WICKREMASINGHE

v.

CHANDRANANDA DE SILVA, SECRETARY MINISTRY OF DEFENCE AND OTHERS

COURT OF APPEAL
GUNAWARDANA, J.
C.A. 861/98
JULY 31, 2000

Writ of Certiorari - Kotalawala Defence Academy - Court of Inquiry - Guilty of ragging - Certificate of Discharge - Failure to give reasons - Principle of Proportionality.

The Petitioner sought a Writ of Certiorari to quash his expulsion from the Kotelawala Defence Academy (KDA) consequent upon a finding of guilt of ragging and repeatedly harassing two trainee cadets.

Held :

(i) Although the Court of Inquiry had found the Petitioner guilty of having aided and abetted Cdt. Piyasena in the various acts of ragging, no reasons had been given by the Court of Inquiry for such finding.

(ii) It is indeed highly desirable that reasons are given for a finding because the availability of reasons will tend to support the idea not only that justice had been done or meted out but that justice had been done on a rational basis.

(iii) 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.

(iv) By taking the decision to dismiss the Petitioner 'having considered' the recommendation of the Court of Inquiry and not the evidence, the Board of Management had failed to retain the degree of free and unfettered judgment which it was its duty to have exercised in considering whether or not to dismiss the Petitioner.

Gunawardana, J.

"That justice is blind does not mean Judges should not be clear sighted. Under the Judicial Review procedure, far from being confined

to the matters averred, the Court is less inhibited and is free to adopt a more interventionist attitude - not with a view to withholding or denying relief but with a view to grant it when justice of the case demands that such a course of action be adopted."

APPLICATION for a Writ of Certiorari/Mandamus.

Cases referred to :

1. *In Re Doody* - 1993 3 All ER 92.
2. *R vs. Civil Service Appeal Board* 1991 - 4 All ER 310.
3. *Public Service Board of New South Wales vs. Osmond* - 1986 ALR 559.
4. *R vs. The Mayor and Commonalty and Citizens of the City of London and Another ex.p Matson* - The Times - October 20, 1995.
5. *R vs. Higher Education Funding Council* - 1994 1 All ER 651.
6. *Premaratne vs. U.G.C.* - 1998 3 SLR 395.
7. *In Re Brind* - 1991 - 1 AC 696.
8. *R vs. Barnsley Metropolitan Borough Council, Exparte* Hook - 1976 3 All ER 452.
9. *Chief Constable of the North Wales Police vs. Evans* (1982) 1 WLR 1155.
10. *Padfield vs. Minister of Agriculture* - 1968 AC 997.
11. *R vs. Board of Visitors of Hull Prison* - (1979) 3 All ER 545.
12. *H. Lavendar vs. Minister of Housing and Local Government* - (1970) 1 WLR 1231.
13. *Gunaratna vs. Chandrananda de Silva* (1998) 3 SLR 286.
14. *Herring vs. Templeman* year (1973) - 3 All ER 569.
15. *R vs. Manchester Metroplitan University ex parte* Nolan, The Independent 15th July 1993.

Application for a Writ of Certiorari.

A.A. de Silva, P.C. with G.F.H. Sauja for Petitioner.

Shavindra Fernando, SSC for Respondents.

Cur. adv. vult.

April 6, 2001
U.DE.Z. GUNAWARDANA, J.

This is an application by the petitioner, who had been undergoing training as an officer cadet at the Sir John Kotelawala Defence Academy, for an order of certiorari quashing his expulsion from the said academy as per the certificate of discharge (P1) dated 10.08.1998 consequent upon a finding of guilt of ragging and repeatedly harassing two trainee cadets, named Olupeliyawa and Rajapaksa, of the same academy.

It would be, substantially, correct to say that the argument put forward on behalf of the petitioner is two - fold and is as follows:

(i) that Olupeliyawa, and Rajapaksa, who were the victims of the alleged ragging had not given evidence, let alone be cross - examined by the petitioner;

(ii) that the discharge of the petitioner from the Academy was a penalty which was grossly excessive in relation to the offence alleged to have been committed by the petitioner thereby invoking the principle of proportionality which ordains that measures, administrative measures, in particular, must not be more drastic than is necessary or justified by the attendant circumstances.

The two above - mentioned arguments will be considered in due course and I propose to consider, first, another aspect (although not raised by the learned President's Counsel for the petitioner) of the proceedings which culminated in the dismissal of the petitioner from the academy viz. the failure on the part of the Court of Inquiry to give reasons for its decisions finding the petitioner guilty and awarding him the maximum punishment possible.

It is to be observed that although the court of inquiry had found the petitioner guilty of (in the language of the court of inquiry itself) having "aided and abetted cdt. Piyasena in the various acts, of ragging perpetrated on 2194 Svc. cdt. R.M.N.

Rajapaksa" and on cdt. Olupeliyawa, no reasons had been given by the Court of Inquiry for such a finding. It is indeed highly desirable that reasons are given for a finding because the availability of reasons will tend to support the idea, not only that justice had been done or meted out but that justice had been done on a rational basis. Had the Court of Inquiry provided reasons, that would have undoubtedly boosted the confidence of everyone concerned, in the process that resulted in a finding of guilt as against the petitioner which brought in its train such dire consequences from his stand point. There are recent English authorities which indicate that the courts are very close to imposing an implied duty to give reasons. According to Lord Musthill's analysis in *Doody*[1] it essentially boils down to whether, in the circumstances, it is fair to provide reasons.

It would be helpful to move on to consider some recent decisions which reveal development or progress towards a requirement to give reasons. It will be clear from these cases that the context will be highly relevant in considering whether or not reasons ought to have been given. In *R. vs. Civil Service Appeal Board*[2], a prison officer had been dismissed after accusations that he assaulted a prisoner. This was later found by the Civil Service Board to have been an unfair dismissal and the board recommended the reinstatement of the officer. However, when that was not implemented by the Home office, the Board then awarded a payment of 6500 pounds as compensation - a sum which was considered by the applicant to be grossly inadequate. Judicial review was applied for in order that he should be informed of the reason for reaching this decision. It was held that although there was no statutory duty to give reasons, there was a common law requirement of natural justice to outline sufficient reasons to indicate whether the decision had been lawful. Lord Donaldson MR cited the decision in *Public Service Board of New South Wales vs. Osmond*[3] to support the view that there should be sufficient reasons for its decision to enable the parties to know the issues to which it addressed its mind and acted lawfully.

Whilst the House of Lords was not willing in Doody (Supra) impose a general duty on all administrative decision makers to give reasons for their decision, the judgment represents a watershed in the judicial attitude towards the giving of reasons by public bodies or persons. As Lord Musthill noted in the above case: "I find in the more recent cases on judicial review a perceptible trend towards an insistence on greater openness or if one prefers the contemporary jargon "transparency" in the making of administrative decisions."

In *R. vs. The Mayor and Commonalty and Citizens of the City of London and another ex. p. Matson,*[4] the Court of Appeal of England held that the Court of Aldermen was required by fairness to give reasons for its decision to refuse to adopt Mr. Matson's election as an Alderman of the city. Matson had been elected by 54 votes to 15, but by virtue of ancient custom his election was subject to approval by the Court of Aldermen. Matson appeared before the Court of Aldermen and was subjected to somewhat hostile questioning about his career and alleged support for another person in a separate contest for a council seat. By a secret ballot the Court of Aldermen refused to endorse Matson by 17 to 1. No reasons were given for the decision. Neill L.J. considered that Matson's election to public office, the fact that the Court of Aldermen was a Court of record and the effect on Matson's reputation of his rejection by the Court of Aldermen, were factors which meant that fairness required the provision of reasons by the latter body.

Of course, no rigid rules can be spelt out as to where to draw the dividing line between cases in which reasons have to be adduced for the decision and those in which provision of reasons would be inapposite or unnecessary. The decision has to be made on a case by case basis. As at present the position is that "there being no general obligation to give reasons, there will be decisions for which fairness does not demand reasons."

Following on from Doody (Supra). His Lordship Sedley J. in *R. vs. Higher Education Funding Council*[5] concluded that:

(a) "that there is no general duty to give reasons for a decision but there are classes of cases where there is such a duty to give reasons for a decision. (b) One such class is where the subject matter is an "interest so highly regarded by the law" for example, personal liberty - that fairness requires that reasons, at least, for particular decisions, be given as of right." From the judgment above referred to one can see the courts beginning the refinement of the principles spelt out in Doody by starting to explain the different situations where fairness does require the provision of reasons for decisions.

In the *R. vs. Higher Education Funding Council* case above - mentioned it has been explained that the decision has to be supported or substantiated with reasons where the subject matter involved is "an interest so highly regarded by law." Personal liberty has been instanced as such an interest. I think man's reputation or livelihood would also fall into the category of an interest to be highly valued. In fact, in the case (Matson's) referred to above, the Court of Appeal (England) held that the Court of Aldermen was obliged to give reasons for refusing to endorse the election of Matson as an Aldermen of the city, since the decision of the Court of Aldermen affected the reputation of Matson who had been elected, but whose election the Court of Aldermen had refused to confirm.

Lord Musthill's landmark judgement in Doody (referred to above) sets out, as explained earlier on, the circumstances where reasons for a decision were required. Indeed, it can be said that the judgment imposes a general duty to give reasons when conditions set out by his Lordship are satisfied. In Doody case Lord Musthill recognised that a duty to give reasons had arisen in that situation because the decision gravely affected the prisoner's future. It goes without saying that there can be an increasing variety of situations in which fairness demanded that reasons be made known to those who are affected thereby.

It cannot be gainsaid that the decision to remove or discharge the petitioner from the Kotelawala Defence Academy

will, for certain, blast the petitioner's career prospects and, thereby his livelihood, as well. And what is worse, his career or livelihood is nipped in the bud, so to say, or destroyed at the earliest stage conceivable. In an eloquent judicial pronouncement on what is, sometime, considered to be another aspect of the requirement of natural justice i.e. the right to legal representation, Lord Denning had expressed the view that "when a man's reputation or livelihood is at stake, he not only has the right to speak by his own mouth. He also has the right to speak by counsel or solicitor." The observation reproduced above although not germane on the aspect of duty to give reasons for a decision, yet are a pointer to the fact that reputation, career or livelihood are factors that excel others (considerations) in importance and that those considerations are "highly regarded by the law" in the matter of deciding whether or not principles of natural justice have been breached in making a given decision. Of course, to date, there is no general duty to give reasons, although there is a strong trend towards requiring decision makers to provide reasons for their decisions.

To deal with one of the two points raised by the Learned President's Counsel for the petitioner, viz. the argument based on proportionality, although the absurd or perverse sense of unreasonableness has been now and then the subject of academic and even judicial discussion, I am not all that certain whether it can be treated as a separate head of review in our law, because it has not been considered to be so, except, perhaps, in the rather stray case referred to by the learned President's Counsel (Mr. A.A. de Silva) for the petitioner, that is, the case of *Premaratna vs. U.G.C.*[6] In that case, I, who wrote the judgment, (with His Lordship Yapa J. agreeing with me) was more inspired by those moving words of Portia: "quality of mercy is not strained; it droppth as the gentle rain from heaven" which words are not of an age but for all time. In *Brind's case*[7] "Proportionality" was not explicitly recognized by the House of Lords as a separate head of review in the domestic law of England although Lord Diplock mentioned it as a possible future addition to the review categories of illegality, irrationality

and so on. But on the facts of this case in hand, I have to be more cautious in applying the test of proportionality although the learned President's Counsel for the petitioner, in his cryptic submissions, has invited me to do so, for the petitioner in this case deserves no such consideration at my hands for if the allegations against him (the petitioner) are true, and I have no reason to dismiss them outright, the deeds that he had done, on the face of them, come very near to an atrocity greatly overstepping the bounds of practical jokes. Even in England, 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. This concept of course, has become a regularly used tool of legal reasoning in the European Court of Justice and the European Court of Human Rights. 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 which was one of the grounds upon which we (the court) granted relief to the petitioner in the *Premaratna case* referred to above, judgment of which case was written by me. Of course, in that case, there were other cogent grounds, as well, for interfering with the decision of the University Grants Commission to dismiss the student from the faculty of medicine.

However, Halsbury's Laws of England (4th ed. vol. 1(1) re-issue 1989) recognizes proportionality in the context of administrative law as follows: "The court will quash exercise of discretionary power in which there is not a reasonable relationship between the objective which is sought to be achieved and means used to that end, or where punishment imputed by administrative bodies or inferior courts are wholly out of proportion to the relevant misconduct. The principle of proportionality is will established in European Law and will be applied by English Courts where European law is enforceable in the domestic courts. The principle of proportionality is still at a stage of development in English Law; lack of proportionality is not usually treated as a separate ground of review in English

law but is regarded as one indication of manifest unreasonableness."

In the Brind's case (supra) possibility for the integration of the concept of proportionality was left open. Indeed, it is contended by some authorities that this doctrine has already found a place in English (domestic) case law. *Vide R. vs. Barnsley Metropolitan Borough Council, Ex parte Hook*[8] which was referred to in my judgment in the *Premaratna case* referred to above. Lord Denning's comments made in the said case, that is, in Hook's case, regarding punishment as being "altogether excessive and out of proportion" have led to some discussion about proportionality emerging or being recognized as a ground of review in England. In the case referred to above, which is a memorable decision, the facts of which are: Harry Hook, a street trader, one evening after public lavatories had been closed, urinated in a side street near to the market where he (Harry Hook) had a stall. Two council employees witnessed this event. There was a heated exchange with these council work men who reported Hook to the market manager. The manager considered this matter to be a serious incident and wrote to Hook revoking his licence which had the effect of permanently preventing Hook from trading at the market. Hook was granted further hearing by the council. After Hook's case had been heard the committee took the decision to uphold the ruling of the market manager. In the Court of Appeal (England) Lord Denning ruled that the decision could not stand - one of the reasons being that the punishment of depriving the man of his livelihood was out of all proportion to the original incident which, according to Sri Lankan ways and ways of doing things, would have been the recognised standard norm - to put it in a humorous vein.

As noted above, no reason had been given for prescribing the maximum punishment for the petitioner; nor for even finding him guilty. The petitioner in this case, had been pursuing a course of study or training for nearly 03 years at the Kotelawala Defence Academy without any sort of complaint being made against him. In any event, there is evidence of none. And, if not

for this inquiry which commenced on 20th of March 1998, he would have successfully completed his course of training in November of the same year. It is to be observed that under Kotelawala Defence Academy Regulation No. 29, the punishment prescribed for misconduct on the part of a cadet of the academy, is graded varying in severity from dismissal to a mere admonition. In fact, the above regulation contemplates seven kinds of punishment on a sliding scale. The fact that court of inquiry itself had found the petitioner guilty of only "aiding and abetting" assumes some significance, in my view, in the matter of punishment because the recommended punishment (by same Court of Inquiry) for the four other cadets who had been found guilty (at the same inquiry) of having "supported" cadet Piyasena in harassing Olupeliyawa and Rajapaksa, had only been "relegation of commissioning for one year" which, I think, means that the warrant conferring authority on them (the said four cadets) will be delayed or withheld for one year. But only a very thin partition, if at all, viewing the matter pragmatically, would divide "aiding and abetting" from "supporting" which also means to give help or aid. However, it may well be that the Court of Inquiry felt that, on the evidence, in apportioning the degree of culpability - the conduct of the petitioner was more deserving of blame. Generally speaking, it is true, that as a matter of practice, reasons, as such, are not given by even a regular court of law for the sentence or punishment. But needless to say, that since no reasons have been given even for the finding of guilt, it would have facilitated matters from the stand - point of the Court of review, (Court of Appeal) if reasons had, in fact, been given by the Court of Inquiry for differentiating in the matter of punishment, between the petitioner, who had been found guilty of "aiding and abetting" and four others, who had been given very much lighter punishment, although they (the latter four) had been found guilty of "supporting" the rag leader. It is to be observed that the petitioner had been dismissed outright - although the petitioner had been found guilty of "aiding and abetting" which is, so to speak, akin to "supporting" - if, in fact they are not identical.

It would have been, indeed, highly desirable if reasons had been given by the Court of Inquiry because the existence of reasons would have supported the idea that justice is seen to be done on a rational basis. In Doody's case (supra) the respondents, Doody and three others, were prisoners who had been convicted of murder and sentenced to a mandatory term of life imprisonment. Although under the law, life imprisonment is the only sentence for murder, it does not mean what it says i.e. that the prisoner remains incarcerated for the rest of his or her natural life. The actual sentence is divided between a penal component, consisting of the period that the trial judge considers necessary and an additional risk component which is the period after the penal element has been served that is considered necessary before the risk to the public is sufficiently reduced to justify release which latter period is decided by the Home Office. It was accepted in Doody that the trial judge makes a recommendation, which does not have to be followed, after which Home Secretray and senior officials at the Home office exercise a wide deicretion. The respondents sought judicial review of the Home Secretary's decision regarding the penal element of their sentences on the ground that the Home Secretary had followed an unfair procedure. One significant element in the respondents' challenge was their argument that fairness required the Home Secretray to give reasons where the Home Secretary decided to impose a penalty element different from that recommended by the trial judge. It was held that once the penal element had been served the prisoner was then entitled to the rights that fairness demanded in the assessment of the remainder of the sentence. This meant that a prisoner should be informed why a particular term had been selected. If there was a failure to follow the recommendation by the trial judge, the reasons have to be given. Lord Musthill held that withholding of reasons in these circumstances was unfair.

In Doody, a second and equally important point emerges from the reasoning employed in the judgment. It was pointed out in that judgement that Home office was susceptible to judicial review. But how was this to be possible ? The process of decision

making itself could be flawed in some crucial way. But for a challenge to be mounted in the courts, reasons were obviously essential. It followed logically that a prisoner would need to see the decision and the reasons for it. The wider implications of this conclusion are highly significant, as it has to be taken to mean that reasons have to be given in all similar or comparable cases where there is a possible challenge available under the judicial review procedure.

In the case in hand too, it was highly desirable, if not necessary, for reasons to have been given, at least, as to why this particular form of punishment which was severest, i.e. dismissal from the Kotetalawala Academy was chosen, on account of three circumstances peculiar to this case:

(i) because no reasons had been given for the finding of guilt either;

(ii) it is unclear as to why the court of Inquiry selected for the petitioner the most rigorous out of the seven punishments prescribed by the relevant regulation;

(iii) in any event, it would have been very desirable if the reasons for differentiating in the matter of punishment, between the petitioner, on the one hand, who was found guilty of aiding and abetting (cdt. Piyasena who was the rag leader) and the other four cadets, on the other hand, who were found guilty of "supporting" Piyasena, and yet were (accordingly) recommended to be "relegated" only for one year;

(iv) the ultimate punishment which was imposed on the petitioner gravely affected his future and virtually destroyed all his prospects or what he was to expect in life.

I cannot look back at the whole process which culminated in the outright dismissal of the petitioner, and say that it had been fair because lack of reasons engender more than an unease regarding the decision of the Court of Inquiry. The decision to expel the petitioner had devastating effects and is such a decision

where the nature and impact of the decision itself required reasons to be given. It is only if reasons are available that I can be satisfied that there is evidence of an informed exercise of judgment (on the part of the Court of Inquiry) in reaching the decisions.

If reasons had been given by the Court of Inquiry I could have satisfied myself or considered the question as to whether or not the Court of Inquiry had focused its mind on exactly what it was that had to be decided and also it had done so or reached the relevant decision taking into account relevant considerations and eschewing the irrelevant. However, the court of review, that is the Court of Appeal, it must not be lost sight of, cannot at this stage, usurp the discretion of the Court of Inquiry which has been set up to take the decisions concerning the disciplinary matters of the relevant academy. If, in fact, the Court of Inquiry had reached a decision after duly considering the relevant factual matters, the Court of Appeal, under the judicial review procedure, cannot, under normal circumstances, substitute its own decision for that of Court of Inquiry, for judicial review does not involve a reconsideration of the merits of the case and is always limited to a scrutiny of legality. In review, the Court of Appeal is not concerned with the merits of the case i.e. whether the decision of the Court of Inquiry was right or wrong, but whether it was lawful or unlawful. In the words of Lord Brightman; "judicial review is concerned not with the decision but with the decision - making process." *(Chief constable of the North Wales Police vs. Evans*[9]. On the evidence in this case, several points arise in favour, of the petitioner which points, it is doubtful, if not certain, had not received any consideration at the hands of the Court of Inquiry: for instance, the fact that Olupeliyawa and Rajapaksa had not taken any initiative in making a complaint that they deserted or abandoned the academy as they were subjected to harassment by the petitioner and others. The academy on its own sought to ascertain why Olupeliyawa and Rajapaksa kept away, without first obtaining leave. It was in response to such an inquiry made by the academy itself that Olupeliyawa made the allegations of ragging. Deserting the academy without

adequate reason would have brought in its wake several dire consequences, perhaps penalties. Olupeliyawa and Rajapaksa had entered into a contract with the academy to follow the course to its very end. They would have had to pay or refund a substantial sum of money if they decamped or took themselves off without justification. In such circumstances, there is always a likelihood for Olupeliyawa and Rajapaksa to seek to justify their abandonment of the course of training they had contracted to follow by exaggerating or even making false allegations in order to justify their failure to continue or to participate in the course of studies or training to its very conclusion. Assuming that the story of harassment is true, one wonders, since no reasons had been given, whether the Court of Inquiry ever had in contemplation the possibility of Olupeliyawa and Rajapaksa making exaggerated, if not false, allegations with a view to lend justification to their giving up the course of training. One cannot say one way or the other because the Court of Inquiry had not adduced any reasons. Had the Court of Inquiry being alive to that relevant question viz. as to whether or not Olupeliyawa and Rajapaksa had exaggerated the allegations or overstated what, in fact, did happen, one has reason to think that the punishment imposed on the petitioner, perhaps, would not have been so drastic as that meted out. The question whether fairness demands the providing of reasons will depend upon the context of decision and will have to be answered on a case by case basis. But, the points referred to above in this judgment, I think, are sufficient enough to convince anyone that the peculiar circumstances of this case are such as to cry out for reasons, at least, with regard to the matter of punishment, if not also for the decision finding the petitioner guilty.

The decision of the Court of Inquiry can be said to be irrational because it is contrary to reason in that the most relevant reason (as to whether or not Olupeliyawa and Rajapaksa had exaggerated or overstated the allegations in order to fortify their position that their decampment was directly attributable to harassment and ragging) had not been considered by the Court of Inquiry; or, at least it is uncertain

since no reasons had been adduced, as to whether or not the Court of Inquiry was conscious of that aspect. It is worth repeating that it is the fact that both Olupeliyawa and Rajapaksa remained silent as to this matter, till they were questioned by the academy itself, as to their failure to report or return to the academy that engenders a feeling of strong uncertainty that ragging was not the sole cause of their decampment but they had a personal disinclination to continue the training and that they lacked the will - power to do so. Otherwise, they had no reason, as, they had, in fact, done to insist that they be discharged even after their alleged tormentors viz. the petitioner and cdt. Piyasena, had been ordered to be sacked and removed from the Academy. As stressed above, as well, if the Court of Inquiry had considered the factual aspects enunciated above and reached a decision it would not have been, open to me, to interfere with the decision unless, perhaps the decision was grossly and flagrantly unjust or unfair. When, as in this case, the Court of Inquiry had omitted to consider a highly germane ground, viz. whether Olupeliyawa and Rajapaksa had overstated what, in fact, did happen, or when it is unknown (since reasons have been withheld) whether or not it had done so, then it is difficult to say that the decision of the Court of Inquiry was rested on rational grounds. As Lord Keith stated in *Padfield vs. Minister of Agriculture*[10] absence of reasons, when there was no duty to give them, could not by itself provide support for irrationality except, by inference that there were no rational reasons. When the decision is not based on rational grounds or when there is room for thinking so - then review by the courts on the ground of irrationality becomes a possibility. Most, if not all, the matters, in favour of the petitioner, considered in this judgment were not raised by the notable President's Counsel who appeared for him. In fact, the submission of the learned President's Counsel was that Olupeliyawa had not given oral evidence before the Court of Inquiry (which was factually incorrect) and that Olupeliyawa had merely sent a petition on which the Court of Inquiry had taken the decisions complained of. Olupeliyawa had not only given evidence but had also been cross - examined. If the submission that the Court of Inquiry

had expelled the petitioner on the basis of a mere petition that had been sent by Olupeliyawa had been factually correct, that in itself without more, would have been a ground for quashing the decisions against the petitioner. The learned President's Counsel had stopped short and had not followed up by saying that the Court of Inquiry could not have arrived at the decisions against the petitioner on hearsay evidence. The learned President's Counsel had not referred to the locus classicus on the point viz. *R. vs. Board of Visitors of Hull Prison*[11] where the Court of Appeal held that prisoners facing serious disciplinary charges under the prison rules before the Board of Visitors were entitled to a proper hearing. To recapitulate the facts of that case: after a prison riot in 1976 there were disciplinary hearings held according prison rules 1964, at which unsupported statements by prison officers were admitted. It was conceded that this amounted to hearsay evidence. The findings of guilt were quashed and Lord Lane L.J. stated that: "it is clear that the entitlement of the Board of Visitors to admit hearsay evidence is subject to the overriding obligation to provide the accused with a fair hearing..... where a prisoner desires to dispute hearsay evidence and for this purpose to question the witness, and where there are insuperable or very grave difficulties in arranging for his attendance the board should refuse to admit that evidence."

But as pointed out above, the submission of learned President's Counsel that Olupeliyawa had not given evidence is without foundation. There is at least, one other feature (in favour of the petitioner) in these proceedings, which resulted in the expulsion of the petitioner, although that aspect too was not raised on his behalf by way of argument by the President's Counsel for the petitioner. This court is not only a court of review but also court of justice and being a court of review (under the judicial review procedure) the Court of Appeal exercises or rather has necessarily to exercise a supervisory jurisdiction, and as such, I propose to consider in the sequel, that aspect as well, although not specifically raised. A view had been expressed that a court of review (under the judicial review procedure) is

precluded from considering points not raised specifically in the petition submitted to the Court of Appeal. I cannot bring myself to accept that that view represents a general rule for the court cannot pretend not to notice facts which hits the court in the eye, so to say. In this case, it is clear that the Board of Management, which ordered the dismissal of petitioner had acted under dictation of Court of Inquiry. Regulation 29(c) states that any cadet of the Academy who is guilty of proved misconduct shall be subject to - dismissal if ordered by Board of Management.

It is clear that under the relevant rules, the exclusive power to expel the petitioner resides in the Board of Management, But, it is clear that the Board of Management had, in expelling the petitioner, acted, more or less, under the dictation of the Court of Inquiry which had recommended the exapulsion. In proof of that, I need not do more than refer to the certificate of dismissal P1 (addressed to the petitioner) where it is stated thus: "the Board of Management of the Academy at its 325th meeting held on 22.07.1998 having considered the recommendations of above Court of Inquiry decided to award the following punishments:

(i) to dismiss you from the Academy w.e.f. 22.07.1998

(ii) to recover the value of the bond and agreement....."

The certificate, set out above, must be taken to have said what it meant and meant what it said. Plainly, according to the terms of the certificate itself, the Board of Management, in expelling the petitioner, had taken into consideration only the recommendations of the Court of Inquiry. The Board of Management has failed to consider the evidence, as it should have. It is worth reminding oneself that ultimate responsibility of deciding whether or not to dismiss a cadet, whose misconduct had been proved (assuming that such misconduct had been proved) rests solely and exclusively with the Board of Management.

And to decide that question viz. whether or not to dismiss - one must necessarily have regard to or consider the relevant evidence. It is, to say the least, unfair to decide to dismiss the petitioner as the Board of Management had, in fact, done without considering the question whether the evidence demands or justifies a dismissal. The very fact that the Board of Management had not considered the evidence, at least, in a cursory manner, is proof of the fact that the Board of Management had not exercised its judgment independently, as it was its duty to have done, in deciding whether or not to dismiss the petitioner. It is to be remembered that in the certificate of dismissal (P1) it is stated that the Board of Management had decided to dismiss the petitioner "having considered the recommendations of the Court of Inquiry." It is not stated that recommendations were considered in relation to or with reference to the evidence and there is nothing to even remotely suggest that the Board of Management had given any thought to the evidence. By taking the decision to dismiss petitioner, " having considered" the recommendations of the Court of Inquiry - and not the evidence, the Board of Management had failed to retain that degree of free and unfettered judgment which it was its duty to have exercised in considering whether or not to dismiss the petitioner. The Board of Management in dismissing the petitioner could have had regard to the recommendations of the Court of Inquiry but there was no obligation on the Board of Management "to comply" with the recommendations which, in fact, the Board of Management had done and had thereby failed to exercise its own discretion and judgment as to the exercise of the powers conferred on it under regulation 29 (C) which reads thus: "Any cadet of the academy who is guilty of proved misconduct shall be subject to (i) dismissal if ordered by the Board of Management."

There does not appear to have been a genuine exercise of the discretionary power to dismiss or not which is vested in the Board of Management. Where a decision - maker allows someone else to have the dominant influence, so that the other person is, in effect, dictating the outcome, this too is regarded as unlawful

fettering of discretion. In *H. Lavender vs. Minister of Housing and Local Government*[12] application for planning permission was refused and the appeal was disallowed by the minister. From the minister's decision letter it was clear that the reason for rejection was that the site of the application was in an area of good - quality agricultural land. In these circumstances the Ministry of Agriculture was consulted and if they objected to the grant of planning permission then the appeal was disallowed. In other words the minister who was supposed to decide the appeal did not really make the decision but left it to officials in another ministry. The decision of the Minister of Housing and Local Government refusing planning permission was quashed because the Minister of Housing had wrongly delegated that decision to the Minister of Agriculture and thereby, had in effect, inhibited himself from exercising a proper or any discretion in deciding whether planning permission should be granted. I think it would be pertinent to reproduce an excerpt of my own judgement in *Gunaratna vs. Chandrananda de Silva*[13] at 286 which is as follows: "there is a wrongful failure on the part of the Public Service Commission to exercise its discretion and its own judgment because it had improperly parted with its own powers by accepting the "recommendation" or dictation from the respondent (Secretary / Defence). The Public Service Commission is not alter ego of the Secretary / Defence although it had acted as if it were."

In any event, because it was the Board of Management that was vested with the power to decide whether or not to dismiss - the Board, before it decided to implement or adopt the recommendation of the Court of Inquiry - ought to have afforded an opportunity to the petitioner to show cause why that recommendation ought not to be adopted by the Board. It is said: *qui aliquid statuerit parte inaudita altera aequum licet discerit haud aequum fecerit*" (he who decides or determines any matter without hearing both sides, although he may have decided right, has not done justice). It is worth referring to a case which has a relevance in this context. In *Herring vs. Templeman*[14] the student in question was not allowed to

continue on a course at a teacher training college because his work was deemed unsatisfactory. This was after the poor standard of his work had been confirmed by an external assessor. It was held by the Court of Appeal (England) that the academic board only had the power to make recommendations regarding dismissal. It was further held that although the student was not entitled to a full trial before the governing body yet the governing body was under a duty to give the student a fair chance to show why the recommendations of the academic board should not be given effect to or accepted. Clearly the Board of Management (Kotelawala Defence Academy) which alone had the power to dismiss the petitioner had not given the petitioner an opportunity to show cause against the recommendations of the Court of inquiry being implemented.

It is I think, profitable to advert to one more case on this aspect. *R. vs. Manchester Metropolitan University, ex parte - Nolan,*[15] was a case involving a student on the Common Professional Examination (CPE) in law who was accused of having committed disciplinory offences under the university regulations. He had taken notes into examinations and that was spotted by the invigilators. He was given on oral hearing by the Faculty Examinations Disciplinory Committee, at which he was represented. It was claimed that he had not referred to the notes and he also brought evidence in mitigation in the form of testimonials and psychiatrist's report. The disciplinary committee recognised the mitigating circumstances and found the applicant guilty, not of cheating, but of the lesser offence of attempting to secure an unfair advantage. However, it was left to the CPE Board to determine the penalty. The Board first met in July but following legal advice rescinded its decision. When it met again to impose a penalty in September, it did not have the mitigating evidence before it; nevertheless, it imposed the ultimate penalty, not only declaring that the applicant had failed all six examinations but denying him the chance to resit them. The decision was quashed by order of certiorari. Sedley J. held that Board was empowered to impose the most serious penalty without the decision being considered disproportionate, but to

do so it must have all the relevant evidence. Not having this evidence, it was held, amounted to a failure of procedural justice.

As pointed out above, there is nothing to show that the Board of Management (Kotelawala Defence Academy) took into consideration anything else than the recommendation of the Court of Inquiry - as borne out by the very certificate of dismissal (P1) itself issued by the said Board. Of course, none of the points on which this order is rested in favour of the petitioner had been urged by the eminent President's Counsel who appeared for the petitioner. Perhaps, he had, very generously, credited me (the court) with a knowledge of all relevant law or was backward in imparting his knowledge to the court.

It must however be noted that this decision of mine is rested on material, attracting attention, available to, or before, the court:

(i) that no reasons had been given by the Court of Inquiry (although not raised by the learned President's Counsel for the petitioner) is a fact - an incontrovertible fact, at that, which was conspicuous;

(ii) that the Board of Management (Kotelawala Defence Academy) had virtually acted, as explained above under the dictation of the Court of Inquiry is also a fact which is obtrusively clear, be it noted, on the face of the certificate of dismissal (P1) which is a document issued by the Board of Management itself. It is so stated on the certificate (P1) itself. That justice is blind does not mean judges should not be clearsighted. Besides, as stated above as well under the judicial review procedure the court exercises a supervisory jurisdiction. A court exercising such supervisory powers can inspect and even direct. Under the judicial review procedure, far from being confined to the matters averred in the petition, the court is less inhibited and is free to adopt a more interventionist attitude - not with a view to withholding or denying relief but with a view to grant it when justice of the case demands that such a course of action be adopted. As Confucius said whilst good had to be recompensed with good, even evil has to be recompensed with justice.

For the foregoing reasons I do hereby grant an order of cettiorari quashing the finding of guilt made by the Court of Inquiry, the recommendations dated 06.02.1998 made thereon, and also quashing the order of dismissal - made by the Board of Management - as per the certificate of discharge dated 10.08.1998.

Further, the Board of Management is directed by an order of mandamus to permit the petitioner to continue to follow the course of training and study (from the stage at which the petitioner was discharged) and also permit the petitioner to sit for all the relevant remaining examinations.

Application allowed.