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ELECTRONIC SURVEILLANCE

Late last year Commissioner of Police K B Burnside posed a series of questions; "Tell me how, in the absence of phone tapping may the police apprehend and bring to justice the criminal administrator who will do little more than pick up a telephone to set a new series of crimes in motion? How do you catch a man who will never be at the scene of a crime? How do you catch the boss when his employees, bound to secrecy by fear or by 'criminal honour' are the only ones who are really at risk?"

In New Zealand no criminals of the genera mentioned have been convicted. So the answer is either you don't, or we have not got any – the latter proposition stretching credulity. Back we come, so soon after the Security Intelligence Service Amendment Act 1977 to the vexed questions of communications interception and electronic surveillance – to what have been described as "the most controversial and widely disliked tools of law enforcement".

The Commissioner's hint that the police be granted authority to use electronic surveillance has met with a mixed but largely unenthusiastic response. The response to be avoided though is an unthinking response, for when the country's top policeman says, that there are areas of criminal activity where the police are ineffective his opinion is not to be lightly dismissed. In effect he is pointing to a choice between living with a situation or doing something about it.

The first and basic question is whether the Comissioner is being unduly alarmist. Is there really organised crime? Are the police trying hard enough? How serious is it? The obvious area of criminal law in which to look for the answer to those questions is that of drug trafficking. However one should not overlook such matters as the traffic in colour television sets and the like. Court reports on cases involving the use of undercover agents point to extensive police activity but activity that has been limited in its effect. The circumstantial evidence suggests a prima facie case. Whether electronic surveillance is an effective means of combating organised crime is a matter on which opinions differ. However, the American experience may provide some guidance. The effect of the American legislation allowing electronic surveillance was reviewed in 1976 after it had been in force for eight years. (See "Report of the National Commission for Review of Federal and State Laws Relating to Wire Tapping and Electronic Surveillance. 1976".) The majority of the Review Committee considered that "Electronic surveillance was an indispensable aid to law enforcement in obtaining evidence of crimes committed by organised criminals". A substantial minority of the Committee, while disagreeing with the majority's broad general approval of Court-authorised surveillance nonetheless found that surveillance "had been used successfully in a limited number of major cases" with the qualification that it "had resulted in the conviction of only a few upper echelon crime figures". There is then a measure of agreement that it produced results, there being disagreement only on the extent of those results and whether they justified the cost.

What is the cost? The cost to society is the loss of a measure of individual privacy. The extent of the loss depends on the limits placed on the use of electronic surveillance and the limits imposed by cost and manpower considerations. The types of limits that have been imposed include Court authorisation and surveillance (at a superior Court level) and limiting use to the investigation of specified offences. The constraints that operate to discourage use of elec-

tronic surveillance are those of manpower and cost. A control on misuse of electronic surveillance is that evidence obtained will be inadmissible in Court and possibly the one opportunity to secure the conviction of a major criminal will be lost.

The protection of individual privacy demands the preparation of a substantial case for a warrant – work that a man-short police force will hardly welcome; involves the authorisation and subsequent supervision of warrants – work that our hard-pressed Judges are unlikely to encourage; and requires meticulous observance of procedures by a force all too aware from experience with undercover agents that any slight departure from the rules is to open the cage.

A Committee has been established to consider electronic surveillance and doubtless it will be taking a hard look at these questions of need, effectiveness, control, and impact on individual privacy. But just as granting authority for electronic surveillance should be justified in terms of need and effectiveness so should opposition be based on something more than the assertion of an absolute right to individual privacy. It could prove a self-defeating luxury.

Tony Black

ADMINISTRATIVE LAW

THE PROTECTION OF THE INDIVIDUAL AGAINST AUTHORITY BY MEANS OF ADMINISTRATIVE JURISDICTION

By R G McElroy, CMG, LL.D Barrister and Solicitor, Auckland, NZ. This is the text of a paper delivered at the 16th Biennial Conference of the International Bar Association, held at Stockholm, 15–21 August 1976. (It was first published in the International Legal Practitioner January 1977 which is the IBA Journal).

Enquiries carried out by Dr Hoekema the Chairman of Committee 7 – General Administrative Law, on this subject show that, while there are marked differences in their approach to this problem, countries of the British Commonwealth and of Western Europe and the United States find the same problem is common to them all – how to protect the subject against the Executive?

The topic is a vast one, and its treatment in a Paper of this length must necessarily be general, and perhaps less than adequate.

In the past 50 years, whole new empires of executive power have been created. For the citizen, it is vital that such power should be used in a way conformable to standards of fair dealing and good administration.

It is appropriate first to look at the problem and briefly consider the measure of its growth in the present century before we consider the legal steps that have been taken in different forms in different countries to cope with the problem. Early in this Century, certainly by the end of World War 1, it was apparent in most developed countries that there has been a growth in the power of the Executive over the subject which represented a revolution in the relationship between the individual and the State. This was becoming obvious in England by 1929 *(a)* and in 1932 a Parliamentary Committee on Ministers powers in the United Kingdom stated in its Report to Parliament that:

> "the most distinctive indication of the change of outlook of the Government of this country in recent years has been its growing pre-occupation, irrespective of party, with the management of the life of the people."

That Committee of 1932 certainly did not realize the extent to which another War, requiring the control of the country's economy, and the post-war development of the Welfare State, would increase the responsibility of the Government, and its subordinate agencies, for many aspects of the life of every individual citizen. To the existing social services, such as education and partial health services, were added others including compulsory insurance against unemployment, industrial injuries and other risks, and a wide expansion of health services to include medical and dental treatment. Along with these changes came control of all land development and building projects under the Town and Country Planning Acts, nationalization of coal, electricity, railways, shipbuilding, and steel industries. Rents of furnished houses also came under control, affecting many thousands of citizens. The same sort of changes were taking place in the countries of Western Europe, in the U.S.A., and in the more developed countries of the British Commonwealth, all of which changes required an enormous increase in the administrative machinery of Government. It does not require imagination to appreciate how frequently existing rights of individuals were to be affected by these far-reaching administrative "controls".

(a) See Lord Hewart, Lord Chief Justice of England in "The New Despotism" (1929)

Machinery had to be devised to settle disputes where the individual found that his interests conflicted with the wider public interest, or where terms of legislation which conferred rights to welfare generally, needed to be applied to his particular case, which was the professed aim of these revolutionary changes in the national life.

The phrase "administrative law" is applied to this machinery, but there is no precise definition of it in the English system of law. An approximation is to say administrative law is concerned with the operation and control of the powers of administrative authorities. The authorities are the Government, through its various departments and local authorities acting under delegated legislation.

It is proposed to examine the present day approach to these problems in what might be called the common law countries by outlining the development of administrative law in England, with some comparative references to New Zealand, Canada and the United States of America, and to contrast this approach with that in the European countries whose legal systems are based upon the civil law, and with other references of somewhat limited extent to the law in Scandinavian countries.

It seems to me that the approach to this problem in the common law is best emphasized by a brief glance first at the French system. In France, there exists the well known system of "droit administratif" which is administered by special administrative Courts. These Courts are not part of the ordinary judicial machinery of the country, but form an integral part of the administrative system itself. Only a brief account of it can be given here.

The droit administratif has been built up entirely on a case law basis, but French administrative courts are not fettered by any doctrine of binding legal precedent, such as compels Courts in England to follow unquestioningly the decisions of courts of higher authority. We shall see later that the strict observance of this rule of binding precedent did cause considerable confusion in the development of English administrative law during nearly 50 years of the 20th Century, and hampered its development of coherance and cohesiveness at an important time of its growth.

The centrepiece of the French system is the Conseil d'Etat, which also plays the part of general adviser to the Government. In the Conseil d'Etat, the Section du Contentieux functions as the highest administrative Court. Originally, it had a general competence over all administrative decisions, but since 1953 the local administrative Courts (Tribunaux Administratifs) have in effect become the courts of first instance and the Section du Contentieux is now essentially a Court of Appeal. The jurisdiction entrusted to these Courts covers

> "all litigation between public authorities and third parties, or between public authorities themselves, concerning the execution non-execution or bad execution of public services".

Characteristic features of the French system are that the ordinary citizen has easy access to the administrative Courts; the proceedings are juridical and associate wide powers of investigation with the rule of contradictory (contradictoire) defence; and relief either results in quashing an administrative decision (recours pour exces de pouvoir), or provides financial compensation for damage received through illegal or arbitrary action (recours de plein contentieux).

Because English law, until very recently, had failed to develop an effective system of administrative law, it has not been uncommon for some English commentators to give praise to the French system and to say "we need a proper system of administrative law like the French Conseil d'Etat". Unlike the legal position in England, the Conseil d'Etat has developed some very comprehensive principles of compensation for injury by administrative action. An advantage of the French system is that the judges and their commissaires, as well as the advocates, are all lawyers highly skilled in this special jurisdiction and therefore the subject has more coherence and consistency than in Britain.

English critics of the French system contend there is the constitutional disadvantage of its being cut off from the main stream of the law because it is a system apart, with its own special Courts not assimilated into the system of the ordinary courts of law. Professor Dicey, whose textbook "Law and the Constitution" first appeared in 1880 and became the classic work on the subject, contended strongly that there is real constitutional importance in the protection of the citizen against the government by the judges who preside over the ordinary Courts of Law. He wrote unfavourably of the French system. Professor Hamson in his Hamlyn Lectures in 1954 demonstrated that Dicey to some extent, misunderstood the French system. *(b)* His views influenced however, several generations of English lawyers. Today, a better informed view is taken and it is now clear that each system can contribute something of value to the other *(c)*.

(b) See Prof. C. J. Hamson, Professor of Comparative Law, Cambridge University, Lectures published under title "Executive Discretion and Judicial Control" (1954) Lecture 2 at pp 50-52, and pp 69-75

(c) Op. cit. Chapter V, "Some Reflections".

Having described briefly the French system, it is easier in a forum such as this, with representative lawyers of many countries within the International Bar Association, to indicate the way in which administrative law has evolved in England within a system of judicial control by the judges of the ordinary courts. When this is done, it will be more convenient later to attempt any comparison of the merits or defects of either system. It is only of historical interest to note that the Conseil d'Etat, which stands at the apex of the system of droit administratif, was created by the Emperor Napoleon contemporaneously with his establishment of the Code Civil. It has evolved to its present stage of development in approximately 175 years.

As already stated, administrative law has been evolved in England within a system of judicial control by the judges. A decision of 1615 marks the beginning. The English judges, using the forms and procedures of the ordinary Courts, gradually extended their control over the use of power by administrative authorities by developing their use of certain ancient Writs known to English law as the Prerogative Writs, since the original source of their authority was the King's prerogative.

The Prerogative Writs had their origin in Norman times and by the reign of James I (1603–1625) these had been fashioned to enable the Court of Kings Bench, (which was the Court superior to the others in the common law system) to issue one or other of these Writs (according to the remedy required in a particular situation) to compel Courts of inferior jurisdiction not to exceed the jurisdiction conferred upon them.

Two writs were the ones most commonly the Writ of Certiorari to annul past action where it was held to be wrong, and the Writ of Mandamus to compel the exercise of power which an inferior Court was declining to use. For an inferior Court to refuse to exercise a power it had, was as bad as to exceed its power. A third writ, the Writ of Prohibition, as the name suggests, was a writ issued by the King's Bench Division ordering an inferior Court not to exercise power in circumstances when it might otherwise have done so (but for the prohibition).

In England today, these Writs (since 1938 called Orders), and also referred to as the "extraordinary remedies", remain the chief means by which the ordinary Courts of Law exercise control over the actions of the executive government, including local authorities. Some of the rigid requirements which had to be satisfied before these ancient forms of writs could be applied for have been the reason why the Courts have not wholly succeeded in their efforts to control the extensive exercise of executive power in modern times. If the wrong writ was chosen, the desired remedy could not be obtained, and it was necessary to start again. This was the cause of much delay and expense. Only within the last 5 years have these archaic hindrances been partly overcome so that the desired remedies can be used more effectively to control executive action.

In Canada, and in New Zealand, but not yet in England, legislation has been passed to establish a simpler system of procedure to enable citizens to have access to the ordinary courts to control excess or defects in jurisdiction both of the new "special tribunals" which proliferated since World War II, and of administrative authorities or officials. This legislation was first passed in the province of Ontario in 1971 and in New Zealand in 1972. The ancient remedies of Certiorari, Mandamus and Prohibition as instruments to control administrative tribunals or officials, have not been abolished in New Zealand, but the New Zealand Judicature Amendment Act 1972 enables a very simple form of application to be made, and upon this application any of the extraordinary remedies may be sought and granted. This beneficial procedure has already been extensively used.

Since the prerogative writs are still used in England, and to a partial extent in the United States, which derived them along with the system of common law from England, it is needful to see how they were originally applied to exercise judicial control over executive acts, since at their origin they were designed to control only inferior courts. This study is necessary to understand some confusion earlier in the 20th century about the extent to which the ordinary courts could exercise control over administrative acts.

As early as 1615, the Court of Kings Bench was asked to declare that the removal from office of a burgess (or councillor) by the Mayor and other burgesses was unlawful upon the ground that this action was taken without affording him a hearing *(d)*. The Chief Justice Sir Edward Coke, declared that the Court had power "not only to correct errors in judicial proceedings but other errors and misdemeanours extra-judicial" (at p 98 (b)) He then said,

> "... if ... they have proceeded against him without hearing him answer to what was objected or that he was not reasonably warned, such removal is void ... such removal is against Justice and Right" (p 99 (a)).

By this decision, Chief Justice Coke, who has been sometimes called "the father of the common law", first established the jurisdiction of the

(d) *Baggs Case* (1615) 11 Co Rep 93 (b).

Courts to control an "extra-judicial" proceeding, and as well laid the foundation of a principle that has since been called a "sacred principle" of natural justice – the rule embodied in the maxim "audi alteram partem".

In case after case throughout the 17th, 18th and 19th centuries this latter principle was repeatedly upheld *(e)*. One example is enough *(f)*. In 1863 a builder had partly erected a house when a Board of Works, without giving any warning, demolished it, purporting to act under a Statute which gave it authority to pull down any new house if 7 days notice to commence building had not been given to it. The Court of Exchequer held the builder should first have been given notice and an opportunity to be heard. Mr Justice Byles, a member of the Court said (at p 194).

> "It seems to me that the Board was wrong whether they acted judicially or ministerially I conceive they acted judicially because they had to determine the offence, and they had to apportion the punishment as well as the remedy. That being so, a long course of decisions,... ending with some very recent cases, establish that, although there are not positive words in a statute requiring that the party shall be heard, 'yet the justice of the common law will supply the omission of the legislature.". *(g)*.

In 1911, three hundred years after Chief Justice Coke laid down this principle of "natural justice," *(h)* it was restated in its most complete and comprehensive form in the House of Lords by the Lord Chancellor, Lord Loreburn.

"Comparatively recent statutes have extended if they have not originated, a practice of imposing upon departments or officers of state the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter for discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases, the Board of Education will have to ascertain the law and also ascertain the facts. I need not add that in doing either, they must act in good faith and fairly listen to both sides... But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view". *(i)*.

Thus, even in cases where the Executive act was administrative, and not judicial in any way, the Courts required this principle of natural justice to be observed.

Notwithstanding this, and only 4 years later, another House of Lords decision was delivered which had the contrary effect upon administrative acts of the Executive *(j)*. This later case related to an administrative decision where a Local Government Board refused to disclose to a person affected by the closing order of a Borough Council, an inspectors report on the property closed. Lord Haldane, who delivered the leading judgment, did not disagree with Lord Loreburn's statement of principle, (quoted above) but ruled that the requirements of natural justice were sufficiently met without disclosing the inspector's report.

Because of the doctrine of English law that decisions of the House of Lords are binding on all lower Courts, this decision had a most unfortunate effect upon the development of administrative law for approximately the next 50 years, until 1963, when the House of Lords re-affirmed the principle of law laid down by Chief Justice Coke and applied in the earlier cases. *(k)*.

In the half century from 1915 to 1963, confusion existed throughout a period when departments of Government and local authorities were extending their administrative control over a vast range of diverse economic and social activities. Courts in England, being bound to follow the decision in Arlidge's case took a similar view of an administrative decision by a Minister holding the Minister was free of obligations to comply with the rules of natural justice. A Privy Council case in 1951 taking the same view, became binding on all courts in the British Commonwealth *(l)*.

Between 1915 and 1963, numerous instances arose in which the Courts, seeking to protect the citizen from the arbitrary exercise of administra-

(e) See eg Kelly C.B. in *Wood v Wood* (1874) LR 9 Exch 190, 196. "This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals".

(f) *Cooper v Wandsworth Board of Works* (1863) C.B.N.S. 180.

(g) See Erle C.J. at p.189; and Willes J. at p.190.

(h) It is of particular interest to note that Lord Hailsham L.C. using the expression "natural justice" in a very recent case, added "or as it was called by Byles J. – The Justice of the Common Law". See Pearlberg v Varty [1972] 2 All E.R. 6,

(i) *Board of Education v Rice* [1911] A.C. 179, 180.

(j) *Local Government Board v Arlidge* [1915] A.C. 120.

(k) *Ridge v Baldwin* [1963] 2 All E.R. 66.

(l) *Nakkuda Ali v M.F. de S. Jayaratna* [1957] A.C. 66.

tive discretion, only succeeded in doing so by holding that the particular administrative authority was "quasi-judicial", or was "acting judicially" in the particular instance. By this process of reasoning, Courts sought to escape from being bound by the decisions above referred to which had proved adverse to the citizen. The result was a series of cases in which legal decisions were expressed in terms of artificial distinctions created to give courts jurisdiction over administrative decisions which offended rules of natural justice. This artificiality of reasoning created much confusion and uncertainty for nearly 50 years.

Finally, in 1963, the House of Lords, by its decision in the case of *Ridge v Baldwin* restored the original rule of English law established in the earlier cases. This decision has proved to be of momentous importance to the subsequent development of administrative law in England. The case was one in which a Chief Constable had been dismissed from his position by a Committee without specific charges being furnished to him nor an adequate opportunity given to answer complaints against him. Lord Reid, who delivered the most important judgment, reviewed historically the cases from 1615 onwards *(m)* and this great Judge re-affirmed that the rule of natural justice, that a man was entitled to a hearing, must be applied to administrative decisions as well as to judicial hearings. He said,

> "The older authorities clearly show how the Courts engrafted the principles of natural justice on to a host of provisions authorizing administrative interference with private rights". (p. 76).

It was in this same House of Lords case of *Ridge v Baldwin* that Lord Reid observed that, "We do not have a developed system of administrative law," and he went on to say,

> "So it is not surprising that in dealing with new types of cases the Courts have had to grope for solutions, and have found that the old powers, rules and procedure are largely inapplicable to cases which they were never designed or intended to deal with. But I see nothing in that to justify our thinking our old methods are any less applicable today than ever they were to the older types of case" (p. 76).

In the past 14 years since this was said there have been several decisions of the House of Lords and Court of Appeal which have notably advanced the development of a system of administrative law in England.

In 1968, five years after *Ridge v Baldwin*, the House of Lords went further in its application of the principle of natural justice in the case of *Padfield v Minister of Agriculture.* [1968] 1 All ER 694. In that case, the Minister refused to refer a complaint of discrimination to a committee of investigation provided for by the Statute. He had an unfettered discretion to do so, but would not exercise it, giving as his reason that to refer the complaint to a committee of investigation would raise "wide issues". The House of Lords held that an order of Mandamus should be issued to the Minister to require him to consider the complaint "according to law". Lord Reid said

> "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and the objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole, and construction is always a matter of law for the Court". (p. 699)

In *Wiseman v Borneman* [1969] 3 All ER 275 decided a year later, Lord Reid developed this principle of construction a little further, "to achieve justice". Thus, he said,

> "For a long time the Courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this *unusual kind of power* is exercised it must be clear that the statutory procedure is insufficient to achieve justice, and that to require additional steps would not frustrate the apparent purpose of the legislation". (p. 277).

In these cases, there is discerned the new trend of the judges to discuss these cases not in terms of distinctions, whether the power exercised was judicial or administrative, but in terms of "achieving justice". They were thus fashioning principles of administrative law of general application to all cases whether judicial in character or clearly administrative. In 1971, Lord Wilberforce, in his speech in *Malloch v Aberdeen Corporation* [1971] 2 All ER 1278, spoke throughout in terms of questions and principles of "administrative law". In 1972, the Lord Chancellor in another House of Lords case, *Pearlberg v Varty* [1972] 2 All ER 6, observed that

> "The doctrine of natural justice has come in for increasing consideration in recent years and the Courts generally, and your Lordships House in particular have, I think rightly, advanced its frontiers considerably." (p. 11).

The trend of the above cases is to show that modern Courts are now readier to get to the substance of the administrative law issues and to brush aside former technical procedural obstacles. They do this by statutory interpretation based on "careful even meticulous construction of what

(m) See [1963] 2 All E.R. at pp 72–75

that statute actually means in the context in which it was passed (p.11). In applying this process of construction to cases of administrative law, the Lord Chancellor said,

> "that the Courts will lean heavily against any construction of a statute that would be manifestly unfair.". (p. 11)

In other words, if there is any ambiguity or doubt the Court will lean against an interpretation that could be oppressive. The term "fairness" is gaining increasing usage. In a New Zealand case *(n)* decided by the Court of Appeal in 1974 most of the above authorities were referred to, and the President of the Court of Appeal indicated that their cumulative effect was that the requirement of "fairness" is to be applied to administrative actions as well as judicial functions "if the interests of justice make it apparent that the quality of fairness is required in those actions". (p. 548).

Whether the concept of fairness is a synonym for natural justice is not yet quite clear. There is some doubt, but one might hope that it is.

If there was any lingering doubt after Lord Reid's affirmation that the rule of natural justice extended to administrative acts, a decision of the Chief Justice, Lord Widgery, in 1974, dispelled it. In *R. v Hillingdon Borough* [1974] 2 All ER 643 which was a town planning matter in which the Borough Council granted its permission subject to an unreasonable condition, Lord Widgery held that it was, immaterial that the planning authority did not have a duty to act judicially – certiorari would issue to anybody with jurisdiction to determine the rights of subjects.

The effect of these decisions is to open much more widely the use by English judges of the remedies of certiorari and mandamus in administrative law by clearing away obstacles that had been placed on the use of the ancient prerogative writs.

It is now necessary to describe a new type of legal entity which began to appear in England during World War I and which has proliferated greatly in the past 50 years. This is the phenomenon of the "special tribunal". It is needful to consider its effect upon the development of administrative law.

A host of such "special tribunals" have been created since World War I to implement government policy in areas where politics inspired some social or economic programme. These special tribunals were often composed of laymen, in that they were not trained in law and were often appointed for their sympathy with the objects of the legislation granting the powers to carry out the programme or policy. Civil servants, zealous to carry out the social objects of the legislation, were often not over concerned to safeguard or protect the rights of the individual citizen against the use of executive power, and so there was very seldom provision for those rules of procedure which apply in ordinary courts of law to ensure that justice is done. In the English Courts of law there are two principles which predominantly characterize natural justice. These are the rules that "a man may not be judge in his own cause" (nemo judex in causa sua) and "hear the other side" (audi alteram partem). The latter was the rule most often breached, but occasionally, the Departmental interest in the issue breached the former. There are other rules also.

Many "special" tribunals and administrative officers operated under no rules of this kind and, no occasion, they have disregarded these principles of natural justice. When the courts sometimes restrained them from making decisions that were in breach of natural justice, the civil servants endeavoured in a number of cases to have clauses incorporated in the enabling Acts of Parliament to exclude these "special" tribunals from judicial control. Such Acts of Parliament usually contained a clause to the effect that the decisions of the tribunal could not be called in question by legal proceedings for certiorari, mandamus, prohibition or declaration. These types of clauses were known as "exclusive" or "privative" clauses which purported to exclude or deprive the courts of jurisdiction. Sometimes, but not always, the Courts were able to gain control over these special tribunals despite such clauses if the judges found in a particular case that, on a proper construction of the language of the enabling Statute, a tribunal had exceeded its statutory powers. If the Courts found the tribunal had thus acted in excess of its powers, (ultra vires) (exces du puvoir) it further held that no "privative" clause could operate to confer a jurisdiction that did not exist, and so these clauses, devised in various forms by zealous civil servants, have progressively been struck out by the courts as invalid. Some of these cases are referred to later.

So many "special" tribunals were created in the years before and after World War II, and so many varieties of procedure were adopted by them, (together with "short-cuts") by omitting procedures designed to observe rules of natural justice, (ostensibly in the interests of efficiency and speed of decision), that by 1955 there were some 2000 different tribunals in England, falling into about 35 different categories.

Some of these tribunals gave reasons for their decisions, but many did not. This was a vital mat-

(n) *Lower Hutt City Council v Bank* [1974] 1 NZLR 545.

ter on which there was no uniform rule, and many tribunals avoided giving reasons in order to prevent the courts from discovering whether they had acted in excess of their jurisdiction, or in some other way had offended against rules of natural justice.

These tribunals had in fact become a jungle. Many, to their credit, were working well and the members serving on them were well intentioned, but there was a conspicuous lack of order and consistency. Until 1957, Parliment had never stopped to inquire how these manifold tribunals fitted into the constitutional scheme of things in England. Increasing dissatisfaction and mounting public pressue forced an inquiry into their working.

The Franks Committee, presided over by Sir Oliver Franks (now Lord Franks) was appointed to inquire into and report upon the tribunal system. The first result of the Franks Committee's work was that a valuable survey of all the various tribunals was supplied by their parent departments. Some Government departments put forward the view that tribunals in the social service field should be regarded as adjuncts to the administration of the services themselves. The Franks Committee in its Report of 1957, rejected this view. It said,

> "We do not accept this view. We consider that tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration. The central point is that in all these cases, Parliament has deliberately provided for a decision independent of the department concerned ... and the intention of Parliament to provide for the independence of tribunals is clear and unmistakeable."

The Franks Committee considered that three fundamental objectives were required of tribunals

(1) Openness
(2) Fairness
(3) Impartiality

They expressed this as follows:

> "In the field of tribunals openness appears to us to require the publicity of proceedings and knowledge of the essential reasoning of decision; fairness to require the adoption of a clear procedure which enables parties to know their rights, to present their case fully and to know the case which they have to meet; and impartiality to require the freedom of tribunals from the influence real or apparent from Departments concerned with the subject matter of their decisions".

The central proposal of the Franks Committee was there should be a permanent Council on Tribunals in order to provide some standing machinery for the general supervision of tribunal organization and procedure.

The Tribunals and Inquiries Act 1958 was passed to give effect to the Franks' Committee's central proposal to treat these special tribunals as part of the judicial system. It provides first for establishment of the Council on Tribunals. The Council has the general oversight over tribunals and inquiries. It reports from time to time to the Lord Chancellor, who appoints its members. The tribunals under its superintendence are listed in a Schedule to the Act. It is not a Court of Appeal or a Council of State on the French or Italian model. Its task is to keep under review the "constitution and working" of the listed tribunals, and report on any other question which the Chancellor may refer to it. It can receive complaints from individuals. It must be consulted before any new procedural rules for tribunals are made. A recommendation is that the Chairman of a tribunal should usually be a lawyer.

The Franks Report constitutes the most thorough inquiry made into the English system of administrative adjudication. The Report recognized that administrative tribunals have become a permanent part of the English constitutional system and concentrates upon procedural reforms in the hearings before such tribunals and upon review of their decisions by the Courts where they breach such procedures. One very important recommendation of the Franks Committee was that legislation should be passed to abolish so-called "exclusive" or "privative" clauses so that judicial control by means of the remedies of certiorari and mandumus is secured. The Tribunals and Inquiries Act 1968 did *not* include this provision and cases of this kind have continued to prevent justice, but the Courts have developed a process of construction of statutes which is in most cases effective to "strike down" these clauses.

In this regard, a case of the first importance was the House of Lords decision in 1969 in *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208 which ended a long conflict in earlier decisions and established that if a tribunal misconstrues the provisions empowering it to act, this is an error of law going to its jurisdiction, and in the case of such an error of law, a privative clause cannot operate to prevent the law Courts from intervening to redress the wrong decision of law. Four years later in the Court of Appeal, the Master of the Rolls, Lord Denning in *Sec. for State v ASLEF* [1972] 2 All ER 853 expressed a similar view about errors of fact and held that if they go to the question of jurisdiction the "error" is redressable by the Courts notwithstanding a privative clause.

Thus, while privative clauses in statutes have not been abolished by Act of Parliament as was

recommended by the Frank's Committee, the Courts are now demonstrating a determination to disallow them when they can find grounds to do so.

Some 12 years before the Franks Committee's central recommendation was adopted by creating a Council on Tribunals, the United States had adopted a different approach to the same problem of a multitude of administrative "Agencies" of a wide variety of types. To ensure some uniformity and the observance of fundamental legal principles, the United States passed an Act called the Administrative Procedure Act 1946 which laid down certain basic rules of procedure which were required to be observed by all administrative agencies. It constituted a Code of uniform procedural requirements, the failure to observe which could give a right of review by the Courts. A basic feature of the Administrative Procedure Act was its incorporation of the "due process" requirement of the Fifth and Fourteenth Amendments of the United States Constitution. The constitutional requirement of "due process of law" is close to the common law concept of "natural justice". *(o)* Thus, a decision of the United States Supreme Court has held that the right to be heard is an essential part of "due process".

When the Franks Committee sat in 1957, the United States Administrative Procedure Act had been in operation for 10 years, and a criticism of it based on observation of its working, was that its requirement of "a uniform code for all cases and to provide in advance for all exceptions" would "work well for some purposes but badly for others". The ground for this was that the United States statute lays down firm – even rigid – procedural requirements which must be followed in the processing of all administrative cases, such as a formal hearing where the parties may be re-examined by Counsel, call evidence, cross-examine the other parties witnesses, insist on the production of documents etc. This has led to circumvention of the Act in many areas where the strict application of its provisions would tend to injure individual rights because of delays and expense involved in protracted judicial hearings. Few people seeking welfare benefits for example, can afford the luxury of a full trial proceeding to determine the nature of their entitlement.

The solution adopted in England was claimed to be preferable because of its greater flexibility in suiting the procedural requirements to the nature and purpose of the enquiry.

Canada stands in a position somewhere between the United States and England in this matter. It has inherited the common law, but has also been influenced in its jurisprudence by the circumstance that French law is applied in the Province of Quebec, and other Provinces have been influenced by an awareness of the approaches of French Law. It is also strongly affected in its social and economic conditions by the United States and its procedures are influenced by this.

Beset with the same administrative problems as arose in England and the United States during and after World War II, Canada has developed a statutory reform in administrative law somewhat different from both the Uniform Procedure Act of the United States and the Council on Tribunals procedure evolved in the United Kingdom. The lead was given in the Province of Ontario where a "Commission on Civil Rights in Ontario" under the Chairmanship of the former Chief Justice of Ontario, Mr J.C. McRuer was set up. It made an exhaustive survey and the McRuer Report is monumental.

To give effect to its main recommendations, a group of Bills designed to make statutory changes in procedures were prepared in 1968–1969. For our purposes, one of these is of primary importance. It was intituled "An Act to provide a single procedure for the judicial review of the exercise or the failure to exercise a statutory power". The Canadian Act was passed into law in 1971. A New Zealand Act in almost the same terms and based upon a study of the Canadian draft Bill, was enacted as The Judicature Amendment Act 1972.

The interest of the above Canadian and New Zealand statutes is that they set out to effect a reform in administrative law by enabling a simplified procedure to replace the complex procedures of the prerogative writs. In England, from an innate conservatism, no similar step has yet been taken though it has received some consideration.

In England, a Law Commission was established under the Law Commission Act 1965, which has to some extent been concerned with various matters which are the subject of this paper. This Commission is a permanent Commission under the Chairmanship of Lord Scarman, formerly Lord Justice Scarman. In May 1969, Lord Scarman's Commission recommended to the Lord Chancellor that a broad inquiry be made into administrative law by a Royal Commission or by a Committee of comparable status. This appears to contemplate a Commission to undertake a task similar to that undertaken by the Royal Commission in Ontario of which the former Chief Justice McRuer was Chairman.

The Lord Chancellor decided the time was not ripe for a full scale inquiry of this nature, but instead, requested the Law Commission to review the existing remedies for judicial control of administrative acts and omissions with a view to

(o) See note (h) ante.

evolving a simpler and more effective procedure. This of course, was a reference to the defects, difficulties and delays that had been shown to exist in respect of the use of the ancient forms of the prerogative writs. This limited investigation on "Remedies in Administrative Law" formed the subject matter of the Law Commission's Working Paper No 40 of 1971.

There has since been some difference of opinion about how this reform in procedure should be introduced into England and, so far, no new procedure has yet been introduced in that country. It is of interest however, that Professor H.W.R. Wade an authority of great distinction on this subject, has commented upon the Canadian and New Zealand Statutes that,

> "The Ontario and New Zealand proposals are in my opinion, eminently sensible measures of law reform" – and again "This is a reform of exactly the kind that I favour".

He comments further:

> "Essentially they represent the type of reform which I advocate, which facilitates the operation of the existing remedies, allows them to be freely interchanged and combined and removes procedural discrimination."

I am unable to express a view on the working of the Canadian legislation since 1971, but I can confirm the effective working of the New Zealand legislation of 1972.

The approach of New Zealand to reform in the area of administrative law was to set up in 1966 the "Public and Administrative Law Reform Committee" which makes Annual Reports to the Minister of Justice with recommendations for reform. Its Annual Reports are published and a number of its recommendations have been adopted. Its most important recommendation, contained in its Fourth Report, published in January, 1971, was that an application styled "Application for Judicial Review" should be introduced on which the Court would be empowered to award mandamus, certiorari, prohibition, declaration, injunction or any combination of them. This "would stand alongside and not supersede the existing remedies", but the New Zealand Administrative Law Reform Report added that it was expected "the existing remedies would in time simply cease to be used". This is what is happening. The new procedure has been freely used and has proved most effective. All the extraordinary remedies are available on the new form of application and there is no delay in reaching a hearing in the Supreme Court, which corresponds in status to the High Court in England.

While not having the same status as the Council on Tribunals in England, since it is not created by statute, but simply by appointment of the Minister, the New Zealand Administrative Law Reform Committee functions somewhat in the same manner, though its recommendations are merely persuasive. Its first Report included a survey of all special Tribunals. Later Reports took these seriatim and suggested changes of procedure to accord with rules of natural justice. Many have been accepted by the Tribunals concerned, but some have not, due to Departmental resistance *(p)*.

One of the first recommendations of the Committee which was accepted by the Minister of Justice and implemented by legislation was to create within the Supreme Court an Administrative Division, somewhat in the manner of the Divisions in the High Court in England. Administrative law cases are assigned to this Division by the Chief Justice who is himself a member and four Supreme Court judges sit singly to decide such cases in addition to their other judicial work.

The Administrative Law Reform Committee has about 9 members. Its first Chairman was the then Secretary of Justice. It is now the Professor of Administrative Law at the University of Auckland. Among its former members are two Queens Counsel, now Supreme Court Judges, one of whom is a Judge of the New Zealand Court of Appeal. Another former member was a senior Crown Counsel, later Assistant Commissioner of State Services, and now Secretary of Justice. Members include a former Senior Counsel to the Law Drafting Office a former Secretary of the Treasury, other senior Crown Counsel the Professor of Administrative Law at Victoria University and barristers in private practice. In its researches for the solution of a particular problem, it draws on knowledge of its members, mainly of the legal system in New Zealand and of other common law countries. It is a part-time Committee, which meets on one day a month. Its tenth Annual Report is to be issued shortly.

The writer's knowledge of the systems of administrative law in European countries is not extensive, and for some of the material that follows he has drawn upon citations in a research paper prepared by Mr E.J. Haughey, M.A., LL.M., B.Com., a former Crown Counsel in New Zealand.

In France, as set out earlier in the Paper, administrative jurisdiction is exercised by a system of separate and specialized courts. France is the model for several countries of Western Europe.

In West Germany (both in the Federal government and the lander) and in Switzerland, a strong legal control is exercised over the country's administration through special administrative courts (as in France). This is also the situation in Belgium to a less extent. In Italy, the Consiglio di

(p) A conspicuous instance is the Ministry of Works.

Stato is regarded as a pale reflection of the French Conseil d'Etat.

In Holland there is the Raad van Staate or Council of State, which functions as an Advisory Board to the Queen, but until recently, wide areas of central administrative activity were excluded from its control and, even where it had jurisdiction, its powers of inquisition were said to be inadequate. I understand from Dr Hoekema that there has recently been a new law which gives to the Council of State a real administrative jurisdiction and that in future this Advisory Board will have the final word, and not the Minister concerned, who previously has been able to put aside the advice of the State Council if his decision is attacked by an individual.

The countries of Scandinavia provide an interesting contrast among themselves. In Sweden and Finland the administration is subject to administrative courts, but to a very large extent free from control by the ordinary courts. In this respect, Sweden, and Finland even more so, resembles France. In Denmark (and Norway) however, the ordinary courts exercise review over administrative activity.

In Denmark, a party aggrieved by a final administrative decision may sue in the ordinary courts for its annulment or modification. If monetarily injured he may seek to recover damages from the State. An official who has abused his powers may be prosecuted before those courts which have power to pass upon the propriety of disciplinary sanctions including removal from office.

Thus, the Scandinavian countries are to be contrasted in two respects. In Sweden and Finland, acts of the administration are subject to administrative courts, but are largely immune from control by the ordinary courts; and in that regard they resemble France. In Denmark and Norway, acts of the administration are subject to the ordinary courts, and in that regard these latter countries resemble England. But over the last 40 years, the attitude of the Danish courts towards a number of fundamental principles of administration, has been influenced by the "jurisprudence" of the French Conseil d'Etat e.g. in such matters as the French doctrine of detournement de pouvoir, and the important question of compensation from the State for injury caused by administrative action.

It is perhaps within the scope of this Paper to note, what is perhaps widely known, that the institution of Ombudsman originated in Sweden and was developed there. In 1919, it was established in Finland. In 1955, Denmark created the institution though with considerable modifications. It was on the Danish model that New Zealand established its office in 1962. Since then, Ombudsmen have been appointed in a considerable number of countries. The office is valuable to investigate cases of bureaucratic mistakes and other complaints of administrative action. But the Ombudsman's power to remedy these is limited. If he cannot persuade the Department concerned to correct its action, he can only report to the Prime Minister and thereafter if he thinks fit to Parliament. Nevertheless, his office is today an indispensable institution and a host of minor grievances are remedied by his reports to Departments.

This brings us to consideration of one final matter. English administrative law has not developed as yet a remedy in damages for administrative wrongdoing. As earlier noted in this Paper, French law provides financial compensation for damage received through illegal or arbitrary action (recours de plein contentieux).

With regard to this remedy a French writer says

"In the 'recours de plein contentieux' the contender . . . can ask in particular for compensation for the damage caused through any fault of the administration. The administration may be obliged to take material action – to pay a pension, evacuate a property, correct irregular local elections, etc. It is regarded to be at fault not only when illegal action has been taken; tardiness, inefficiency or negligence can cause sufficient harm for compensation as allowed. This is the way of appeal open to the civil servant who has unfairly lost his office, to the patient who has suffered from mismanagement in the public hospitals, to the citizen who has suffered an accident or damage from any public construction, etc. It would be impossible to make out an exhaustive list of the situations in which such compensation might be allowed. The administrative courts were for a time criticized as being too strictly economical of public funds in dealing with these complaints; but this tendency has been completely reversed in the last five years or so, and very large sums are paid out to provide adequate compensation for the most varied damages".

In English and American law there is need for the development of a comprehensive and satisfactory body of rules and principles relating to the recovery of damages for administrative wrongdoing. Until this redress is available justice is denied to many citizens.

Examination time – From an answer to a question about the Unit Titles Act 1972 in a Land Law paper: "Mortgagees don't favour it if a building is burnt down. They can recoup from the insurance money. They get nothing for the block of air".

CONSTITUTIONAL LAW

HABEAS CORPUS AND THE STATELESS PERSON

Immigration legislation generally empowers the detention and deportation of illegal immigrants. Does that power justify indefinite detention in a case where no country can be found to take the detained person? That was the question asked by Lui Ah Yong who after nine years of detention sought a writ of habeas corpus for his immediate release from Penang Prison. The following judgment was delivered by the HONOURABLE MR JUSTICE ARULANANDOM, *High Court in Malaya in the case of Lui Ah Yong v Superintendent of Prisons, Penang (Originating Motion No 22 of 1975: Judgment delivered 1 December 1975).*

"Something is rotten in the State of Denmark". These words were uttered by Marcellus in Shakespeare's Hamlet after the ghost of Hamlet's father appears to Hamlet and beckons Hamlet to follow it, and Hamlet follows. Marcellus uses these words not so much in condemnation but more in frustration and bewilderment.

In the case before me the applicant Lui Ah Yong seeks a writ of habeas corpus for his immediate release from the Penang Prison. The undisputed facts before this Court are as follows:

About 22 May 1967 the applicant was arrested and detained by the police for illegal entry into the Federation from China. On 24 August 1967 he was charged in the Magistrate's Court Sitiawan for an offence under s 6 (1) of the Immigration Ordinance 12/59 – namely for entering the country illegally. He pleaded guilty to the charge and was sentenced to two months imprisonment. On the same day he was also charged with using a forged blue identity card. He pleaded guilty to the charge also and was sentenced to three months imprisonment.

On 25 November 1967 the Controller of Immigration issued an Order of Removal under s 56 (2) of the Immigration Ordinance.

Section 56 (2) of the Immigration Ordinance reads as follows:

> "Any person unlawfully entering or re-entering or attempting unlawfully to enter or re-enter the Federation or unlawfully remaining in the Federation shall whether or not any proceedings are taken against him in respect of such offences be liable to be removed from the Federation by order of the Controller".

On the same day the Controller also issued an Order of Detention under the powers vested in him under s 34 (1) of the Immigration Ordinance which reads as follows:

> "34 (1) Where any person is ordered to be removed from the Federation under the provisions of this Ordinance, it shall be lawful for the Controller to order such person to be detained in custody for such period as may be necessary for the purpose of making arrangements for his removal:
>
> "Provided that any person detained under this subsection who appeals under the provisions of subsection (2) of section 33 against the order of removal may, in the discretion of the Controller, be released, pending the determination of his appeal, on such conditions as to furnishing security or otherwise as the Controller may deem fit".

(Section 33 has no application to this case as the Order of Removal was made under s 56).

Since that date the applicant has been in custody for a period which now nearly amounts to about nine years.

There are several grounds advanced by the applicant in order to establish that his detention was illegal, viz that he had been arrested and detained without trial and that he did not know why he was detained but during the course of argument and as a result of evidence being adduced, counsel for the applicant conceded that the applicant had been tried in Court for the two offences mentioned before and that his detention was as a result of the order of removal made under s 56 (2) of the Immigration Ordinance.

But the most serious argument advanced by Counsel was that s 34 (1) of the Immigration Ordinance was not intended for the purpose of detaining a person indefinitely and the inordinate length of detention made the detention illegal.

Referring to the first limb of his argument one must concede that by no stretch of the imagination could it be held that the powers of detention given in s 34 (1) of the ordinance were intended to be or even, contemplated as powers to detain a person indefinitely in prison. If it were so it would be totally unjust and oppressive and would go far beyond the severest provisions for detention contained in our penal

laws which provide for definite periods of imprisonment or at least for regular reviews of the case where detention is indefinite. And in the case of sentences of imprisonment even a person sentenced to life imprisonment under the Penal Code usually serves only about 13 years.

The second limb of the argument merits greater consideration, ie whether a detention which at its inception was legal could become illegal as a result of passage of time or for other reasons. The answer to this question will necessarily determine the result of this application.

The application is for a writ of habeas corpus. *Wharton's Law Lexicon* defines habeas corpus as follows:

> "This, the most celebrated prerogative writ in the English Law, is a remedy for a person deprived of his liberty. It is addressed to him who detains another in custody, and commands him to produce the body, with the day and cause of his caption and detention and to do, submit to, and receive whatever the Judge or Court shall consider in that behalf".

Learned senior federal counsel has submitted to me that if the order of removal and the order of detention were lawful and valid, no Court should interfere and a writ of habeas corpus seeking an order nisi and an order absolute should not be entertained.

The only case cited to me in respect of an order of removal and order of detention under s 34 (1) of the Immigration Ordinance was the case of *Ex parte Johannes Choeldi and Ors* (1960) MLJ 184 where Rigby J released the applicants on the ground that the application in matters which concerned their personal liberty were entitled to avail themselves of any technical defects which may invalidate the order which deprived them of that liberty.

In the instant case from the admitted facts the applicant was convicted under s 6 (1) of the Immigration Ordinance on his own plea of guilt of entering the country unlawfully. In that event the order of removal under s 56 (2) of the Immigration Ordinance was a lawful and valid order and there are no technical defects in the order – in fact it follows the standard form used in all orders.

On the strength of the order of removal, the order of detention was issued. In view of what I shall say later, it is necessary to consider the terms of the whole order. It reads as follows:

"To:

LUI AH YONG a/k LUI KOK (1929)

"Whereas an order has been made for your removal from the Federation under s 56 (2) of the Immigration Ordinance, 1959.

"And whereas your detention is considered necessary until arrangements can be made for your return to your place of embarkation or country of citizenship.

"Now know you that, I, Lim Hock Chuan, Controller of Immigration, States of Malaya, by virtue of the powers vested in me under subsection (1) of section 34 of the said Ordinance, do hereby order that you be detained in Penang Prison.

"Dated at KUALA LUMPUR this 25th day of November, 1967.

Sgd Lim Hock Chuan
Controller of Immigration,
States of Malaya".

Now s 34 (1) empowers the Director-General (Controller in the earlier Ordinance) to order a person to be detained in custody for such period as may be necessary for the purpose of making arrangements for the person's removal from the Federation.

Hence it is not an order of detention per se, ie it is not an order of detention for the sake of detention for the purpose of punishment, security or national interest. The detention is not an end in itself but purely a means to an end, ie to detain the person for the purpose of removing him from the Federation. Hence as a consequential order to the order of removal, it is a perfectly valid order and cannot be considered unlawful. But that was in 1967.

Today in 1975 the Court is asked to decide on whether the continued detention of the applicant is lawful. Eight years have slipped by while the applicant has been deprived of his liberty and has languished in prison – not for any offence he has committed because he has already served two months imprisonment for entering the country illegally but he has been detained for administrative expediency.

The Deputy Director of Immigration Encik Mohd Noor b Ahmad in his affidavit in reply to the application has this to say in justification of the continued detention of the applicant:

> "Several arrangements have been made to remove the applicant to a country outside Malaysia but are all in vain as no country so far contacted was prepared to accept the applicant. Arrangements to remove the applicant is still in progress".

This, to say the least, discloses a most scandalous state of affairs and does not bring any credit to the administration. A man has been incar-

cerated for the ostensible purpose of deportation and nine years later the Court is told, and even that as a result of a writ of habeas corpus being filed, that arrangements to remove him are still in progress. The word progress must surely be used euphemistically. Progress is defined in the *Oxford Dictionary* as advance, continuous improvement. And here after a passage of nine years during which the authorities have not succeeded in putting a man on a ship, or a plane or even a bullock cart to take him away from the country, it is said that arrangements are in progress. During this period of time space has been conquered, kingdoms have been lost and won and man has even visited the moon and come back. And yet this unfortunate human being unknown to the rest of the world has been deprived of his liberty and held in a prison, while I quote "Arrangements are still in progress to remove him from the Federation". It is true that the subject matter is a human being and unlike smuggled goods or prohibited imports, he cannot be destroyed by burning or dumped into the sea. But the least one could have expected in a just society would have been for the authorities, when they were faced with problems of deportation, to consider alternate ways of keeping track of him so that when the order of removal was ready to be executed, he could be removed without him having to languish in prison for nine years or even longer.

Now to come back to the law.

The order of detention states in para 2 that the detention of the applicant was considered necessary until arrangements could be made for his return to the applicant's place of embarkation or country of citizenship.

It is undisputed that the applicant's place of embarkation was China and from the Bar, the learned senior federal counsel admitted that China had refused to receive the applicant.

The citizenship of the applicant is not established. It is conceded by the Deputy Assistant Director of Immigration in his affidavit that the applicant was born in this country and it is also conceded by senior federal counsel that the applicant was in possession of a red Identity Card No PK324481 issued at Sitiawan on 13 December 1948. With the citizenship of the applicant in a questionable state it is impossible to determine which country of his citizenship the authorities have been trying to deport the applicant to. From the evidence before the Court it would appear that at the present time the applicant is not a citizen of any country especially since China seems to have abandoned the doctrine of jus saguine which in earlier days made a Chinese a citizen of China irrespective of the place of birth.

In view of this it is quite obvious that the authorities have exhausted all avenues and are unable to remove the applicant to his place of embarkation or his country of citizenship.

The powers of detention under s 34 (1) are clearly and unambiguously limited to detention for the purposes of removal to one of two places, ie the place of embarkation or country of citizenship and therefore the moment the detaining authorities have failed or found themselves in a position where the object of detention cannot be fulfilled, then it cannot be argued that further detention remains lawful. The purpose of the detention having been frustrated, continued detention a fortiori becomes unlawful.

The intention of the Legislature in enacting s 34 (1) of the Immigration Ordinance was certainly not to justify detention for life or for an interminable period. It is a rule of construction of statutes which have penal effects that they should be construed strictly and in favour of the liberty of the subject. Any form of detention does violence to Article 5 of the Constitution and hence powers given by law must be construed not only strictly but where occasion merits should lean in favour of and with mercy to the subject. See *Chye Chong & Ors v PP* (1975) 1 MLJ 215 and *Musa bin Salleh v PP* (1973) 1 MLJ 167. I do not need any authority or need to cite any precedent when I enunciate that the provisions of any statute, be they penal or otherwise are not intended to be cruel, oppressive or inhuman. In considering the provisions by analogy with the Banishment Act, it is to be noted that s 7 (1) of the Banishment Act empowers the Minister to suspend the order and release the banishee on his entering into a bond with or without surety and subject to any conditions as may be specified in the order. Similarly under s 8 of the Act when an expulsion order is made the minister may impose such conditions as he may think fit as to residence, occupation or conduct to police supervision, etc., which shall be observed by the person affected by the order while he remains in Malaysia. From the tenor of these provisions it is abundantly clear that s 34 (1) of the ordinance only contemplated removal of the person affected from Malaysia within a reasonable time required for putting into effect the removal order and not for detaining a person indefinitely and arbitrarily.

In this case the applicant has a wife who is a Malaysian citizen and resident in Sitiawan with his four children. The object of the order of removal cannot be frustrated by his being released from detention to the care of his wife and being put on a bond with a surety to attend on the Director-General of Immigration when he has completed, I repeat, completed all arrange-

ments and is ready to put the applicant on board a plane or a ship to be taken to a certain destination where he will be received. I say this because it would be just as cruel and inhuman to put him on a carrier which takes him to and from Malaysia and another country which will not receive him and thus only substitute a mobile place of detention instead of the present localised one.

I therefore order that the applicant be forthwith released from detention. I further order that the applicant enter into a bond in the sum of $1,000 with one surety, the condition of the bond being that he would reside in Sitiawan with his wife Loy Lang Chor at 14 Simpang Dua New Village, Sitiawan, Perak and surrender himself to the Director-General of Immigration when called up to do so for the purpose of being put on a ship or plane to be taken to a country prepared to receive him.

INDUSTRIAL LAW

LAW PRACTITIONERS AS PARTIES TO INDUSTRIAL ARBITRATION

By A SZAKATS, *Professor of Law, Otago University*

White collar unions (if this expression can be regarded as proper in the present fashion of coloured shirts) have been accepted long ago in overseas countries by professional and scientific, as well as clerical, employees as organisations for their protection, but in New Zealand some persons in these groups apparently still regard union membership as beyond the pale. A recent decision of the Supreme Court, *Calvert v Industrial Court and Otago Clerical Workers I.U.W.* (unrep, SC Dund, 21 Sept 1977 M.167/75), in an application for review, throws revealing light on this unreasonable attitude.

The applicant, an employee of a firm of solicitors, refused to join the union despite several requests. His employment was subject to the Wellington, Marlborough, Westland and Otago and Southland Law Practitioners Collective Agreement which contained an unqualified preference provision. The effect of such a clause is that any adult person employed by an employer bound by the agreement and in a position subject to it must become and remain a member of the union while so employed, otherwise both he and the employer commit a breach of award: Industrial Relations Act 1973, ss.98 and 103. Upon action commenced by the union secretary the Industrial Court exercising its jurisdiction under ss 144, 147 and 151 of the Act found the breach proved and imposed a penalty. In the review hearing (which the Supreme Court heard in its ordinary jurisdiction) the applicant deposed that the validity of the Law Practitioners' Collective Agreement had been challenged in the Industrial Court, but the basis of the challenge did not emerge, and in any case it was not relied on. Roper J remarked that "[t]he bases on which Mr Calvert [sought] to set aside the Industrial Court's decision [were] not at all that clear," and he endeavoured to summarise the grounds under three headings:

(1) Proceedings before the Industrial Court were of penal nature requiring proof beyond reasonable doubt, and the Court had not proceeded in accord with the rules of natural justice in deciding on the proof.

(2) There was no obligation on Mr Calvert to join the union, as it was in breach of its duty under s.180 of the Act to supply a copy of its rules.

(3) No award or collective agreement to which law practitioners are parties can legally be made, as practising barristers or solicitors are not permitted "to appear or be heard" before the Industrial Commission in arbitration proceedings, and there is no procedure in the Act for an award being made without both parties being present.

No appeal lies against a decision of the Industrial Court. Its decisions may be challenged only on the ground of lack of jurisdiction (s. 47 (6) of the Act), but it appears that the applicant tried to broaden the review into an appeal on the merits of the case. Roper J. very properly restricted the inquiry to the question whether the Industrial Court had exceeded its jurisdiction and had failed to act in accord with natural justice.

The allegations as to infringement of natural justice were rather feeble. The applicant contended that the Industrial Court had no proof of any award or collective agreement binding on him and containing the unqualified preference clause, or of the Union rules. It was not argued that pursuant to s.87 of the Act production of an official printed copy would have been sufficient proof, but as

the union pointed out, though the copies had been available, the applicant had never required formal proof. Indeed the existence of the agreement with the preference clause had been common ground. The learned Judge could find "no basis in law" for the proposition that as he had not been supplied with a copy of the union rules Mr Calvert was therefore not subject to the collective agreement. His Honour pointed out the irrelevance of the rules in this respect, as they did not refer to unqualified preference, nor did s.103 make their supply a condition precedent to a defaulting worker being "deemed" to have committed a breach.

The existence of the employment relationship in the sense of there being a contract of service between the applicant and the firm of solicitors was not denied. Had he been an independent contractor or a partner he could have validly claimed non-applicability of the agreement. A salaried "junior partner" may, nevertheless, be an employee at the same time. The Judicial Committee held in *Lee v Lee's Air Farming Ltd* [1961] N.Z.L.R. 325, P.C. that Mr Lee's directorship in the company "[was] no impediment to his entering into a contract to serve the company." The Industrial Court while recognising this principle in *Taranaki Shop Assistants Union v Dunbar Cash Stores Ltd* (1975) B.A. 4515 on the evidence before it arrived at the conclusion that the two shareholders and directors of the company were not employees, and therefore not required to join the union. In *Rona Print Ltd v N.Z. Printing and Related Trades I.U.W.* (1975) 75 B.A. 5923, however, on the basis of the facts the same Court held that a director who also drew weekly wages was a "worker" and had to become a member of the union. It may be argued that in the case of a partnership there is no corporate personality distinct from the physical person of a shareholder-employee and therefore the former cannot employ the latter. This is true, but if a salaried "partner" has been given merely a titular admission into the partnership, his real position remains that of an employee employed by the senior, the "real" partners.

This question cannot now arise as pursuant to s.112A of the Act (as inserted by s.17 of the Industrial Relations Amendment Act 1976 (No. 2) and Schedule 1A (inserted likewise) the holder of a practising certificate under the Law Practitioners Act 1955 is exempt from union membership. At the time relevant to the case in review the amendment was not in force. Further, Mr Calvert was not qualified to be admitted as a barrister and solicitor. The proper way for him would have been to resort to the conscientious objection procedure under ss.105–112 of the Act, provided he were able to prove a sincere and honest "conscientious belief".

The third point, the alleged inability of barristers and solicitors to enter into a legally binding collective instrument was dismissed rather briefly, but in a most logical way. The relevant provision of the Act, s.30 (4), is obviously aimed at restricting representation of any party to arbitration proceedings by a legal practitioner, but not at excluding barristers and solicitors as employer parties to arbitration, or for that matter conciliation, proceedings. Although the subsection bars practitioners even when acting under a power of attorney, it is clear that this applies to them merely in their representative capacity. Barring them as parties would render collective wage settlement for employees in law offices impossible, unless a person not holding a practising certificate appeared for the employers. Such a view obviously would be illogical and contrary to the right of parties to appear personally (s.30 (1)). Roper J. correctly concluded that "consent" in terms of s.30 (4) "could not be withheld if the arbritration hearing was to proceed in accord with the principles of natural justice."

Many a suspect does not even know the name of a solicitor let alone how to contact him out of hours. Even if he does, that solicitor may be away ill, over the top with alcohol or perhaps disenchanted with this particular client – *New Law Journal.*

In a television interview after Norwich [football match] the manager of Manchester United, when asked his views on violence, said that he was a "strong believer in capital punishment" (it transpired that he thought that this meant birching) – *The Economist.*

At one point during the 5,000 hours of conversation and soliloquy recorded in the Oral Office, he [Ex-President Nixon] dismisssed its [the US Supreme Court] nine judges "clowns". Now that he wants the tapes and 42m pages of documents returned, his lawyers are being more careful – *The Economist.*

A woman was killed as she took a late night walk to help her to sleep because her attacker thought she was his wife – *The Times.*

The perk that raised a wry laugh recently came from Scotland, where the Dundonian company who used to be called the Dundee Crematorium offer to give every shareholder a free funeral or cremation if he owns 500 shares or more – *The Scotsman.*