1957 *Present* : Gunasekara, J.

S. K. SUBRAMANIAM, Petitioner, *and* THE MINISTER OF LOCAL GOVERNMENT AND CULTURAL AFFAIRS *et al.*, Respondents

S. C. 152—In the matter of an Application for a mandate in the nature of a Writ of Certiorari under Section 42 of the Courts Ordinance

S. C. 274—In the matter of an Application for mandate in the nature of a Writ of Quo Warranto under Section 42 of the Courts Ordinance

Certiorari—Quo warranto—*Member of a Town Council—Removal from office—Duty of Minister to act judicially—Town Councils Ordinance, No. 3 of 1946, s. 197 (1), (2), (3)—Local Authorities Elections Ordinance, No. 53 of 1946, s. 10 (2)—Courts Ordinance, s. 42.*

An Order under Section 197 (1) of the Town Councils Ordinance removing a member of a Town Council from office can be made by the Minister only if he " is satisfied that there is sufficient proof " of any of the facts enumerated

in that Section. When making such Order, the Minister not only exercises a power which involves legal authority to determine questions affecting the rights of subjects but is also under a duty to act judicially, and would therefore be amenable to *certiorari* if the member in question is not first given a fair opportunity of showing cause against an Order being made against him.

Under Section 197 of the Town Councils Ordinance a member who is not the Chairman cannot be removed from the office of member on the ground that at a time when he was the Chairman he was, as Chairman, guilty of conduct for which he could have been removed from the office of Chairman.

Gunapala v. Kannangara (1955) 57 N. L. R. 69 not followed.

APPLICATIONS for writs of *certiorari* and *quo warranto*.

H. V. Perera, Q.C., with *Izadeen Mohamed* and *H. D. Tambiah*, for petitioner in both applications.

M. Tiruchelvam, Acting Solicitor-General, with *V. G. B. Perera*, Crown Counsel, for 1st respondent in Application 152 and 2nd respondent in Application 274.

No appearance for 2nd respondent in Application 152.

H. C. Keerthisinghe, for 3rd respondent in Application 152 and 1st respondent in Application 274.

September 6, 1957. GUNASEKARA, J.—

These two applications, for mandates in the nature of writs of *certiorari* and *quo warranto* respectively, arise out of the same facts and were heard together. They relate to an Order made by the Minister of Local Government and Cultural Affairs (who is a respondent to both applications) in the purported exercise of powers vested in him by section 197 of the Town Councils Ordinance, No. 3 of 1946. The relevant provisions of the section, as amended and modified by subsequent legislation, are in these terms :

" (1) If at any time the Minister is satisfied that there is sufficient proof of—

(*a*) persistent refusal to hold or attend meetings or to vote or to transact business at any meetings that may be held ; or

(*b*) wilful neglect, or misconduct in the performance, of the duties imposed by this Ordinance ; or

(c) persistent disobedience to or disregard of the directions, instructions or recommendations of the Minister or of the Commissioner ; or

(*d*) incompetence and mismanagement ; or

(e) abuse of the powers conferred by this Ordinance, on the part of the Chairman or on the part of any Town Council or any of the members thereof, the Minister may, as the circumstances of each case may require, by Order published in the *Gazette*—

(i) remove the Chairman from office ; or

(ii) remove all or any of the members of the Council from office, and direct that a by-election in accordance with the provisions of written law for the time being applicable in that behalf shall be held for the purpose of electing a member in place of each member so removed ; or

(iii) dissolve the Council.

(2) Every Order made under sub-section (1) shall contain such directions and such supplemental, consequential and incidental provisions as may be necessary for the purpose of giving effect to the Order, and shall, on publication in the *Gazette*, have the force of law ".

The Order in question refers to the petitioner, Mr. S. K. Subramaniam, and was published in the *Gazette* of the 26th October 1956. It recites section 197 of the Town Councils Ordinance and the relevant subsequent legislation, and states that the Minister " being satisfied that there is sufficient proof of i. incompetence and mismanagement ; and ii. abuse of the powers conferred by the first-mentioned Ordinance, on the part of Mr. Sarawanamuthu Kasipillai Subramaniam, a member of the Rattota Town Council ", removes him " from the office of member of that Council " and directs that a by-election be held to fill the vacancy. An election was held in pursuance of this Order and on the 18th February 1957 Mr. Zainul Abdeen (who too is a respondent to both applications) was declared elected a member of the Council in place of the petitioner. In each of the Applications the petitioner asks that the Minister's Order should be quashed and that it should be declared that the petitioner is and continues to be a member of the Council. In Application No. 274 he also asks that the election of Mr. Abdeen be set aside as being bad in law.

The petitioner had been elected a member of this Town Council at a general election held in December 1954, and his term of office, which began on the 1st January 1955, was due to expire in the ordinary course on the 31st December 1957. His account of the circumstances in which the Order in question was made, as set out in each of the two petitions and the affidavits filed in support of them, is as follows. He was elected Chairman of the Council on the 17th January 1955. By a letter dated the 11th July 1956 he was called upon to show cause why an Order should not be made by the Minister under section 197 of the Town Councils Ordinance upon certain grounds that were specified in the letter.

The letter, which was from the Permanent Secretary to the Ministry and was addressed to the petitioner as Chairman of the Council, was in these terms :

"*Complaint by Ratepayers' Association*

The Hon'ble the Minister, whose attention has been drawn to representations made by the Ratepayers' Association of Rattota against your administration, has directed me to request you to state, within two weeks from the date of receipt of this letter, whether you have any cause to show against action under Section 197 of the Town Councils Ordinance in view of :—

(*a*) Your failure to reply to the 13 letters sent by Mr. Piyumasinghe, Member of Your Council ;

(*b*) Your taking upon yourself duties which normally should be performed by Health Officers, thereby causing a deterioration in the sanitary condition of the Town and its conservancy and scavenging services ; and

(*c*) Your permitting the Vice-Chairman to contravene the law and act in an arbitrary and prejudicial manner as indicated in my letter of even date to the Vice-Chairman, a copy of which is annexed for your information. "

The petitioner replied by a letter dated the 25th July 1956 denying these allegations. Later, by a letter dated the 5th October 1956 and addressed to the Assistant Commissioner of Local Government, Central Region, he tendered his resignation "from the office of Chairman only" as from the 16th October 1956. He says that he did so in compliance with a request made to him by the Minister at an interview and that after his resignation from the office of Chairman he "continued to be a member of the said Council and he was at no time informed of any default on his part as a member of the said Council". He complains that the Minister did not give him any notice of an intention to remove him from the office of a member of the Council, or communicate to him at any time any charges against him "*qua* member of the said Council", or give him an opportunity of meeting such charges.

Upon these allegations of fact the petitioner originally sought to have himself restored to the office of a member of the Council by a mandate in the nature of a writ of *mandamus* directed to the Chairman. His application for the issue of such a mandate, which was filed on the 27th November 1956, was taken up for hearing before H. N. G. Fernando, J. on the 13th March 1957. After some discussion it was laid by until the determination of an application for a writ of *certiorari* which the petitioner undertook to file. The circumstances in which it was laid by are set out as follows in my brother Fernando's order.

"The Attorney-General on behalf of the 2nd respondent, the Minister of Local Government and Cultural Affairs, has stated to Court that in his opinion the appropriate remedy which the petitioner might seek would be by way of an application for a Writ of Certiorari.

Apparently, the reason why such an application was not actually made was that it was thought that the decision of this Court in the case reported in 57 N. L. R., page 69, would have been adverse to such an application. The Attorney-General now states that the Minister of Local Government has been advised that that decision should not be relied upon, particularly in view of the earlier decision of three Judges in the case reported in 51 N. L. R., page 105.

Having regard to these matters, Counsel for the petitioner now undertakes to make an application for a Writ of Certiorari and requests that the present application be laid by for consideration, if necessary, after the determination of the fresh application."

The present application for a mandate in the nature of a writ of *certiorari* was filed in pursuance of this arrangement on the 18th March 1957, and the application for a mandate in the nature of a writ of *quo warranto* was filed on the 27th May 1957.

At the hearing of these applications before me the learned acting Solicitor-General, who appeared for the Minister, contended that *certiorari* did not lie, and that even if it did the facts set out in the petitioner's own affidavits showed that the Minister had complied with the requirements of the law. (The allegations of fact made by the petitioner in his affidavits have not been contradicted in these proceedings.)

The source of the jurisdiction of this Court to issue mandates in the nature of writs of *certiorari* and other prerogative writs is section 42 of the Courts Ordinance (Cap. 6), which empowers the Court to issue such mandates "according to law". As was pointed out in *Nakkuda Ali v. Jayaratne*[1] "when s. 42 gives power to issue these mandates 'according to law' it is the relevant rules of English common law that must be resorted to in order to ascertain in what circumstances and under what conditions the Court may be moved for the issue of a prerogative writ". In accordance with these rules,

> "Wherever any body of persons, having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs." *Per* Atkin, L.J., in *The King v. Electricity Commissioners*[2].

An order published under section 197 of the Town Councils Ordinance removing a member of a Town Council from office also has the effect (under section 10 (2) of the Local Authorities Elections Ordinance, No. 53 of 1946) of disqualifying him for 5 years for election as a member of any local authority or for sitting or voting as such member. It is not disputed by the acting Solicitor-General that the powers conferred on the Minister by section 197 of the Town Councils Ordinance involve legal authority to determine questions affecting the rights of subjects, but he contends that the Minister is not under a duty to act judicially, and therefore *certiorari* does not lie.

[1] *(1950) 51 N. L. R. 457 at 461.* [2] *[1924] 1 K. B. 171 at 204.*

There is support for this contention in *Gunapala v. Kannangara* [1], where it was held that the Minister of Local Government performs an executive and not a judicial act when he exercises the power vested in him by section 61 of the Village Communities Ordinance (Cap. 198) to remove from office the Chairman of a Village Committee. There is no difference that is material to the present question between the provisions of that section and those of section 197 of the Town Councils Ordinance, and the decision in *Gunapala's* case is therefore in point. This was the decision which, the Minister had been advised by the Attorney-General, "should not be relied upon, particularly in view of the earlier decision of three Judges in the case reported in 51 N. L. R. page 105".

The earlier decision to which the Attorney-General referred was that of a Divisional Bench in the case of *de Mel v. de Silva* [2], where the question was whether it was competent to this Court to issue a mandate in the nature of a writ of prohibition to a Commissioner appointed by the Governor-General under the Commissions of Inquiry Act, No. 17 of 1948, to investigate and report whether any member of the Colombo Municipal Council had committed certain acts of bribery. A statute that came into operation after the issue of the commission, entitled the Colombo Municipal Council Bribery Commission (Special Provisions) Act, No. 32 of 1949, required the Governor-General to cause to be published in the *Gazette* any finding by the Commissioner that such acts of bribery had been committed by a member of the Council. It also provided that upon the publication of such a finding in the *Gazette* the councillor against whom the finding was made would immediately forfeit various civic rights. The Court held that the Commissioner was a person having legal authority to determine questions affecting the rights of members of the Council and having a duty to act judicially, and that it was therefore competent to the Court to grant the application for a mandate.

It was stated in the judgment of the Divisional Bench [3] that the Commissioner had to inquire into various allegations of bribery and for that purpose he had to examine witnesses on oath or affirmation "and reach a decision on such evidence with regard to the allegations made against the petitioner". While it so happened that in that case the person who had "legal authority to determine questions affecting the rights of subjects" also had the power to examine witnesses on oath or affirmation it is not necessary that such a person should have that power in order that he may be under a duty to act judicially. Thus, it was pointed out in *R. v. Manchester Legal Aid Committee* [4] that "an administrative body in ascertaining facts or law may be under a duty to act judicially notwithstanding that its proceedings have none of the formalities of and are not in accordance with the practice of a court of law"; and in *Board of Education v. Rice* [5] that it may have such a duty though it has no power to administer an oath and need not examine witnesses. The Commissioner in *de Mel's* [2] case was under a duty to act judicially because his decision, upon questions affecting the rights of subjects, was one that

[1] *(1955) 57 N. L. R. 69.*
[2] *(1949) 51 N. L. R. 105.*
[3] *(1949) 51 N. L. R. 105 at page 111.*
[4] *[1952] 1 All E. R. 480 at 489.*
[5] *[1911] A. C. 179 at 182.*

had to depend upon the proof of certain allegations of fact, and not because he had the power to examine witnesses on oath or affirmation or had some of the other attributes of a court.

An authority whose decision is in question would be one that is under a duty to act judicially " if it is exercising, after hearing evidence and opposition, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition " : *R. v. London County Council* [1]. Such a case must be distinguished from one where there is committed to an executive authority " the decision of what is necessary or expedient " ; (*Carltona, Ltd. v. Commissioners of Works* [2]) ; for if an administrative body in arriving at its decision " at no stage has before it any form of lis and throughout has to consider the question from the point of view of policy and expediency, it cannot be said that it is under a duty to act judicially " : *R. v. Manchester Legal Aid Committee* [3].

An Order under section 197 (1) of the Town Councils Ordinance can be made only if the Minister " is satisfied that there is sufficient proof " of any of the facts there enumerated. Quite clearly the question whether there is sufficient proof of a fact is one that can only be decided on evidence, and not on considerations of policy or expediency. The acting Solicitor-General points out, however, that the Minister has a discretion as to whether an Order under that section should or should not be made, and contends that in the exercise of that discretion the Minister may take into account considerations of policy and expediency (such as, for instance, a paucity of persons qualified for election) and therefore *certiorari* does not lie to review such an Order. The answer to this contention is that before the Minister can make an Order in the exercise of his discretion he must decide on evidence whether there is proof of the necessary facts, and at that stage he has a duty to act judicially. Such a situation is discussed in the following passage in the judgment in *R. v. Manchester Legal Aid Committee* [4] :

" When, on the other hand, the decision is that of an administrative body and is actuated in whole or in part by questions of policy, the duty to act judicially may arise in the course of arriving at that decision. Thus, if, in order to arrive at the decision, the body concerned has to consider proposals and objections and consider evidence, then there is the duty to act judicially in the course of that inquiry. That, as it seems to us, is the true basis of the decision in *Errington v. Minister of Health* [5]. While the Minister's decision to confirm the clearance order was an administrative act for the purpose of which he was entitled and bound to take into consideration questions of policy, yet, before arriving at the decision, he had to consider the objections of the property owners and the views of the local authority. In other words, at one stage of the proceedings leading up to his decision there was something in the nature of a lis before him, and at that stage there was a duty to act judicially, as, for instance, not to hear one side behind the back of the other. Again, in *R. v. London County Council* [1], all that it

[1] [1931] 2 K. B. 215 at 233.
[2] [1952] 1 All E. R. 480 at 490.
[3] [1943] 2 All E. R. 560.
[4] Ibid. at p. 489.
[5] [1935] 1 K. B. 249.

seems to us SCRUTTON, L.J., was saying was that in the case of the London County Council it was enough to make them amenable to certiorari that they had to decide on evidence between a proposal and an opposition during which they had a duty to act judicially."

With all respect to the learned judge who decided the case of *Gunapala v. Kannangara* [1], I agree with the Attorney-General's view that the decision in that case should not be relied upon particularly in view of the decision in *de Mel v. de Silva* [2].

The learned acting Solicitor-General has also based an argument on the provision in subsection (2) of section 197 of the Town Councils Ordinance that an Order made under subsection (1) "shall, on publication in the *Gazette*, have the force of law". The argument is that by this provision the Minister has been vested with a delegated legislative power and that the validity of an Order made in the purported exercise of that power cannot be questioned unless it is *ultra vires* on the face of it. It is contended that for this reason *certiorari* does not lie even though the Order is one that can be arrived at only by a quasi-judicial process.

I am unable to accept this contention. It is only an Order "made under sub-section (1)" that can "have the force of law" upon publication in the *Gazette*. Therefore an Order that has not been made in accordance with the provisions of that subsection cannot have this effect even though there is nothing on the face of it to show that it is *ultra vires*. There is no provision creating a conclusive presumption that an Order has been duly made if it appears to be regular on the face of it. Therefore the Court has jurisdiction to go behind the Order in an inquiry as to its validity, and as the Minister is under a duty to act judicially in arriving at the Order its validity can be inquired into in *certiorari* proceedings.

There is support for this view in the decision of the House of Lords in *Minister of Health v. The King* [3], where the effect of an enactment by which Parliament has delegated its legislative function to a Minister is considered. Section 40 of the Housing Act, 1925 (15 Geo. 5 c. 14), empowered the Minister of Health to make an order confirming, with or without modifications, an improvement scheme made under the Act, and provided that the order when made was to have effect as if enacted in that Act. It was held that this provision did not prevent an inquiry into the validity of the order by way of proceedings in *certiorari*.

As the Order in question in the present case was one that had to be arrived at by a quasi-judicial process it could not be validly made unless the petitioner was first given a fair opportunity of showing cause against it. It is true that the Ordinance does not expressly provide that a councillor must be given such an opportunity before he can be removed from office; but "although there are no 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". (*Per* Byles, J., in *Cooper v. The Wandsworth Board of Works* [4]). It is a well established principle "that where judicial functions, or quasi-judicial functions, have to be

[1] *(1955) 57 N. L. R. 69.*
[2] *(1949) 51 N. L. R. 105.*
[3] *[1931] A. C. 494.*
[4] *(1863) 14 C. B. (N. S.) 180 at 191.*

exercised by a Court or by a board, or any body of persons, it is necessary and essential . . . . that they must always give a fair opportunity to those who are parties in the controversy to correct or to contradict any relevant statement prejudicial to their view". (*Per* Roche, L.J., in *Errington v. Minister of Health* [1]).

It is contended for the Minister that such an opportunity was given to the petitioner when he was informed by the letter of the 11th July 1956 of the allegations made against him and was invited to state whether he had "any cause to show against action under section 197 of the Town Councils Ordinance" and was later granted an interview with the Minister on the subject of this letter. The letter referred to complains about the petitioner's "administration", that is to say, the discharge of his functions as Chairman of the Council, and the allegations that he was called upon to answer related solely to his conduct in that capacity The only evidence as to what occurred at the interview is the averment in the petitioner's affidavits that it was as requested by the Minister on that occasion that he resigned the office of Chairman. There is no evidence that there was any discussion of the question of his continuing to be a member of the Council.

In terms of section 197 of the Ordinance, if the Minister is satisfied that there is sufficient proof of certain conduct "on the part of the Chairman or on the part of any Town Council or any of the members thereof", he may, "as the circumstances of each case may require", by Order published in the *Gazette* (i) remove the Chairman from office or (ii) remove all or any of the members from office or (iii) dissolve the Council. The Minister's power to make these Orders is subject to the qualification "as the circumstances of each case may require". It seems to me that this qualification implies that the Chairman may be removed from the office of Chairman only for conduct on his part in that capacity, that a member may be removed from the office of member only for conduct on his part as a member and that the Council may be dissolved only for conduct on the part of the Council as such. A member who is not the Chairman cannot be removed from the office of member on the ground that at a time when he was the Chairman he was as Chairman guilty of conduct for which he could have beeen removed from the office of Chairman. Subsection (3) of the section provides that where the Minister removes a Chairman from office "the Chairman shall be deemed to vacate forthwith the office of member of the Council as well as the office of Chairman". Provision for such "deeming" would be unnecessary if subsection (1) had the effect of empowering the Minister to remove a Chairman from both offices upon proof of conduct which rendered him liable to be removed from the office of Chairman.

The petitioner has asserted in his affidavits that he had been given no opportunity of showing cause against the Order in question before it was made. The facts relied upon by the acting Solicitor-General as proving the contrary only show that the petitioner was called upon to answer allegations that in his capacity of Chairman of the Council he was guilty

[1] [1935] 1 K. B. 249 at 280.

of conduct rendering him liable to be removed from that office, and not that he was required to meet a charge of conduct rendering him liable to be removed from the office of member.

Both applications are entitled to succeed. The Order in question is quashed and it is declared that the petitioner continues to be a member of the Council and that the election of Mr. Zainul Abdeen (the 3rd respondent in Application No. 152 and 1st respondent in Application No. 274) is void.

It was agreed that an order for costs should be made only in respect of one Application. The petitioner will be paid the costs of Application No. 152 by the 1st respondent. I make no order as to the costs of Application No. 274.

Applications allowed.