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REGINA

v.

MINISTER OF FINANCE

EX PARTE BRIJ BHUSHAN

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[SUPREME COURT, 1977 (Kermode J.), 2nd December]

Appelate Jurisdiction

Insurance—licence to carry on business as insurance agent—refusal by Commissioner of Insurance to grant a licence—subsequent appeal to Minister of Finance—dismissal of appeal by Minister without the appellant being given opportunity to appear and present his case—whether breach of natural justice—Insurance Act 1976 *ss.* 59, 60 (1) (2), 61 (1), 73 (1) (3) (4) (5)—*Immigration Act* 1971 *s.* 18 (1)—0.55—*Interpretation Act* 1967 *s.* 31—*Insurance Agents & Brokers Act* 1972—*Rules of the Supreme Court* 1968 0.2, 0.55 *rs.* 3 (1), 6 (3), 7 (5). C

Natural justice—insurance—licence to carry on business as insurance agent—refusal by Commissioner of Insurance to grant a licence—subsequent appeal to Minister of Finance—dismissal of appeal by Minister without the appellant being given opportunity to appear and present his case—whether breach of natural justice—Insurance Act 1976 *ss.* 59, 60 (1) (2), 61 (1), 73 (1) (3) (4) (5)—*Immigration Act* 1971 *s.* 18 (1)—Rules of the Supreme Court 1968 0.2, 0.55 *rs.* 3 (1), 6 (3), 7 (5). D

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Under the Insurance Act 1976, it became necessary for the appellant to reapply for a licence to practise as an insurance agent. This application was refused by the Commissioner of Insurance on the grounds of alleged misconduct. The appellant submitted a petition of appeal supported by documents to the Minister and asked for a personal hearing which was refused. The Commissioner's decision was upheld. The appellant contended that such a refusal to grant him a personal hearing F amounted to a breach of natural justice and sought an order of mandamus directing the Minister to hear and determine the appeal according to law.

Held: 1. Fair and proper procedural standards must be observed where deprivation of or encroachment on a legally recognised interest is consequential on a finding of misconduct. In such circumstances the principle *audi alteram partem* must apply, and the failure of the Minister to grant the appellant a hearing was a G breach of natural justice.

2. It was not possible for the court to revoke the Commissioner's decision and grant the licence as this was in the discretion of the Minister, and the court could not usurp this function.

Per curiam: A 'hearing' may not necessarily be an oral hearing and it can H include the making of written representations. Insurance Act *s.* 73 (1) makes no reference to any hearing, but if a person is entitled to protection of the *audi alteram partem* rule, he is *prima facie* entitled to put his case orally.

Cases referred to:

A *Hardayal Singh In re* Civil action 80 of 1977 (unreported).
Durayappah v. Fernando [1967] A.C. 337; [1967] 2 All E.R. 152.
Cooper v. Wandworth Board of Works [1863] 143 E.R. 414; 14 C.B.N.S. 180.
Pergamon Press Ltd. In re 1971 Ch. 388.
R. v. Gamming Board for Great Britain ex parte Benaim & Khaida [1970] 2 Q.B. 417.
B *R. v. St. Mary Abbotts Assessment Committee* [1891] 1 Q.B. 378.
R. v. Kingston J.J.s exparte Davey (1902) 86 L.T. 589.

Appeal against the decision of the Minister of Finance upholding a decision of the Commissioner of Insurance in refusing to issue an Insurance Agent's Licence to the appellant.

S. M. Koya **for the appellant.**
C ***J. Flower*** **for the respondent.**

KERMODE J.: [2nd December 1977]—

This is an appeal by the appellant under section 73(4) of the Insurance Act No. 36 of 1976 against the decision of the Minister of Finance on an appeal to the Minister under secton 73 (1) of the Act, upholding the decision of the Commissioner of D Insurance in refusing to issue a licence to the appellant pursuant to an application made by him under section 59 of the Act.

An appeal lies to the court by a person aggrieved by a decision of the Minister, if it involves a question of law, with leave of the court.

The appellant moved this Court ex parte on the 10th June 1977 for leave to appeal and leave was granted.

E **Both counsel at the hearing indicated that they had experienced difficulty in connection with the procedure to be followed on the hearing of this appeal. Subsection (5) of section 73 of the Act provides that the Chief Justice may make rules for regulating the practice and procedure in connection with an appeal under subsection (4). To date no rules have been made by the Chief Justice.**

F Until rules are made by the Chief Justice Order 55, Rules of the Supreme Court have application subject to any procedural provisions made by the Act. Subsection (4) of section 73 of the Act, which limits an appeal to this court to questions of law only, restricts the full application of Order 55.

Under Order 55 rule 3 (1) an appeal must be brought by originating motion and notice of such motion must state the grounds of appeal. The appellant filed a notice G of motion on the 15th day of June 1977 seeking a number of orders, in particular directions as to the practice and procedure to be followed, and on the same day filed a notice of appeal setting out the orders sought and the grounds of appeal.

The notice of motion filed by the appellant was not an originating motion as required by Order 55 rule 3 (1).

This motion was heard by Mishra J. on the 28th June 1977 who referred in his rul-H ing to the fact that Mr Koya had conceded that the facts stated in the appellant's petition of 6th June 1977 filed in support of the appellant's application for leave to appeal unless denied, were sufficient for the determination of the issues of law raised by the grounds of appeal. Mishra J. directed that the appellant within 7 days

of the date of the ruling file an affidavit in support of his appeal alleging any additional facts that he might wish to rely on and leave was given to refer to facts outlined in the petition dated 6th June 1977. A

The respondent was at liberty to file an affidavit in reply within 7 days after service upon him of the appellant's affidavit.

No affidavit in reply was filed by the respondent. Mr Flower for the respondent, however explained that he did not consider an affidavit by the respondent was necessary and that the respondent would present his argument in answer to the appellant's argument based on the grounds of appeal. B

Mishra J. did refer to Order 55, Rules of the Supreme Court but considered it was not necessary to determine to what extent the order applied to this appeal in view of the directions he had given in his ruling.

The foregoing recital indicates that there has been some confusion and misunderstanding as to the procedure to be followed in relation to this appeal. C

Subsection (5) of section 73 of the Act is enabling and permissive and the fact that the Chief Justice has not made any rules must be taken to indicate that he considers Order 55, Rules of the Supreme Court already provide adequate rules for regulating the practice and procedure in connection with appeals of the nature of this appeal. D

Order 55 has not been strictly complied with but this in my view is merely an irregularity and does not nullify the proceedings. (Order 2, Rules of the Supreme Court.)

There is before the court a petition of appeal containing all the facts the appellant relies on together with the notice of appeal to which I have already referred. During the hearing two letters were admitted by consent. E

Order 55 rule 6 (3) gives the court wide powers to amend the grounds of appeal or to make any other order to ensure determination on the merits of the real question in controversy between the parties. These powers are enlarged by rule 7 of Order 55. Recourse was not necessary to such additional powers at the hearing because in my view there is before the court sufficient facts on which to decide whether or not the Minister had erred in law in dismissing the appellant's appeal. F

The facts, which are not disputed, are that the appellant duly applied under the provisions of section 59 of the Insurance Act for a licence to carry on his business as an insurance agent. He had previously held an agent's licence granted to him under the Insurance Agents and Brokers Act 1972 which was unlimited as to time. This Act was repealed by the Insurance Act 1976 necessitating the appellant seeking a licence under that Act to enable him to continue in business as an insurance agent. G

Subsections (1) and (2) of section 60 of the Insurance Act provides as follows:

"60.—(1) Where the Commissioner is satisfied on an application under section 59 that—

(*a*) the applicant has sufficient experience in and knowledge of insurance matters; H

(*b*) the financial standing and general character of management of the applicant are sound; and

A (c) it is otherwise in the public interest that a licence or a renewal thereof should be granted to the applicant,

he may, subject to such terms and conditions as he may consider necessary and subject to the other provisions of this Act, issue to him a licence, or a renewal thereof, to expire on the 31st day of December of the year in respect of which it is issued.

B Provided that no application for the renewal of a licence shall be made more than one year from the date of the expiration of that licence.

(2) Where the Commissioner refuses to issue a licence or a renewal thereof, he shall record the reasons for such decision and shall furnish a copy thereof to the applicant."

C In my view the word "may" in subsection (1) of section 60 has the force of "shall" if the applicant has fully complied with section 59 and the Commissioner is satisfied about the three matters (a) to (c) inclusive however impose terms or conditions when issuing a licence.

D Where an application is refused by the Commissioner he must record the reasons for his decision and furnish a copy to the applicant. To comply with subsection (2) the Commissioner must record *all* the reasons for refusing to grant a licence. The Commissioner complied with subsection (2) and wrote to the appellant in the following terms:

" *re: Application for Licence*

E With reference to your application dated 7th January 1977, I regret to inform you that I am unable to issue you with a licence in terms of section 58 of the Insurance Act No. 35 of 1976.

In terms of section 60 (2) of the Insurance Act of 1976 the reasons for my decision are as follows:

F It was alleged by your former principal, the Colonial Mutual Life Assurance Society, that your services were terminated on account of gross misdemeanours. In particular, it was alleged that you had obtained the signatures of one Aisea Masivesi and one Samisoni Moroka on blank forms, including blank medical examination forms. From the available evidence it appears that you were responsible for or assisted in procuring or preparing and submitting false medical reports in respect of proposals made by the said Masivesi and Moroka when in fact such medical examinations had not taken place.

G In the circumstances, I am not satisfied in terms of section 60 (1) (c) of the Insurance Act of 1976 that it would be in the public interest to issue you with the licence applied for."

H From the Commissioner's decision the appellant appealed to the Minister and complained (*inter alia*) that the Commissioner acted in breach of the rules of natural justice in refusing to issue the licence.

In his petition of appeal to the Minister the appellent set out the grounds on which he relied and submitted with the petition a number of documents. In his

petition he disclosed to the Minister his intention to make oral submissions and lead evidence in support of his appeal. This was followed by a telephone call by Mr Koya, acting for the appellant, on the 30th May 1977 to the Minister asking the Minister whether he would fix a date and place for hearing of the appeal and hear submissions from counsel. Mr Koya was advised by the Minister that he had no intention so to do but that as soon as his investigations and consultations were completed he would give his decision. A

The Minister's decision was conveyed to Messrs. Koya and Company by letter dated the 2nd June 1977 written by the Permanent Secretary for Finance in the following terms: B

" *Appeal by Mr Brij Bhushan Lal*

With reference to your Petition of Appeal dated the 20th of May 1977, I am directed to inform you that the Minister has carefully considered the averments in your Petition of Appeal but regrets his inability to accede to your request that the decision of the Commissioner of Insurance be revoked. In terms of section 73(1) of the Insurance Act of 1976, the Minister upholds the decision of the Commissioner of Insurance refusing to grant a licence to Mr Brij Bhushan Lal. C D

The Minister is satisfied that on the available evidence including the information and explanations made available by and on behalf of Mr Brij Bhushan Lal that he was guilty of such misconduct as would make it proper and necessary in the public interest to refuse him a licence to act as an insurance agent. E

With reference to your letter of May 27th, I am to inform you that the Minister will not be exercising the powers vested in him by section 31 of the Interpretation Act."

From that decision the appellant has appealed to this court on questions of law. There are 10 grounds alleging the Minister erred in law which I do not propose to set out in this judgment. F

The only ground I need to consider is the fourth ground which states:

"The Respondent erred in law in not giving your Petitioner any opportunity to argue and make submissions or lead evidence in support of his said appeal."

Before considering that ground of appeal it is necessary to consider section 73 (1) of the Act which reads as follows: G

"73 (1) Subject to the provisions of subsection (2), a person aggrieved by a decision of the Commissioner under this Act may within one month from the date on which the decision is intimated to him, appeal therefrom by petition in writing to the Minister who may, in his discretion, uphold or revoke such decision." H

Other than the fact that the appeal is by way of petition in writing the Act is silent as to the procedure to be followed by the Minister in considering the appeal.

A The Minister is not empowered by the Act to grant a licence but he has a discretion either to uphold or revoke the Commissioner's decision. If he revokes the decision the Commissioner would no doubt be directed to issue the licence and would do so. If the Minister has not erred in law, under section 73 (3) of the Act his decision is final and conclusive.

B The Minister did consider the appeal and made a decision upholding the Commissioner's decision but the appellant complains (*inter alia*) that there was a denial of natural justice in that the appellant was given no opportunity to be heard on his appeal.

C It can be assumed in the absence of any denial by the respondent that the Minister did, as he advised Mr Koya he intended doing, carry out investigations and had consultations before coming to his decision and it appears such investigations and consultations were conducted privately. The appellant was not advised of any matters detrimental to his interests or given any opportunity to answer or refute prejudicial allegations made against him before a decision was made by the Minister.

D It is clear from section 73(1) of the Act that the Minister was constituted an appellate tribunal to consider the appeal on its merits, and there was therefore an obligation on him to act in a judicial manner. It is clear also, as I have stated, that the Minister did consider the appeal and make a decision but the appellant contends the Minister erred in law in not hearing the appeal in the sense that the appellant was given no opportunity to present his case orally.

E Mr Flower for the respondent referred to Civil Action No. 80 of 1977 in *re Hardayal Singh* in which case Stuart J. held that the applicant had no right to appear face to face with the Minister on an appeal to the Minister under section 18(1) of the Immigration Act 1971. That section is similar to section 73(1) of the Insurance Act except that under the Immigration Act the Minister is given power to vary an immigration officer's decision. There is no appeal from the Minister's decision under the Immigration Act as there is under section 73 of the Insurance Act.

F In *Hardayal Singh's* case the learned judge was still concerned to see whether the applicant had been fairly treated and he held on the evidence before him that there had been no unfairness on the part of the Minister.

In *Hardayal Singh's* case the issue was whether he as an alien should be permitted to remain in Fiji and on that issue the Minister clearly had a discretion whether to permit him to remain in Fiji.

G *Hardayal Singh's* case was one of those cases in which courts do not normally afford any procedural protection and application of the *audi alteram partem* rule. That rule is one of the principles of natural justice and recognises that parties must be given adequate notice and opportunity to be heard.

S.A. de Smith in *Judicial Review of Administrative Action* 3rd Edition at page 326 states:

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> "Since appeal is the creature of statute, the exclusion of a non-existent right of appeal to the courts is otiose. There appears to be no reported case on the exercise of the Secretary of State's

> discretion under section 26. Comment on the inherent powers of review enjoyed by the courts must therefore be speculative. But their past attitude towards his powers to exclude and deport aliens is probably relevant. That attitude has been characterised by extreme self-restraint, although his power has not been expressly protected against judicial review. There is always the possibility that a court might be ready to intervene if an outrageous abuse of powers were to be perpetrated by the Secretary of State in refusing a certificate of naturalisation or registration; and if it could be demonstrated that he had refused to consider an application on its merits, mandamus might yet issue. But one can predict that the case would have to be one that clamoured for judicial redress."

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Different considerations apply in the instant case where there is a statutory right of appeal to a Court. Here we have a case where an insurance agent previously licensed under another Act sought a licence which was refused. Coupled with the refusal to grant the appellant a licence, thus enabling him to continue his business of many years standing, were accusations of gross misconduct by the Commissioner of Insurance which in the Minister's decision becomes a statement that "he was guilty of such misconduct as would make it proper and necessary in the public interest to refuse him a licence to act as an insurance agent."

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S.A. de Smith in *Judicial Review of Administrative Action* at page 158 where he discusses natural justice—right to a hearing says:

> "The Courts will be particularly ready to hold that fair procedural standards must be observed where deprivation of or encroachment on a legally recognised interest is consequential on a finding of misconduct or (in some situations) incompetence, or where the action taken or to be taken involves making an accusation or otherwise casting an aspersion on another's reputation ....
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> The more severe the penalty, imposition, deprivation, encroachment or slur, the more likely is it that the courts will apply the *audi alteram partem* rule."

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In a note to this quotation the learned author states:

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> "This elementary point emerges from numerous cases on licensing ...."

The Minister's reason for upholding the Commissioner go a long way further than a mere accusation, it is a statement of fact that the appellant had been guilty of such misconduct as to make it proper and necessary in the public interest to refuse a licence. No opportunity was given to the appellant by the Minister to be heard in answer to the allegations levelled against him either orally or by written representations. At page 159 Professor Smith states:

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> "One can also imagine situations where the criteria for granting a licence are so clearly delineated, or the unfairness of the summary refusal of a licence or the summary award of a licence to a competitor will be so manifest (e.g. because the worthiness of the applicant rather than the availability of resources is the dominant factor

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> shaping a decision), that it will be right for a court to hold that the deciding body is under an implied duty to give an applicant an opportunity of being heard and of being apprised of all information on which the decision may be founded."

There is no doubt in my mind that in this case the *audi alteram partem* rule applies.

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In Alfred Thangarajah Durayappah of Chundikuly, Mayor of Jaffna v. W. J. Fernando and Others [1967] A.C. 337 the Privky Council considered an appeal in which it was alleged that there was a denial of natural justice where there was ministerial exercise of power dissolving a municipal council.

At page 348 of the report there appears this passage:

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> "Upon the question of *audi alteram partem* the Supreme Court followed and agreed with the earlier decision of *Sugathadas v. Jayasinghe,* a decision of three judges of the Supreme Court upon the same section and upon the same issue, namely, whether a council was not competent to perform its duties. That decision laid down
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> > "as a general rule that words such as 'where it appears to .....' or 'if it appears to the satisfaction of .....' or 'if the ..... considers it expedient that .....' or 'if the ..... is satisfied that .....' standing by themselves without other words or circumstances of qualification, exclude a duty to act judicially."
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> Their Lordships disagree with this approach. These various formulae are introductory of the matter to be considered and are given little guidance upon the question of *audi alteram partem*. The statute can make itself clear upon this point and if it does *cadit quaestio*. If it does not then the principle stated by Byles J. in *Cooper v. Wandsworth Board of Works* must be applied. He said:
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> > "A long course of decisions, beginning with Dr. Bentley's case, and ending with some very recent cases, establish, that, although there are no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the ommission of the legislature." "

At pages 350 and 351 appears this passage:

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> "While their Lordships are only concerned with the question of incompetence, the true construction of the section must be considered as a whole and its necessary intendment in the light of the common law principles already stated.
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> It seems clear to their Lordships that it is a most serious charge to allege that the council, entrusted with these very important duties, persistently makes default in the performance of any duty or duties imposed upon it. No authority is required to support the view that in such circumstances it is plain and obvious that the principle *audi alteram partem* must apply.

> Equally it is clear that if a council is alleged persistently to refuse or neglect to comply with a provision of law it must be entitled (as a matter of the most elementary justice) to be heard in its defence. Again this proposition requires no authority to support it."

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That case was concerned with alleged incompetence of a municipal council. The instant case is a much stronger case in that it is concerned with allegations of gross misconduct.

In *re Pergamon Press Ltd.* [1971] Ch. D. 388 Lord Denning M.R. at pages 399 and 400 said:

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> "Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, not quasi-judicial, but only administrative: see *Reg. v. Gaming Board for Great Britain, Ex parte Benaim and Khaida* [1970] 2 Q.B. 417. The inspectors can obtain information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him. They need not quote chapter and verse. An outline of the charge will usually suffice."

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In my view the Minister should have granted the appellant a hearing and his failure to do so was a denial of natural justice.

A 'hearing' may not necessarily be an oral hearing and it can include the making of written representations.

Section 73(1) of the Act makes no reference to any hearing and in the absence of any clear statutory guidance on the matter if a person is entitled to the protection of the *audi alteram partem* rule he is *prima facie* entitled to put his case orally. In a number of reported cases the Courts have held natural justice to be satisfied by an opportunity to make written submissions to the deciding body. While the appellant did present a very full petition to the Minister that was not in my view written representations but merely disclosing the grounds on which the appellant based his appeal. Had the petition to the Minister been written representations Mr Koya would no doubt have bolstered up his client's case with the additional evidence he sought to introduce into this appeal and which I indicated I was not prepared to consider as this was an appeal on a question of law and I was not concerned with the merits of the application to the Commissioner for a licence, except so far as the facts related to any questions of law I have to consider. I am not called on to consider whether the Commissioner of Insurance acted in breach of the laws of natural justice. The Act provides for an appeal to the Minister and it was for the Minister on an appeal to him to consider whether the Commissioner had acted properly in refusing the licence.

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The Minister has a statutory duty to consider the appeal and in the absence of statutory procedural provisions he is not bound to follow procedural rules akin to rules governing an appeal to a court of law.

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In my view where a statute provides a specific right of appeal to a Minister, as it does under the Insurance Act, the appellant must be given an opportunity of

A presenting his case to the Minister and he should be acquainted with particulars of any prejudicial allegations máde against him so that he is in a position to answer them. If the Minister after receiving the appeal receives or appears to receive evidence or information in the absence of the appellant which is not fully disclosed to him the case for setting aside a decision even where there is a hearing is a very strong one.

B While this case is concerned with the refusal to issue a new licence, and there are cases which indicate that different considerations may apply where there is a revocation of a licence, the facts in this case bear some resemblance to a revocation of a licence. The appellant previously held a licence unlimited as to time and was compelled to seek a new licence by the provisions of the new Act. He had been in business as an insurance agent for some years and a refusal to issue him a licence to replace the licence he previously held was a serious matter to the appellant.

C As I have stated I am not concerned whether there is a failure of natural justice by the Commissioner as the appellant contends but I am concerned with any such failure by the Minister. In this case there is a statutory right of appeal to the Minister and any failure by him of natural justice can be construed as a denial of that right of appeal.

D It was the Minister's duty to consider whether the Commissioner had properly considered the application for a licence and whether the reasons he gave for refusing the licence were valid and based on facts. This necessitated giving the appellant an opportunity to deny that:

(a) His services with C.M.L.A. were terminated for gross misdemeanours

(b) That he had obtained the signatures of Aisea Masivesi and Samisoni Moroka on blank forms including blank medical examination forms

E (c) That he was responsible or assisted in producing false medical reports in respect of proposals made by the said Masivesi and Moroka when in fact such medical examinations had not taken place.

These were very serious allegations and ones which could be proved either to be true or false by hearing evidence. The appellant in my view should have been permitted to give evidence and called witnesses and the failure by the Minister to

F permit him to do so was on the facts manifestly unfair.

There was evidence submitted to this court which I would have had to consider if this court was empowered to make an order that a licence be issued to the appellant. For reasons which I will give later the court cannot make such an order and the evidence I have referred to was irrelevant to this appeal.

G The evidence would be relevant in a hearing before the Minister.

If at the hearing before the Minister who, as an appellate tribunal was concerned with the reasons the Commissioner gave for refusing the licence, the appellant was able to establish the facts he alleged in the documents filed in this court it would appear that;

H 1. The appellant was not a servant of the Colonial Mutual Life Assurance but an agent and his agency was terminated by letter dated 14th December 1976 in which letter there is no mention of any "gross misdemeanours."

2. As late as 22 October 1976, only a few weeks before Colonial Mutual Life Assurance terminated the appellant's agency, the company described the appellant's services to the company in these terms: A

   "There were some tremendous individual performances this last fortnight notably from Brij Lal who has headed Kevin O'Brien for top spot ....."

3. A Jaspal Singh, presumably a doctor, wrote to the Commissioner of Insurance on 14th February 1977 stating that if the forms of Messrs. Aisea Masivesi and Samisoni Moroka bore his signatures he must have examined them. B

These facts throw doubts on the validity of the reasons given by the Commissioner for refusing a licence. There may have been other facts within the knowledge of the Commissioner. If so those facts should have been disclosed to the appellant so as to enable him to properly present his case to the Commissioner. C

The Minister upheld the Commissioner's refusal to grant a licence on the grounds that it was proper and necessary in the public interest to refuse the licence. It is not known whether the Minister considered the following matters which in my view are relevant:

1. That the alleged acts committed by the appellant were in connection with an agency between the appellant and his principals between whom a dispute had arisen. D
2. The principals did not, so far as the evidence before me discloses make any report to the police. The appellant has not been charged or convicted of any offence relating to the alleged misconduct.
3. The principals terminated the appellant's agency which was a lucrative one and this termination must have resulted in considerable loss of income for the appellant. E
4. That the appellant had sufficient experience in and knowledge of insurance matters and his financial standing and general character of management were sound.
5. That the interests of the public, if the alleged conduct of the appellant concerned the public interests, are adequately protected by section 61(1) of the Act which enables the Commissioner to revoke a licence if there are valid reasons for doing so. F
6. Whether it was fair to deprive the appellant in all the circumstances of his right to continue his business as an insurance agent.

As to whether the appellant can be represented at the hearing before the Minister there is authority for the proposition that one who is entitled to appear in person is also entitled in the absence of express provision to the contrary, to be represented by a lawyer of his choice. G

The case of *R. v. St. Mary Abbotts Assessment Committee* [1891] 1 Q.B. 378 establishes the *prima facie* common law right of any person who has a statutory right to appear before a non-judicial tribunal to conduct his business before the tribunal by an agent as well as personally. In *R. v. Board of Appeal ex p. Kay* (1916) 22 C.L.R. 183 a case where the Board had refused to proceed with the hearing of the appeal in the presence of the appellant's counsel the court held the appellant was entitled to be represented by counsel. H

A The Minister under the Act is not a domestic tribunal but an appellate tribunal and the interests of the appellant could be seriously prejudiced if he was not permitted to present his case with the assistance of counsel.

Being of the view that on the facts there has been a denial of natural justice it follows that the Minister's decision in upholding the Commissioner's decision thereby dismissing the appellant's appeal cannot stand and must be set aside.

B Mr Koya, relying on Order 55 rule 7(5) of the Supreme Court Rules, urged that the court should make the order which the Minister should have made that is revoke the Commissioner's decision and order issue of the licence. I do not consider the court can make such an order.

Mr Koya overlooks the fact that the Minister has a discretion either to uphold or revoke the Commissioner's decision.

C S. A. de Smith states in his *Judicial Review of Administrative Act* at pages 485 to 6 on the authority of *R. v. Kingston JJs ex p. Davey* (1902) 86 L.T. 589:

> "The courts cannot, if they are to keep within the accepted limits of their own jurisdiction, order the competent authority to exercise it's discretion in the applicant's favour."

D In general a discretion must be exercised only by the authority to which it is committed. That discretion must be exercised in good faith and must have regard to all relevant considerations and must not be swayed by irrelevant considerations.

If the appellant was seeking an order of mandamus the proper form of the mandamus would be one to hear and determine the appeal according to law *(R. v. Kingston JJ ex p. Davey* which I have already referred to). That is the form of order

E I propose to make.

The appeal is allowed and it is ordered that the appeal to the Minister under section 73(1) of the Insurance Act be heard and determined according to law.

Appeal allowed. Order that appeal to Minister be heard and determined according to law.