

IN THE SUPREME COURT OF FIJI  
Judicial Review  
ACTION NO. 5 OF 1984

R. v. CONTROLLER OF PRISONS & OTHERS  
EX PARTE: SEFANAIA MASI KAUMAITOTOYA

Mr. Noor Dean for the applicant  
Mr. J.K.L. Maharaj for the respondent

J U D G M E N T

The applicant seeks by way of Judicial Review pursuant to Order 53 Rules of the Supreme Court an order of certiorari to quash the decision of the Controller of Prisons purporting to act under section 15 of the Prisons Act to discharge the applicant from the Prison Service.

The applicant described the Controller as the Commissioner and it is noted that the Controller himself and the Public Service Commission describe him as the Commissioner.

I can find no reference to a Commissioner in the Prisons Act but assume that the Commissioner and the Controller of Prisons is one and the same person.

The applicant also seeks a number of declarations and damages.

The applicant has filed a very lengthy affidavit in support of his application to which are annexed a number of documents.

No affidavit in reply has been filed. Mr. Maharaj advised that he is not in a position to refute the facts stated. One reason for his difficulty is that the then Controller of Prisons who purported to give the applicant notice of intention to discharge him is ill in hospital and not in a condition to give him instructions.

Mr. Maharaj however stated that he would oppose the application on legal grounds accepting for the purpose of this application the facts alleged by the applicant in his affidavit.

The applicant at the time of his discharge from the Prison Service on the 15th April, 1983, held the rank of Principal Prison Officer (PPO).

Prior to his discharge he had applied in civil action No. 282 of 1982 for certain declarations in connection with his demotion by the then Controller of Prisons from the rank of P.P.O. to P.O. Class B.

As the applicant now alleges bias and breach of the rules of natural justice by the Controller who featured in action 282 of 1982 it is necessary to refer to the facts in that case.

The Controller who purported to demote the applicant in 1982 was Major Masi. The demotion was pursuant to disciplinary action being taken against the applicant in respect of two offences allegedly committed by the applicant. Major Masi acquitted the applicant of one of the offences and found him guilty on the other and demoted him.

Contemporaneously with the demotion of the applicant, Colonel Masi purported to discharge the applicant under the provisions of section 15 of the Prisons Act.

Since the present action is also concerned with purported action by an Acting Controller of Prisons (not Major Masi) section 15 is set out hereunder :

"15 - (1) Subject to subsection (3) any officer of the Prisons Service other than a senior officer may be discharged by the Controller at any time -

- (a) if he is pronounced by a Government medical officer to be mentally or physically unfit for further service;
- (b) on reduction of establishment;
- (c) if the Controller considers that he is unlikely to become, or has ceased to be, an efficient officer.

(2) Every officer of the Prisons Service discharged under the provisions of subsection (1) shall be given one month's notice of intention to discharge him from the Prisons Service or at the option of the Controller one month's pay in lieu of such notice.

(3) Where it is considered that any such officer should be so discharged, he shall be so informed and told that -

- (a) any representations made in writing by him within 14 days, will be forwarded to the Secretary of the Public Service Commission, accompanied by all relevant papers and records for a decision to be made by the Commission; and that
- (b) if he makes no representations within 14 days, he shall be discharged in the manner prescribed by this section."

In action 282 of 1982 it was declared that the Controller ( Major Masi) had not properly exercised his powers under section 15 in discharging the applicant. It was also declared that the finding by Major Masi that the applicant had committed an offence was irregular and it was stated in the decision that the Controller was not empowered to impose any punishment.

The Court's decision was announced in August

4.

1982.

From the 17th day of August, 1982, until the 31st day of August, 1982, the applicant waited to be recalled to duty and made several attempts to see the Controller (who was apparently still Major Masi). Major Masi did not communicate with the applicant nor was the applicant permitted to see or speak to him.

On the 31st August, 1982, the applicant reported for duty and was instructed by Superintendent Apolosi Vosanibola to report back the next day. He did so and was on that day served with a letter of the same date signed by Major A.S. Masi who described himself as Commissioner of Prisons notifying the applicant that pursuant to section 15(1)(c) he intended to discharge the applicant on the grounds that he had ceased to be an efficient officer. The text of that letter is as follows :

"I have over the past few days looked afresh at the whole of the information available to me touching your performance as an officer of the Prisons Service.

I consider that you have ceased to be an efficient officer. In exercise of my powers under Section 15(1)(c) of the Prisons Act, I therefore intend to discharge you from the Prisons Service.

In accordance with Section 15(2), I hereby give you one month's notice of my intention to discharge you commencing from today.

Pursuant to Section 15(3), I am to inform you that any representations made in writing by you within 14 days of the date of this memorandum will be forwarded to the Secretary of the Public Service Commission, accompanied by all relevant papers and records for a decision to be made by the Commission and that if you make no representations within 14 days, you shall be discharged in the manner prescribed by Section 15."

The following day the applicant received another

letter interdicting him from duty.

Major Masi's actions on that occasion followed advice from a Crown Law Legal Officer who had not recommended an appeal from the decision in action 282 of 1982 but advised Major Masi to exercise his discretion under section 15(1)(c).

The applicant then consulted his solicitors who on the 9th September, 1982, wrote to the Controller. The letter was not a diplomatic one and expressions were used therein which would have more than irritated any controller quite apart from Major Masi who is now accused of bias and acting unfairly and in breach of natural justice.

On the 13th September, 1982, on instructions from the applicant his solicitors wrote direct to the Secretary of the Public Service Commission. This letter was written by the same solicitor who had written the previous letter. It was again not couched in diplomatic terms and would not have won any sympathy for the applicant.

The solicitor requested that he be permitted to appear before the Commission to make submissions on behalf of the applicant.

From the date he was interdicted on 2nd September, 1982, until informed by Mr. M.V. Buadromo who signed the letter dated 14th April, 1983, as Acting Commissioner of Prisons, the applicant remained under suspension. That letter notified him that he was discharged from the prison service with effect from the 15th April, 1983.

Prior to his discharge there had been correspondence passing between interested parties.

On the 17th January, 1983, the Secretary of the Public Service Commission wrote to the applicant's solicitors

referring to the prior letter of 11th November, 1982, which is not in evidence, and informing them that in the absence of any further communication the matter would be considered by the Public Service Commission at its meeting on 19th January, 1983.

The Commission met on that date and on the 26th January, 1983. On the later date the Commission considered representations made by the applicant's solicitors and came to a decision.

The text of the decision was communicated to the Controller by the Secretary of the Public Service Commission in a letter dated the 2nd February, 1983. The decision which was a directive and in mandatory terms was as follows :

"The Commission decided that the Commissioner of Prisons should be asked to finalise the current charges made on 1.9.82; that he must follow the required legal procedures and must particularly state precisely on what grounds he proposes to dismiss Kaumaitotoya and having done so submit his report earliest to the Commission. Judge Kermode's decision on Civil Action 282/82 will no doubt be kept in mind by the Commissioner.

The situation arising from Judge Kermode's decision makes it desirable that this case be discussed between the Commission, the Permanent Secretary for Home Affairs, and the Commissioner of Prisons, and asked that arrangements be made for them to appear before the Commission at its next meeting."

A report purporting to be a letter from "The Commissioner of Prisons" was sent to the Secretary, Public Service Commission on the 9th February, 1983.

It is a lengthy Report and was signed "A. Vosanibola for Commissioner of Prisons". The Report does not appear to have been written by the "Commissioner" or Controller.

The Controller did not proceed with finalisation of the charges as directed by the Public Service Commission. Nor did he "follow the required legal procedures" and in particular state precisely on what grounds he proposed to discharge the applicant. He did, however, submit a report dated 9.2.83, if the Report signed by a Mr. A. Vosanibola "for Commissioner of Prisons" stating in some detail the reasons and grounds on which he proposed to discharge is accepted as a report by the Controller.

The applicant in his affidavit states that the report was never disclosed to him and he complains this was a breach of "the basic rules of the service" which require that the officer reported on be informed of adverse comments.

It is not known what happened between the date of the report and the 14th April, 1983, a period of over two months.

Mr. Dean for the applicant initiated these proceedings on the 20th March, 1984. On that date he applied ex parte for leave to apply for Judicial Review.

Although there was considerable delay in applying for Judicial Review, that delay was not explained in the applicant's affidavit nor was it readily apparent until the annexures to the affidavit were studied closely after the hearing was concluded.

Leave was given to the applicant to apply for Judicial Review.

Neither counsel referred to delay at the hearing.

Under Order 53 rule 4(2) the Court, had it been aware of the delay, could have refused to grant

leave to seek an order of certiorari since considerably more than 3 months had elapsed at the time of the application since the decision sought to be quashed had been made. Now that the delay is apparent the Court is still empowered under Order 53 rule 4(1) to refuse any relief sought on the application.

I do not propose, however, to exercise that power because firstly no objection was raised by Mr. Maharaj and secondly this is a case where if relief is granted the applicant will be granted a declaration.

Mr. Dean must have been in some doubt as to the procedure he should adopt and who should be the respondents. He also took out an originating summons against the same respondents as in this application but did not proceed with it.

He did not appreciate that if he was applying for an order of certiorari the Attorney-General representing the Crown should not have been made a respondent. Prerogative remedies are not available against the Crown because the Crown is the nominal plaintiff or applicant in these proceedings.

The Chairman of the Public Service Commission should not have been made a respondent. He is only a member of the Commission and no decision is made by the Chairman acting alone.

The decision which the applicant complains about is that leading to his dismissal by the Controller of Prisons.

In the report signed "A. Vosanibola, for Commissioner of Prisons", 12 instances of alleged misconduct between the years 1973 and 1981 are given and they are stated to be the reasons the Commissioner considered for discharging the applicant under section 15(3) of the Prisons Act.



The 12 instances are as follows :

- "(a) In 1973 PPO Kaumaitotoya was charged with three others for assaulting two re-captured prisoners at Togalevu. However, the charge was acquitted by the Court.
- (b) In 1979 he was strongly suspected of introducing methylated spirits and hack-saw blades into Suva Prison for use by prisoners and was temporarily transferred to Prison Headquarters.
- (c) In 1979 he made arrangement with J.R. White & Co. for the purchase of track-suits and other sports goods for members of his recruit course. The Company had to advise this Service that the goods had not been paid although recruits had paid to Kaumaitotoya all or part of the costs of the items. This was not paid to J.R. White & Co. J.R. White was advised to take its own civil action against this Officer.
- (d) This officer was the most senior officer on duty at Suva Prison on the night of 31/12/79 - the night when prisoners went on riot.

It was reported to him on that night that three prisoners had broken out of their cells and were breaking into other cells.

In that situation, being the most senior officer on duty, he did not take any immediate action. He preferred to refer the matter to his Officer-in-Charge who was off-duty at that time.

Kaumaitotoya's inability to cope with such a situation resulted in the disturbance spreading to the other parts of the Prison. He had acted cowardly and he should have been equally blamed.

- (e) On 21st December, 1980, at Maximum Security Prison, being the most senior officer on duty at that time, instructed seven officers to assault two prisoners who were cuffed to each other. He took part in the assault himself.

Disciplinary charges were proposed against him and the others resulting in their discharge from the Service in early 1981. However, he was re-instated with the others because the Commissioner was not empowered to discharge them except with the concurrence of the Public Service Commission.

- (f) In December, 1980 he led a group of officers from Naboro in a brawl against youths from Togalevu and Kalokolevu at the Fisherman's Lodge.

- (g) During 1980 he presented three personal cheques to the Naboro Officers Club for payment of \$112 worth of drinks. The Bank of New South Wales then returned the cheques because there was no fund in his account with the Bank. The matter was reported to the Police who after investigation advised that no criminal charges could be taken against Kaumaitotoya.

On his own admission, however, Kaumaitotoya was instructed to pay the money to the Club. He had been paying this money until his interdiction from duty in February.

- (h) In February, 1982, he was convicted for coming late for duty and as well as for treating a senior officer with disrespect.
- (i) He made allegation against CPO Mohammed Hassan that Hassan attempted to bribe Kaumaitotoya with \$1,000 to advise prisoner Jone Mateyawa to drop a report of assault against ex-Prison Officer Nemani Tueli. This case ended in court and CPO Hassan was acquitted of the Charge.
- (j) PPO Kaumaitotoya was reported for giving information to the 'Fiji Times' about the 'bribery' allegation as discussed at (i) above. Although he denied the allegation he admitted that he had spoken to one Suresh Prasad a 'Fiji Times' reporter on the day before the publication was made in the above paper.
- (k) PPO Kaumaitotoya was also reported for having lengthy discussions with prisoner Edward Shiu Narayan in January 1981 on matters affecting the prisons and the prison system, thereby being familiar with the prisoner.
- (l) The Prison Officers Association on 23.8.82 made representation to the Permanent Secretary for Home Affairs and Immigration that subordinate officers were strongly not in favour of Kaumaitotoya continue as an Officer because the officer's attitude and dealings were such that his credibility had been shattered."

The applicant answered each of the alleged reasons in his affidavit. I do not propose to set out his answers to the 12 instances of conduct which the Commissioner considered in detail but will comment on the reasons using the facts stated in the applicant's affidavit.

The first two reasons given (a) and (b) should

have been ignored. The applicant was acquitted by a Court of the 1973 charges but he then resigned. He rejoined the service in 1979. Reason (b) was merely suspicion which did not result in any charges being laid.

Reason (c) was a private matter between J.R. White & Co. and the applicant as was recognised by the Prison authorities at the time.

Reason (d) raises the serious charge of cowardice and attributing blame for the disturbance to the applicant.

Major Masi in a letter written on the 17th October, 1981, while acting as Controller of Prisons made a statement which contradicts the accusations levelled at the applicant in (c).

He wrote (Exhibit L).

"Be advised that I was one of those who was in Suva before, during and after the Riot and that I did not hear any allegation against you at any time at all.  
(emphasis added)

Reason (e) indicates disciplinary charges were proposed (emphasis added). No charges were in fact laid but acceptance of the allegations as one of the reasons indicates that the Controller unfairly treated him as having committed an offence.

As regards reason (f), the unrefuted reply by the applicant is that he was not present on the occasion of the alleged brawl and no charges were laid against him by the police or the Prison authorities.

Reason (g) refers to a personal matter. The police investigated and were satisfied that no criminal proceedings should be instituted.

Reason (h) is the only conviction the defendant

admits but he still disputes that he was properly convicted.

It was 3rd February, 1982, that the applicant was charged with offences alleged to have been committed on the 27th January, 1982.

No charges against the applicant arose out of reasons (i) but Nemani Tueli went to prison for three years.

One of the two charges the applicant faced in February 1982 arose out of the alleged incident in reason (j). The alleged facts in reason (k) gave rise to the second charge.

The Commissioner himself found the applicant not guilty of the first charge yet he includes reason (j) as one of the reasons for discharging the applicant.

The second charge was the one that the Commissioner was directed by the Commission to hear. He decided not to comply with the directive yet used the alleged facts as yet one more reason for discharging the applicant.

The applicant did not answer reason (l). He ignored it and in my view was the proper way to treat it. It is a type of accusation that cannot be answered unless a copy of the representation was made available. Nor is it known who made the representation on behalf of the Association of which Association Major Masi was probably a member.

At the time the Controller considered the overall performance of the applicant, the applicant was the Deputy Commandant of the Staff Training School.

The Controller makes no mention of the Reports on Recruit Course 1/81. Major Masi welcomed the 18 new

recruits on 2nd November, 1981. He should have been aware of the contents of the Report which is undated and appears to have been written by Acting Assistant Superintendent C.M. Hill, the Commandant of the Staff Training Centre.

There are two specific reference to the applicant in this report as under :

"Knowing the many difficulties that may unexpectedly arise in the course programmes Mr. S. Kaumaitotoya, sacrificed to hold night lectures. This was done through an amicable understanding between the Commandant and Mr. S. Kaumaitotoya, Assistant Commandant".

and later in the report

"It is not out of place for me to make a special comment on my deputy on his hard performance and sacrifice and dedication during his long hours from 0430-2200 hours each day without any transport given him. He ran both ways".

Of the 180 lecture periods, the applicant conducted 70 of them and the Commandant 25. Major Masi conducted 1. 60 of the periods were attachments to Naboro and Suva prisons and unattended periods. The applicant bore the brunt of the lectures. The percentage average results of the 17 recruits was a very commendable 78%.

The course was for 6 weeks and would have finished on 18th December, 1981, and the Report would have been written some time after that date.

On the 29th January, 1982, he was suspended from duty pending disciplinary proceedings being brought against him (vide decision in C.A. 282 of 1982 Sefanaia Masi Kaumaitotoya v. Controller of Prisons and Another).

Failure to mention the applicant's meritorious service at a time so close to the date of the alleged offences arising out of reasons (i), (j) and (k) of the report can only

have been deliberate.

It is not known what action the Controller took after receipt of the letter (Ex.K) written by a F. Robinson advising him of false accusations made against the applicant in connection with the Prison riots unless it was Major Masi's letter (Exhibit L) which he wrote to the applicant dated 17.10.81.

The last paragraph of that letter which I have already quoted is significant in view of the contents of the report. Reason (d) accused the applicant of cowardly conduct.

Annexure "N" to the applicant's affidavit is a Statement made by a Edward Shiu Narayan in the nature of a complaint against the Controller of Prisons, Major Masi. This Statement which is a detailed one was made to the Ombudsman representatives who warned Narayan of the serious nature of the report.

If the facts stated by Narayan are correct they disclose a very serious state of affairs indeed and would without any other evidence establish the applicant's allegation that the Controller Major Masi was biased. Indeed the alleged facts go further and indicate a conspiracy against the applicant.

While there has been no denial of the facts alleged by the applicant, Mr. Maharaj did disclose his inability to get any instructions from Major Masi. Both Robinson and Edward Shiu Narayan were prisoners and they have not sworn any affidavit verifying their allegations. Accordingly I ignore their allegations.

The Commandant did not comply fully with the provisions of section 15 of the Prisons Ordinance. The section requires that the officer to be discharged be

informed that he is to be discharged. He is also to be informed that he can make representations in writing within 14 days which will be forwarded to the Secretary of the Public Service Commission accompanied by all relevant papers and records. There is nothing in section 15 which calls for a report from the Controller. The report was not written until 9.2.83, 5 months after the applicant was given notice that he was to be discharged. He never had any opportunity to make representations on the contents of that report which was written in confidence and never disclosed to him.

Section 15 does not call for any hearing but it does require that the officer to be discharged have the opportunity to make representations regarding the proposed discharge. Subsection (3)(a) of section 15 in referring to all relevant papers and records indicates that the papers and records are those in existence at the time the officer is informed he is to be discharged. It is not enough merely to tell the officer that it is the opinion of the Controller that he has ceased to be an efficient officer without disclosing the basis for such opinion so that the officer has something on which to base his representations.

The applicant could be expected to know what adverse reports had officially been made against him if Civil Service procedure had been complied with but he could not have anticipated the 12 reasons given by the Controller in support of his opinion that the applicant had ceased to be an efficient officer.

Mr. Dean did not refer me to any provision in Routine Orders about adverse reports but any Civil Service officer who has had occasion to make an annual report on a fellow officer is well aware that that officer must be shown any adverse report on him. Apart from that it is quite unfair to make an adverse report on an officer without giving the officer reported on an opportunity to make

representations particularly when the report is to someone whose decision could affect his Civil Service career.

If there were any adverse reports on the applicant's personal file, I would have expected the present Controller of Prisons to have referred to that fact. It is not known whether any records or papers were in fact forwarded by the Controller to the Secretary of the Public Service Commission.

Mr. Maharaj was requested to furnish a summary of the service history of the applicant. This he has done but the applicant prepared his own summary which has been filed with Mr. Maharaj's consent.

I do not accept the applicant's summary as it goes further than a summary and contains self serving comments and explanations.

What is of interest in Mr. Maharaj's summary is that the applicant was given notice of intention to discharge him on no less than 3 occasions. He was discharged on 21.1.81 but reinstated after appeal to the Public Service Commission on 8th April, 1981.

On 11th March, 1982, he was again discharged but his application to this Court succeeded on 17th August, 1982.

The third and last notice was dated 1st September, 1982, and he was discharged on 14th April, 1983.

Messrs. Parshotam & Company wrote to "The Commissioner of Prison" on behalf of the applicant. The letter complained of the unjustified dismissal of the applicant. It refers in the last paragraph to representations to be made by the solicitors to the Public Service Commission which the writer of the letter considered the solicitors were "bound by law to do so".



The applicant's solicitors were not correct in their interpretation of section 15 of the Prisons Act.

The applicant's solicitors, however, did by letter dated 13th September, 1982, addressed to the Secretary, Public Service Commission within 14 days make representations on behalf of the applicant.

A copy of that letter was apparently sent to the "Commissioner of Prisons".

If the solicitors had followed subsection (3) of section 15 they would have prepared the representations for their client to sign. There is nothing in section 15 however which would prevent a solicitor acting for the applicant.

Mr. Maharaj did not raise any technical objections regarding the representation to the Public Service Commission. It appears from the Commission's letter to the "Commissioner of Prisons" dated 2nd February, 1983, that it had received and considered a representation from the applicant's solicitors written on his behalf.

The Controller's failure to comply with the mandatory instructions conveyed to him in their letter of 2nd February, 1983, must also be considered. No explanation was given by Major Masi or any of the respondents as to why those instructions were ignored.

The applicant was dismissed on 15th April, 1983, pursuant to section 15 of the Act after notice dated 1st November, 1982, had been given to him. The Public Service Commission apparently conveyed another decision to the Controller on 7th April, 1983. What that decision was is not known but presumably it was confirming that the applicant be discharged.

The Act does not specify in any detail the part the Commission plays in the discharge of an officer by the

Controller. Subsection (3)(a) indicates that the Commission makes "a decision".

The legislature no doubt had in mind section 105 of the Fiji Constitution. Power to appoint and remove a person in public office is vested in the Fiji Public Service Commission.

The Commission considered the matter at its meeting on 26th January, 1982 and came to a decision. The Controller was directed to do two things !

- (a) To finalise the current charges made on 1st September, 1982.
- (b) That he must follow required legal procedure and state precisely on what grounds he proposes to dismiss the applicant and having done so to submit his report to the Commission.

There were no current charges "made" on 1st September, 1982, but there was one charge pending on that date.

The Controller did not "finalise that charge". Nor did he state precisely on what grounds he proposed to dismiss the applicant if the Commission intended, as I think it did, that the applicant should be told precisely the reasons he was to be dismissed in a further notice to be given to the applicant.

It appears to me that the Commission was not happy about the action that had been taken by the Controller and wanted the charges finalised and the procedure then strictly followed which would have entailed a further one month's notice to the applicant containing more detail than was provided in the prior notice. Whatever the

Commission intended it did come to a decision and that decision was in my view not to confirm the intended dismissal of the applicant pursuant to the notice dated 1st September, 1982. Having made a decision on 26th ~~January~~ July, 1982, there is some doubt in my mind whether the Public Service Commission had any jurisdiction to make the second decision on 7th April, 1983.

I am also in some doubt as to whether another notice in any event should not have been given to the applicant. It was Major Masi who considered the applicant had ceased to be an efficient officer. It was his personal opinion. It was a A. Vosanibola who purported to write a report "for Commissioner of Prisons" but it was M.V. Buadromo acting Commissioner of Prisons who actually discharged him. He referred in his letter of 14th April, 1983, to his P/C-76 dated 1.9.82". That was not Colonel Buadromo's letter but Major Masi's. Colonel Buadromo on reviewing the applicant's record may well have disagreed with Major Masi.

On my interpretation of section 15 of the Act, it is the Controller who considers the officer unlikely to become an efficient officer and only that Controller who is empowered to discharge an officer. Another Controller may not have been of the same opinion. Whether Major Masi had retired shortly after he wrote his letter of 1st September, 1982, is not known.

These aspects of the case were not discussed by counsel and I do not propose to consider them any further. The applicant has nothing against Colonel Buadromo but alleges that Major Masi was biased and acted unfairly.

I am in no doubt at all that Major Masi entertained strong personal animosity towards the applicant so much so that in considering whether the applicant should be discharged he ignored facts clearly

indicating the applicant was at least a most competent instructor and taking into account rumour and suspicion and even ignoring an acquittal.

Major Masi's actions as disclosed by the facts indicates he did not objectively, in good faith and fairly consider the applicant's performance as an officer.

I have to accept that the report of 9th February 1983, was Major Masi's report which was signed on his behalf. That report had but one objective and that was to procure the Public Service Commission's concurrence in the dismissal of the applicant - a more biased and unfair report it would be difficult to imagine.

Under section 15 of the Prisons Act the Controller had a power which only he could exercise. Whether he was biased or not by necessity he was the only person empowered to dismiss the applicant under that section.

Nevertheless he had a duty to act fairly in the exercise of his discretion.

S.A. de Smith in his Judicial Review of Administrative Action Third Edition at p. 208 said :

"That the donee of a power must "act fairly" is a long-settled principle governing the exercise of discretion, though its meaning is inevitably imprecise. Since 1967 the concept of a duty to act fairly has often been used by judges to denote an implied procedural obligation. In general it means a duty to observe the rudiments of natural justice for a limited purpose in the exercise of functions that are not analytically judicial but administrative."

In Board of Education v. Rice & Others [1911]

A.C. 179 Lord Loreburn at p. 182 in referring to statutory administrative decisions and in particular

decisions by the Board of Education pointed out that the Board had to ascertain the law and the facts. He said :

"I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything.....!"

In Kanda v. Government of the Federation of Malaya /19627 A.C. 322 the Privy Council at p.337 said :

"The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: Nemo iudex in causa sua: and Audi alteram partem. They have recently been put in the two words, Impartiality and Fairness. But they are separate concepts and are governed by separate considerations. In the present case inspector Kanda complained of a breach of the second. He said that his constitutional right had been infringed. He had been dismissed without being given a reasonable opportunity of being heard.

If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them."

In the instant case Major Masi did not tell the applicant anything more than what he put in his written notice of 1st September, 1982, about the reasons he considered the applicant had ceased to be an efficient officer. He wrote in the first paragraph :

"I have over the past few days looked afresh at the whole of the information available to me touching your performance as an officer of the Prisons Service."

He did not specifically disclose to the applicant any of the twelve reasons that appeared five months later in the Report to the Public Service Commission.

The legislature provides a right for the applicant to make representations in writing. It does not provide for any hearing. He was not told the reasons or given any chance at all to correct or contradict the allegations in the Report either to the Controller or to the Public Service Commission.

The Privy Council at p. 337 went on to say :

"It follows of course that the judge or whoever has to adjudicate must not hear evidence or receive representation from one side behind the back of the other. The Court will not enquire whether the evidence or representation did work to his prejudice sufficient that they might do so."

Those words are equally applicable in the present case.

The procedure in section 15 is similar to a charge being brought against the applicant. The Controller is the complainant, the applicant the accused and the Public Service Commission adjudicator.

The Public Service Commission should not have considered the Report which on the face of it was biased and prejudicial without permitting the applicant an opportunity to see it and make representation.

The notice given by the Controller was defective because it did not in fairness give the applicant any opportunity of making representations. The decision of the Public Service Commission was also vitiated by its failure to observe the rules of natural justice.

Mr. Maharaj was given an impossible task in seeking to defend the actions of the Controller. It is understandable that he could not obtain information from Major Masi but I would have expected an affidavit from the present Controller and/or the Secretary of the Public Service Commission denying facts alleged by the applicant or furnishing other facts in support of the argument that the dismissal of the applicant was lawful.

Mr. Maharaj referred to the case of Hackett v. Lander and Solicitor General /1917/ N.Z.L.R. as authority for the proposition that this Court has no power to pronounce upon the advisableness and propriety of the exercise of the Controller's discretion. That case was concerned with powers of the Governor in Council to make regulations to prohibit actions which in his opinion were injurious to (inter alia) the public safety. It was held that the Court's powers to pronounce the regulations ultra vires was limited to cases where the

regulations could have nothing to do with the objects for which they were authorised to be made.

That case has no application to the facts in the present case. The Controller's opinion is not sacrosanct and the Court is not precluded from considering the facts on which he came to his opinion.

Even if the Court could not consider whether there was a proper basis or any basis at all for such opinion there still remains the issue that the Controller must act fairly and not in breach of natural justice.

I find as a fact that the Controller did not act fairly and his notice and purported dismissal of the applicant was in breach of natural justice.

I have to consider what relief should be granted to the applicant.

Firstly the Chairman of the Public Service Commission should not have been made a party and no order is made against him. Certiorari does not lie against the Attorney-General representing the Crown.

I grant the applicant a declaration but not in the form sought by the applicant.

I declare that the Controller of Prisons acted unfairly and in breach of natural justice in not disclosing to the applicant sufficient reasons for his notice of his intention to discharge the applicant dated 1st September, 1982, to enable the applicant, pursuant to section 15 of the Prisons Act to make representation thereon and further acted again in breach of natural justice in forwarding to the Public Service Commission a highly prejudicial, biased and unfair report on the applicant which was not at any time disclosed to the

applicant before he was discharged.

It follows from this declaration that the notice was invalid and the purported discharge of the applicant was a nullity.

The applicant (the plaintiff) is to have the costs of these proceedings.

*R.G. Kermod*

(R.G. KERMODE)

J U D G E

S U V A,

AUGUST, 1984.