1967 *Present :* **T. S. Fernando, J., and Alles, J.**

A. S. M. HASSAN, Petitioner, *and* THE CONTROLLER OF IMPORTS AND EXPORTS, Respondent

S. C. 453 of 1966—Application for Writs of Certiorari and Mandamus

Import and Export (Control) Act (Cap. 236)—Sections 2 and 3—Import (Licensing) Regulations, 1963, Regulation 2—Issue or cancellation of licences thereunder—Controller's power is purely executive and not judicial—Licensee need not be heard before his licence is cancelled—Natural justice—Certiorari.

Regulation 2 of the Import (Licensing) Regulations, 1963, made by the Minister under section 2 of the Import and Export (Control) Act, reads as follows :—

" No person shall import goods of any description into Ceylon except under the authority of a licence granted by the Controller and subject to such conditions as may be specified therein. "

Held, that Regulation 2, more especially when it is read with a Notice that " the Controller may at his discretion refuse to register any application or cancel any registration already effected ", confers on the Controller the widest possible powers in the matter of the issuing of licences. In issuing licences or cancelling licences already issued he is performing no more than a purely executive or administrative function answerable only to the Minister who appointed him and who in turn is answerable to Parliament in respect of the administration of the Act by officers appointed by him. As the Controller has no duty to act judicially, he is not bound to afford a person an opportunity of showing cause against the cancellation of a licence already issued to him. Accordingly, *certiorari* does not lie to quash an order made by the Controller cancelling the registration of a person as a Ceylonese Trader.

APPLICATION for writs of *certiorari* and *mandamus* against the Controller of Imports and Exports.

H. W. Jayewardene, Q.C., with *S. Sharvananda*, *N. Kasirajah* and *C. Chakradaran*, for the petitioner.

H. L. de Silva, Crown Counsel, with *P. Naguleswaran*, Crown Counsel, for the respondent.

Cur. adv. vult.

July 31, 1967. T. S. FERNANDO, J.—

The Import and Export (Control) Act (Cap. 236) which came into force on 8th April 1955 for the purpose of providing for the control, *inter alia*, of the importation and exportation of goods made provision in section 3 thereof for the appointment of officers (including a Controller of Imports

and Exports) for the purpose of the said Act. By section 2 (1) of the Act the Minister is empowered to make, with the approval of the Cabinet of Ministers, regulations providing for the prohibition or regulation of the importation or exportation of goods of any specified description; by section 2 (2) he is empowered to make, with similar approval, regulations (i) restricting to persons of any prescribed class or description the issue of licences required by any scheme of control that may be introduced, (ii) specifying the persons or authorities by whom and the circumstances in which licences may be issued, refused, cancelled or suspended, and (iii) providing for a right of appeal to the Minister against any decision of the Controller; and section 2 (4) requires the regulations that are made under section 2 to be published in the *Gazette* and provides for the date on which they shall come into force. The regulations are required to be brought before both Houses of Parliament for approval, and any regulation which fails to receive such approval is deemed to be rescinded as from a date indicated in section 2 (4).

The Minister, on 10th January 1963, acting in terms of section 2, made certain regulations called the Import (Licensing) Regulations, 1963 (published in *Gazette* No. 13,477 of 11th January 1963), and regulation 2 of these Regulations is reproduced below :—

> " No person shall import goods of any description into Ceylon except under the authority of a licence granted by the Controller and subject to such conditions as may be specified therein."

It is not disputed that of the schemes of control introduced by the Controller one was the restriction to a particular class of persons described as Ceylonese Traders of the issue of licences to import goods described as " Ceylonised Goods " from certain areas described as " Ceylonised Areas ". As part of that scheme the Controller published in *Gazette* No. 14,152 of 27th August 1964 a notice R1 described as Import Control Notice No. 18 of 1964 calling for applications for registration as Ceylonese Traders. It was expressly declared in the said notice that " the Controller may at his discretion refuse to register any application or cancel any registration already effected ", and that " an appeal against the decision of the Controller should be lodged with the Minister within a period of ten days from the date of communication of the decision ". The petitioner on 4th September 1964 made an application for registration pursuant to this notice and received from the Controller letter P1 of 6th January 1965 informing him that he is registered provisionally as a Ceylonese Trader for 1965 for the purpose of trading with " Ceylonised Areas " and in respect of " Ceylonised Goods ".

Under the scheme of control allocations of import quotas were to be made to registered Ceylonese Traders based upon their declared imports of the respective classes of goods during certain specified previous years. The petitioner, after his provisional registration P 1, received licences to import certain goods, but was informed by the Controller by letter P 2

of 22nd April 1965 that, as certain specified customs certificates submitted by him to substantiate his statements of import declarations have been found to contain untrue particulars, the issue of import allocations and licences to him is being stopped with immediate effect. P2 was followed by letter P 4 of 17th May 1965 in which the Controller informed the petitioner that the certificate of provisional registration of 6th January 1965 is cancelled as he had obtained import quotas by making false declarations.

The petitioner appealed unsuccessfully to the Minister against this order of the Controller, and on 2nd November 1966 made this present application seeking the issue by this Court of mandates in the nature of Writs of *Certiorari* and/or *Mandamus* quashing (by way of *certiorari*) the order (1) of cancellation of his provisional registration as a Ceylonese Trader and (2) of cancellation of the import allocations and licences issued to him and directing (by way of *mandamus*) the Controller (1) to restore his registration and (2) to restore to him the cancelled allocations and licences, and also to issue to him all allocations and licences he may be entitled to in the future by virtue of his registration as a Ceylonese Trader. The delay in seeking the intervention of this Court is explained by the circumstances that the petitioner had first to exhaust the other remedy of appeal to the Minister available to him and that the Minister made his order only as late as October 1966.

We are now in the year 1967 and, even if the petitioner could have satisfied us that there is here a case meriting the intervention of this Court, *Mandamus* is of no avail to direct the Controller to restore the cancelled 1965 licences inasmuch as an order to that effect would now prove futile. Fully appreciating the position resulting from the long delay, Mr. Jayewardene stated that the petitioner would be content if the order of cancellation of his registration as a Ceylonese Trader is quashed because, as he stated, the issue of allocations and licences follows and is dependent on the maintenance of the registration which is the recognition of the petitioner's status.

It is not disputed by the Controller that he did not afford the petitioner an opportunity of showing cause against the cancellations of the licences and the registration. A failure to observe the well-known rule of natural justice is therefore admitted, but it is the position of the Controller that the rule does not require to be observed in this case where he had no duty to act judicially. Whether there was such a duty must ultimately depend on an interpretation of the relevant statute and regulations having the force of law. The only law governing the issue of import licences is to be found in the Import (Licensing) Regulations earlier referred to by me. Regulation 2 which I have reproduced above confers on the Controller the widest possible powers in the matter of the issuing of licences. In issuing licences or cancelling licences already issued he is performing no more than a purely executive or administrative function, answerable only to the Minister who appointed him

and who in turn is answerable to Parliament in respect of the administration of the Act by officers appointed by him. While the power conferred on the Controller of Imports bears a close resemblance to the power given by the relevant regulations to the Controller of Textiles and examined by the Privy Council in the case of *Nakkuda Ali v. Jayaratne* [1], it may be described as even less fettered than the power given to the latter. In *Nakkuda Ali's case* the power of the Controller of Textiles to cancel a licence was conditioned—see Regulation 62—by the Controller having " reasonable grounds to believe that the dealer is unfit to be allowed to continue as a dealer ". Here the power of the Controller of Imports is unconditioned at any rate by law. I must of course presume that officials of this rank act with due responsibility and, even where they are taking purely executive or administrative action, it must not be assumed that they are free to act unfairly. While I would welcome the day when the rules of natural justice are observed even in the performance of purely executive action, I cannot overlook the circumstance that the law has hitherto not recognised the existence of such a duty ; and, indeed, in all probability there will always remain certain classes of executive action where it would be impracticable to defer such action until the party to be affected is heard in opposition thereto.

It was apparent at the very outset of the argument before us that the petitioner had to fail unless he could satisfy us that *Nakkuda Ali's case* (*supra*) was not applicable. It is a decision of the highest appellate Court of this Country and is binding on us. The position there was that dealings in textiles were restricted to such persons as held textile licences issued by the Controller of Textiles, and in effect a dealer who could not get or who lost a textile licence was out of the textile business so long as the scheme continued in operation. As Lord Radcliffe put it—see p. 463—" In truth when he (the Controller) cancels a licence he is not determining a question ; he is taking executive action to withdraw a privilege ". It is undoubtedly correct, as Mr. Jayewardene submitted, that this decision has been the subject of some criticism from academic lawyers, one of whom referred to it as ushering in the twilight of natural justice [2]. In a court of law, however, it is a decision of very high authority and in a Ceylon court it remains of the highest and binding authority.

Our attention was invited also to certain criticisms of this case in the judgments of the House of Lords in *Ridge v. Baldwin* [3]. It must, however, be noted that only Lord Reid of the five judges who heard that case doubted—see p. 79—the correctness of the *Nakkuda Ali* decision. Lord Evershed dissented—see p. 94—from the view taken by Lord Reid that the decision ought not to be followed. The only other judge who referred to it, Lord Hodson, expressed no definite view—see p. 133—preferring, as he said, to " retreat to the last refuge of one confronted

[1] *(1950) 51 N. L. R. 457.* [2] *Professor H.W.R. Wade in (1951) 67 L. Q. R. at 103.*
[3] *(1964) A. C. 40.*

with as difficult a problem as this, namely, that each case depends on its own facts ". In the recent case of *Durayappah v. Fernando* [1], Lord Upjohn, giving the reasons of the Privy Council and referring to Lord Reid's analysis of the case of *Rex v. Electricity Commissioners* [2] in *Ridge v. Baldwin* (*supra*) stated that " it should not be assumed that their Lordships necessarily agree with Lord Reid's analysis of that case or with his criticism of the *Nakkuda case* ".

Mr. Jayewardene finally sought to gather some support for the petitioner from the decisions in what are called the Livelihood Cases, particularly those of *Lawlor v. Union of Post Office Workers* [3] and *Nagle v. Feilden* [4]. The first of these is not, in my opinion, an authority relevant to the application before us because the claim there rested on contract; and, in the second, what the Court of Appeal had before it was an appeal from an order made in Chambers dismissing an appeal from an order of a Master in Chambers striking out a plaintiff's statement of claim. Lord Denning M.R. expressly stated there that he does not decide the question but merely that there was a serious question for determination. More to the point is the case of *Russell v. Duke of Norfolk* [5], where the Court of Appeal held that, assuming that the application for a licence and the licence itself together constituted a contract to permit the trainer to act as such, the stewards had power under the contract in their unfettered discretion to withdraw the trainer's licence without any inquiry at all, and it was impossible consistently with an unfettered and absolute discretion to imply a term in the contract that an inquiry, if held, should be in accordance with natural justice.

A proper construction of Import Control Notice R1 and of the other relevant notices leaves no room for doubt that the discretion of the Controller in regard to the registration of persons as Ceylonese Traders and the issue of allocations and licences is of such a plenary kind that, as learned Crown Counsel submitted, a right to a hearing of any kind before cancellation can be effected is ruled out. In respect of both matters the Controller is taking pure executive action, and the decision of *Nakkuda Ali's v. Jayaratne* (*supra*) is a sufficient answer to the petitioner's claims on this application.

Although what I have pointed out above is sufficient to dispose of the application before us, I should, nevertheless, like to refer also to two authorities of a persuasive character brought to our attention by Crown Counsel. The first is a decision of the High Court of Australia in *Metropolitan Meat Industry Board v. Finlayson* [6] that dealt with an application for a writ of *mandamus* commanding the Meat Industry

[1] *(1966) 69 N. L. R. 265.*
[2] *(1924) 1 K. B. 171.*
[3] *(1965) 1 A. E. R. 353.*
[4] *(1966) 1 A. E. R. 694.*
[5] *(1949) 1 A. E. R. 109.*
[6] *(1916) 22 C. L. R. 340.*

Board to hear and determine according to law an application for its consent for the slaughtering of cattle. Section 19 of the Meat Industry Act, 1915 (H. S. W.), provided that " no person shall, except with the consent of and under the conditions prescribed by the Metropolitan Meat Industry Board, within the Metropolitan abattoir area, slaughter any cattle or dress any carcase for human consumption, except at a public abattoir ". Section 20 provided that " The consent of the Board, under the last preceding section, may be given in such form, and subject to such terms and conditions as the Board may in its absolute discretion determine ". The High Court held that under those sections the Metropolitan Meat Industry Board have an absolute and unfettered right to grant or withhold their consent, and, therefore, that on an application for their consent they need not give reasons for withholding it, or, before determining whether to grant or withhold it, inform the applicant of any objection which they think stands in his way so that he may have an opportunity of meeting it. The second is a decision of the King's Bench Division, *R v. Barnstaple Justices, ex parte Carder* [1], which has a particular bearing on a scheme like that for registration of Ceylonese Traders outlined in Notice R1 preparatory to the issue of allocations and licences, the notice itself being something that is not provided by law. The Cinematograph Act of 1909 empowered county councils and justices of the peace to grant licences to persons to use " premises specified in the licence " for the purposes of a cinema, subject to certain terms, conditions and restrictions. A practice was stated to be in existence whereby, in cases where it was intended to erect premises for use as a cinema, justices were asked to approve the plans of the building to be erected, and thereby honourably to commit themselves or their successors to grant the licence after completion of the premises. On application made for writs of *certiorari* and *mandamus*, it was held by the Court that the Act gave no power to grant licences except in respect of premises actually in existence, and that the practice was beyond the powers given by the Act, and unenforceable. Lord Hewart, L.C.J. there stated that it is impossible to contend that justices, in sitting for the preliminary purpose of considering plans of a building not yet constructed, are engaged in a judicial proceeding such as may be brought to the notice of the court for the purpose of obtaining the issue of a prerogative writ of *mandamus* or of *certiorari*, and that the application was one in respect of an essentially extra-judicial proceeding.

The above considerations have compelled me to dismiss this application.

In regard to costs, it is right to mention that there are before us seven other similar applications preferred by other applicants seeking to quash similar cancellations. I refer to S. C. Applications 454 to 457 and 493 to 495 of 1966. Counsel appearing for the respective parties there are the same as counsel on this application. They were agreed that these

[1] *(1937) 4 A. E. R. 263.*

seven applications should abide the result of Application No. 453. An order in respect of them is being made separately today ; but in respect of all eight applications we order that the Controller will be entitled to costs as on one application alone, such costs being borne in equal shares by each of the eight applicants. Accordingly we order the applicant in No. 453 to pay the Controller one-eighth of his taxed costs.

ALLES, J.—I agree.

Application dismissed.