1963 *Present :* **T. S. Fernando, J.**

KADAWATA MEDA KORALE MULTI-PURPOSE CO-OPERATIVE SOCIETIES UNION LTD., Petitioner, *and* A. RATNAVALE (Deputy Food Controller) and another, Respondents

S. C. 311 of 1963—In the matter of an Application in the nature of Writs of Certiorari and/or Mandamus under Section 42 of the Courts Ordinance

Certiorari—*Food Control Act (Cap. 171)—Section 8—Revocation of authorisation issued to a wholesale dealer—Procedure—Are functions of Deputy Food Controller of a judicial or administrative nature ?—" If he considers it expedient so to do in the interests of the public "—Applicability of* audi alteram partem *rule—Natural justice—Question of penalty versus revocation*—Mandamus.

[1] *(1963) 65 N. L. R. 73 at p. 84.*

The petitioner Union was a wholesale dealer which was authorised, in terms of Regulations made under section 6 of the Food Control Act, to deal in rationed commodities. It received from the 1st respondent (the Deputy Food Controller) a letter dated June 27, 1963, which read as follows :—

" I hereby cancel the licence issued to the Kadawata Meda Korale Multipurpose Co-operative Societies Union Ltd. as a wholesale dealer under clause 8 (1) of the Food Control Act, No. 25 of 1950. "

Sub-sections (1) and (2) of section 8 of the Food Control Act are in the following terms :—

" 8. (1) The Food Controller may, if he is satisfied that any distributor, merchant or dealer has contravened the provisions of any Order or regulation made or deemed to be made under this Act, or if he considers it expedient so to do in the interests of the public, revoke any authorisation or directions, relating to the sale or supply of any food, article of food or cattle, issued to such distributor, merchant or dealer.

(2) In any case where it would be lawful for the Food Controller in accordance with the provisions of sub-section (1) to revoke any authorisations or directions, he may, on an application made by the distributor, merchant or dealer, as the case may be, in lieu of such revocation, order such distributor, merchant or dealer to pay a penalty of an amount not exceeding five thousand rupees. "

Held : Where a Deputy Food Controller, acting under the second part, and not under the first part, of section 8 (1) of the Food Control Act, revokes the authority granted to an authorised wholesale dealer because he considers it expedient so to do in the interests of the public, he is acting in an administrative and not in a judicial or quasi-judicial capacity. In such a case, there is no obligation on him to comply with the requirements of the *audi alteram partem* rule. Accordingly, a writ of *certiorari* is not available to question the revocation of authority granted to the dealer.

Weeraratne v. Poulier (48 N. L. R. 441), *Edirisinghe v. Rajendra* (49 N. L. R. at 500) and *Nakkuda Ali v. Jayaratne* (51 N. L. R. 457) followed.

Ridge v. Baldwin (1963) 2 A. E. R. 66 distinguished.

The provisions, however, of sub-section (2) of section 8 impose an obligation on the Deputy Food Controller, in every case of intended revocation of authorisation, to give notice to the dealer about the action proposed to be taken against him, so that he may, if so advised, show that a payment of penalty should be substituted in place of the revocation. The statutory duty of the Deputy Food Controller to give such notice is enforceable by *mandamus*.

APPLICATION for writs of *certiorari* and/or *mandamus* against the Deputy Food Controller.

H. W. Jayewardene, Q.C., with *M. T. M. Sivardeen* and *L. C. Seneviratne*, for the petitioner.

A. C. Alles, Solicitor-General, with *V. Tennekoon*, Deputy Solicitor-General, *H. L. de Silva* and *P. Naguleswaran*, Crown Counsel, for the respondents.

Cur. adv. vult.

December 12, 1963. T. S. FERNANDO, J.—

This proceeding has been the subject of prolonged argument before me, and the application for the intervention of this Court has been strenuously pressed on behalf of the petitioner and equally strenuously resisted on behalf of the respondents. I have had the advantage of able arguments on both sides and I must here express my indebtedness therefor to learned Counsel.

The petitioner Union, a wholesale dealer authorised by the 1st respondent, the Deputy Food Controller, in terms of Regulations made under the Food Control Act, No. 25 of 1950, to deal in rationed commodities, received from the latter the letter P6 of June 27, 1963 which was in the following terms :—

> " I hereby cancel the licence issued to the Kadawata Meda Korale Multi-purpose Co-operative Societies Union Limited as a wholesale dealer under clause 8 (1) of the Food Control Act, No. 25 of 1950. "

Aggrieved by this cancellation the petitioner moved this Court on July 1, 1963 claiming the issue by the Court of (*a*) a writ of certiorari quashing the order purported to be conveyed by P6 as well as an earlier order made on June 3, 1963 (to which I shall refer later), (*b*) a writ of mandamus directing the 1st respondent to continue the supply of food and rationed articles as if there had been no cancellation of the licence, and (*c*) an interim order directing the 1st respodent to continue the supply of food and rationed articles to the petitioner pending the final hearing and determination of the application.

When the application came up before this Court on July 1, 1963, *ex parte* in the first instance, it was heard by Herat, J. and Abeyesundere, J., who, after hearing counsel in support, made order directing notice to issue on both respondents and also granting the relief (*c*) claimed by the petitioner, viz. an order that, pending the final disposal of the application, the revocation of the authorisation as a wholesale dealer be suspended and rendered inoperative and that " the usual food rations " be issued to the petitioner until the final disposal of the application. Upon receipt of notice of this interim order, the respondents applied to the Court on July 4, 1963 for a revocation of the order alleging that it had been obtained on a misrepresentation of a material fact, viz. the allegation in the petition and affidavit that unless the interim order was made the issue of weekly rations to some 117,000 ration card holders will be seriously jeopardised. It would appear that the motion for the vacation of the interim order could not be taken up for hearing before July 22, 1963 on account (1) of other work of the Court and (2) of want of sufficient time for counsel to get ready for argument. The application came on for hearing before me on this last-mentioned date along with the motion for vacation of the interim order. The learned Solicitor-General contended that the order of this Court " suspending and rendering inoperative " the

revocation of the authorisation of the petitioner had been made without notice to and without hearing the 1st respondent and that he was anxious to argue that that order cannot stand. I inquired from Counsel for the parties whether it would not be more satisfactory if I went on to hear the whole matter so that there may be a final determination of all the questions raised, a course in which learned counsel acquiesced.

The Food Control Act, No. 25 of 1950 (Cap. 171), which is an Act to make provision for the regulation and control of the distribution, transport and supply of food enables the Minister to make Order, inter alia, for the regulation and control of the supply etc. of rice. Section 6 of the Act empowers the Minister to make regulations for the purpose of carrying out or giving effect to the principles and provisions of the Act, and in terms of that section certain regulations have been made and published in *Gazette* No. 10,416 of June 20, 1952, and thereafter amended from time to time. These regulations bear the short title of The Food Control Regulations. Section E thereof governs the allocation and rationing of controlled commodities, and Part III of that Section relates to the supply and distribution of controlled commodities in places other than estates. Rice is a controlled commodity. It is subsidised both to the producer and to the consumer. Under Regulation 5 (1) of the said Part III, the Deputy or Assistant Food Controller for any district or area may, in order that supplies of any controlled commodity be made available for sale, in accordance with the regulations, to the inhabitants of that district or area, inter alia, authorise such number of wholesale dealers as he may consider expedient to sell supplies of any controlled commodity to specified authorised distributors or persons in charge of depots. The Deputy Food Controller for the Ratnapura district authorised the petitioner, in terms of these regulations, to be a wholesale dealer in respect of Kadawata Meda Korale.

The petitioner states that on May 26, 1963, the 2nd respondent who is the Assistant Food Controller for the same District, acting on the orders of the 1st respondent, purported to inspect the stocks of rationed rice lying at the main store of the petitioner. The petitioner admits that on that occasion the 2nd respondent objected to the practice employed by the petitioner of issuing rice to the estates on a Friday and Saturday in respect of the week commencing on the following Monday for distribution to their labourers who are holders of rice ration books.

The petitioner received from the 1st respondent letter P1 of June 3, 1963, in which the allegation was made that " when the Assistant Food Controller inspected the petitioner's store at Balangoda on May 26, 1963, a shortage of 1170 cwts., 1 qr., 16 lbs of white rice was detected ". It was further stated in P1 that " the subsidised value and the penalty at the rate of 25% (Rs. 58,760·40) should be paid into this office within 14 days from the date of this letter ". This is the order of June 3, 1963 referred to in the prayer of the petitioner. The petitioner replied to

this by P2 of June 17, 1963 alleging that the statement that there was a shortage was false, that the petitioner was not given an opportunity of being heard before a demand for the value of the shortage and a penalty was made, that the action taken was not bona fide and had been designed for reasons of political expediency to assist the political opponents of the president of the petitioner Union. P2 also contained an enquiry as to the provision of law under which the demand for payment of subsidised value and penalty was made. Thereupon by letter P3 of June 23, 1963 the 1st respondent requested the manager, the storekeeper and administrative secretary of the petitioner Union to be present at the 1st respondent's office at 10.30 a.m. on June 26, 1963. The petitioner by letter P4 of June 25, 1963 inquired from the 1st respondent, with reference to the letter sent to the three officers above-mentioned, why those officers were wanted. It is alleged (and that allegation is not denied) that the petitioner had no officer styled 'administrative secretary'. The manager and storekeeper, however, on June 26th attended the office of the 1st respondent where they were questioned on certain matters, and the manager was thereafter written to again (by P5 of June 26th)—this time with reference to the enquiry in P4—requesting him to be present at 10 a.m. on July 4th at the 1st respondent's office for an inquiry under the Food Control Act. This inquiry fixed for July 4th was not held because, by letter P6 of June 27th already referred to, the 1st respondent—despite the contents of P5—purported to cancel the petitioner's licence. P6 the terms of which have been reproduced earlier in this judgment does not indicate under which of the two limbs of section 8 (1) of the Food Control Act the cancellation was effected.

Section 8 (1) is in the following terms :—

> " The Food Controller may, if he is satisfied that any distributor, merchant or dealer has contravened the provisions of any Order or regulation made or deemed to be made under this Act, or if he considers it expedient so to do in the interests of the public, revoke any authorisation or directions, relating to the sale or supply of any food, article of food or cattle, issued to such distributor, merchant or dealer. "

This sub-section (1) reproduces substantially the wording of regulation 18 (1) of the Defence (Food Control) (Special Provisions) Regulations, 1943—vide *Gazette* No. 9131 of June 5, 1943. Under that regulation 18 (1) it had been provided that—

> " The Deputy Food Controller for any district or area may at any time, if he is satisfied that any authorised distributor or wholesale dealer has acted in contravention of or failed to comply with any provision of the Ordinance (No. 22 of 1937) or of these regulations or of the Control of Prices Ordinance, No. 39 of 1939, or of any order

or regulation made thereunder, or if he considers it expedient so to do in the interests of the public, by Order revoke the authority granted or the directions issued to that distributor or dealer under Regulation 5 of this Part."

Where a Deputy Food Controller, acting under the said Defence Regulation 18 (1) revoked the authority granted to an authorised distributor of rice and flour because he considered it expedient so to do in the interests of the public, Dias J. in *Weeraratne v. Poulier*[1] held that the Deputy Food Controller was acting in an administrative and not in a judicial capacity, and that a writ of certiorari was not available to question the revocation. That learned judge, however, observed—see page 444—that "it may be that under the first part of regulation 18 (1) the Deputy Food Controller when making an order thereunder acts in a quasi-judicial capacity." In the following year in the case of *Edirisinghe v. Rajendra*[2], Dias J. expressed himself more definitely thus :—

> "It will be seen that sub-section (1) of regulation 18 creates two separate jurisdictions, namely (*a*) the authority or licence may be revoked if the Deputy Food Controller is satisfied that a distributor or wholesale dealer has done something wrong, and (*b*) where the Deputy Food Controller considers it expedient so to do in the interests of the public. It is common ground between the parties that if, in this case, the Court holds that the authority of the petitioner was revoked under jurisdiction (*a*), the order cannot stand, because the respondent acted without jurisdiction inasmuch as the petitioner was not afforded an opportunity of being heard in his defence. On the other hand, it is agreed that if the petitioner's authority was revoked under jurisdiction (*b*), this would be a purely administrative matter and that the relief claimed cannot lie."

And again,—at page 501—

> "As I have already pointed out, section (regulation ?) 18 (1) creates two separate and distinct jurisdictions available to the Deputy Food Controller. The first jurisdiction arises only when he "is satisfied" that there has been a breach or a contravention of the regulations. In such a case the officer acts judicially, and he cannot be said to be "satisfied" until he has given the petitioner an opportunity of being heard. The second jurisdiction, which is not cognizable by the Courts, arises "if he considers it expedient in the interests of the public" to revoke the authority or licence."

The petitioner complains that there has been no compliance by the 1st respondent with the *audi alteram partem* rule. The learned Solicitor-General contends that this rule of natural justice has to be observed only if the revocation of the authorisation granted to the petitioner

[1] *(1947) 48 N. L. R. 441.* [2] *(1948) 49 N. L. R. at 500.*

was effected under the first limb of section 8 (1) of the Act. He points out that the 1st respondent effected the revocation by resorting to the second and not to the first limb of that sub-section. Mr. Jayewardene argued that in spite of the averments in the affidavit presented by the 1st respondent to this Court the facts disclose that he must have acted under the first limb. If so, he argued, there was no doubt that he was under a duty to act judicially and the writ of certiorari must issue as natural justice has been violated. It is therefore necessary to examine the material before me to decide under what part or limb of section 8 (1) the 1st respondent can be said to have acted.

In the absence of any indication in P6 itself which would assist in a decision of this question, one must fall back on a scrutiny of the affidavits.

The 1st respondent in his affidavit of July 4, 1963, states that while preliminary investigations were still being conducted by his assistant, the 2nd respondent, into the matter of the shortage, he received on June 26, 1963 from the Assistant Commissioner of Co-operative Development a copy of a letter of June 18th—R 2—addressed to him by the petitioner together with a copy of that officer's reply to the petitioner— R 1—by which the latter was requested to inform the 1st respondent of the action it (the petitioner) had taken. The 1st respondent goes on to state that on perusing the contents of R 2 he gathered that the petitioner had, after being apprised of certain irregularities, complied with the requirements of the law and with the directions issued by the 2nd respondent for one week and, alleging inconvenience, had decided to revert to the old practice and to continue to act in breach of the Food Control Regulations and contrary to the directions given by the 2nd respondent. He avers that he considered it not to be in the interests of the public to continue as an authorised wholesale dealer a person who had expressly declared his intention to act in contravention of the Food Control Regulations and directions issued by the 2nd respondent and that, accordingly, he considered it expedient in the interests of the public to revoke the authorisation granted to the petitioner to be a wholesale dealer. That he avers was the reason for revoking the authorisation by letter R 3 (same as P 6). Much argument could have been avoided in this case had the 1st respondent indicated in R 3 the limb of the section 8 (1) under which he made the revocation.

Mr. Jayewardene, for the petitioner, has argued that the statement in the affidavit that action was taken because the 1st respondent considered it not to be in the interests of the public to continue the petitioner as a wholesale dealer is an afterthought induced by a realisation on the part of the 1st respondent of the position that as a result of the non-observance of the rules of natural justice the revocation of the authorisation was liable to be quashed by this Court on the application made thereto on July 1, 1963. He points to the fact that there was no legal authority for the imposition of the penalty indicated in P 1. The petitioner has hitherto not been informed of the existence of any such

authority, and the learned Solicitor-General himself could point to none. The 1st respondent's affidavit—vide para. 3—where it refers to P 1—states that " in addressing that letter I was not acting or purporting to act in the exercise of any judicial or quasi-judicial power. The letter was only a demand for payment of money which I thought was due to the Crown ". It is also emphasized that the inquiry which was initiated by the 1st respondent, presumably as a result of the protest P 2, was still pending—it had actually been adjourned for July 4th—when the revocation was abruptly effected on June 27th. The petitioner by a second affidavit of July 7th has pointed to a letter, also bearing date June 18—P 16 D—which he states was sent by him to the 1st respondent, and which, it is contended, would have proved to the latter that the petitioner had no intention to act contrary to regulations or directions. These two documents, R2 and P 16 D, are important in the determination of the question now being examined, and may usefully be reproduced below. They both bear the same date, June 18, 1963.

P. 16 E (or R 2) addressed by the petitioner to the Assistant Commissioner of Co-operative Development is in the following terms :—

> " In view of the Deputy Food Controller's complaint we tried this week with very great difficulty to store our rice rations at the Union and issue rice on Monday and Tuesday. For this we had to curtail bringing provisions and other goods to find store accommodation. Yet we were unable to issue the rations although we worked up to 11.30 p.m.
>
> As a result there had been some complaints from estates and authorised dealers. Hence we are reverting back to our old system. "

while the terms of P. 16 D are as set out below :—

> " In view of your complaint that rice should not be issued on Fridays and Saturdays, we wanted to give your suggestion a trial. To do so we had to stop bringing other essential goods and with difficulty store a part of the rice on our verandah and even outside at great risk. If there was rain a large quantity of the rice could have been damaged.
>
> Although we worked till 11.30 p.m. on 17.6.63 with additional staff, we could not issue all our customers for the day.
>
> In view of the many complaints and the impossibility of carrying out your order we wish to revert to the practice we have so far followed of issuing rice on Fridays and Saturdays too.
>
> We will be doing so from next week if we do not hear from you to the contrary in the meantime. "

The 1st respondent denies by affidavit that there is any record of the receipt of letter P. 16 D. The Secretary of the petitioner has submitted an affidavit of July 7th stating that letters P. 16 D and P. 16 E were both posted on June 18th and that this fact is borne out by the outward letter register which is in his possession. In these days of notorious uncertainty in the delivery of letters committed to the post, I am not able to reach a conclusion—faced as I am by the denial of the 1st respondent—that this letter P. 16 D did reach the 1st respondent. On behalf of the 1st respondent it has been contended that even the statement that P. 16 D was posted is open to doubt. It is submitted that, if P. 16 D and P. 16E were written and posted on the same day, it is significant that in informing two officers of the same fact, two letters couched in language differing one from the other had to be resorted to. The simpler and more straightforward course of action, the learned Solicitor-General commented, would have been to send the Assistant Commissioner of Co-operative Development an information copy of the letter addressed to the 1st respondent. There is, in my opinion, force in this comment.

Reaching, as I have done, the conclusion that on the material before me, the 1st respondent did not receive P. 16D, but had only P.16 E or R2 before him, it is not possible for me to reject the assertion of the 1st respondent that in the matter of the revocation of the authorisation granted to the petitioner he acted under the second limb of section 8 (1) of the Act. Therefore, following the authority of the cases of *Weeraratne v. Poulier* (supra) and *Edirisinghe v. Rajendra* (supra), I am forced to the conclusion that the 1st respondent has not been shown to have been acting in a judicial or quasi-judicial capacity in taking the action that has been challenged on this proceeding.

Mr. Jayewardene next contended that, even if it be held that the 1st respondent was acting under the second limb of section 8 (1), there was an obligation on him to comply with the requirements of the *audi alteram partem* rule. He placed great reliance on the very recent decision of the House of Lords in *Ridge v. Baldwin* [1] where some doubt was cast on the decision of the Privy Council in *Nakkuda Ali v. Jayaratne* [2], notably in the judgment of Lord Reid. The learned Solicitor-General, in subjecting the Food Control Act and the Regulations to close analysis, appeared to equate the authorisation granted to the petitioner to a licence or privilege, and thus to seek support for his argument for the exclusion of the remedy of certiorari in this case by reliance on the following observations of the Privy Council in *Nakkuda Ali's* case. Observed Lord Radcliffe in that case: "In truth when he cancels a licence he is not determining a question: he is taking executive action to withdraw a privilege because he believes and has reasonable grounds to believe that the holder is unfit to retain it". For the reason so stated the Privy Council held that the Textile Controller in that case had not the duty to act judicially. Subjecting a long line of cases decided by English courts

[1] *(1963) 2 A. E. R. 66.* [2] *(1951) A. C. 66—51 N. L. R. 457.*

to close analysis, Lord Reid in *Ridge v. Baldwin* (supra) concluded that the judgment in *Nakkuda Ali's* case when it followed and applied Lord Hewart's statement of the law in *R. v. Legislative Committee of the Church Assembly*[1] that before certiorari can issue, not only must the person or body have legal authority to determine questions affecting the rights of subjects but " there must be superadded to that the characteristic that the body has to act judicially " was given under a serious misapprehension of the effect of the older authorities and therefore cannot be regarded as authoritative. It must be noted, however, that of the other four judges who participated in the judgment of *Ridge v. Baldwin*, only Lord Hodson referred to *Nakkuda Ali's* case ; and he himself, when making but a passing reference thereto in connection with cases arising out of the issue and withdrawal of licences, observed " It may be that I must retreat to the last refuge of one confronted with as difficult a problem as this, namely, that each case depends on its own facts and that here the deprivation of a pension without a hearing is on the face of it a denial of justice which cannot be justified on the language of the sub-section under consideration. "

Counsel for the petitioner argued that, as the issue of mandates in the nature of writs of certiorari, mandamus, etc., under section 42 of the Courts Ordinance is governed by the relevant rules of English Common Law—vide *Abdul Thassim v. Edmund Rodrigo*[2] and *Nakkuda Ali v. Jayaratne* (supra)—under English law today the decision in *Nakkuda Ali's* case must be considered to have been superseded by that in *Ridge v. Baldwin*. Accordingly he argued that this latter case calls to be applied as being the relevant English authority on the subject. Even if I were to make the assumption that is the basis of learned counsel's argument, I am bound to observe that I feel there is force in a submission put forward before me by Mr. Tennekoon on behalf of the respondents that in making the statements he has made in *Ridge v. Baldwin* in reference to *Nakkuda Ali's* case and *R. v. Legislative Committee of the Church Assembly* (supra), Lord Reid does not appear to have taken into consideration the circumstance that both these last-mentioned cases dealt with applications for certiorari or prohibition, while *Ridge v. Baldwin* was a case of a pure declaratory action. Had this last-mentioned case been one arising out of an application for certiorari or prohibition, and had, on a close analysis thereof, the majority decision of the House been shown to be that, where a person or body has legal authority to determine questions affecting the rights of subjects, the judicial element has to be inferred from the nature of the power I might have been constrained to consider seriously that the 1st respondent was under a duty to observe the *audi alteram partem* rule even when exercising his powers under the second limb of section 8 (1). But such not being the case, it is my duty to consider *Nakkuda Ali v. Jayaratne* (supra) binding on me. It may also be noted that Mr. Ridge was dismissed by the Watch Committee partly,

[1] *(1928) 1 K. B. 411, at 415, 416.* [2] *(1947) 48 N. L. R. at 128.*

at any rate, as the latter thought he was negligent in the discharge of his duty. Under section 191 (4) of the Municipal Corporations Act, 1882, the Watch Committee was empowered to dismiss any borough constable " whom they think negligent in the discharge of his duty, or otherwise unfit for the same ". Had the dismissal been effected solely because the Watch Committee thought Mr. Ridge was " otherwise unfit ", it appears to be doubtful whether the principles of natural justice would have had to be observed.

Mr. Jayewardene relied also ou certain observations in Professor De Smith's treatise on Judicial Review of Administrative Action (see pages 46 and 279) in support of the argument that rights of individuals which attract the duty to act judicially are not necessarily " rights " in the jurisprudential sense of attributes to which correlative duties are annexed. But an attempt to equate the functions of the Food Controller or his Deputies under the Act and the Regulations to that of an ordinary licensing authority may lead to fallacious results. It is not an unimportant circumstance that under the Act and the Regulations the appointment of dealers and distributors is at the absolute discretion of the Controller or his Deputies. There is nothing revolutionary in the concept of licences or authorisations also being at the absolute discretion of these officers where they are satisfied that the public interest requires it. Referring to the maxim *audi alteram partem*, Stratford A.C.J. in *Sachs v. Minister of Justice*[1] stated :

> " Sacred though the maxim is held to be, Parliament is free to violate it. In all cases where by judicial interpretation it has been invoked, this has been justified on the ground that the enactment impliedly incorporated it. When on the true construction of the Act, the implication is excluded, there is an end of the matter. "

I would respectfully adopt this observation as being applicable even to the powers of our own Parliament. One has therefore to examine the relevant provision of the law to reach a decision whether it implies an observance by the authority concerned of the rule of natural justice. I do not consider that the interpretation of the relevant words here— " The Food Controller may, if he considers it expedient so to do in the interests of the public, revoke . . . . "—admits of any serious argument. In taking action under the second limb of section 8 (1) the Food Controller (or his Deputy—see definition in Section 3) is clearly deciding the matter on questions of policy. There is no room for the argument that the Courts can exercise any form of supervision or control in the decision as to what is or is not in the interests of the public. That is a decision committed by Parliament solely to the specified public officer. I therefore respectfully agree with the statement of law as laid down by Dias J. in the cases cited above which arose out of the analogous Defence Regulations.

[1] *(1934) 5 S. A. L. R. —A. D. 11 at 38.*

Does the law so laid down apply without qualification in a similar case arising out of the Food Control Act? It appears to me that under the Act there is a significant difference that calls for notice. Section 8 of the Act contains a sub-section (2) which requires to be reproduced here :—

> 8 (2)—" In any case where it would be lawful for the Food Controller in accordance with the provisions of sub-section (1) to revoke any authorisations or directions, he may, *on an application made by the distributor, merchant or dealer*, as the case may be, in lieu of such revocation, order such distributor, merchant or dealer to pay a penalty of an amount not exceeding five thousand rupees. "

It has been suggested that the Act (No. 25 of 1950) was enacted in a time of peace, and that it was considered necessary to mitigate the rigour of the law which obtained in time of war and in the immediate post-war period when the food problem was acute by which a revocation of an authorisation was final and conclusive. Whatever may have been the reason that prompted Parliament to introduce sub-section (2), it is sufficient for the purpose of this judgment to note that an amendment of the law has been introduced and to ascertain its meaning. I cannot see that the language admits of any serious doubt. The existence of the phrase " where it would be lawful " in conjunction with " in lieu of such revocation " makes it reasonably plain that before revocation is effected either (*a*) by reason of a contravention having been made out or (*b*) because it is expedient in the public interest, opportunity has to be given to the person affected to show that a penalty should be imposed rather than a revocation effected. The problem now reduces itself therefore to one of plain construction of a statute. No doubt, the question of penalty versus revocation only arises upon an application by the party affected. But how is that party to make such an application unless he is given notice of the action intended to be taken by the statutory authority? In the case of an alleged contravention of an order or regulation, an opportunity would have been granted to the person affected to prove the contrary before the Food Controller satisfied himself that a contravention was made out. An analogy would be the reaching of a verdict of guilty or not guilty in a criminal case. Even in such a case the statute appears to require that the Controller should inform the party affected that the contravention is proved to the Controller's satisfaction and then it is open to that party to apply for the substitution of a penalty. To continue the earlier analogy, this would be the stage of passing sentence where a verdict of guilty has been reached. Where action has been taken on the ground of expediency, in the interests of the public, the party affected may not know anything at all of his impending fate. If he first learns of the action taken only when he receives a letter revoking his authorisation, he is faced with a ' fait accompli ', but it was argued that it is open to him to apply to mitigate the rigour of the revocation by the imposition on him of the lesser penalty. I am quite unable to

agree that sub-section (2) of section 8 provides for mitigation of penalties already imposed. On the contrary, it is plain that in every case of intended revocation the party affected must be noticed of the action proposed to be taken so that he may, if so advised, apply for the substitution of the punishment indicated in that sub-section.

Learned counsel for the petitioner argued that, in view of the wording of the sub-section (2), as an opportunity had to be granted to the petitioner before its authorisation was revoked, the remedy by way of certiorari to quash became available. I entertain some doubt whether non-compliance with a statutory requirement such as the one in question is sufficient to convert what was essentially an administrative or executive act to an act which attracted to it liability to interference by way of certiorari or prohibition. I am not unmindful of those decisions where it has been held that the duty to act judicially may arise in the course of what is primarily an administrative function, e.g. *R. v. Manchester Legal Aid Committee* [1]. I prefer, however, to rest my decision on the basis that here the Deputy Food Controller was, on a proper construction of section 8 (1) and (2), under a duty to give notice to the petitioner that he intended to revoke the authorisation granted to him before making the revocation itself so that the petitioner may decide whether he should make the application specified in section 8 (2). On that view of the law, the 1st respondent has failed to perform a statutory function which was a pre-requisite to action revoking the authorisation of the petitioner. The order P 6 or R 3 was therefore, in my opinion, void.

Mandamus is a remedy which is available in the discretion of the Court to require public officials to carry out their duties and to supply a defect of justice even if there be another but less convenient and effectual remedy. In the exercise of this Court's discretion, I am of opinion that a mandate in the nature of a writ of mandamus should issue compelling the 1st respondent to give the petitioner notice of intended revocation of its authorisation as a wholesale dealer. Mandamus has been invoked on this application when it was first filed in this Court although, no doubt, the reason stated for such invocation is something other than that for which I now propose to grant it. It is always open to this Court to permit a petitioner to amend his application but, although for purposes of technical perfection an amendment of the prayer might have been insisted upon, I do not consider it necessary to require compliance at this stage with such a rule of technicality and delay the decision of this Court any longer when the argument of counsel for the parties has made it obvious that there is no defence to the demand for interference by way of 'mandamus'. The order of June 27, 1963 communicated to the petitioner has, therefore, to be quashed. It is accordingly quashed, and a mandate will issue to compel the performance of the statutory function indicated above.

[1] *(1952) 1 A. E. R. at 489.*

In view of the course the argument took before me, it is permissible to add that if all that can be adduced against the petitioner is that it has by taking the action indicated in P. 16 E (or R2) shown, in a letter addressed to a person other than the 1st respondent himself, a disinclination to comply with lawful directions issued by the authorities, the 1st respondent may yet be inclined to consider whether the interests of the public may not be sufficiently met by the imposition of an appropriate penalty in terms of section 8 (2). The petitioner has made an attempt to show that by P 16D it indicated a willingness to comply with the directions if the 1st respondent insisted on such a compliance in spite of the difficulties experienced.

The petitioner has prayed also for a quashing of the " order " of June 3, 1963 contained in letter P1 requiring it to pay a sum of Rs. 58,760/40 by way of subsidised value and penalty. The demand contained in P1 has not been supported at the argument and, indeed, it did not appear to be doubted that the request could not be supported at law. I do not consider it necessary in the circumstances to deal with that part of the prayer.

The 1st respondent must pay to the petitioner the costs of this application. There was no necessity for the 2nd respondent to have been made a party to this application and, therefore, I make no order for costs as against him.

Order of Deputy Food Controller partly quashed.