[IN THE COURT OF APPEAL OF SRI LANKA]

1973 *Present :* **Fernando, P., Sirimane, J., and Samerawickrame, J.**

E. M. WIJERAMA and 9 others, Appellants, *and* A. T. S. PAUL, Respondent

APPEAL No. 11 OF 1972

S.C. 209/71—Application for a Writ of Certiorari

Medical practitioner—Charge of infamous conduct in a professional respect—Inquiry by Medical Council—Absence of one or more of the members on some days at the inquiry—Effect—Natural justice—Rule that those who adjudicate must hear—Extent of its applicability—Penal Cases Committee—Participation of its Members at the inquiry—Whether bias can be inferred—Certiorari—Scope of the remedy—Availability notwithstanding right of appeal to Minister whose decision shall be final—Meaning of expression "error of law on the face of the record"—Statutory tribunals—Desirability of their stating reasons for their decisions—Medical Ordinance (Cap. 105), ss. 15, 18 (1) (2), 20, 25, 33, 72—Medical Disciplinary (Procedure) Regulations, 1959, Regulations 4, 5 (2), 8, 9, 11, 14 (4), 17, 21 (4), 22 (2), 24—Courts Ordinance, ss. 42, 88—Criminal Procedure Code, s. 292—Court of Appeal Act, No. 44 of 1971, s. 8 (1) (b).

The respondent, a medical practitioner, was found guilty by the Medical Council consisting of ten medical practitioners (the appellants) upon a charge of infamous conduct in a professional respect in that, by writing a letter to the editor of a newspaper, he advertised for the purpose of obtaining patients or promoting his own professional advantage or was commending or drawing attention to his own professional skill. The charge was framed, and the inquiry was held, in terms of certain provisions of the Medical Ordinance of 1927 and the Medical Disciplinary (Procedure) Regulations of 1959. The Council commenced the inquiry in consequence of a complaint made by another medical practitioner and a report made thereupon by a Penal Cases Committee consisting of five persons all of whom were also members of the Council, but, in such a case, it is the Council and not the Penal Cases Committee thereof that determines whether an inquiry shall be held (Regulation 8 (1) and (2)). Although five members constituted the requisite quorum for a meeting of the Council, all ten members had decided to attend the meetings. All of them did not attend every meeting, but there were always no less than eight members present. At the conclusion of the evidence the Council found that the respondent was guilty and postponed for a future date its decision as to the erasure of the respondent's name from the register of medical practitioners. No reasons were given for the finding, and there is nothing in the Regulations to compel a setting down of reasons. The respondent did not appeal to the Minister in terms of section 18 (1) of the Medical Ordinance, but applied to the Supreme Court for a writ of *certiorari*. When the Supreme Court allowed his application, the Medical Council filed the present appeal in terms of section 8 (1) (b) of the Court of Appeal Act No. 44 of 1971.

During the inquiry by the Medical Council, a full note of the evidence in the form of question and answer was taken down each day by stenographers and reproduced in typed form by the next day of inquiry. Each member of the Council and the lawyers for the two sides had been supplied from day to day with a copy of the typed record of the whole proceedings.

1*——A 00867—2,808 (73/08)

Held, (i) that, although one or more members of the Medical Council were absent on one or other of the ten days of inquiry, their absence did not in fact cause the respondent that kind of prejudice which constitutes a violation of the rule of natural justice that those who adjudicate must hear. "When the procedure followed, having regard to all the circumstances of the particular case, has been substantially just and fair, the superior courts in their supervisory capacity should guard themselves against an impression that natural justice can best be served by these tribunals observing a strait-jacket procedure."

(ii) that it could not be contended that the presence of the five members of the Penal Cases Committee at the meetings of the Medical Council when the inquiry was held and their participation in the finding against the respondent raised a likelihood of bias. In the scheme contemplated by the Medical Ordinance read with the Disciplinary (Procedure) Regulations the real complainant was neither the Penal Cases Committee nor the Medical Council but was the person referred to as the complainant in the Regulations. "While it may be desirable that members of a Penal Cases Committee do not themselves sit at meetings of the Council where the disciplinary inquiry takes place, we must recognize that it must be left to authorities other than the Courts to achieve such a desirable end."

(iii) that, notwithstanding that the decision of an inferior tribunal is by a statute made final in the manner of section 18 of the Medical Council Ordinance, *certiorari* can still issue for excess of jurisdiction or for error of law on the face of the record or on the ground of bias or violation of the principles of natural justice. In the present case, there was error of law on the face of the record. Although the Medical Council did not give reasons for its decision, it maintained a complete record of its proceedings and incorporated all the relevant evidence. There was no evidence in support of the charge that the letter written by the respondent to the editor of the newspaper amounted to an advertisement by the respondent of his professional skill. In the circumstances, the decision of the Medical Council should be quashed.

Obiter : Even in the absence of a legal requirement, it is desirable that any tribunal against whose decision an appeal is available should, as a general rule, state the reasons for its decision, a course of action which has the merit of being both fair to the petitioner and complainant concerned and helpful to the appellate authority.

APPEAL from a judgment of the Supreme Court reported in (1972) 75 N. L. R. 361.

N. Satyendra, with *D. C. Amarasinghe* and *R. D. C. de Silva,* for the appellants.

H. W. Jayewardene, with *G. Candappa, Mark Fernando, Miss U. J. Kurukulasuriya* and *Ranil Wickremasinghe,* for the respondent.

Cur. adv. vult.

April 18, 1973. FERNANDO, P.—

This is an appeal, in terms of section 8(1) (b) of the Court of Appeal Act, No. 44 of 1971, by the members of the Ceylon Medical Council against a judgment of the Supreme Court ((1972) 75 N. L. R. 361) granting a mandate in the nature of a writ of certiorari to quash a finding of the Council reached on February 15, 1971 that the respondent, Mr. A. T. S. Paul, a surgeon, was guilty of infamous conduct in a professional respect.

The Ceylon Medical Council has been established under the Medical Ordinance of 1927 (Cap. 105) and, on the dates relevant to this appeal, would appear to have consisted of ten members who are all appellants before us. That Ordinance (section 20) provides for the keeping of a register of medical practitioners qualified to practice medicine and surgery in Ceylon and confers (section 25) on the Medical Council a discretionary power to erase from that register on any ground authorised by the Ordinance the name of any person appearing thereon. One of the grounds (section 33) for such an erasure is that the Medical practitioner concerned has been guilty of infamous conduct in a professional respect. Section 72 enables the Minister (of Health) to make regulations for the purpose, inter alia, of giving effect to the principles and provisions of the Ordinance ; the regulations so made are to be tabled in the Legislature for approval and thereafter to be published in the Gazette. On such publication the regulations are declared to be " as valid and effectual as though herein enacted. "

Regulations as aforesaid, it is admitted, have been made and those relevant for the purpose of this appeal appear in a supplement to Gazette No. 11,980 of November 27, 1959 under the title of the Medical Disciplinary (Procedure) Regulations, 1959. These provide for the manner in which complaints or reports against a medical practitioner may be made and disposed of. Acting under regulation 4, the 1st appellant who is the president of the Ceylon Medical Council referred to the Penal Cases Committee of the Council a complaint against the respondent made by another surgeon. That Committee consisted (see First Schedule to the Regulations) of the president himself and four other members of the Council (4th, 6th, 8th, and 9th appellants) elected by ballot. While three members of the Committee constituted a quorum, it would appear that all five members, as indeed they were entitled to do, attended the meetings of the Committee that investigated the complaint against the respondent and made a report thereon to the Council. Regulation 8(1) requires the Council to consider this report and to determine whether or not an inquiry should be held into the facts or matters alleged in the complaint. What is

important to remember is that it is the Council (reg. 8(1) and (2)) and not the Penal Cases Committee thereof that determines whether an inquiry shall be held.

As required by regulation 8(3) the respondent was served with a notice of inquiry (P1) into three charges numbered 1, 2(*a*) and 2(*b*), which are set out in the judgment of Alles J. in the Supreme Court. We reproduce below the text of charges 2 (*a*) and 2 (*b*) as that text is relevant for the appreciation of the point upon which our decision of this appeal rests :—

> 2(*a*)—You did advertise for the purpose of obtaining patients or promoting your own professional advantage by procuring or sanctioning or knowingly acquiescing in the publication in the issue of the "Ceylon Observer" dated 17th February 1970 of an article entitled "Not Me" with reference to an article entitled "Talking Point" published in the issue of the "Ceylon Observer" dated 9th February 1970 thereby commending or drawing attention to your professional skill, knowledge, service or qualifications ;
>
> 2(*b*)—that in the course of the same transaction referred to in charge 2(*a*) above, by procuring or sanctioning or knowingly acquiescing in the publication of the said article entitled "Not Me" with reference to the said article entitled "Talking Point", you did depreciate the professional skill, knowledge, service or qualifications of another registered medical practitioner, viz. Mr. T. D. H. Perera, F.R.C.S.

Although five members constituted a quorum for a meeting of the Council, it would appear that all ten members had decided to attend the meetings of the Council at which this inquiry was held. A chart showing the attendances shows that all ten did not attend every meeting. Nevertheless, there were always no less than eight members present. The inquiry extended, with adjournments, over ten days covering the period August 29, 1970 to February 15, 1971. The proctor appointed by the Council and whose office is provided for by the Regulations presented the facts, led evidence and generally conducted the case against the respondent, while the respondent was present throughout and was represented by counsel. At the conclusion of the evidence and of the addresses of counsel and proctor respectively, the 1st appellant, as President of the Council, announced the Council's findings which were that the respondent was not guilty on Charges 1 and 2 (*b*), but guilty on Charge 2 (*a*). No reasons were given for these findings, and there is nothing in the regulations to compel a

setting-down of reasons. No record has been made whether the eight members who participated at the two final meetings at which the findings were reached were unanimous or divided and, if divided, the nature of such division of opinion. Acting under the power of the Council—reg. 17—which enables it to postpone for a future date its decision as to erasure of the respondent's name, the 1st appellant also announced that that decision is postponed for one year.

Section 18(1) of the Ordinance renders every order or decision of the Medical Council subject to an appeal to the Minister (of Health), and the latter's decision is declared final. The exercise of the Minister's power to decide an appeal would certainly be facilitated if he knows the reasons which led the Council to make the order or decision complained of. Even in the absence of a legal requirement, we think it desirable that any tribunal against whose decision an appeal is available should, as a general rule, state the reasons for its decision, a course of action which has the merit of being both fair to the practitioner and complainant concerned and helpful to the appellate authority. We observe that section 18(2) casts a duty on the Council to give all information which may be required for the purpose of an appeal, but we are doubtful whether the reasons for an order or decision are embraced within this " information " and consider that furnishing of reasons at that late stage, after appeal filed, is both unsatisfactory and without precedent.

It has not been contended by the appellants that section 18 provides the only remedy to a person aggrieved by an order or decision made by the Council. All that was submitted on their behalf was that an alternative remedy was available. But, as Denning L. J. stated in *Regina v. Medical Appeal Tribunal, Ex parte Gilmore*,[1] (1957) Q.B. at 583, " Notwithstanding that the decision is by a statute made final, certiorari can still issue for excess of jurisdiction or for error of law on the face of the record. " We could, in an effort at completion, add " or on the ground of bias or violation of the principles of natural justice. " Parker L.J. in the same case (589) pointed out that " there are many instances where a statute provides that a decision shall be " final ". Sometimes, as here, the statute provides that subject to a specific right of appeal the decision shall be final. In such a case it may be said that the expression " shall be final " is merely a pointer to the fact that there is no further appeal.....I am satisfied that such an expression is not sufficient to oust this important and well-established jurisdiction of the Courts. "

[1] *(1957) 1 Q. B. at 583.*

The power of the Supreme Court to grant a mandate in the nature of a writ of certiorari or of prohibition is to be found in section 42 of the Courts Ordinance, and the Privy Council decision of *Nakkuda Ali v. Jayaratne*[1] (1950) 51 N.L.R. 461 is still valid authority for the view that, in the issue of mandates "according to law" under section 42 of the Courts Ordinance, we have to resort to the relevant rules of the English common law in order to ascertain in what circumstances and under what conditions their issue can be effected.

The respondent did seek successfully the intervention of the Supreme Court to quash the finding of the Medical Council on charge 2 (*a*), and an examination of the judgment of the Supreme Court shows that that Court considered in the main two points urged for the respondent. These were—

(1) that, by reason of one or more members of the Medical Council being absent on one or other of the ten days of inquiry, such absent members became disqualified to participate on subsequent days of inquiry, and by their participation after such disqualification there has been a violation of the rule of natural justice that those who adjudicate must hear ;

(2) that the fact that five members of the Penal Cases Committee investigated into the complaint made by the other surgeon and reported thereon to the Council disqualified them to participate in the subsequent inquiry for the reason that there was a reasonable likelihood that they were biassed as being virtually both Judges and parties, and therefore there has been a violation of the principle embodied in the maxim "nemo potest esse simul actor et judex".

In regard to this latter point (2), the two judges differed in their conclusions. Alles J. upheld the argument that there was a likelihood of bias, whereas Wijayatilake J., while expressing the opinion that there would have been a tendency for members who were on the Penal Cases Committee to justify their recommendation to the Council, felt that the Court could not question the regularity of the Council's proceedings as they conformed to the Regulations. It would, therefore, seem that the respondent's application succeeded only on point (1). The two judges while upholding that point were, nevertheless, not fully agreed on their reasons, and we must therefore examine those reasons.

[1] *(1950) 51 N. L. R. 461.*

Of the ten members (the appellants) only four failed to attend all ten meetings. These were Dr. Wijegoonewardene (10th appellant), Dr. Rajanayagam (9th appellant), Dr. C. L. A. de Silva (2nd appellant) and Dr. Medonza (6th appellant). Dr. Wijegoonewardene attended only the fourth meeting and did not participate in the decision. Alles J. expressed the view that this member's absence could not have prejudiced the respondent, and we agree. There is no reference in the judgment of Wijayatilake J. to the absence of either Dr. Wijegoonewardene or Dr. Rajanayagam. It would be correct for us to assume that Wijayatilake J. did not consider the absence of either of these members as causing prejudice. Dr. Rajanayagam was absent at the last four meetings. It was at the last two of these four meetings that addresses of counsel were heard and the findings considered. Dr. Rajanayagam appears to have sent a letter of resignation which " had not been accepted by the President of the Council. " Section 15 of the Ordinance enables a member to resign by letter addressed to the president, and there is no requirement of an acceptance before a resignation becomes effective. Alles J. considered that Dr. Rajanayagam's absence at the meetings prejudiced the respondent and he sought to draw an analogy from the situation arising from the absence of a juror in a case through illness or other cause. That is, with respect, not an analogous situation because the quorum there is always the full number of jurors, and a tribunal which acts where the legally required number of judges (or jurors) is not present does so without jurisdiction.

Of the other two members, Dr. de Silva was absent only on the occasion of the second meeting at which the other surgeon was cross-examined. Alles J., rightly as it seems to us, did not consider this member's absence at this one meeting as having been capable of leading to a prejudice of the respondent's case so far as the finding on the only charge now remaining, viz. 2 (*a*) was concerned. Wijayatilake J. did not share that view.

Both judges were, however, agreed that the absence of Dr. Medonza at the eighth meeting (the only meeting he failed to attend) caused prejudice to the respondent in that he thereby did not have the advantage of listening to the answers of the respondent under cross-examination. Alles J. thought that if this member had been present at this particular meeting he might have been able to persuade the other members to come to a different decision. Wijayatilake J. expressed as his reason for the finding of prejudice in the consideration of the respondent's defence the inability of Dr. Medonza, on account of his absence, to observe the demeanour of the respondent while under cross-examination. It would therefore seem that the judgment

of the Supreme Court on point (1) really resulted from that prejudice which the learned judges thought likely to have followed from the absence of Dr. Medonza at that eighth meeting.

We recognize that the relevant regulations contemplate the taking, upon an inquiry, of oral evidence, and it must be noted that there has been no contravention of that requirement. The regulations permit the evidence to be taken at a meeting where the required quorum of members is present. There has been here no contravention of that regulation either. The complaint is that every member who participated in the decision was not present at the taking of the evidence. In reaching its decision on this point, the Supreme Court appears to have been influenced by certain decisions of courts in England and Canada relating to the failure by tribunals to observe natural justice. Alles J. cites a passage from Professor de Smith's treatise on "Judicial Review of Administrative Action" (2nd ed., p. 206) to the effect that "it is a breach of natural justice for a member of a judicial tribunal or an arbitrator to participate in a decision if he has not heard all the oral evidence and the submissions." The proposition so stated by the learned author must, of course, be understood in the light of the judicial decisions he relies on therefor and the references to which are to be found in his notes. The proposition purports only to be the effect of the particular judicial decisions. To appreciate the full scope thereof or the limitations to which it may be subject the cases themselves have to be examined.

Of the cases relied on in the judgments in the Supreme Court, those of *In re Plews and Middleton*[1] (1845) 14 L.J.Q.B. 139 and *Tameshwar v. Reginam*[2] (1957) 2 A.E.R. 683 have no application because they are both cases of want of jurisdiction and not of non-observance of natural justice. In the first of these, evidence was taken only before one arbitrator while the agreement between the parties was to refer their dispute to two arbitrators. In the other case, the court was said to consist of judge and jury and not of the jury alone.

So far as the other three cases are concerned, in *Munday v. Munday*[3] (1954) 2 A.E.R. 667, which incidentally was an appeal and not a certiorari proceeding, there was again want of jurisdiction by reason of non-compliance with a mandatory provision of law (section 98 (6) of the Magistrates' Courts Act, 1952) which required justices composing the court "to be present during the whole of the proceedings." An additional ground

[1] *(1845) 14 L. J. Q. B. 139.* [2] *(1957) 2 A. E. R. 683.*
[3] *(1954) 2 A. E. R. 667.*

there for interference by way of appeal was that justice was not manifestly seen to be done inasmuch as the final decision was given by three justices two of whom had not sat at the first of the three sittings, while the other had not sat at either of the two earlier sittings. Therefore the knowledge of all three justices was derived partly from notes of evidence at which they were not present. There is no indication how complete those notes were, and, in any event, the facts in *Munday v. Munday* were materially different from those of the case on appeal before us. In another case relied on by the Supreme Court, *King v. Huntingdon Confirming Authority*[1] 1929 (1 K.B.D. 698), it was apparent that " the facts were entirely unknown to three of the eight justices who constituted the confirming authority, and it would seem to follow that no notes of evidence had been kept.

Both judges in the Supreme Court greatly relied on a decision of the Supreme Court of Nova Scotia in *Regina v. Committee on Works of Halifax City Council*[2] (1962) 34 D.L.R. 45. Apart from the circumstance that at all relevant meetings of the Committee on Works there was present, as in the case of the Medical Council's meetings, the requisite quorum of members, the material facts are different in the two cases. We would take the liberty of saying, with due respect, that the *Halifax* case appears to have been correctly decided, the law applicable in Nova Scotia also being the English law. The Court's ruling proceeded on the basis that four members who had not heard all the evidence and argument participated in the decision. No record had been kept of the evidence taken ; minutes of the meetings had been kept but these did not contain a full record of what happened thereat. As Ilsey C. J. pointed out in the course of his judgment (p. 49)—" none of this appears in the minutes and the absent aldermen would have had no means of knowing that those alleged adverse reports were not relied on by the Inspector, nor would they have been in a position to appraise the significance of the alleged adverse report from the Fire Department. "

The position at the Medical Council's inquiry was materially different. A full note of the evidence in question and answer form was taken down each day by stenographers and reproduced in typed form by the next day of inquiry. On each such day counsel and proctor, and occasionally the members, pointed out necessary corrections in that record of evidence, and corrections were made of consent. The record contained a verbatim record of objections raised by either side and of the argument thereon. Each member of the Council and the lawyers for the two sides had been supplied from day to day with a copy of the

[1] *(1929) 1 K. B. D. 698.* [2] *(1962) 34 D. L. R. 45.*

typed record. It would be a valid assumption that all members read the copies so supplied. The *Halifax* case is distinguishable on the facts, and we are unable to agree that the absence of Dr. Medonza on the day of the cross-examination of the respondent resulted in material prejudice to the latter. On charge 2 (*b*) the material evidence was limited to the two publications and the respondent's letter to the editor which occasioned the second of these publications. The other evidence, and certainly the respondent's own which, as regards this charge, consisted of a denial of any improper purpose, added nothing of further relevance. If Dr. Medonza was not convinced of the truth of that denial from his reading of the answers of the respondent in the record, it would, in our opinion, be artificial in the extreme to hold that he might have been convinced if he had had the advantage of observing his professional colleague's demeanour at the time the latter testified.

Alles J. has held that a judge who has not heard a material part of the case becomes disqualified from continuing as a judge. While a proposition of that nature baldly stated is not unacceptable, it often becomes a difficult task to decide what is such a material part. In the instant case we are satisfied that the absence of Dr. Medonza was not at a material part of the proceedings. It would be very desirable if all members of a tribunal who commence an inquiry continue to sit thereon until its conclusion; but we must be chary of converting a counsel of perfection into a legal requirement, irrespective of whether the procedure followed has been substantially just and fair. Moreover, the phenomenon of one judge acting on evidence taken before another is not one wholly repugnant to our law, and our legislators have themselves recognised (see e.g. sections 88 of the Courts Ordinance and 292 of the Criminal Procedure Code) the acceptability of decisions reached in that way. We might with advantage also remind ourselves of certain dicta of Lord Reid and Lord Morris to be found in the recent case of *Wiseman v. Borneman*[1] (1969) 3 A.E.R. 274. The former observed that "natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard and fast rules", while the latter stated—

> "We often speak of the rules of natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described in many authorities. But this analysis must bring into relief rather their spirit and their inspiration than any precision of definition

[1] *(1969) 3 A. E. R. 274.*

> or precision as to application. We do not search for prescriptions which will lay down exactly what must, in various divergent situations, be done. The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only " fair play in action ". "

In the complex society into which we are moving legal and socio-economic considerations have motivated the introduction in increasing measure of administrative tribunals whose duty is to reach decisions affecting the rights of citizens but who are required to hold due inquiry. Where the procedure followed, having regard to all the circumstances of the particular case, has been substantially just and fair, the superior courts in their supervisory capacity should guard themselves against an impression being created that natural justice can best be served by these tribunals observing a strait-jacket procedure.

With all respect to the learned judges of the Supreme Court who have come to a conclusion on point (1) that prejudice has resulted or was likely, we are unable to agree that the absence of Dr. Medonsa, or of Dr. de Silva for that matter, caused that kind of prejudice which constitutes a violation of the rules of natural justice.

Turning next to point (2), learned counsel for the respondent sought to satisfy us that Alles J. was right in his conclusion that the presence of the five members of the Penal Cases Committee at the meetings of the Medical Council when the inquiry was held and their participation in the finding against the respondent raised a likelihood of bias. We agree with the view expressed by Wijayatilake J. on this point (2), but, in deference to the opinion expressed by Alles J., we have examined the decisions he has cited in his judgment. It is our opinion that these authorities relate to situations different from that in the proceeding before our Medical Council. *R. v. Milledge*[1] (1879) 4 Q. B. D. 332 was a case where three of the justices who adjudicated upon a summons issued against the accused and convicted them were also members of the town council, and in virtue of that office were members of the sanitary authority and so were parties to the resolution to prosecute the accused. That was the reason why the Queen's Bench Division held that they assumed the double role of prosecutors and judges. In the case of *R. v. Lee*[2] (1882) 9 Q. B. D. 394 the position was the same as in *Milledge* except that there only one member of the sanitary committee sat

[1] *(1879) 4 Q. B. D. 332.*

[2] *(1882) 9 Q. B. D. 394.*

later on the bench as a justice. The *Queen v. Gaisford* [1] (1892) 1 Q. B. D. 381 was a stronger case than even *Milledge* as the magistrate who with another convicted the accused had earlier at a vestry meeting himself moved the resolution which was the foundation of the legal proceedings subsequently taken against the accused. In *Leeson v. General Council of Medical Education and Registration* [2] (1889) 43 Ch. D. 366, the actual decision of the majority of the Court was that the fact that two members of the council (that held the inquiry resulting in a decision to erase from the register the name of a medical practitioner) were members of a Medical Defence Union the object of which was to suppress and prosecute unauthorised practitioners did not amount to their having such an interest as disqualified them although the court stated it was an undesirable practice.

Apart from the decisions mentioned in the judgment of Alles J., our attention was invited on behalf of the respondent to the case of *Frome United Breweries Co. v. Bath Justices* [3] (1926) A. C. 586. We do not consider this authority applicable as there three of the justices whom the Court held were disqualified on the ground of a real likelihood of bias had earlier voted in favour of a resolution of licensing justices authorising a solicitor to appear before the tribunal on their behalf and oppose the renewal of the licence !

In the case before us, an examination of the Disciplinary (Procedure) Regulations shows that the proceedings commence upon a complaint or report (reg. 4), that the complainant is informed (reg. 5 (2)) of a decision of the Council not to refer the complaint to the Penal Cases Committee as well as of a decision to hold an inquiry (reg. 8 (2)). In the latter event the complainant receives (reg. 8 (7)) a copy of the notice sent to the practitioner. The complainant is entitled to receive (reg. 9), on application made to the proctor, copies of affidavits, explanations or other statements. Regulation 11 appears to recognise the complainant as a party to the inquiry. Even after a finding by the Council, where the decision has been postponed, regulations 21 (4), 22 (2) and 24 require that notice of the subsequent meeting be sent to the complainant, enable him to send affidavits or statements to the proctor and entitle him to be heard at the subsequent meeting.

Moreover, as we have noted earlier in this judgment, while the Penal Cases Committee makes a report to the Council, it is the Council itself that is required by the regulations to take the decision that an inquiry shall take place. Therefore, if the

[1] *(1892) 1 Q. B. D. 381.* [2] *(1889) 43 Ch. D. 366.*

[3] *(1926) A. C. 586.*

members of the Committee are disqualified to sit, it must follow necessarily that the other members of the Council are similarly disqualified. We are reminded in this situation of the remarks of Field J. in *Lee's case* (supra) that express terms in an Act of Parliament would be required to enable a person to act both as prosecutor and judge. It would seem that the Medical Ordinance read with its Regulations require the Council to decide to prosecute as well as to judge. The true answer to the objection of bias, however, is that in the scheme contemplated by the relevant law the real complainant is neither the Penal Cases Committee nor the Medical Council but is the person referred to as the complainant in the regulations. The argument raised on bias must therefore fail.

An argument was also addressed to us, probably based on the observations of Cockburn C.J. in the case of *Milledge* (supra) that all five members of the Penal Cases Committee were not obliged to sit on that Committee and that, if only three had sat there, seven other members would have been left to sit on the inquiry by the Council where the quorum required was only five. While it may be desirable that members of a Penal Cases Committee do not themselves sit at meetings of the Council where the disciplinary inquiry takes place, we must recognize that it must be left to authorities other than the Courts to achieve such a desirable end.

Our inability to uphold the two points relied on by the respondent before the Supreme Court does not necessarily involve a success of this appeal. It would appear that a third point was raised by the respondent, and, indeed, some reference thereto is to be found in the judgment of Wijayatilake J. where, as he put it, the Court " is not precluded from questioning a decision which is manifestly erroneous." The petition presented to the Supreme Court by the respondent contained the complaint—(clause (c) of paragraph 4)—that the 1st to the 8th appellants (those members of the Council who participated in making the decision) have made errors of law apparent on the face of the record in making any finding and in coming to any decision adverse to the respondent. " There was no evidence in support of charge 2 (*a*) ". Moreover, there is no reason why a respondent to an appeal may not seek to maintain the judgment appealed against by relying on a ground other than those stated in that judgment, particularly where that ground is one on which he had relied at the time he presented his petition to the original Court.

The remedy by way of certiorari to quash the decision of an inferior tribunal for an error of law on the face of the record was long available in English law, although there was a period during which it had fallen into disuse. In the case of *Overseers of the Poor of Walsall v. London and North-Eastern Railway Co.*[1] (1878) 4 A. C. at 39, Earl Cairns L. C. stated :—

> "But the Court of Quarter Sessions, like every other inferior Court in the kingdom, was open to this proceeding ; if there was upon the face of the order of the Court of Quarter Sessions anything which showed that that order was erroneous, the Court of Queen's Bench might be asked to have the order brought into it, and to look at the order, and view it upon the face of it, to put an end to its existence by quashing it ; not to substitute another order in its place, but to remove that order out of the way, as one which should not be used to the detriment of any of the subjects of Her Majesty."

Reference was made to the *Walsall* case 72 years later when Goddard L. C. J., presiding over a King's Bench Divisional Court, overruling a decision to which he had himself been party, applied the ruling in *Walsall* to quash by certiorari the decision of a tribunal where the latter had embodied its reasons in its order and those reasons were bad in law.—*Rex v. Northumberland Compensation Appeal Tribunal*[2] (1951) 1 K.B. 711. The Court also held that certiorari is not a remedy which can be granted only where an inferior tribunal has acted without or in excess of its jurisdiction. An appeal to the Court of Appeal against this decision was unsuccessful, Singleton L. J. declaring (1952 1 K. B. 341) that " error on the face of the proceedings has always been recognized as one of the grounds for the issue of an order of certiorari," while Denning L. J. elaborated as follows :—

> *at p. 347*—" The Court of King's Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it, offends against the law. "

and again, at p. 348—" Of recent years the scope of certiorari seems to have been somewhat forgotten. It has been supposed to be confined to the correction of

[1] *(1878) 4 A. C. at 39.* [2] *(1951) 1 K. B. 711.*

> excess of jurisdiction, and not to extend to the correction of errors of law ; and several judges have said as much. But the Lord Chief Justice has, in the present case, restored certiorari to its rightful position and shown that it can be used to correct errors of law which appear on the face of the record, even though they do not go to jurisdiction."

The Supreme Court has considered it as well settled under our law that error appearing on the face of the record of a decision of a statutory tribunal renders that decision liable to be quashed—see *South Ceylon Democratic Workers' Union v. Selvadurai*[1] (1962) 71 N.L.R. 247.

If, then, certiorari is available to control or supervise an error of law on the face of the record, what constitutes the record ? To this question too, Denning L. J. in the same *Northumberland* case (*supra*) sought to give an answer which may suffer only in the sense of not being exhaustive. Said he, (1952) 1 K.B. 352, "it has been said to consist of all those documents which are kept by the tribunal for a permanent memorial and testimony of their proceedings ..... Following these cases, I think the record must contain at least the document which initiates the proceedings; the pleadings, if any, but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them. If the tribunal does state its reasons, and those reasons are wrong in law, certiorari lies to quash the decision." In the *Northumberland* case the quashing by certiorari was occasioned by error of law as disclosed in the reasons for the decision. Lord Denning maintained similar views in the later case of *Baldwin and Francis Ltd. v. Patents Appeal Tribunal*[2] (1959) A.C. 663 although the other judges associated with him there, it must be mentioned, preferred to reserve for future consideration a definite opinion on the point. If absence of evidence to support the decision constitutes error of law, we find no little difficulty in imagining how error of law on that ground can ever be established if the supervising court cannot look at the evidence, even where it is available. There is substance in the comment of Professor de Smith, in his "Judicial Review of Administrative Action" (2nd ed., p. 118), that the "no evidence" rule has established itself because Superior Courts exercising appellate or supervisory jurisdiction in respect of errors of law need to have power to intervene wherever manifest or gross error is revealed.

[1] *(1962) 71 N. L. R. 247.*

[2] *(1959) A. C. 663.*

As noted already, neither the Medical Ordinance nor the Medical Disciplinary (Procedure) Regulations require the Council to state its reasons for an order or decision. It has in this case not chosen to state them. It has, however, maintained a complete record of its proceedings from the moment the respondent appeared before it until the stage when the order or decision sought to be quashed was made, and this record contains all the evidence (in the form of question and answer) given and a full and comprehensive record of all the arguments adduced before it. The proceedings show that corrections of the record were permitted from day to day at the instance of the lawyer for one side or the other. The record actually kept was one that would have done credit to any court. It was such a record that was forwarded to the Supreme Court when the *rule nisi* issued, and it is such a record that we have had the advantage of examining on this appeal. There is before us the statement of the charges framed by the Council against the respondent, all the documents produced, a complete record of all the evidence taken upon the inquiry and a comprehensive record of all the arguments and the order or decision made by the Council.

If the order of a court or tribunal purports to incorporate all the relevant evidence, error of law will be apparent, inter alia, if there is no evidence in support of a recorded finding of primary fact or in support of any material fact. That was the position in *R. v. Birmingham Compensation Appeal Tribunal*[1] (1952) 2 A.E.R. 101 where an order of the tribunal was quashed by the Queen's Bench Division on the ground of error of law on the face of the record.

In the case of *Edwards v. Bairstow*[2] (1956 A.C. 29), which we must note was a case of appellate and not supervisory review, the highest of the English Courts has held that even a finding of fact may be set aside "If it appears that the commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained." Professor de Smith in his treatise already referred to above (2nd ed. p. 121), after submitting a number of judicial decisions to examination, states as a proposition that "there appears to be no substantial difference at the present time between appellate review for errors of law and supervisory review for error on the face of the record." This proposition is, of course, to be taken subject to the exceptions which are also set down by the learned author, but which are not material for our consideration on this appeal.

[1] *(1952) 2 A. E. R. 101.*

[2] *(1956) A. C. 29.*

Charge 2 (*a*), the sole charge (reproduced earlier in this judgment) on which a finding of guilt was reached by the Council contained two allegations, (1) that the respondent did advertise commending or drawing attention to his professional skill or knowledge and (2) that the purpose of the advertisement was to obtain patients or promote his own professional advantage.

It is unnecessary to reproduce here the short report P3 headed "Talking Point", the respondent's letter P14 to the editor or the newspaper's own comment P4 headed "Not Me" as they all appear in the judgment of Alles J. in the Supreme Court. It was contended before the Council that the newspaper's condensation P4 of the respondent's letter P14 constituted the advertisement. We entertain doubt as to whether the report P3 contained news of any value to the general public and must express our surprise that news of this nature came to be published in the daily press. Be that as it may, news come to be published so that the public may read them, and the respondent did call evidence of four respectable witnesses (two members of the medical profession and two others) who had read P3 and questioned him as to whether he had anything to do with the operation which was the subject of that report. If the respondent did thereupon address P14 to the editor, he did so with cause, and the cause set out was that the details given in the report have led to a misconception that the operation was performed by him. The editor, in acceding to the respondent's request, omitted to publish the cause so set out. If readers of P3 began to speculate on the identity of the surgeon who performed the alleged operation, it is not to be wondered at that a surgeon who had nothing to do with it but who had been questioned about it by friends and members of the profession felt impelled to dissociate himself from any such happening. There was no evidence that the respondent did anything further thereafter.

We do not ourselves feel competent to express any view as to the wisdom of the course the respondent followed in addressing P14 to the editor. We would confine ourselves to the question before us, which is whether by so doing the respondent was advertising for the purpose of obtaining patients or promoting his own professional advantage or was commending or drawing attention to his own professional skill. The mere fact of a surgeon dissociating himself from any connection with a reported surgical misadventure said to have occurred in circumstances reflecting no credit on the surgeon who performed the alleged operation cannot, in our opinion, reasonably be said to constitute a commending of his own professional skill. The dominant intention of such a

surgeon would ordinarily be to safeguard whatever reputation he enjoys. The mere fact of dissociation, without more, must fall short of commendation of his professional skill or promotion of his own professional advantage.

A tribunal which draws an inference wholly unsupported by the primary facts errs in point of law. Where a perusal of the whole record of the proceedings discloses that the sole material evidence in furtherance of charge 2(a) was the writing by the respondent of letter P14 and thereby causing P4 to be published, it is plain that there is no evidence to support the finding of guilt on that charge. The position is made all the plainer by the finding reached by the Council on charge 2(b) that the respondent by causing this very publication to be made was not depreciating the professional skill or knowledge of the other surgeon, the real complainant in this case. We agree respectfully with the observation of Wijayatilake J. in the Supreme Court that " the Medical Council having acquitted the respondent of the other charges should have proceeded to do so in respect of charge 2(a) too " as well as with his further observation that " a mere storm in a tea cup has developed into a serious confrontation. "

While we must recognise that the Medical Council, subject to the power of the Minister on appeal, remains the best judge of what constitutes infamous conduct in a professional respect, we take liberty to point out that the charge sent out by the Medical Council itself correctly contemplated that advertisement as such was not infamous conduct except where it was accompanied by the specified disreputable or dishonourable intention. While we labour under the disadvantage of an absence of the reasons which led the Council to hold the charge proved, we do have before us all the material that was before the Council. The evidence relevant to the charge led against the respondent consisted of the documents referred to above, and the oral evidence led in support of the complaints concerned mainly the other charges. The respondent's own testimony only tended to exculpate him from any disreputable intention and we have therefore been under no disadvantage in not having been present when that testimony was taken. We are satisfied that there was no evidence before the Council to support the material facts alleged in the charge. We observe that for the respondent, at the conclusion of the case *against* him, his lawyer, in terms of Disciplinary Regulation 14(4) submitted that no case had been made out against him. Our opinion set out above would indicate that that legal submission should have been upheld.

Intervention by certiorari has already been obtained by the respondent. While we are not, as stated earlier, in agreement with the reasons given by the Supreme Court for that intervention, we

are nevertheless satisfied that the court's intervention was necessitated by error of law on the face of the record ; and for that reason the respondent is entitled to two orders, one in the nature of a writ of certiorari to quash the finding of guilty recorded on February 15, 1971 and the other in the nature of a writ of prohibition against the taking of any further proceedings in the matter complained of against him. The appeal is dismissed with costs ; but we direct that orders be made to give effect to our opinion set out above.

Appeal dismissed.