NEIDRA FERNANDO
v.
CEYLON TOURIST BOARD AND OTHERS

COURT OF APPEAL
GUNAWARDANA, J.
CA NO. 1343/98
AUGUST 31, 2000

Writ of Certiorari – Recommendation of dissmissal – Does Writ lie – Public Law and Private Law remedies – Duty to act judicially? Bias – Likelihood of bias – principle of proportionality – Ceylon Tourist Board Act, No. 10 of 1966 s. 5 (A) and 16 (3).

The petitioner was found guilty of all the charges framed against her by the 3rd respondent and had in his report to the 1st respondent recommended that she be dismissed from service. The petitioner sought to quash the said recommendation, on the ground of bias. However, the petitioner had been dismissed after this application had been made to Court, and later reinstated.

It was contended by the respondent that the decision that the petitioner is complaining of is not amenable to judicial review.

Held:

(1) It is clear that the power to make the recommendation a report to the effect that the petitioner should be dismissed had not been made under the contract. In terms of the letter of appointment there was no need to hold an inquiry before the dismissal. The 3rd respondent inquiring officer had made the impugned recommendation not under the contract but in terms of the regulations of the Ceylon Tourist Board Act. The code of regulations in pursuance of which the inquiry had been held had not only been approved by the relevant Minister but had also been published in the *Government Gazette.* Furthermore, because the inquiring officer was called upon to decide the respective rights of the parties ordinarily, there was a duty on the part of the inquiring officer to act judicially. The decision is amenable to judicial review.

(2) The 2nd respondent, Chairman is the complainant in this case. Almost all charges inquired into by the 3rd respondent were charges stemming from certain remarks on allegation that had alleged been made by the petitioner which are said to be reflecting on the Chairman.

Per Gunawardana, J.

"The rule against bias is a doctrine which requires that no man should be the Judge in his own cause. The petitioner had a right to a fair hearing. The inquiring officer must appear to be free from bias which is a concomittant of that right. It is true that the Chairman had not personally decided the matter, but he had appointed the inquiring officer who did make the decision or the recommendation. Bias being insidious one rarely has to or is able to prove actual bias. I think appearances are everything, justice must be seen to be done.

(3) The alleged act of bringing the Chairman into dispute cannot be readily brought under any of the thirteen acts of grave misconduct designated in the Rules.

The doctrine of proportionality provides that a Court of review may intervene if it considers that harms attendant upon a particular exercise of power are disproportionate to the benefits sought to be achieved.

APPLICATION for a Writ in the nature of *Certiorari / Mandamus.*

Cases referred to:

1. *R. v. Football Association ex parte Football League* – (1993) 2 All ER 833.
2. *Aga Khan Case* – (1993) 1 WLR 909 at 924.
3. *Rex v. East Berkshire Health Authority – ex parte* – Walsh 1985 QB 152.
4. *R. v. Civil Service Appeal Board – ex parte* Bruce – 1988 3 ALL ER 686 (QB).
5. *R. v. Crown Prosecution Service – ex parte* P. Hogg (1994) The Times, 24 April.
6. *Ridge v. Baldwin* – 1964 AC 40.
7. *R. v. Barnsley Metropolitan Borough Council – ex parte* Hook – (1976) 1 WLR 1052.
8. *Nanayakkara v. The Institute of Chartered Accountants* – (1981) 2 Sri LR 52.
9. *R. Sussex Justices* – (1924) 1 KB 256.
10. *Dimes v. Grand Junction Canal* – 1852 3 HLC 759.
11. *Metropolitan Properties Ltd. v. Lannon* – 1968 3 ALL ER 304.
12. *Premaratna v. UGC* – 1998 3 SLR 395.
13. *Ex parte Brind* – 1991 AC 696.
14. *R. v. Secretary for Home Department ex parte Cox* – 1993 5 Admin LR 17.
15. In *Re Harry Hook* – 1976 3 ALL ER 452.

In the matter of an application for Writ of *Certiorari / Mandamus.*

Shibly Aziz, PC with *Ms. N. Buhary* for petitioner.

D. S. Wijesinghe, PC with *J. C. Weliamuna* for 2nd respondent.

Y. S. W. Wijetilaka, DSG for 1st respondent.

Dr. J. De Costa with *D. D. P. Dassanayake* for 3rd respondent.

Cur. adv. vult.

July 16, 2001

GUNAWARDANA, J.

The petitioner who had been a fairly high ranking officer in the service of the Ceylon Tourist Board (1st respondent) had been dismissed by the 1st respondent in pursuance of a recommendation made by the inquirer (3rd respondent) who held an inquiry in pursuance of regulations or rules framed under section 16 (3) of the Ceylon Tourist Board Act, No. 10 of 1966 into seven charges framed against her. The 3rd respondent had found the petitioner guilty of all the charges and had in his report dated 30. 10. 1997 recommended that she be dismissed from service, which is the maximum or ultimate punishment. The petitioner seeks only to quash the recommendation. Presumably, the dismissal had taken place after this application had been made to this Court.

In what may be called, the series of charges (amounting to seven) that the petitioner had to face, charges that form the main element in the sheet relate to some allegation or remarks that the petitioner had allegedly made to a former minister, supposedly, so to speak, reflecting on the Chairman of the Ceylon Tourist Board (2nd respondent). The impression is irresistible, taking a common sense view of the matter, that the other charges too, (in the series) against the petitioner had been framed or had been prompted by the fact that the petitioner had allegedly made certain observations which were considered to be derogatory of the 2nd respondent and had obviously antagonised the 2nd respondent who was the Chairman of the Ceylon Tourist Board.

On the submissions, basically, two points demand consideration:

(i) Whether the decision that the petitioner is complaining of is amenable to judicial review,
(ii) If so, whether the decision is vitiated as there was a real likelihood of bias.

The argument put forward on behalf of 1st-3rd respondents is that the relationship between the petitioner and the Ceylon Tourist Board (1st respondent) is a private law matter in that the relationship is governed by a contract. Although it had not been said so, in so many words, the said argument seems to suggest that an employer cannot be compelled to retain somebody as his employee against the will of the employer and whom the employer does not want; the remedy, if any, lies in damages for breach of contract.

At this juncture it is worth pointing out that this case had taken a new turn or direction after the matter was orginally set down for judgment and there was a strong feeling that it was superfluous to deliver a judgment by the Court as the petitioner had been reinstated. However, the learned President's Counsel for the petitioner, after discussion with the petitioner, informed Court that the petitioner would not be content unless the report of the 3rd respondent is also quashed to which proposal the learned Deputy Solicitor-General and Mr. Wijesinha, PC who appeared respectively for the 1st and 2nd - 3rd respondents objected.

The precise limits of what is called "public law" and "private law" cannot be easily worked out. The working out of this distinction is not all that simple. And as such, some measure of flexibility has to be shown by the Court as to the use of these two different procedures.

The search for a rational distinction has displayed a good deal of judicial confusion. Fears are engendered that litigants are non-suited on purely strait-laced technical grounds. There is a degree of impatience

on the part of judges with restrictions imposed by public / private law dichotomy. There are some criteria that will persuade a Court to the view that a decision-making body should be designated as one falling within public law category. Reliefs under the judicial review procedure can be sought only in respect of public law issues. It is, therefore, necessary to ascertain whether or not the issues involved on this application fall within the domain of public law. There appear to be, broadly speaking, two main grounds for this, that is, for holding that an issue is a public law matter: the source of power and the nature of the function exercised by the body in question. The Courts have often, referred to the source of decision-making power as the touchstone. For most administrative authorities the source of their power will be legislation or regulations framed under a statute, as the rules or regulations relevant to this matter are.

There are, of course, other criteria that have to be taken into consideration apart from the source of power and the nature of the function performed by the authority in question in identifying matters which are amenable to judicial review – one such being that there is no right to a remedy in private law. If this is a case of an unfair dismissal of the petitioner by the Ceylon Tourist Board (1st respondent) the petitioner, perhaps, can seek relief in respect of matters governed solely by the contract of employment. But, it is extremely doubtful, whether it would be within the competence of a Labour Tribunal to quash the adverse report of the 3rd respondent.

The fact that there are no other means of challenge can be a determinant of the availability of review was confirmed in *R. v. Football Association, ex parte Football League.*[1]

As regards the question of whether or not a jockey club would ever be regarded as public body for the purposes of review, Sir Thomas Bingham MR in the Aga Khan case[2] at 924 observed: "cases where the applicant or a plaintiff has no contract on which to rely may raise different considerations and the existence or non-existence of alternative remedies may then be material".

In this case the petitioner is challenging or is seeking to quash the report of the 3rd respondent who held the disciplinary inquiry against the petitioner. In fact, such a disciplinary inquiry was not in contemplation under the contract of employment even if, in fact, the letter of appointment dated 03. 03. 1968 granted to the petitioner by Ceylon Tourist Board (1st respondent) can be described as such, that is, as a contract of employment.

The source of authority or jurisdiction of the 3rd respondent (inquirer) was not the consensus of the petitioner to be bound by the findings of the 3rd respondent. The parties, or rather the petitioner, had not consensually submitted to the jurisdiction of the inquirer. He (the 3rd respondent) is performing disciplinary functions ordained by a disciplinary code adumbrated by or spelt out in rules framed under a statute, that is under section 16 (3) of the Ceylon Tourist Board which create a situation where the petitioner is left with the "stark choice of either submitting himself to the control of the 2nd respondent or not participating at all" in the inquiry concerned. The inquirer's (3rd respondent's) authority is not derived from the contract, assuming that the petitioner's service with the Ceylon Tourist Board (1st respondent) stems or arise from a contract of employment which, in fact, is strictly not so. This special method of resolving or dealing with disputes had not been agreed to by the parties but had been devised by rules unilaterally formulated by the 1st respondent under the Ceylon Tourist Board Act. As such judicial review should govern the situation on this particular dispute.

The petitioner in seeking to quash the report of the 2nd respondent is not asserting rights that exist in private law. As explained earlier, the petitioner may sue for breach of contract, if, in fact, there can be said to be one (contract) between herself and the Ceylon Tourist Board. But, the petitioner cannot seek to quash the report in the exercise of private rights. And, as such, the petitioner's application to quash the report must be held to involve a public law issue. Perhaps, the fact that the petitioner is seeking to quash the report

of the 3rd respondent and that such a relief cannot be obtained, say, from the Labour Tribunal may not in itself be determinative or decisive. But, this is an aspect that is relevant, as had been explained in the Aga Khan case referred to above.

The nature of the function of the body in question is also relevant in ascertaining whether its decision involves public law issues. The inquirer (2nd respondent) is comparable to a disciplinary or other body that had been created by statute to which the employer and employee are entitled or required to refer disputes. Because the inquiry had been held by the 3rd respondent who is a body or person created or set up under regulations or rules made under a statute – that creates a public law element. The effect of the regulations under which the inquirer (3rd respondent) had been appointed and under which the 3rd respondent had held the inquiry was to place special restrictions (which partake of the character of statutory restrictions) upon the right of the Ceylon Tourist Board (1st respondent) to dismiss the petitioner unilaterally, which by itself injects an element of public law into issues arising in this case. Sir John Donaldson MR had this to say in this aspect: "The ordinary employer is free to act in breach of his contracts of employment but if he does so his employee will acquire certain private law rights and remedies in damages for wrongful dismissal, compensation for unfair dismissal, an order of reinstatement or re-engagement and so on. Parliament can underpin the position of a public authority employee directly restricting the freedom of the public authority to dismiss, thus giving the employee "public law rights". This statutory restriction – created by the rules (discipline) formulated under the Ceylon Tourist Board Act, upon the right of the employer to dismiss the petitioner constitutes some statutory underpinning of the petitioner's employment or her service.

It can, at least, be arguably said that, in fact, the petitioner had no contract of employment, as such with the Ceylon Tourist Board (1st respondent). In *R. v. Civil Service Appeal Board ex parte Bruce*[4] a distinction, (however tenuous it may appear to be to the uninitiated

or to those not admitted to or conversant with the finer points of Administrative Law) had been drawn between service pursuant to a contract of employment on the one hand, and service merely by virtue of an appointment on the terms of a letter of appointment on the other. In that case May, LJ. held that there was a sufficient public law component or element connected or associated with the dismissal of the executive officer concerned – since the service of the applicant (officer) arose out of an appointment and not in consequence of a contract, as such. Notwithstanding that feature, the Court refused to grant judicial review of the decision of the Civil Service Board dismissing the applicant, because it was felt that the most appropriate forum for resolving disputes arising out of that particular dismissal was an industrial tribunal.

Examination of the letter of appointment dated 03. 03. 1968 (by virtue of which, admittedly, the service of the petitioner under the Ceylon Tourist Board – 1st respondent originated) shows that there is no consensus, mutuality or common agreement about the terms on which the petitioner had been appointed – consensus being the signal quality of a contract. The letter of appointment is all one-sided or unilateral, if I may say so – the Ceylon Tourist Board (1st respondent) prescribing all terms of the appointment, which terms were imposed from above and had to accepted by the petitioner, willy-nilly. In this state of things, it cannot be said that the petitioner's service with or under Ceylon Tourist Board arose out of any contract of employment, as such, and the legal relationship that arose out of that form of service could not be equated to a contract.

When there was a contract, reliefs under judicial review procedure would not be available – since it would be a private law relationship. In *R. v. Crown Prosecution Service ex. P. Hogg*[5] the facts were : A prosecutor in the crown prosecution service was dismissed during probationary period. The Court of Appeal (England) held that relationship between the crown as employer and a crown servant as employee was a private law matter since it was a contractual relationship.

Even where the institution or the body is a statutory body, which is clearly amenable to judicial review in respect of its statutory functions, it may yet be immune from judicial review as had been demonstrated in *R. v. East Berkshire Health Authority ex. P. Walsh*[6] *(supra).* In that case the Court of Appeal held that it would be inappropriate for a senior nursing officer, employed under the National Health Service, to challenge his dismissal by way of judicial review. As the Master of Rolls (Sir John Donaldson) explained, employment by a public authority *per se* did not inject an element of public law in to the issue. The decision seems to have proceeded on the conventional basis that there was no "public law" element in an "ordinary" relationship of master and servant and that accordingly, in such a case judicial review would not be available.

In terms of the letter of appointment given to the petitioner, even assuming that it results in a contract of employment with the Ceylon Tourist Board (1st respondent) – the petitioner's appointment could be terminated by one month's notice or upon payment of one month's salary in lieu of such notice. Assuming that the letter of appointment represents a contract – yet the termination of services of the petitioner had not been effected in pursuance of the terms of that letter – but in compliance with the recommendation of the 2nd respondent who is a creature of the statute. All this imparts a statutory flavour to the recommendation of the 2nd respondent, which is what is now sought to be quashed. It is very clear that the power to make the recommendation or report to the effect that the petitioner should be dismissed from her post had not been made under the contract (assuming there was a contract of employment or that the letter of appointment gave rise to a contract of employment). In terms of the letter of appointment there was no need to hold an inquiry before the dismissal. The letter of appointment, only states thus, with regard to the termination of service or dismissal of the petitioner : "Your employment will be terminable with one month's notice on either side or on payment of one month's salary in lieu of such notice" *(vide* term No. 7 of the letter of appointment dated 03. 03. 1968).

As observed above, the 3rd respondent (Inquiring officer) had made the impugned recommendation (that the petitioner be dismissed from employment) not under the contract, but in terms of the regulations or the Ceylon Tourist Board (Discipline) rules of 1971 formulated under section 16 (3) of the Ceylon Tourist Board Act, No. 10 of 1966. The effect of these rules is to preclude the Tourist Board (1st respondent) from dismissing the petitioner, so to say, at its will and pleasure – thereby imposing some kind of statutory restriction upon the right of the Ceylon Tourist Board (1st respondent) to dismiss the petitioner without assigning any cause – which latter right to dismiss without cause, the Tourist Board (1st respondent) had under the letter of appointment although it had not been exercised by 1st respondent in this instance.

In the case before me, too, it is true to say that the petitioner's service with the Ceylon Tourist Board (1st respondent) was on the basis not of a contract of employment, as such, but on the terms of the letter of appointment which letter was made available to me very obligingly by the learned Deputy Solicitor-General, Mr. Y. Wijayatilaka, at my request and for which I am most grateful to him. This is a very crucial aspect which ought to have been highlighted by the petitioner herself. I called for the letter of appointment because I felt that it is a very significant aspect of this case which had been overlooked. Anyhow, as had been repeatedly pointed out above – no Court or tribunal other than a Court exercising judicial review functions can quash the report of the 3rd respondent recommending the ultimate punishment of dismissal of the petitioner. This consideration, that is, the non-availability of any other means of quashing or challenging the report of the 3rd respondent injects an element of public law into the issue and should make the relevant report, one amenable to judicial review. This approach could be rationalised also on the basis that the inquirer (3rd respondent) was not only a person appointed in terms of a code of regulations – but was also bound to act in pursuance of the same regulations or rules when exercising his functions as an inquirer which created an implied statutory duty to act fairly which duty, be it noted, arose not out of any personal relationship between

the inquirer (3rd respondent) and the petitioner or out of any personal relationship between the *Ceylon Tourist Board* (1st respondent) and the petitioner. There was, as stated above, no consensual submission to the jurisdiction of the inquirer (3rd respondent). At least, it can be said that the petitioner did not submit of her own free-will.

In fact, the inquiring officer (3rd respondent) was under a duty to act judicially which is also a criterion for the granting of *Certiorari.* Of course, prior to the decision in *Ridge v. Baldwin*[6] it was thought that only courts or administrative bodies deciding a dispute between two parties concerning rights traditionally protected by law were under a duty to act judicially and therefore amenable to *Certiorari.* In *Ridge v. Baldwin (supra)* Lord Reid changed the course of development of the law by holding that in order to determine whether there existed a duty to act judicially the Court should have regard to the nature of the power being exercised, and the rights thereby affected. The change in emphasis to what is at stake for the applicant has significantly widened the scope of the remedy. Hence, in *R. v. Barnsley Metropolitan Borough Council, ex parte Hook*[7] some members of the Court of Appeal (England) inferred the duty to act judicially from the fact that the local authority was a statutory body having the power to determine the right of others. The Court of Appeal (England) further held in that case that an order of *Certiorari* ought to be granted on the basis that in revoking the applicant's licence to trade, the council was under a duty to act judicially – the duty to act judicially being inferred from the fact that the decision was one affecting the applicant's livelihood. In the case in hand, too, the petitioner's right to a livelihood is devastatingly affected by the recommendation of inquiry officer (3rd respondent) to the effect that the petitioner be dismissed from employment.

Because the inquiry officer (3rd respondent) was called upon to decide the respective rights of the parties or to put it in other words, as there was a *lis* (controversy) *interpartes* situation, as in the case before me, ordinarily, there was a duty on the part of the inquiry officer

to act judicially. In the *Barnsley* case, referred to above, the right of the trader to his means of livelihood was wiped out or taken away by the decision of the local authority (*Barnsley Metropolitan Borough Council).* And that was one of the reasons which prompted the Court of Appeal to hold that the matter was not immune from judicial review – there being, in the circumstances, a duty on the said Borough council to act judicially.

In the case of *Nanayakkara v. The Institute of Chartered Accountants*[8] cited by the learned President's Counsel for the petitioner, the fact that the inquiry was held under a code of regulations was held to constitute sufficient "statutory underpinning" to make the proceedings amenable to judicial review, even though there was some uncertainty in that case as to whether those regulations has any binding force since those regulations has not then been approved by the Minister. In the case in hand, the code of regulations in pursuance of which the inquiry against the petitioner had been held, had not only been approved by the relevant minister but had also been published in the *Government Gazette* which places the validity of those regulations beyond any controversy.

The learned President's Counsel for the petitioner had submitted that the appointment of the inquiring officer by the Chairman of the Ceylon Tourist Board was violative of the principle of "*nemo judex in causa sua potest*" which is a rule of natural justice that prevents a person suspected of being biased from deciding a matter. That maxim literally means that no man shall be a judge in his own cause. This rule is based on the fundamental requirement which was highlighted in Lord Hewart's judgment in *R. v. Sussex Justices*[9] that "it is not merely of some importance, but of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done". This is a safeguard which is really not concerned with the fact that the decision-maker was actually biased but with the possibility that he or she might have been biased. People who are likely to be biased cannot realistically be expected to make

fair decisions. The Chairman (2nd respondent) is, in fact, the complainant in this case. Almost all the charges against the petitioner that were inquired into by the 3rd respondent were charges stemming from certain remarks or allegations that had allegedly been made by the petitioner, which are said to be reflecting on the Chairman (2nd respondent). I think it would be instructive in this context, to explain the impact of the decision in the *Dimes* case[10] which is reputed to be the *locus classicus* on the aspect of bias. That action had gone on for over 20 years in the manner of *Jarndyce v. Jarndyce* in the *Bleak House* (Dickens) and culminated in the Lord Chancellor affirming decrees that had been made in favour of the proprietors. Dimes discovered, later, that Lord Cottenham (Lord Chancellor) had several thousand pounds worth of shares in the Canal Company (I have considered this selfsame question in greater detail, in case No. CA 753/97).

Because Lord Cottenham was a shareholder in one of the companies that was a party to the proceedings the ruling was set aside with the result that Lord Chancellor was disqualified as a Judge in the case. As Lord Campbell said : "no one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, My Lords, it is of the last importance that the maxim that no man is to be Judge in his own cause should be held sacred . . .. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence . . .". Lord Cottenham had been held to be disqualified (by bias) not because it created a real possibility of bias but because it created a possibility which a reasonable person might have suspected would taint the fairness of proceedings. There is always the prospect of the Chairman (2nd respondent) being suspected of selecting as the inquiring officer one who would be favourably disposed towards him. The Chairman (2nd respondent) would have acted contrary to human nature if he had selected as the inquiring officer, one, for instance, who was ill-disposed towards him. There

is also room for reasonable suspicion that the inquirer might feel obliged to give a decision favourable to the Chairman out of a sense of gratitude or goodwill towards the Chairman for the inquirer owes his appointment to the Chairman (2nd respondent). It can justly be said that confidence in the decision-making process is undermined because of the Chairman's involvement in the decision-making process since the Chairman (who is a party to the proceedings and very much interested in the outcome) had hand-picked the inquiring officer who will figure as the judge or the arbiter. Since the Chairman (2nd respondent) had appointed the inquiring officer a reasonable person has cause to suspect that the Chairman is in the position of being dominant. In fact, the manner in which the Chairman (2nd respondent) conducted himself as a witness before the inquiry officer (3rd respondent) makes me wonder whether the Chairman had not treated the inquiring officer in a condescending way. The fact that the Chairman had made a savagely hostile comment or a call for evil to be visited upon the petitioner whilst giving evidence before the inquirer (3rd respondent) undoubtedly shows that the Chairman felt that he had some ascendancy over the inquiring officer. To reproduce the virulent, if not venomous curse that the Chairman (2nd respondent) made in his own words:

"මේ තැනැත්තිට වැහි නැති හෙණ ගහන්න ඕන. මේ අහුත වෝදනා. මේ අසත්‍ය, සාවද්‍ය, සාපරාධී, බොරු කියන කටට කුණුවෙලා පනුවෝ ගහන්න ඕන."

In *Metropolitan Properties Ltd. v. Lannon*[11] Lord Denning stated: ". . . the Court looks at the impression that would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit".

It was reaffirmed by Lord Denning that justice must be rooted in confidence.

The 3rd respondent (inquiring officer) had done nothing to caution the Chairman (2nd respondent); he had, in fact, refrained from recording the curse when it was first uttered. Obviously, the Chairman (2nd

respondent) had felt he could utter such curses with freedom from any injury to himself or with impunity. When one gets down to the brass tacks and consider the practical details and the basic facts, what, in fact, happened in this case was that the Chairman (2nd respondent) had appointed the inquiring officer to inquire into his own complaint. It had been argued that this is a case of necessity and that no one else other than the Chairman could have appointed the inquiring officer. It is true that rule 5A states that disciplinary inquiry shall be held by an officer nominated by the Chairman. I cannot bring myself to believe that rule 5A had in contemplation a situation such as that as had arisen in this case.

But, it cannot be realistically assumed that under the said section 16 (3) of the relevant Act, the Board (that framed the rules) derived the power to formulate rules in breach of the fundamental rule of natural justice, viz *nemo judex in causa sua potest* or violated the spirit of it. In any event, the rule empowering or requiring the Chairman to appoint an inquiring officer has to be strictly and sensibly construed as being subject to the sacred rule of natural justice before mentioned. It is to, say the least, extremely doubtful as to whether rule 5A authorized the Chairman to appoint the inquirer in a matter to which he himself was a party. The judges of Saskatchewan once had to decide a case *ex necessitate* and pronounce upon the constitutionality of a law rendering them liable to pay income tax on their salaries. But, the Judges in that case were so high-minded as to decide the case against themselves. In the case of Judges and other cases where decisions were upheld as falling within the rule of necessity, the appointment was not *ad hoc*, as in the case of the inquiry officer (3rd respondent) and the appointment was in those cases made under a statute directly passed by Parliament and not under a rule or regulation formulated under a statute, as it is in this case. But, it has been pointed out in De Smith, Woolf and Jowell that the "rule of necessity ought not to be mechanically applied if its enforcement would be an affront to justice". It has further being stressed by the same learned authors in that august treatise that it is necessary for the Court "to scrutinise

the actual conduct of the proceedings closely if the rule cannot be wholly circumvented".

It may will be that the administrative set up ordained or prescribed by the rules framed under the relevant statute, is such as to create the appearance of some bias. In such a case it is incumbent on the Court under the judicial review procedure to consider, with more than ordinary care, whether the inquiring officer's (3rd respondent) judgment had, in fact, been affected or coloured by personal interest or a built-in tendency to support, albeit unwittingly, the Chairman's cause.

As I had said in another case (CA No. 753/97) the inquiring officer had, in fact, or appears to have exhibited some bias in the exercise of his judgment. Bias being insidious, appearances are everything. On the facts of this case there is scope for a reasonable man to perceive that a real danger of bias exists. In fact, one can say that bias is manifested in the action of the inquiring officer in recommending that the maximum possible punishment be meted out to the petitioner without giving any reason whatever for prescribing such a drastic punishment. Punishment is graded varying in severity, under the rules framed under the relevant statute, viz the Ceylon Tourist Board Act, and the rules had prescribed thirteen kinds or modes of punishment ranging from a warning to dismissal. It is unclear why the most severe punishment was chosen by the inquiring officer, out of thirteen kinds of punishment. Suspicion of bias in the inquiring officer could have been dissipated in some measure, if he had shown greater openness and transparency by giving reasons for choosing the most drastic punishment. The appearance of bias is created because one of the parties to the dispute, that is, the Chairman had selected the inquiry officer which appearance becomes more pronounced as the inquiring officer had prescribed severest punishment of all. Lack of reasons would reasonably suggest that Inquiry Officer had no reasons to give and that the most severe punishment had been arbitrarily prescribed to fufil the expectations of the Chairman.

This is not a case where Parliament had by statute directly authorized the Chairman (2nd respondent) to appoint the inquiring officer. Why such a drastic punishment as dismissal is recommended for being critical of the Chairman, assuming that the petitioner's conduct amounted to that, is wrapped in mystery for no reason had been adduced. Lack of reasons makes the recommendation arbitrary, to say least.

The rule against bias is a doctrine which requires that no man should be the judge in his own cause. In reality, the rule against bias 460
is an aspect of fair procedure. The petitioner had a right to a fair hearing. The inquiring officer must appear to be free from bias which is a concomitant of that right. It is true, that the Chairman (2nd respondent) had not personally decided the matter. But, as stated above, he had appointed the inquiring officer who did make the decision or the recommendation. To quote from my own judgment in CA No. 753/97: " . . . bias being insidious, one rarely, has to or, is able to prove actual bias on the part of any decision-maker. I think appearances are everything. Thus, perhaps, explains why it is very often said that justice "must be seen to be done". 470

As a final note, there is one other matter to which I would wish to advert. That is, that the alleged act of misconduct on the part of the petitioner, according to the charge-sheet, is that of bringing the Chairman into disrepute. Five charges relate to or arise out of that. The other two charges are of a very marginal or incidental nature. According to the Board paper dated 03. 11. 1997 (2 R 58) the Board had expressed the view that bringing the Chairman into disrepute to "subversion of discipline". But, according to the Ceylon Tourist Board (Discipline) rules of 1971 there is no such act of misconduct, either "grave" or "not grave" as discrediting the Chairman (*vide* schedules 480
A and B of the rules). Even on the basis that the Chairman (2nd respondent) is a "person in authority" in relation to the petitioner and also assuming that the petitioner had behaved insultingly or contemptuously towards the Chairman, "insolence or disrespect to any person in authority" can amount to an act of grave misconduct (according

to the rules) only if that act had been committed "within the Board Premises" (*vide* act of misconduct No. 8 in schedule A). These rules and "Acts of grave misconduct" being of a penal nature must be strictly construed, more so, as these "acts of misconduct" had been created by rules framed under a statute and not by the statute itself. That being so, act of bringing the Chairman, into disrepute, not being an act of misconduct according to the relevant rules – the Chairman, in any event, could not have appointed an inquiring officer to inquire into it or investigate the matter. The alleged act of bringing the Chairman into disrepute cannot be readily brought under any one of the thirteen acts of grave misconduct designated in the schedule to the rules.

Further, in the schedule "A" of the relevant rules "acts of grave misconduct" appear to be spelt out according to the degree or order of gravity of the act of misconduct. To reproduce the acts of misconduct according to or in the order in which they are listed in the schedule A.

(1) Misappropriation of funds and fraud,

(2) Theft of property or documents belonging or in the custody of the Board,

(3) Conviction of an offence involving moral turpitude,

(4) Habitual breach of the rules of the Board,

(5) Gross impropriety,

(6) Gross negligence resulting in loss to the Board,

(7) Discourtesy to the public,

(8) Insolence or disrespect to any person in authority (within the Board premises) and there are five other acts designated as grave.

The petitioner had not misappropriated funds. She had not committed any fraud. She had not committed theft. Nor had she committed any act involving moral turpitude. Of course, she seems to have poured out a litany of woes to a former Minister. She appears to have had a grievance. She felt that she was unjustly treated. There are certain things that the meekest will not accept. In the circumstances I feel that the recommended punishment of dismissal is disproportionate.

There has been and remains some uncertainty as to the extent to which the notion of "proportionality" may or should be considered to be a ground of review. It is a regularly used tool of legal reasoning in the European Court of Justice. In essence the doctrine of proportionality provides that a Court of review may intervene if it considers that harms attendant upon a particular exercise of power are disproportionate to the benefits sought to be achieved. The petitioner had not committed any serious act of misconduct adumbrated in the schedule to the rules (discipline) framed under the Ceylon Tourist Board Act. In fact, it is extremely doubtful whether she had committed any act of misconduct, identified or described in the rules, at all. The idea of proportionality is, I think, embedded or ingrained in those memorable lines in which Bassanio made the plea to Portia: "wrest once the law to your authority, to do a great right, do a little wrong. And curb this cruel devil of his will . . ." (Merchant of Venice). The impression is irresistible that the petitioner had been punished for a strongly worded letter written by somebody else to whom she had confided.

I had adopted, the principle of proportionality as one of the grounds of my own decision in *Premaratna v. UGC.*[12] The possibility for integration of the concept of proportionality was left open in the case of *ex parte* Brind.[13] However, some authorities point out that this doctrine has already found a place in English case law and they refer to the case of *R. v. Secretary for the Home Department ex parte Cox*[14] and also to the well-known case of Harry Hook[15]. In the latter case Harry Hook's (a street trader) licence was revoked by the

Barnsley Metropolitan Borough Council. Hook had, one evening, urinated in a side street near to the market. There had also been a heated exchange of words between Hook and the council employees who had witnessed the event. In the Court of Appeal Lord Denning ruled that the decision revoking Hook's licence could not stand. Lord Denning gave several reasons for his decision – one such being that the punishment of depriving a man of his livelihood was out of all proportion to the original incident.

To cite an excerpt from my own judgment in the Premaratna case referred to above. "It looks as if the inquirer's view seemed to be based on the conception of retributive justice alone. Indignation against injustice seems to have been the sole criterion adopted by the inquirer. "Thine eye shall not pity; but life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot" does not represent the perfect system of justice; perfect system of punishment is based on neither the retributive nor the deterrent principle exclusively, but is the result of a compromise between them. As Salmond puts it, from a utilitarian point of view, such a conception, i.e. punishment based solely on retributive justice is inadmissible. Salmond further states "punishment in itself is an evil and can be justified only as the means of attaining greater good. Retribution in itself is not a remedy for the mischief of the offence but an aggravation of it".

It is to be recalled that the recommendation of the 3rd respondent, sought to be now quashed by the petitioner, if implemented will have the same oppressive effect, that is, the petitioner will be dismissed from her employment.

For the aforesaid reasons I do hereby quash, by an order of *Certiorari*, the report or the order dated 30. 10. 1997 made by the 3rd respondent.

Application allowed.