other material available to the respondent, P2 had been made by the respondent's predecessor-in-office in consultation with the then Cabinet of Ministers and the relevant administrative officials in furtherance of the governmental policy: that the documents R1–R6 contradict the petitioners' allegation of *mala fide* tainting the said Order P2: that, upon the respondent assuming office in July, 1977, the respondent reviewed and reconsidered whether or not the vesting of the petitioners' business undertakings should continue and decided that it should: that the Order P7 was thereupon made as a matter of governmental and administrative policy in the public interest: that the advice rendered to the respondent by the said Advisory Board on 15.3.1978, in consequence of the appeal made by the petitioners is based purely upon the representations made by the petitioners to the said Advisory Board: that the respondent having considered the said advice and having also consulted the

relevant Minister and also the Cabinet of Ministers decided not to revoke the said Order P7: that the said decision not to revoke P7 was taken by the respondent in the exercise of the undoubted discretion vested in the respondent by section 7(3) of the said Act and was arrived at on the basis of, *inter alia*, Governmental policy and the public interest and rested upon, among other material, the documents R1 to R16: that the provisions of section 7(3) do not cast an imperative duty or obligation on the respondent to revoke a primary Vesting Order upon being advised to do so by the Advisory Board: that the respondent is not bound to accept and act upon the advice of the Advisory Board: that the said provisions in law vest in the respondent a discretion whether to make an order of revocation or not: that in so deciding the respondent is not guided only by such advice, but that the respondent can and must also be guided by considerations of Governmental policy and the public interest: that, in so acting, the respondent acts in a purely executive character: that the respondent owes no duty to the petitioners the performance of which could be compelled by way of a writ of mandamus: that in making primary Vesting Order under the provisions of section 2(2) of the said Act the respondent acts throughout in his executive capacity and does so in the exercise of an unfettered and absolute discretion based upon considerations of Governmental policy of State and public interest: that such an order is not an order or decision which is, in, law, amenable to a writ of certiorari: that any interference with the exercise of the said discretion vested in the respondent would amount to a substitution of the view of the Court to that of the respondent who alone is the authority empowered by Parliament to make such an Order: that there is no requirement that the petitioners should have been heard before the Order P7 was made: that, even if the petitioners did have any such right to be heard at that stage, the failure to do so has not caused the petitioners any prejudice, as they have thereafter, in pursuance of the right to appeal granted to them by section 7(1) of the said Act, in fact appealed to the Advisory Board before which they did have a full and sufficient opportunity of presenting their case: that this Court has no jurisdiction to grant the writs prayed for by the petitioners in view of the provisions of section 22 of the Interpretation Ordinance (Cap. 2) as amended by Act No. 18 of 1972: that the said Order P7 is not a purely executive Order, but is "an executive cum legislative order" as it has also been approved by Parliament, and, as it has the sanctity of an Act of

Parliament, it is beyond the pale of judicial review: that the petitioners cannot make use of any speeches made in Parliament by the respondent or the Prime Minister or any other Minister or Member of Parliament referring to the "take-over" of the business undertakings of the petitioners to support any position or preposition put forward by the petitioners in these proceedings, as Hansard is, as far as this Court is concerned, "a closed book".

It will be useful at this stage to make a general survey of the provisions of the said Act No. 35 of 1971. As already set out, it has as its main objective the making of provision for the acquisition either by agreement or compulsorily, of business undertakings by the Government for the Government; and section 2(1) makes provision for the Minister of Finance, of his own motion or at the request of another Minister, either to direct the Secretary to the Treasury to acquire a business undertaking by agreement, or by an Order published in the Gazette to vest in the Government any business undertaking: sub-section (2) of this section states that from the date on which such business undertaking is either acquired or vested, the Government shall have absolute title to such business undertaking free from all encumbrances: sub-section (3) requires such vesting order to be laid before the House of Representatives for approval within the period specified therein: and, in terms of sub-section (5), where such approval is refused, such business undertaking is deemed never to have vested in the Government: in terms of sub-section (4), where such approval is granted, such vesting order becomes final and conclusive and is not to be called in question in any Court whether by writ or otherwise: section 17 defines a business undertaking to mean any undertaking of a commercial, industrial, agricultural or professional nature, inclusive of all properties, movable or immovable, used for the purposes of such undertaking: once a business undertaking is acquired by or vested in the Government, section 3 authorises the appointment of one or more competent authorities to manage and administer the affairs of such a business undertaking: section 4 deals with the rights and liabilities of a business undertaking subsisting at the date of such acquisition by, or vesting in the Government; section 5 empowers the competent authority to take possession of such business undertaking, and, in terms of section 6, the competent authority is made subject to the general or special direction of the Minister; section 7(1) enables the proprietor of a business undertaking, in respect of which a Vesting Order is made, to appeal to the Minister

of Finance against such vesting order, and in terms of sub-section (2) the Minister of Finance may refer such an appeal to an Advisory Board, which is appointed by the Prime Minister, and the said Advisory Board shall advise the Minister on the question whether such Order should be revoked: and sub-section (3) states that "the Minister may, after considering the advice tendered to him by the said Advisory Board, revoke the primary Vesting Order in respect of which the appeal was made"; section 8 deals with the compulsory transfer to the Government of movable or immovable property required for the purposes of any such business undertaking so acquired by or vested in the Government; section 9 deals with the exclusion from a Vesting Order of any property, which has vested in the Government by virtue of such Vesting Order, by a divesting Order, and the effect of such a divesting Order; section 10 provides for the requisitioning of property (and the derequisitioning thereof) for the purposes of such a business undertaking: the operation of a bank account by the owner of a business undertaking, which is so acquired by or vested in the Government, is prohibited or controlled by the provisions of section 11; the regulation making power is dealt with by section 12; section 13 empowers a person authorized in writing by the Minister to enter the premises or place where any business undertaking is carried on and inspect its books and properties, and also demarcate its boundaries, and call for any information relating to it: section 14 empowers the Minister (or any person authorized by him) to serve a notice of claim on an owner of a business undertaking declaring that such business undertaking is required for the purposes of the Government; sub-section (3) prohibits the alienation to any person other than the Government of any property of or any rights in respect of any business undertaking in respect of which such a notice of claim has been made; sub-section (4) requires the furnishing of information, relating to any business undertaking, which the Minister specifies, by persons when requested to do so by the Minister; section 15 sets out the various offences made punishable by this Act; payments in respect of any property acquired by or vested in the Government are regulated by section 16; and lastly the provisions dealing with interpretation are embodied in section 17.

It will be useful at this stage to consider the position of Ministers when they exercise powers and functions which have been entrusted to them by Parliament under various provisions of

law, and also the question whether or not the exercise of such powers is subject to the supervision of the Courts, and, if so, the nature and extent of such judicial review.

In the case of *Johnson & Co. (Builders) Ltd. v. The Minister of Health* (1) where the question of the nature and the character of the functions exercised by a Minister who is called upon to confirm a compulsory purchase order made under the provisions of the Housing Act, came up for consideration, Lord Greene, M. R., stated: that the decision whether to confirm or not must be made in relation to questions of policy; that the Minister, in deciding whether to confirm or not , will like every Minister entrusted with administrative duties, weigh up the considerations which are to affect his mind, the preponderating factor in many, if not all, cases being that of public policy, having regard to all the facts of the case; that, generally speaking, firstly the functions of the Minister in carrying such provisions into operation are fundamentally administrative functions; that, in carrying them out, he has the duty which every Minister owes to the Crown, viz., to perform his functions fairly and honestly and to the best of his ability; that his functions are however administrative functions, subject only to the qualification that, at a particular stage and for a particular and limited purpose there is superimposed on his administrative character a character which is loosely described as "quasi-judicial"; that the language which has always been construed as giving rise to the obligations, whatever they may be, implied in the words "quasi-judicial" is to be found in the duty to consider the objections which is superimposed on a process of Ministerial action which is essentially administrative; that such a process may begin in all sorts of manners—the collection of information, the ascertainment of facts, and the consideration of representations made from all sorts of quarters, and so forth, long before any questions of objection can arise under the procedure laid down by the Act; that at that stage, in acting to carry the Act into effect or for purposes relevant to it and bearing on it, the Minister is an executive officer of Government, and nothing else; that the administrative character in which he acts reappears at a later stage in that after considering the objections, which may be regarded as the culminating point of his quasi-judicial functions, there follows something which again is purely administrative, viz., the decision whether or not to confirm the order; that that decision must be an administrative decision, because it is not to be based purely on the view that he forms of

the objections, *vis-a-vis* the desires of the local authority, but is to be guided by his view as to the policy which, in the circumstances, he ought to pursue; that it is in respect of the public interest that the discretion that Parliament has given to the Minister comes into operation; that it could well be that, on considering the objections, the Minister may find that they are reasonable and that the facts alleged in them are true, but, nevertheless, he may decide that he will overrule them: that his action in so deciding is a purely administrative action, based on his conceptions as to what public policy demands: that his views on the matter he must, if necessary, defend in Parliament, but that he cannot be called on to defend them in the Courts; that it is clear that the decision of the Minister is not impeachable in the Courts on the grounds on which a judicial decision might be impeached; that, for instance, it would be impossible for an objector to attempt to get the decision set aside on the grounds that the evidence at the inquiry, or the evidence put before the Minister in his quasi-judicial capacity, was insufficient to support his decision to confirm the order; that, in a nutshell, the decision of the Minister is a thing for which he must be answerable in Parliament, and his actions cannot be controlled by the Courts; that, if a Minister acts unfairly, his action may be challenged and criticized in Parliament; but that it cannot be challenged and criticized in the Courts unless he has acted unfairly in another sense, viz., in the sense of having, while performing quasi-judicial functions, acted in a way which no person performing such functions, in the opinion of the Court, ought to act. At page 403, in discussing further the obligation implied by the use of the word "quasi-judicial" Lord Greene quotes the observations of Henn Collins, J., in the case of *Miller v. Minister of Health,* (2):

> "I think one must remember in approaching these matters that the question what a Minister shall or shall not do when acting administratively is not one that can be determined on any principle of law, nor yet on any principle, as I see it, of natural justice as between the Minister and any one member of the community. The Minister, acting in his administrative capacity is governed by considerations of expediency. He has to decide ultimately, I suppose, subject to the review and governance of Parliament—what in his view is best for the community. No principle of natural justice as between any individual and the Minister of the Crown has any place in that kind of administration, but when questions as to whether those

administrative powers should be exercised have been referred to him by Act of Parliament, in this case the Housing Act, 1936, at that point he has to consider judicially the matter that is so brought before him. That does not mean, as the authorities have shown, that he is not to use any knowledge which has come to him, so to speak extra-judicially, but all the material which has been formulated for his judicial consideration must be (made) available to him on both sides. That is the meaning of his acting with natural justice in a judicial capacity".

Johnson's case (supra) has recently been considered by the House of Lords in the case of *Bushell and another v. Secretary of State for the Environment* (3) in which the applicability of the principles of natural justice at a public local inquiry held to enable objections to be heard in respect of two schemes proposed by the Minister for the construction of two stretches of motor way, and the duty of the Minister is regard to the material considered by him when arriving at a decision were discussed. Lord Diplock, in the course of the judgement, referred to Lord Greene's judgment in the *Johnson case (supra)* as a "neglected but luminous analysis of the quasi-judicial and administrative functions of a Minister as confirming authority of a compulsory purchase order. . . . . ", and stated that that judgment contains a salutary warning against applying to procedures involved in the making of administrative decisions concepts that are appropriate to the conduct of ordinary civil litigation between private parties. Whilst affirming the views of Lord Greene, in regard to the various stages of the decision-making process, Lord Diplock states, at page 617, with reference to the 'quasi-judicial' stage, which is reached when the Minister is considering the objections:

"In doing this he must act fairly as between the promoting authority and the objectors; after the inquiry has closed he must not accept from third parties fresh evidence which supports one side's case without giving the other side an opportunity to answer it. But when he comes to reach his decision what he does bears little resemblance to adjudicating on a lis between the parties at an inquiry. On the substantive matter, viz. whether the order should be confirmed or not, there is a third party who was not represented at the inquiry, the general public as a whole whose interests it is the Minister's duty to treat as paramount. . . . . "

These principles were also considered by the House of Lords in the case of *Padfield v. The Minister of Agriculture* (4), in which the question which arose for consideration was whether, where a statute provided that a committee of investigation shall be charged with the duty, "if the Minister in any case so directs", of considering and reporting to the Minister on any complaint made to the Minister as to the operation of a scheme dealing with the marketing of milk in England and Wales, the Minister was under a duty to refer to the committee of investigation a complaint made to him by the appellants, who are members of the South-East regional committee of the Milk Marketing Board, in regard to the prices paid for milk under the said scheme, and whether the Minister could be compelled by way of mandamus to make such reference. The Minister, in that case, had declined to refer the said complaint to the said committee of investigation setting out in two letters the reason for so doing. Lord Morris stated , in the course of the judgment at page 706: that, when a Minister who is vested with executive discretion proceeds properly to exercise his judgment then it is no part of the duty of any Court to act as a Court of Appeal for his decision or express an opinion as to whether it was wise or unwise: that a Court could intervene only when the Minister failed or refused to apply his mind to or to consider the proper question, or where the Minister misinterpreted the law or proceeded on an erroneous view of the law, or where the Minister bases his decision on some wholly extraneous consideration or where the Minister fails to have regard to matters which he should have taken into account. At page 717, Lord Upjohn stated: that a Minister in exercising his powers and duties conferred upon him by statute can only be controlled by a prerogative order which will only issue if he acts unlawfully; that unlawful behaviour may be stated as an outright refusal to consider the relevant matter, or by misdirecting himself in point of law, or by taking into account some wholly irrelevant or extraneous consideration, or by wholly omitting to take into account a relevant consideration: that the policy reasons upon which a Minister may act should not be based upon political considerations; that unless a Minister acts unlawfully and thereby overstepped the true limits of his discretion and thus exceeds his jurisdiction, the Court has no jurisdiction to interfere; that a Court in such a case, acts not as a Court of Appeal and has no jurisdiction to correct the decision of a Minister acting lawfully within his jurisdiction however much the Court may disagree with its exercise.

In this case the House of Lords in asserting the right of the Courts to review an allegedly absolute discretion of the Minister, held that the Minister had acted unlawfully, and rejected the theory of an unfettered discretion vested in the Minister, which the Courts cannot review. At page 702, Lord Reid stated that there is no authority to support the unreasonable proposition that it must be all or nothing—either no discretion at all or an unfettered discretion. At page 699 Lord Reid also stated:

> "He may disagree with the view of the committee as to public interest, and if he thinks that there are other public interests which outweigh the public interest that justice should be done to the complainers he would be not only entitled but bound to refuse to take action. Whether he takes action or not, he may be criticised and held accountable to Parliament, but the Court cannot interfere."

Lord Upjohn at page 719, referring to the claim of an "unfettered" discretion, states that even if such an adjective were used in a statute it could:

> "do nothing to unfetter the control which the judiciary have over the executive, namely that in exercising their powers the latter must act lawfully and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion on the Minister rather than by the use of adjectives."

The House of Lords took the view that, although the Minister was vested with a discretion, such discretion had not been properly exercised according to law and directed that the Minister be required to consider the matter according to law. In this case Their Lordships also considered the question whether a Minister should give reasons for a decision made by him in the exercise of a statutory discretion vested in him. In dealing with the argument that the Minister is not bound to give reasons, Lord Upjohn at page 719 stated:

> "that without throwing any doubt on what are well known as the club expulsion cases, where the absence of reasons has not proved fatal to the decision of expulsion by a club committee, a decision of the Minister stands on quite a different basis: he is a public officer charged by Parliament with the

discharge of a public discretion affecting Her Majesty's subjects; if he does not give any reasons for his decision it may be if circumstances warrant it, that a Court may be at liberty to come to the conclusion that he had no good reason for reaching that conclusion and directing a prerogative order to issue accordingly".

The decision of the House of Lords in this case has been referred to by *de Smith* in his book entitled *"Judicial Review of Administrative Action "(4th edition) at page 293* as "an important landmark in the current era of judicial activism in this area of administrative law".

In the case of *Congreve v. Home Office,* (5), where the complaint was of a misuse of power by the Home Secretary in that he exercised his statutory powers for an unlawful purpose by revoking a radio licence, Lord Denning, M.R. at page 709 stated: that where a Minister misuses the power conferred upon him by Parliament the Courts not only have the authority but it is also their duty, to correct such misuse of power by the Minister or his department, no matter how much the Minister may resent it; and at page 718 Roskill, L.J. stated that: it is not for the Court to decide whether or not the executive has acted reasonably save in the sense that, if the action is shown to be such that no reasonable authority could have taken it, then and then only should the Court interfere: that, provided the Minister acts within the four corners of his jurisdiction, the Court cannot interfere.

Laker Airways Ltd. v. Department of Trade, (6), is also a case in which the Court of Appeal was called upon to review the exercise by a Secretary of State of a statutory power to revoke an air-carrier licence, and Lord Denning at page 193 reaffirmed the principle that when discretionary powers are entrusted to the executive by statute the Courts can examine the exercise of such powers so as to see that they are used properly and not improperly or mistakenly under the influence of a misdirection in fact or in law, and at page 194 stated that, if it is found that a Minister has exercised his powers improperly or mistakenly so as to impinge unjustly on the legitimate rights or interests of the subject, then it is the duty of the Courts to intervene and say so.

The view that, where a Minister was required by a statute to be 'satisfied,' a Minister had an unlimited discretion which could not

be challenged in the Courts, unless bad faith was shown was rejected in the case of *Secretary of State v. Tameside* (7), where in the Court of Appeal Lord Denning, M.R. stated that the theory of an unlimited discretion adopted in the case of *Liversidge v. Anderson,* (8), during the War was accepted only in regard to regulations in war time or immediately after the War when the decisions of the executive had to be implemented speedily and without question and that such statements do not apply today. In the House of Lords, which affirmed the decision of the Court of Appeal, Lord Diplock observed that the decision to be taken is a matter for the Secretary of State and that it was not for the Court to substitute its own opinion for that of the Secretary of State, but that it is for the Court to determine whether it has been established that in reaching his decision the Secretary of State has directed himself properly in law and had in consequence taken into consideration matters which he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider.

That a Corporation in considering applications for hackney carriage licences under a statute was under a duty, in exercising such administrative function to act fairly, and that even where the Corporation's function was administrative, the Court would not hesitate to intervene, if it was necessary to secure fairness, and that the duty to act fairly meant that the Corporation should be ready to hear persons or bodies whose interests were affected, was laid down by the Court of Appeal in England in the case of *Re Liverpool Taxi Owners Association,* (9).

In the recent case of *Fernandopulle v. Minister of Lands and Agriculture,* (10) at 119, His Lordship the Chief Justice observed:

> "When Common Law rights are involved, the Court always has a right of review, *Reg. v. Barnsley Council, Ex parte Hook, (1976) 1 W. L. R. 1052.* The Common Law right to possession of one's property is one of these. *Reg. vs. Agricultural Land Tribunal, Ex parte Davis,(1953) 1 W.L.R. 722."*

A consideration of the principles referred to above clearly show: that, although Ministers may be vested with wide discretion in the exercise of statutory powers given to them by Parliament, there is, however, no power which is unfettered and which the Courts cannot ordinarily review: that, in exercising their discretion Ministers owe a constitutional duty to perform it

fairly, honestly, reasonably and to the best of their ability: that, in doing so, the Ministers must obey all elementary rules of fairness: that, although the ultimate decision of a Minister is purely administrative, based also upon considerations of governmental policy and his conception of what public interest demands, yet in the decision-making process his functions may also, at a certain stage, be quasi-judicial: that questions of policy are matters entirely for the Ministers: that policy must not be based on political considerations which are extraneous: that, although a Minister is not bound to give reasons for a decision made by him in the discharge of a statutory discretion, yet it is most desirable that he should; for, if he does not, the Court may, in appropriate circumstances, come to the conclusion that the Minister had no good reason for arriving at such conclusion: that, the Courts can and must intervene where there has been an abuse of power: tnat the Courts can interfere with Ministerial discretion only where the Minister is shown to have acted in excess of power, which Parliament has conferred upon him: that the grounds upon which Courts can so interfere with the exercise of a discretion and get the Minister back on the right road are bad faith, capricious or arbitrary exercise of power, acting on ulterior purpose: that no Court would declare the action of a Minister invalid and illegal merely because the Minister has acted ineptly or without tact: that the Courts can review to see that such powers are used properly and not improperly or mistakenly under the influence of a misdirection in fact or in law, and whether the Minister has asked himself the right question and taken reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly; that, where the Minister acts within the four corners of his authority, the Courts cannot and will not interfere.

As already set out the petitioners attack P7 on several grounds; that it has been made in violation of the principles of natural justice and or the duty to act fairly; that it was made merely for the purpose of curing a procedural defect which affected P2, and not after any independent consideration of the necessity for the present Government to take over the said business undertakings: that it is contaminated with the *mala fides* which vitiated the earlier order P2.

Mr. Choksy contended that even if P7 was beset with infirmities at the time it was first made by the respondent , its

subsequent approval by Parliament has operated to cure it of its previous shortcomings, if any, and to clothe it with all the sanctity of an Act of Parliament. He maintained that P7 is not a purely executive act but "an executive cum legislative act". It seems to me that, in view of the principles set out in the judgment of the House of Lords in the case of *F. Hoffmann-La Roche and Co. A.G. and others v. Secretary of State for Trade and Industry* (II), this argument cannot be accepted. In that case the Secretary of State for Trade and Industry made an order in the form of a statutory instrument under the provisions of section 10(1) of the Monopolies and Restrictive Practices (Inquiry and Control) Act of 1948. This order had to be laid before and affirmatively approved by both Houses of Parliament for it to become permanent. In discussing the legal status of such an order Lord Morris, at page 1140, stated:

> "The order then undoubtedly had the force of law. Obedience to it was just as obligatory as would be obedience to an Act of Parliament. There was only the difference that whereas the Courts of law could not declare that an Act of Parliament was ultra vires, it might be possible for the Courts of law to declare that the making of the order (even though affirmatively approved by Parliament) was not warranted within the terms of the statutory enactments from which it purported to derive its validity";

and Lord Wilberforce at page 1145, expressed as follows:

> "That an attack can be made on a statutory instrument for want of power needs no demonstration, and I agree with your Lordships that it makes no difference, for this purpose, that the instrument has been laid before and approved by the two Houses of Parliament";

and Lord Diplock at page 1153 elucidated the principle thus:

> "My Lord, in constitutional Law a clear distinction can be drawn between an Act of Parliament and subordinate legislation, even though the latter is contained in an order made by a statutory instrument approved by resolutions of both Houses of Parliament. Despite this indication that the majority of members of both houses of the contemporary Parliament regard the order as being for the common weal, I entertain no doubt that the Courts have jurisdiction to declare it to be invalid if they are satisfied that in making it the Minister

who did so acted without the legislative power conferred on him by the previous Act of Parliament under which the order purported to be made; and this is so whether the order is ultra vires by reason of its contents (patent defects) or by reason of defects in the procedure followed prior to its being made (latent defects)"; and

Lord Cross, at page 1159, said as follows:

" . . . . . I am not, any more than Lord Diplock, prepared to agree with the view . . . . . that an order made by statutory instrument acquires the status of an Act of Parliament if it is approved by resolutions of both Houses of Parliament."

Having regard to the principles set out above, I am of opinion that this Court has the power to review the said Order P7, and, notwithstanding the fact that P7 has subsequently been approved by an affirmative resolution of Parliament, declare it to be invalid if this Court is satisfied that the respondent has, in making the said order, not acted in the manner required by law.

The petitioners rely upon the material placed before the Advisory Board at the hearing of their appeal, and the contents of the report of the said Advisory Board, a copy of which was marked as "X" by learned counsel for the respondent at the hearing before this Court, and also the document R3 to establish their allegation of *mala fides* as against the earlier Order P2. At the hearing of the said appeal before the Advisory Board no evidence was led on behalf of the respondent to contradict the evidence placed by the petitioners. On the other hand the Advisory Board was, on 16.2.1978, expressly informed by learned Deputy Solicitor-General, who had appeared as amicus, that the Attorney-General had inquired from the respondent as to the material that was available "to contradict or controvert" the evidence led by the petitioners and that the respondent had informed the Attorney-General that there was no such material as could be placed before the Advisory Board, and that the Attorney-General too has no material from any other source which could be placed before the Advisory Board "to contradict or controvert" the material already placed before the Advisory Board by the petitioners. The learned Deputy Solicitor-General had further informed the Advisory Board that he was not in possession of even any material with which tocross-examine the

witnesses who had testified on behalf of the petitioners. It must be noted that, by that time, not only the documents R1-R6, which had come into existence before the respondent took office, but also the documents R10 and R11, which have come into existence after he took office, would have been available to the respondent. Even so, the respondent had not thought it fit to place them before the Advisory Board, and had instead permitted the evidence so placed by the petitioners to go unchallenged and uncontradicted. In these circumstances, I do not think the respondent can now be heard to contend that the material set out by him—which does not contain any material which was not available to the respondent on 16.2.78, the date on which the learned Deputy Solicitor-General made the aforesaid statement before the Advisory Board—contradicts the petitioner's allegation that the first preliminary vesting order made on 29th December, 1976, was made *mala fide*. The evidence led by the petitioners before the Advisory Board and the report "X" are all matters which have taken place after the date on which the Order P7 was made. There is nothing before us which shows, or from which it could be inferred, that the respondent was aware, at or before the date on which he made the Order P7, of the material so brought to light by the said evidence and the said report. Nor has any allegation of malice on the part of the respondent himself been made. P7, it must also be noted, has been made on 6.9.77, after P2 had been revoked the previous day, 5.9.77, by P6. P7 is, therefore, an entirely new Order having, in law, a separate and independent existence of its own. Furthermore, the documents R7, R8, R9 and R10 show that the Order P7 has been made only after the respondent had had consultations with his Ministerial colleagues, who had interests in regard to such matters, and he had been advised that the said business undertakings of the petitioners should vest in the new Government as well.

It also appears to me that the position taken up on behalf of the petitioners, that P7 was made merely to get over a procedural defect which affected P2, cannot also be said to be established. The petitioners rely on, in order to establish this allegation, the speeches said to have been made in Parliament by the then Prime Minister (P9—Col 1749-50), the respondent (P9—Col 1747-48) and the Minister of Lands and Land Development and Mahaweli Development (P11—Col 105). Learned counsel for the respondent has objected to the said speeches being taken into consideration in determining this matter, for the reason that "Hansard is a closed

book as far as the Courts are concerned". Mr. de Silva concedes that speeches made in Parliament cannot be looked into in order to aid in the interpretation of a statutory provision, but he submitted that such speeches could be looked into in order to find out how an Act has been implemented by the Government. Mr. de Silva also relies on the said speeches to show how and why the Order P7 came to be made, and the undertaking said to have been given by the Prime Minister.

The Parliament (Powers and Privileges) Act, No. 21 of 1953 (Cap. 383), the Preamble to which states that it is, *inter alia,* to secure freedom of speech and debate or proceedings in the House, sets out in: section 3 that the freedom of speech debate or proceedings in the House shall not be liable to be impeached or questioned in any Court or place out of the House: section 4 that members shall not be liable to any civil or criminal proceedings in respect of anything said or done by them in Parliament: section 7 that the immunities to be enjoyed by the members are to be the same as those enjoyed by the members of the House of Commons of the Parliament of the United Kingdom: section 9 that all privileges, immunities and powers of the House shall be part of the general and public law of the Island and shall be judicially noticed by all Courts of the Island. Section 57 of the Evidence Ordinance sets out the facts of which Courts must take judicial notice; and, amongst them is set out, in sub-section (4), the course of proceedings of the Legislature of the Island. The provisions of section 78 (3) of the Evidence Ordinance set out the manner in which the proceedings of the Legislature of this Island can be proved. Both sections 57 and 78 of the Evidence Ordinance appear in Part II of the Evidence Ordinance which is entitled "On Proof" and provide for the mode of proving facts which are in issue and facts which are relevant. These two sections do not deal with the admissibility and relevancy of facts. They are concerned only with the mode of proof.

The question of the admissibility of evidence of what is said and done in Parliament was gone into in the case of *Church of Scientology of California v. Johnson-Smith,* (12). In that case an action for libel was brought before the Queen's Bench Division against a member of Parliament for defamatory remarks made by the defendant during a television interview; and when the defendant put forward the defence of fair comment and privilege, the plaintiff in reply alleged malice. In order to establish malice,

the plaintiff sought to adduce evidence, including extracts from Hansard, of what the defendant had said and done in Parliament. Browne, J. held that what is said and done in Parliament in the course of proceedings in Parliament cannot be examined outside Parliament for the purpose of supporting a cause of action even though the cause of action itself arose out of something done outside Parliament, and so shut out such evidence. The House of Lords did also, in the cases of *Davis v. Johnson,* (13), and *British Railway Board v. Pickin,* (14), rule out, though on other grounds, applications to refer to proceedings in Parliament.

It is clear that "the parliamentary history" of a statute, in the sense of the debates which took place in Parliament when a Bill was considered, cannot be referred to by a Court to aid it in construing a provision of a statute—vide *Craies: On Statute Law (7th Edition)* pages 128-130. In fact Mr. de Silva himself accepted the position that speeches made in Parliament, in the course of the debate when a bill is presented to Parliament, cannot be referred to in Court as an aid in the construction of the provisions of a statute. It seems to me that in taking cognizance of "the course of proceedings of Parliament" all that a Court could do is to take cognizance, for instance, of the Parliamentary agenda, of the dates on which a Bill was placed on the agenda and thereafter moved, of its procedural progress through Parliament, and the date on which it received the Speaker's Certificate. The Court cannot inquire into what was done prior to the Bill being introduced to Parliament, or why it was so introduced, and what the members said and did in relation to it in Parliament. Any reference or inquiry by Court into anything that is alleged to have been said or done by a member of Parliament during the various stage of the progress of a Bill through Parliament may involve an adjudication by Court, which the Court is not competent to undertake. If, as is clear, a Court cannot take into consideration anything said or done in Parliament to aid it in the construction of a provision of a statute passed by Parliament itself, still less legitimate would it be for the Court to take into consideration anything so said and done for any other purpose.

It therefore appears to me that the petitioners are not entitled to rely on the said documents P9, and P11 for the purpose for which they have sought to produce them before this Court in these proceedings.

In this view of the matter, I am of opinion that the challenge to the validity of the Order P7, made on the grounds, that it is riddled with the mala fides which afflicted the earlier Order P2 and that it was made for a collateral purpose, namely to overcome a procedural infirmity which affected P2, and was not made after an independent consideration of the necessity to vest the said business undertakings in the present Government, must fail.

I shall now proceed to consider the attack made upon the said Order P7 on the ground that it has been made in violation of the principles of natural justice.

English law recognises two principles of natural justice: *audi alteram partem* (that the parties be given adequate notice and an opportunity of being heard), and *nemo judex in causa sua* (that an adjudicator be disinterested and unbiased). One of the earliest instances in English law of a person being given relief because he had not been given an opportunity of being heard could be found in *Bagg's case* (15) where a chief burgess of Plymouth, who had been disfranchised for unbecoming conduct was reinstated by way of Mandamus as he had been removed without notice or hearing (*Smith*: page 159). In the 19th century several decisions established that the rule of *audi alteram partem* should govern the conduct of every tribunal or body of persons invested with authority "to adjudicate upon matters involving civil consequences to individuals"—*Wood v. Wood* (16) at 196 (Smith page 160): that, where a statute authorising interference with property or civil rights was silent on the question of notice and hearing, the Courts did invoke the "justice of the common law . . . . . to supply the omission of the Legislature", and lay down the rule which was "of universal application and founded on the plainest principle of justice", that public authorities must either give the person concerned "notice that they intend to take this matter into their consideration with a view to coming to a decision, or, if they have come to a decision, that they propose to act upon it, and give him an opportunity of showing cause why such steps should not be taken"—*Cooper v. Wandsworth Board of Works,* (17), at 194.

Although about the beginning of the 19th century the House of Lords in the case of *Board of Education v. Rice* (18) stated that officers of State who had the duty of deciding or determining questions "must act in good faith and fairly listen to both sides,

for that is a duty lying upon everyone who decides anything . . . . .", yet, four years later in 1915 in *Arlidge's case* (19), the House of Lords held that a government department determining a housing appeal was not obliged to divulge an inspector's report to the appellant even though the report contained statements prejudicial to his case which he might have wished to controvert.This decision, according to *Smith*, page 164, marked the beginning of a partial retreat by the English Courts from their earlier position and that for nearly half a century—until the 1960s—the English Courts showed a marked reluctance to hold that an implied duty to give prior notice and opportunity to be heard was imposed on persons and authorities empowered to make decisions in the general field of administrative law. During the period of the two World Wars "although enormous powers over persons and property were vested in the Government the Courts showed an understandable reluctance to scrutinize the exercise of essential powers in such a way as to make it more difficult for the Government to govern" (*Smith*, page 165), and "to interfere with the discretion of the Ministers—in fighting the War—and repairing the ravages done by it" *Denning: The Discipline of the Law*, page 88.

This attitude of the English Courts continued till the 1960s. Then came the decision of the House of Lords in the case of *Ridge v. Baldwin*, (20), which has been hailed as a land-mark in the field of administrative law. This case dealt with the dismissal of a Chief Constable by a Watch-Committee which gave the Chief Constable no notice of the proposal to dismiss him, or of the particulars of the grounds on which such dismissal was based; nor an opportuniy of placing his case. The House of Lords held, *inter alia*, that the dismissal was bad for failure to observe the rules of natural justice and that although such dismissal had been affirmed by the Secretary of State whose decision was said to be final and binding under the provisions of the relevant Act, yet such decision could not make valid that which was a nullity. Lord Reid cited with approval the decision in *Cooper's case (supra)* and quoted the rule, set down by Erle, C. J. and described as a rule 'of universal application and founded on the plainest principles of justice" by Willes, J. that no man should be deprived of his property without his having an opportunity of being heard, and that that has been applied to many exercises of power which in common understanding would not be at all a more judicial proceeding than would be the act of the district board in ordering a house to be

pulled down, and in which case Byles J. had also stated 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". Lord Reid also expressed the view that the duty to observe the rules of natural justice should be inferred from the nature of the power conferred upon the authority.

The applicability of the principles of natural justice was considered by the House of Lords in the case of *Durayappah v. Fernando,* (21): and their Lordships stated that outside well-known cases such as dismissal from office, deprivation of property and expulsion from Clubs, there is a vast area where the principle can only be applied upon most general considerations, and that in such cases three matters must always be borne in mind when considering whether the principle should be applied or not:

> "There are three matters which must always be borne in mind when considering whether the principle (audi alteram partem) should be applied or not. These three matters are: First, what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when a right to intervene is proved, what sanctions in fact is the latter entitled to impose upon the other. It is only upon a consideration of all those matters that the question of the application of the principle can properly be determined."

This judgment also makes it clear that, 'in the well-known classes of cases', which includes the deprivation of property, in the absence of any express provision to the contrary in the relevant statute, the principles of natural justice should be applied.

Any discussion of the modern concepts of the principles of natural justice would not be complete without a reference to the oft-quoted observation of Lord Hailsham, L.C. in the case of *Pearlberg v. Varty,* (22):

> "The doctrine of natural justice has come in for increasing consideration in recent years, and the Courts generally and Your Lordships' House in particular have, I think rightly,

advanced its frontiers considerably. But at the same time they have taken an increasingly sophisticated view of what it requires in individual cases."

The House of Lords has considered the applicability of the principles of natural justice and the duty to hear in the case of *Fairmount Investments Ltd. v. Secretary of State for the Environment,* (23), also. In that case the applicant owned several houses in an area which the local council had, under the provisions of the Housing Act of 1957, declared to be a clearance area. Subsequently the Council made a compulsory purchase order for the purpose of demolishing the houses. The applicant objected; and the Secretary of State appointed, in terms of the provisions of the said Act, an inspector to hold an inquiry. The Council published, before the said inquiry, documents showing the reasons for the compulsory purchase proposal and a summary of the principal grounds of unfitness. There was no reference to foundations and no suggestion that the foundations were so defective as to rule out any question of rehabilitation. No reference was made to the foundations even at the inquiry. At the end of the inquiry the inspector visited the houses in question, and in his report stated that, because of certain defects in the foundations, and other previously stated defects, satisfactory rehabilitation would not be a financially viable proposition. Thereafter the Secretary of State confirmed the compulsory purchase order. The appellant thereupon sought an order, under the provisions of the said Act, quashing the said compulsory purchase order. The House of Lords held that the decision of the Secretary of State had been made in breach of the rules of natural justice since it was based upon as opinion formed by the Inspector as to the inadequacy of the foundations which had not been part of the Council's case and which the applicant had had no opportunity of refuting either by showing that the opinion was erroneous or by showing that the inadequacy did not render rehabilitation impracticable. Viscount Dilhorne stated, at page 869, with regard to the respondents' (who were the applicants) complaint:

"Just as it would have been contrary to natural justice if the Secretary of State in making his decision had taken into account evidence received by him after an inquiry without an objector having an opportunity to deal with it, so here in my view it was contrary to natural justice for his decision to confirm the order to be based to a very considerable extent on

an opinion, which investigation might have shown to be erroneous. . . . . .

"By the failure to give the respondents any opportunity to deal with these matters, they were in my opinion substantially prejudiced. . . . . ."; and

Lord Russell of Killowen, at page 874, stated:

"But in this case I am unable consonant with the essential principles of fairness in a dispute to uphold the compulsory purchase order. All cases in which principles of natural justice are invoked must depend on the particular circumstances of the case. I am unable in the instant case to generalise. I can only say that, in my opinion, in the circumstances I have outlined, Fairmount has not had—in a phrase whose derivation I nor Your Lordships could trace—"a fair crack of the whip."

The applicability of the principles of natural justice in respect of administrative orders, the legal effect of a failure to observe such principles, and the question whether such failure could be cured by a subsequent full opportunity of being heard before an appellate tribunal were all considered by a Bench of five judges of the Supreme Court in the case of *H. R. Ameradasa et al. v. The Land Reform Commission et al.* (24). The question which their Lordships were called upon to consider was whether in the exercise of their powers under the provisions of section 13 of the Land Reform Law, No. 1 of 1972, the Land Reform Commission and the Minister are controlled by the principle of *audi alteram partem* and if so, the legal consequences of the failure to observe such principle. Their Lordships (by a majority) held that both the Land Reform Commission and the Minister were under a duty to observe the said principle of *audi alteram partem,* and that the failure by the Land Reform Commission to do so rendered its decision a nullity which cannot be cured even by a valid hearing subsequently by the Minister. Sharvananda, J. in the course of His Lordship's judgment, stated: that every tribunal or other body exercising judicial or quasi-judicial functions is expected to observe fundamental rules of natural justice in the exercise of its power, that the judicial element is inferred from the nature of the power: that a duty to act judicially in conformity with the rule of *audi alteram partem* is imposed by the common

law on administrative bodies whose decisions prejudicially affect individuals or property: that *prima facie* a duty to act judicially will arise in the exercise of a power to deprive a party of his property, rights or legal status: that a person or body determining a justiciable controversy between parties or between itself and a single party, must give each party a fair opportunity to put his own case and to correct or contradict any relevant statement prejudicial to him: that it is contrary to natural justice that a party's contentions may be overruled by considerations in the judicial mind which the party has no opportunity of controverting and that the undisclosed evidence may, if subjected to criticism, prove to be misconceived or based upon false premises: that it is a general priniciple of statutory construction that, in the absence of plain statutory language to the contrary, any provision giving power to a tribunal to make an order which will affect the interests of an individual is to be construed as a power which will not be exercisable unless the person affected has had the opportunity to be heard: that it is to be construed in accordance with the rule of *audi alteram partem* and not in derogation therefrom: "that the justice of the common law will supply the omission of the legislature." His Lordship also quoted the observations of Lord Guest in *Wiseman v. Borneman,* (25) at 279 that:

> "if the statute is silent on the question the Courts will imply into the statutory provisions a rule that the principles of natural justice should be applied. This implication will be made on the basis that Parliament is not to be presumed to take away parties' rights without giving them an opportunity of being heard in their interest. In other words, Parliament is not to be presumed to act unfairly".

His Lordship referred to the case of *Shareef v. Commissioner for Registration of Indian and Pakistani Residents* (26), where, on an application for registration as a citizen, the Deputy Commissioner, who held the statutory inquiry refused the application on a ground which was based chiefly on a report of an investigating officer and upon a letter written by an Inspector of Schools neither of which was disclosed to the appellant at the inquiry and the appellant was not informed of the details of the material relied against him and was not given an opportunity of answering the case against him, the Privy Council, having taken the view that the Deputy Commissioner was acting in a semi-judicial capacity and

was therefore bound to observe the principles of natural justice, stated:

> ". . . . . .the party should be given a fair notice of the case made against him and that he should be given adequate opportunity at the proper time to meet the case against him."

His Lordship also considered the effect of a breach of the duty to observe the principles of natural justice and concluded, after a consideration of the principles set out in the cases of *General Medical Council v. Spackman* (27), at 644–5, *Annamunthodo v. Oilfields Workers' Trade Union,* (28), and *Ridge v. Baldwin (supra)* and *Anisminic v. Foreign Compensation Commission* (29), that a breach of the said duty is a matter that affects jurisdiction and renders the decision or determination a nullity and therefore void. His Lordship further proceeded to consider what are the features of natural justice and what natural justice requires; and having referred to the judgment of Lord Hudson in the case of *Ridge v. Baldwin (supra)* and *Halsbury* (4th Edition) Vol. I, page 93, and *de Smith* (4th Edition) page 172, stated that the three features of natural justice are:

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

and that natural justice does not always require that the parties be entitled to an oral hearing, and that at times it would be fair to decide on the basis of written representations, but that the persons affected must be appraised of and given a proper opportunity,

> (1) to make representations on their own behalf; or
> (2) to appear at a hearing or inquiry, (if one is to be held) : and
> (3) effectively to prepare their own case and to answer the case (if any) they have to meet.

Smith (4th Edition) page 238-9, discusses the concept of a duty to act fairly thus:

> "That the donee of a power must 'act fairly' is a long-settled principle governing the exercise of discretion, though its meaning is inevitably imprecise. Since 1967 the concept of duty to act fairly has often been used by judges to denote an

implied procedural obligation. In general it means a duty to observe the rudiments of natural justice for a limited purpose in the exercise of functions that are not analytically judicial but administrative. Given the flexibility of natural justice, it may not have been strictly necessary to use the term 'duty to act fairly' at all, but its usage is now firmly established in the judicial vocabulary. Its value has lain in assisting the extension of implied procedural obligations to the discharge of functions that are not analytically judicial, and in emphasing that acting in accordance with natural justice does not mean forcing administrative procedures into a strait-jacket. The comparatively recent emergence of this use of the 'duty to act fairly' may also enable the Courts to tackle constructively procedural issues that have not traditionally been regarded as part of the requirements of natural justice."

Wade too discusses the modern concept of "acting fairly" in his book on *Administrative Law* (4th Edition). At page 446 and 447 Wade states: that although *Ridge v. Baldwin* sorted out the confusion caused by the artificial use of the word 'judicial' to describe functions which were in reality administrative, it did not eliminate this misnomer from the law: that a means of doing so has appeared in a later line of cases which lay down that power of a purely administrative character must be exercised 'fairly' meaning in accordance with natural justice which, according to Harman, L.J. in *Ridge v. Baldwin,* (20 A) at 578 (and quoted with approval in the House of Lords by Lord Morris in the case of *Wiseman v. Borneman (supra)*), "after all is only fair play in action": that by this simple verbal short-cut the result is reached directly that administrative powers which affect rights must be exercised in accordance with natural justice: that the Courts now have two strings to their bow, namely, an administrative act may be held to be subject to the requirements of natural justice either because it affects rights or interests and therefore involves a duty to act judicially in accordance with the classic authorities and *Ridge v. Baldwin (supra)* or it may simply be held that it automatically involves a duty to act fairly and in accordance with natural justice.

In the year 1966 in the case of *Re H.K. (An Infant)* (30) where an officer at the London Airport refused to admit a boy from Pakistan on the ground that he appeard to be well over 16 years of age, Lord Parker, C.J., held: that, even if an immigration officer is not acting in a judicial or quasi-judicial capacity, he must

neverthless act fairly: that good administration and an honest or bona fide decision must require not merely impartiality, nor merely bringing one's mind to bear on the problems, but acting fairly: that the rules of natural justice, which would apply in a case such as that, is merely a duty to act fairly.

This somewhat simple basis for natural justice was also adopted by Lord Denning M.R. in the cases of *R. v. Gaming Board for Great Britain, ex parte Benaim and another,* (31), and *Re Pergamon Press,* (32).

In this latter case, at page 399, Lord Denning stated as follows:

> "Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the Inspectors must act fairly. This is a duty which vests on them, as on many other bodies, even though they are not judicial or quasi-judicial, but only administrative."

In this connection it has also to be remembered that Article 10 of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations in 1948 provides:

> "Every one is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him."

Although the Declaration lacks binding force in international law, yet it postulates a common standard of achievement, and it has now become an accepted presumption of statutory interpretation that Parliament does not intend to legislate in contravention of the provisions of the Convention—vide *Smith (supra)* page 246—7. Sri Lanka has also now acceded to the two Internationl Instruments—The International Covenant on Civil and Political Rights, and The International Covenant on Economic, Social and Cultural Rights. Against this background it is not unreasonable to construe the said Act as not being intended to interfere with the availability of the principles of natural justice to those in respect of whose business undertakings primary Vesting Orders are made under the provisions of the said Act.

On a consideration of the principles set out above I am of opinion that, where a statute empowers a Minister to make orders

which interfere with the rights of property enjoyed by a citizen, the Minister is, in the absence of a clear, and an express provision to the contrary set out in the said statute itself, ordinarily under a duty to observe the principles of natural justice and or to act fairly before he exercises such powers, even though the said statute itself is silent in regard to the adoption of such a procedure.

With regard to the question whether a hearing given on an appeal is an acceptable substitute for a hearing not given or not properly given earlier, *Wade* (4th Edition) at page 465 states: that in principle there ought to be an observance of natural justice equally at both stages: and that natural justice is violated if the true charge is put forward only at the appeal stage: that if natural justice is violated at first stage, the right of appeal is not so much a true right of appeal as a corrected initial hearing: that instead of a fair trial followed by appeal, the procedure is reduced to unfair trial followed by fair trial. *Smith:* (4th Edition) at page 193, whilst discussing this question whether the absence of a hearing before a decision is made could be adequately compensated for by a hearing *ex post facto,* states: that, whilst a prior hearing may be better than a subsequent hearing, a subsequent hearing is better than no hearing at all: that, although the Courts have held that statutory provisions for an administrative appeal or even full judicial review on the merits are sufficient to negative the existence of any implied duty to hear before the original decision is made, this approach, however, may be acceptable where the original decision does not cause serious detriment to the person affected, or where there is also a paramount need for prompt action, or where it is impracticable to afford antecedent hearings.

Whether the failure observe the principles of natural justice at the initial stage when an order is made could be remedied by a full opportunity being granted to an aggrieved party at a later stage before an administrative appellate body was considered by Megarry, J. in the case of *Leary v. National Union of Vehicle Builders* (33), which was also quoted with approval by Sharvananda, J. in *Amaradasa's case (supra).* In that case *(Leary's case)* L., who had been a member of the defendant union for many years, was excluded by the branch committee on the ground that L. was in arrears with his contributions. This decision was

taken by the branch committee without any notice to L. Thereafter L. appealed to the executive committee; and the executive committee held an inquiry at which L. was present and was afforded a full hearing. At the conclusion of the inquiry the executive committee decided to endorse the exclusion of L., but granted L. permission to appeal to the Appeals Council. L. appeared before the Appeals Council and presented his own case. The Appeals Council too dismissed L's appeal. L. thereupon came into Court seeking declarations and an injunction; and, in the course of the judgment Megarry, J. at page 720, stated:

> "If one accepts the contention that a defect of natural justice in the trial body can be cured by the presence of natural justice in the appellate body, this has the result of depriving the member of his right of appeal from the expelling body. If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal? Even if the appeal is treated as a hearing de novo the member is being stripped of his right to appeal to another body from the effective decision to expel him. I cannot think that natural justice is satisfied by a process whereby an unfair trial, although not resulting in a valid expulsion, will nevertheless have the effect of depriving the member of his right of appeal when a valid decision to expel him is subsequently made. Such a deprivation would be a powerful result to be achieved by what in law is a mere nullity; and it is no mere triviality that might be justified on the ground that natural justice does not mean perfect justice. As a general rule, at all events, I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body."

A consideration of the provisions of Act No. 35 of 1971, which has been set out earlier in this judgment, shows that acquisitions of business undertakings, in terms of the provisions of the said Act, have not been contemplated to be always compulsory. The preamble itself states that it is an Act to provide for acquisitions either "by agreement or compulsorily". If such acquisitions are by agreement then clause *(a)* of sub-section (1) of section 2 confers the necessary power. If it is otherwise, then

it is clause *(b)* of the same sub-section (1) that would have to be availed of. The provisions of sections 13 and 14 of the said Act give an indication that the legislature did contemplate a situation when certain preliminary steps would have to be taken before resorting to the provisions of section 2. Section 13 provides for powers of entry into places where business undertakings are being carried on, for the taking of inventories of the properties of such business undertakings, for the inspection of books, registers, documents of such business undertakings, for the demarcation of the boundaries of such business undertakings, and for calling for returns and information. Section 14 provides for the service of a "notice of claim" on a proprietor of a business undertaking declaring that such undertaking is required for the purposes of the Governemt. The effect of such a "notice of claim" is to prevent the alienation of such business undertaking thereafter to any person other than the Government. There is nothing in this Act which expressly or impliedly prohibits the proprietors of a business undertaking, which the Government proposes to take over, from being heard before a primary Vesting Order is made. On the contrary it contemplates negotiations with a view to a take-over by agreement. If such negotiations are not successful there could still be a take-over, but without the consent of the proprietor.

The consequences of a primary Vesting Order, as far as the proprietor of the business undetaking affected is concerned, are extremely serious and far-reaching: once such an order is made, the title to such business undertaking vests absolutely in the Government, as from the date of such vesting, free from all encumbrances: a competent authority is appointed to manage and administer the affairs of such business undertaking: the competent authority so appointed then takes possession of the property of such business undertaking, and begins to function subject to the directions of the Minister of Finance: the Minister of Finance has also the power to direct the Bank, in which the proprietor of such business undertaking had an account at the time of such take-over, not to permit such proprietor to operate such bank account.

A primary Vesting Order, therefore, constitutes a serious

interference with the Common Law right of the proprietor of a business undertaking to own, possess and enjoy such property. Such an Order could also operate not only to incur financial loss and damage to a proprietor but also to deprive a proprietor of his means of livelihood.

Section 7 (1) of the said Act gives an aggrieved proprietor the right of appeal to the Minister of Finance within fifteen days of the date of a Vesting Order. Although sub-section (2) of section 7 requires the Minister of Finance to refer such an appeal to an Advisory Board there is, however, no time limit specified before the expiration of which such reference should be so made. So too has no time limit been set out before the expiration of which such Advisory Board should tender its advice to the Minister of Finance. As things turned out in this case, the petitioner's appeal had been taken up by the Advisory Board only on 23.12.77; and the hearing before the said Board was concluded only on 2.3.78; and the Advisory Board's advice to the Minister had been tendered on 15.3.78—six months after the petitioners had been effectively dispossessed of their property. In such circumstances even a successful appeal could very well turn out to be only a Pyrrhic victory. Futhermore, it has also been submitted—and, as will be seen later, with success—that the Minister of Finance is under no obligation to accept a recommendation made by the Advisory Board to revoke a primary Vesting Order. It must also be noted that, in this case, the respondent did not, as already stated, controvert or contradict the material placed before the Advisory Board by the petitioners to support their position that the Order P2 is vitiated and is bad in law. Not a tittle of evidence was led on behalf of the respondent before the Advisory Board to repudiate the allegation of *mala fides* alleged by the petitioners, and to justify the take-over effected by the respondents' predecessor-in-office by P2. Not only were the documents R3 and R10, which without doubt would have been available to the respondent, not placed before the Advisory Board, the respondent even went to the extent of informing the Advisory Board through the Deputy Solicitor-General, that he was not possessed of any material with which to counter the petitioner's position so categorically placed before the Board. Had the documents R3 and or R10 been placed before the Advisory Board the petitioners would then have had a full opportunity of countering their contents and

stating what they had to state in defence. Whatever the petitioners so stated, with regard to R3 and or R10, would have been available to the respondent when the occasion arose for him to exercise the power vested in him under section 7 (1) of the said Act. I do not think that it is, in these circumstances, now open to the respondent to fall back and rely upon R3 and or R7 to support the making, by him, of the Order P7. Of the documents produced by the respondent before this Court and referred to in paragraph 22 of the respondent's statement of objections the documents R1 to R10 are the only documents prior to the date of P7: and out of these documents too, R3 and R7 are the only documents of any consequence in regard to this matter. No explanation has been proferred by the respondent as to why the relevant contents of R3 and or R10 were not placed before the Advisory Board, and the petitioners thereby given an opportunity to meet the extremely serious allegations levelled against the petitioners in the said documents R3 and or R10 which have only to be perused to realise the considerable prejudice that would be caused to the petitioners if one is in any way influenced by the allegations set out in them without informing the petitioners of the said allegations and giving the petitioners a reasonable opportunity of answering such allegations. There is nothing in R3 and or R10 the disclosure of which would have prejudiced the public interest. On the other hand public interest demands the exposure of such miscreants. A disclosure of the contents of R3 and or R10 and any other material available to the respondent. and considering what the petitioners had to state would not have impeded any prompt action which had to be taken by the respondent. The provisions of the said Act empowered the respondent with sufficient authority to take such preventive action as would have been necessary. There has been no allegation of any emergency—national or otherwise—which necessitated any urgent action. The monetary value of the property taken over was, as far as it affected the petitioners, extremely high. Against this background the respondent should not have, in my opinion, taken into consideration any of the allegations set out in R3 and or R10 both of which contain matters highly prejudicial to the petitioners, without first hearing what the petitioners themselves had to state in regard to such allegations. A failure to follow such a course of action would result in a contravention of the principles of natural justice and a violation of the "duty to act fairly". Fairness, as it seems to me, demanded that the petitioners were informed of the matters that were being counted against them,

and that they were afforded a reasonable opportunity of meeting that which was being alleged against them, before the primary Vesting Order P7 was made.

On a consideration of the foregoing, I am of opinion that, although there is no express requirement in section 7 (1) of the said Act that the Minister should, before making a primary Vesting Order, give the proprietor of the business undertaking sought to be compulsorily acquired an opportunity of being heard, yet, I am of opinion that the Minister is, in doing so, under a duty to observe the principles of natural justice and or the duty to act fairly. The respondent has clearly failed to observe the said rule and or to discharge such duty. Such failure has also caused considerable prejudice to the petitioners.

It is clear that a breach of the principles of natural justice and the duty to act fairly render the decision affected thereby bad in law and void–vide *Ridge v. Baldwin, (supra); Amaradasa's case (supra);* and *Wade;* (4th Edition, pages 447–9).

Mr. Choksy also contended that the petitioners are not entitled to maintain these applications in view of the provisions of section 22 of the Interpretation Ordinance, as amended by Act No. 18 of 1972.

Section 2 (4) of the said Act provides that a primary Vesting Order shall, subject to a refusal by the House of Representatives to approve it, be "final and conclusive and shall not be called in question in any Court whether by way of writ or otherwise". Section 22 of the Interpretation Ordinance, as amended, states that the effect of such an expression is to shut out the jurisdiction of the Courts upon any ground whatsoever to pronounce upon the validity or legality of such an order, decision, determination, direction or finding made or issued in the exercise or the apparent exercise of the power conferred upon a person, authority or tribunal. The first proviso to the said section 22, however, takes out of the purview of the said section, the power of the Courts to issue, *inter alia,* writs of certiorari, mandamus and prohibition where the Supreme Court (this would now include this Court) is satisfied that, though the person, authority or tribunal, upon whom the power to make or issue such order, decision, determination, direction or finding is conferred, was bound to conform to the rules of natural justice, yet, such person, authority

or tribunal, has failed to conform to the said rules.

As set out earlier, I have taken the view that: the respondent was bound to observe the principles of natural justice and "to act fairly" before making the primary Vesting Order P7: that the respondent has, however, failed to do so: that such failure has also caused the petitioners considerable prejudice.

The basis for this objection put forward on behalf of the respondent is that the said primary Vesting Order, P7, has not been made by a "person, authority, or tribunal" as contemplated by paragraph (b) of the first proviso to the aforesaid section 22. The contention adduced in support is that: a primary Vesting Order made under section 2 (1) by the Minister is required by sub-section (3) to be laid before Parliament, within the period specified therein, for affirmative approval by Parliament: that what becomes operative in the order made by the Minister and approved by Parliament: that such an Order is an "executive cum legislative" Order, and is not caught up by the aforesaid paragraph (b).

I, however, find myself unable to accept this submission. A primary Vesting Order made under the provisions of the said Act is an act of the Minister of Finance. It is made by the Minister of Finance, either *ex mero motu,* or at the request of another Minister. This comes into operation from "the primary vesting date", which date is also specified by the Minster of Finance himself in the said primary Vesting Order itself. The moment it comes into operation it attracts to itself the provisions of sub-section (2) of section 2 of the said Act. It is only sometime thereafter, before the effluxion of the time limit set out in sub-section (3), that the primary Vesting Order so made is laid before Parliament. The resolution passed by Parliament is to approve the said Order. Such approval does not elevate the said Order to the position of an Act of Parliament. Such approval does not change its original character of one made by the Minister. Such resolution merely approves something that has already been done by another. There is no adoption of the Order by Parliament as one done or made by itself. It remains what it was—an act of the Minister—a statutory instrument made by the Minister. Parliament merely gives it, as it were, its blessings. The principle set out in the *F. Hoffman—La Roche and Co. case (supra)* clarify the true nature and status, in law, of an Order such as P7. P7, in my

opinion, is an "Order" made by a "person".

Section 22 of the Interpretation Ordinance was also considered in *Amaradasa's case (supra).* The Supreme Court, however, allowed the application for a writ of certiorari. In that case too the the application was founded on the assertion that a duty to observe the principles of natural justice has been violated. I am of the view that this objection put forward on behalf of the respondent is not entitled to succeed.

Having regard to all that which has been set out above, I am of opinion that the petitioners are entitled to the isssue of a writ of certiorari as prayed for.

I have given this matter the anxious consideration that a matter of this nature and importance deserves; more so because, in the words of Lord Denning, M.R., (in the case of *Laker Airways Ltd. v. Department of Trade (supra)* at page 194):

> "It is a serious matter for the Courts to declare that a Minister of the Crown has exceeded his powers. So serious that we think hard before doing it. But there comes a point when it has to be done. These Courts have the authority and I would add the duty, in a proper case, when called on to inquire into the exercise of a discretionary power by a Minister or his department. If it is found that the power has been exercised improperly or mistakenly so as to impinge unjustly on the legitimate rights or interests of the subject then these Courts must so declare. They stand, as ever, berween the executive and the subject, alert, as Lord Atkin said in a famous passage, 'alert to see that any coercive action is justified in law'. See *Liversidge v. Anderson.* To which I would add 'alert to see that discretionary power is not exceeded or misused".

In view of all that has been set out above, the "point" has, in my opinion, been reached in this case; and it behoves this Court not only to exercise its authority, but also to do its duty.

I accordingly, make order issuing a writ of certiorai quashing the aforesaid primary Vesting Order P7.

Even though, in view of my order upon the application for a writ of certiorari, a consideration of the relief sought for by way

of mandamus would be unnecessary, yet, as this matter was also argued in depth by learned counsel, appearing for the petitioners and the respondent, I propose to consider this particular ground of relief as well. The relief by way of mandamus will of course be considered on the assumption that P7 is a valid Order.

The relief which the petitioners have prayed for by way of mandamus, as set out in paragraph (a) of the prayer to the petition, is: "for an order in the nature of a writ of mandamus directing and ordering the respondent to revoke the primary Vesting Order dated 6th September, 1977, in accordance with the advice tendered to him by the Advisory Board pursuant to the appeal made to him by the petitioners."

Mr. H. L. de Silva has placed the petitioner's claim for mandamus on the basis: that the provisions of section 7 (3) of the said Act, though couched in permissive language, does not operate to vest in the respondent a discretion whether or not to make an order of revocation upon being so advised by the Advisory Board: that the said provisions, whilst conferring upon the respondent an enabling power, do also cast an obligation upon him to make an order of revocation if the Advisory Board so advises the respondent: that the said power is so vested in the respondent to enable it to be exercised in favour of determinable persons such as the petititoners in respect of whose business undertaking a primary Vesting Order had been made, but which, upon an appeal being preferred, the Advisory Board has advised the respondent to revoke: that the said power is so vested to effectuate a legal right, which persons such as the petitioners would have to have such an Order revoked and to get back their property which had been unjustifiably taken over by the State. Mr. de Silva relies very heavily upon the principles enunciated over a century ago by the Privy Council in the case of *Julius v. The Lord Bishop of Oxford,* (34), and approved subsequently in several cases, notably by the House of Lords in 1968 in the *Padfield case (supra).* Mr. de Silva submitted that *Julius's case (supra)* is the "sheet—anchor" of his submissions.

The facts and circumstances of *Julius' case (supra)* are: that section 3 of the Church Discipline Act provided that, in every case of any clerk in holy orders who may be charged with any offence against the Laws Ecclesiastical or concerning whom there may exist scandal or evil report as having offended against the said

laws, "it shall be lawful for the bishop of the diocese" within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or, if he shall think fit, of his own motion, to issue a commission under his hand and seal to the persons specified in the said section for the purpose of making inquiry as to the grounds of such charge or report: that the appellant, Julius, was a parishioner of the parish of Clewer of which Rev. Carter was the rector: that Julius thought that Mr. Carter not only himself practised but also permitted his curates to practise certain ritualistic observances in the performance of Divine Services which were forbidden by the laws of the Church of England: that Julius presented to the Bishop of Oxford, in whose diocese Clewer is situate, a letter of complaint, dated 11.7.1878, as to those ecclesiastical offences, and applied to have a commission issued by the bishop for an inquiry into the grounds of the said charges, in terms of the provisions of Section 3 referred to above: that, after some correspondence in regard to this matter, the bishop refused the said application: that the reason for such refusal was set out by the bishop in a letter, dated 10.8.1878, sent to Julius: that thereupon Julius moved the Queen's Bench Division and obtained a writ of mandamus commanding the bishop to issue a commission or to send to the Court of Appeal for the province letters of request in terms of Section 13 of the said Church Discipline Act: that thereupon the bishop appealed to the Court of Appeal which allowed the appeal and set aside the order of Queen's Bench Division: that, from the judgment of the Court of Appeal, Julius appealed to the House of Lords. Although the House of Lords dismissed the appeal, Their Lordships, however, laid down the principles upon which the question – whether permissive language used in a statute to vest a person with a power could, in certain circumstances, be construed as imposing upon such person the obligation to exercise such power in favour of a person who has a legal right to call for the exercise of such power – should be considered.

Earl Cairns, the Lord Chancellor, stated at page 222, as follows:

> "The question has been argued and has been spoken of by some of the learned Judges in the Courts below as if the words 'it shall be lawful' might have a different meaning, and might be differently interpreted in different statutes, or in different parts of the same statute. I cannot think that this is correct. The words 'it shall be lawful' are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or

authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so. Whether the power is one coupled with a duty such as I have described is a question which, according to our system of law, speaking generally, it falls for the Queen's Bench to decide, on an application for mandamus. And the words 'it shall be lawful' being according to their natural meaning permissive or enabling words only, it lies upon those, as it seems to me, who contend that an obligation exists to exercise this power, to shew in the circumstances of the case something which, according to the principles I have mentioned, creates this obligation."

In the course of his judgment the Lord Chancellor also quoted the following words of Mr. Justice Coleridge in the case of *Reg. vs. Tithe Commissioner*(35).

"The words undoubtedly are only empowering, but it has been so often decided as to have become an axiom, that in public statutes words only directory, permissory, or enabling, may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice."

Lord Penzance, at page 229, too set down the said principle as follows :

"The words 'it shall be lawful' are distinctly words of permission only – they are enabling and empowering words. They confer a legislative right and power on the individual named to do a particular thing, and the true question is not whether they mean something different, but whether regard being had to the person so enabled – to the subject matter, to the general objects of the statute, and to the person or class of persons for whose benefit the power may be intended to have been conferred – they do, or do not, create a duty in the person on whom it is conferred to exercise it."

At page 235, Lord Selbourne gave expression to the principle thus:

"The question whether a Judge or a public officer, to whom a power is given by such words, is bound to use it upon any particular occasion, or in any particular manner, must be solved aliunde and, in general, it is to be solved from the context, from the particular provisions, or from the general scope and objects, of the enactment conferring the power."

On an application of these principles to the facts and circumstances of the case, Their Lordships came to the conclusion that the said section gave the bishop complete discretion to issue or decline to issue such commission.

In the *Padfield case (supra)* in regard to this aspect of the case what arose for consideration was, as set out earlier, whether the words, "if the Minister in any case so directs. . ." appearing in the relevant statute, should be construed as casting an obligation upon the Minister to refer to the committee of investigation, constituted under the said statute, an appeal made to the Minister, also in terms of the same statute, by a party aggrieved by an Order made by the Minister in terms of the selfsame statute. Relying upon the principles set out in *Julius's case (supra)*, it was contended, on behalf of the applicants, that the said words not merely conferred a power but also coupled such power with a duty. The view, which was taken by the House of Lords, however, was that the said words were sufficient to show that the Minister had a discretion, but that they gave no guide as to its nature or extent.

Mr. de Silva cited several other English cases where the aforesaid principles, set out in *Julius's case (supra)*, have been cited with approval and followed. On an application of the said principles to the facts and circumstances of each case the Courts have in some cases decided that the enabling power was not merely permissive but was coupled with a duty casting an obligation to exercise it, whilst in others the decisions have been that they are merely permissive and vest in such authority a discretion. The principles to be followed are clear; but the difficulty, as it very often occurs, is in the application of such principles to the facts and circumstances of the particular case.

A reading of sub-section (3) of Section 7 shows that the revocation set out therein is to be made by the Minister only "after considering the advice tendered to him by the Advisory Board." The Minister is, therefore, expressly required to do something, namely, to consider the advice, which the Advisory Board has given him, before setting out to take the next step

which he has the power to do – namely, the act of revocation – in terms of the said Section. These words do, at first sight, suggest the existence of a requirement to pause and think before embarking upon an act of revocation. Mr. de Silva submitted that all that the Minister was required to consider at that stage was whether there is any fact or circumstance which would vitiate the act of the Advisory Board – such as fraud, corruption, bias – and which would render invalid the advice so tendered by the Advisory Board, and that, even so, the Minister cannot act on his own without an order of a competent Court holding such advice invalid upon any such ground. I, however, find it difficult to limit the Minister's consideration in that way, that it should be limited only to the consideration of the question of the validity of the advice, and that too only if there exists a determination by a Court to that effect. It seems rather to have been intended that such consideration should be of the content and the nature of such advice, a consideration of the merits of such advice and the grounds upon which such advice is so based. There is also another aspect of this matter. If, as is contended on behalf of the Petitioners, the Minister has no option but to give effect to the advice of the Advisory Board if such advice is that the Primary Vesting Order should be revoked, then that would in effect mean that what becomes all important and operative is the view of the three members of the Advisory Board, who, though appointed by the Prime Minister and would be persons in whose ability, integrity and independence the Prime Minister has confidence are, nevertheless, persons who are not members of Parliament. The Primary Vesting Order has, by the time the appeal is lodged, become not merely an act of the Minister alone but an act which has also, after due consideration by Parliament, received the approval of Parliament. That being so, it is most unlikely that Parliament would have intended that the continued existence of such an act should depend upon the views of three "outsiders," however eminent and capable they be, and that, if three such persons were to advise the Minister that such order should be revoked then the Minister should be bound to act in accordance with such advice. It seems to me that the intention was rather, that, where advice is tendered by the Advisory Board that a revocation be made, before such advice is given effect to, the Minister should consider the basis upon which such advice is preferred and also have regard to the impact, if any, the compliance with such advice would have upon the relevant policy of the government, and again have consultations with his Cabinet colleagues and any other official experts. It is most unlikely that Parliament's intention was to make the revocation dependent wholly upon the view of the members of the Advisory Board. Parliament would

rather have intended that the revocation, if any, of such an Order should be the responsibility of a person, who is not only under a obligation to follow the normal conventions of Parliamentary government before taking action to revoke an Order which has had Parliament's approval, but is also a person who could be called upon to account for his actions on the floor of the House. This is even more so as the acquisitions in respect of which appeals are so considered by the Advisory Board are acquisitions made compulsorily.

In this view of the matter, it appears to me: that the provisions of Section 7 (3) of the said Act vested in the Minister a discretion, and that he was not bound to act in accordance with the advice tendered to him by the said Advisory Board: that it is within the discretion of the Minister whether or not to accept such advice and make an order of revocation in terms of Section 7 (3) of the said Act; that, in arriving at such a decision the Minister exercises purely an administrative function based upon a consideration of not only the advice of the said Advisory Board and the material placed before the said Board by the Appellants, but also the relevant governmental policy and what the Minister thinks is in the public interest: that, in so acting, the Minister is nevertheless under a duty to act fairly.

Even though the provisions of Section 7 (3) of the said Act vest a discretion in the Respondent, the question which would thereupon arise is whether such discretion has been exercised according to law. If, however, the Respondent has not exercised such a discretion according to law, then, upon the authority of the *Padfield case (supra)*, the Respondent could be directed by this Court to exercise such discretion according to law. On the Respondent's own showing the Respondent has, in deciding not to revoke P7, taken into consideration, *inter alia*, not only the documents R3 and R10, referred to earlier, but also the document R14. Admittedly none of the contents of either of the said documents – R3, R10, R14, – have been communicated to the Petitioners and the Petitioners afforded a reasonable opportunity of stating what they have to say in regard to them. In the circumstances it would, having regard to the principles set out in the earlier part of this judgment, appear that a strong case could be made out against the Respondent on this score as well. The Petitioners' claim for relief by way of Mandamus, as set out earlier, is, however, not on this footing – that an admitted discretion has not been exercised according to law and that Mandamus should issue directing the re-exercise of such discretion according to law – but is on the basis that what was conferred on the

Respondent was not a discretion but a power which he was obliged to exercise in accordance with the advice tendered to him by the Advisory Board. This the Respondent has failed to establish. The Petitioners' claim has not been presented in their petitions, as in the *Padfield case, (supra),* in the alternative – that, if the Minister is held not to be under a duty but to be vested with a discretion, then such discretion has not been exercised according to law. That being so, I do not think this Court should consider the grant of relief upon a basis not expressly set out in the petitions and in respect of which the Respondent was not called upon to meet in his statement of objections.

For these reasons, the Petitioners' claim for relief by way of Mandamus, as set forth in the petitioner, is not, in my opinion, entitled to succeed. The application for a Writ of Mandamus made by the Petitioners – J. B. Textiles Industries Ltd. -- in these proceedings, bearing No. 1137/79, is, accordingly, dismissed.

Although the Petitioners have, in their applications for Writs of *Certiorari* also prayed for Writs of Prohibition, at the hearing before this Court, however, no submissions were made on behalf of the Petitioners in regard to relief under this heading. Besides, the relevant facts and circumstances also show that the Petitioners' claim for relief on this basis cannot succeed. In the circumstances, the Petitioners' applications for relief by way of Writs of Prohibition are also dismissed.

As the Petitioners have succeeded in their applications for Writs of *Certiorari,* but have failed in their claims for Writs of Mandamus and Prohibition, and, as all the applications were consolidated for the purpose of hearing submissions of Counsel, I direct the parties to bear their own costs of the respective applications.

De Silva, J. I agree.

Applications for Writ of Certiorari allowed.

Application for Writs of Mandamus and prohibition refused.