33/79

IN THE PRIVY COUNCIL No.29 of 1977

O N A P P E A L

FROM THE COURT OF APPEAL OF THE COMMONWEALTH OF THE BAHAMAS

B E T W E E N

THE ATTORNEY-GENERAL — Appellant

- and -

THOMAS D'ARCY RYAN — Respondent

RECORD OF PROCEEDINGS

CHARLES RUSSELL & CO.
Hale Court,
Lincoln's Inn,
London, WC2A 3UL

Solicitors for the Appellant

PHILIP CONWAY THOMAS & CO.,
61 Catherine Place,
London, SW1E 6HB

Solicitors for the Respondent

IN THE PRIVY COUNCIL No.29 of 1977

ON APPEAL

FROM THE COURT OF APPEAL OF THE COMMONWEALTH OF THE BAHAMAS

BETWEEN:

THE ATTORNEY-GENERAL — Appellant

- and -

THOMAS D'ARCY RYAN — Respondent

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

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BETWEEN:

THE ATTORNEY GENERAL — Appellant

- and -

THOMAS D'ARCY RYAN — Respondent

RECORD OF PROCEEDINGS

No.1

PLAINTIFF'S SUMMONS

In the Supreme Court

No.1 Plaintiff's Summons dated 7th April 1976

COMMONWEALTH OF THE BAHAMAS 1976

IN THE SUPREME COURT No.285

Common Law Side

IN THE MATTER of the Constitution of the Commonwealth of the Bahamas

AND

IN THE MATTER of the entitlement of Thomas D'Arcy Ryan to be registered as a citizen of the Commonwealth of the Bahamas

BETWEEN: THOMAS D'ARCY RYAN Plaintiff

AND

THE ATTORNEY-GENERAL Defendant

In the Supreme Court

No.1
Plaintiff's Summons dated 7th April 1976

S U M M O N S

To the Attorney-General of the Bahamas, Chambers, East Hill Street, Nassau, New Providence, Bahamas.

LET the Defendant within 14 days after service of this Summons on him, inclusive of the day of service, cause an appearance to be entered to this Summons, which is issued on the application of the Plaintiff Thomas D'Arcy Ryan of Westward Villas, Gambier, New Providence Bahamas.

By this Summons the Plaintiff seeks a declaration that upon the true construction of the Constitution of the Commonwealth of the Bahamas the Plaintiff is entitled to be registered as a citizen of the Commonwealth of the Bahamas in accordance with the provisions of the said Constitution; Further or other relief; Costs.

If the Defendant does not enter an appearance, such judgment may be given or order made against or in relation to him as the Court may think just and expedient.

DATED the 7th day of April, A.D. 1976

(Sgd)

REGISTRAR

NOTE: This Summons may not be served more than 12 calendar months after the above date unless renewed by order of the Court.

THIS SUMMONS was taken out by Cecil V.Wallace Whitfield, Esq., of Chambers, the Mosmar Building, Queen Street, Nassau, Bahamas Attorney for the Plaintiff whose address is as above given.

DIRECTIONS FOR ENTERING APPEARANCE

The Defendant may enter an appearance in person or by an Attorney either

(1) by handing in the appropriate forms, duly completed, at the Registry of the Supreme Court, Parliament Street, Nassau, Bahamas, or,

(2) by sending them to that office by post.

In the Supreme Court

No.1
Plaintiff's Summons dated 7th April 1976

No. 2

In the Supreme Court

No.2
Plaintiff's Affidavit with exhibits thereto dated 7th April 1976

PLAINTIFF'S AFFIDAVIT
WITH EXHIBITS THERETO

COMMONWEALTH OF THE BAHAMAS 1976

IN THE SUPREME COURT No. 285

Common Law Side

IN THE MATTER of the Constitution of the Commonwealth of the Bahamas

AND

IN THE MATTER of the entitlement of Thomas D'Arcy Ryan to be registered as a citizen of the Commonwealth of the Bahamas

B E T W E E N:

THOMAS D'ARCY RYAN Plaintiff

AND

THE ATTORNEY-GENERAL Defendant

A F F I D A V I T

I, THOMAS D'ARCY RYAN of Westward Villas in the Gambier District of the Island of New Providence one of the Islands of the Commonwealth of the Bahamas (hereinafter referred to

In the Supreme Court

No.2
Plaintiff's Affidavit with exhibits thereto dated 7th April 1976

as "the Bahamas") Company Manager, make Oath and say as follows :-

1. THAT I was born on the 24th September, 1925 in Brockville, Leeds Co., Ontario, Canada. There is now produced and shown to me marked "T.D.R.5" a copy of my Birth Certificate.

2. THAT on the 19th May, 1951 at St.Francis Xavier's Cathedral in the City of Nassau in the Island of New Providence one of the Islands of the Commonwealth of the Bahamas I was lawfully married to Sheila Marie Ryan formerly Pemberton.
A copy of the entry No.815 in the Register of Marriages is now produced and shown to me marked "T.D.R.1" which is a certificate evidencing the said marriage.

3. THAT the said Sheila Marie Pemberton is a person who was born in the former colony of the Bahama Islands on the 10th day of September, 1927 and is a Citizen of the Bahamas by virtue of Article 3(1) of the Schedule of the Bahamas Independence Order, 1973 (hereinafter referred to as "the Constitution"). Copies of pages of Bahamian Passport No.025105 issued to the said Sheila Marie Ryan as a Citizen of the Commonwealth of the Bahamas on the 13th November, 1974 are now produced and shown to me marked "T.D.R.2"

4. THAT on the 8th February, 1966 I was granted a Certificate that I belonged to the Bahama Islands for the purposes of the Immigration Act, 1963 which said Certificate has never been revoked.
A copy of the said Certificate for which I paid the required free £50 (Sterling) is now produced and shown to me marked "T.D.R.3".

5. THAT I am and have been ordinarily resident in the Commonwealth of the Bahamas since December, 1947.

6. THAT on the 20th June, 1974 in the manner prescribed by the Bahamas Nationality Act I applied to be registered as a Citizen of the Bahamas under the provisions of Article 5 (2) of the Constitution.

7. THAT in November, 1974 together with my Wife I attended the Ministry of Home Affairs in accordance with their directive and was interviewed by a Mr. Walkine the then Permanent Secretary.

8. THAT on the 16th June, 1975 Mr. Lester M. Turnquest for the Permanent Secretary the Minister of Home Affairs wrote a letter to me the terms of which are reproduced in a copy which is now produced and shown to me marked "T.D.R.4"

9. THAT I respectfully request that this Honourable Court declare my rights under the Constitution of the Bahamas to be registered as a citizen of the Bahamas.

SWORN at New Providence)
this 7th day of April) (Sgd) T.D'Arcy Ryan
A.D. 1976)

Before me,

(Sgd)

NOTARY PUBLIC

This AFFIDAVIT is filed on behalf of the Plaintiff herein.

In the Supreme Court

No.2 Plaintiff's Affidavit with exhibits thereto dated 7th April 1976

Exhibit T.D.R.5 to document No.2 Birth Certificate T.D.Ryan 13th April 1950

EXHIBIT T.D.R.5
BIRTH CERTIFICATE
OF T.D.RYAN

FORM 20

THE VITAL STATISTICS ACT
BIRTH CERTIFICATE

NAME RYAN, THOMAS D'ARCY
LARMON

DATE OF BIRTH SEPT.24, 1925 SEX M

PLACE OF BIRTH BROCKVILLE, LEEDS CO.

REGISTRATION SEPT.26, 1925 25-05-046295

ISSUED AT TORONTO, ONTARIO, CANADA

THE 13 DAY OF APR. 1959 (Sgd) Phillips
Registrar General

T.D.R. 1
MARRIAGE CERTIFICATE OF T.D.RYAN

Exhibit T.D.R.1 to document No.2 Marriage Certificate of T.D.Ryan 27th June 1974

MARRIAGE ACT (Ch.88)
COPY of an Entry in a REGISTER of MARRIAGES

Given at the REGISTRAR GENERAL'S OFFICE NASSAU, N.P.

WHEN MARRIED	NAME AND SURNAME	CONDITION	CALLING	AGE	DISTRICT AND RESIDENCE AT THE TIME OF MARRIAGE	FATHER'S NAME AND SURNAME
Nineteenth day of May	Thomas D'Arcy Ryan	Bachelor	Accountant	26 years	East Street CITY District Nassau N.P.	Thomas J.Ryan
Nineteen hundred & fifty-one	Sheila Marie Pemberton	Spinster	School Teacher	23 years	Grange Mount Eastern District Nassau N.P. Bahamas	Herbert Pemberton

Married at St.Francis Xavier's Church - Nassau by me Brendon Forsyth O.S.B. a Marriage Officer of the District of The Bahamas

This Marriage was celebrated between us) Thomas D'Arcy Ryan
Sheila Marie Pemberton
In the presence of us) H.C.Black
Pamela Raine

This Nineteenth day of May 1951

CERTIFIED to be a true Copy of an Entry in a Register of Marriages in the District above mentioned Given at the Registrar General's Office, Nassau, N.P. Bahamas, under the Seal of the said Office, the 27th day of June 1974

(Sgd) Vivian Humes
for Registrar General

7.

In the
Supreme Court

Exhibit
T.D.R.2 to
document No.2
Passport of
Mrs. S.M.Ryan
dated 13th
November 1974

EXHIBIT T.D.R.2
PASSPORT OF MRS. S.M. RYAN

MRS. S.M. RYAN
BAHAMAS PASSPORT

COMMONWEALTH OF
THE BAHAMAS

025105

ROYAL BAHAMAS POLICE FORCE

CRIMINAL INVESTIGATION DEPARTMENT
NASSAU, BAHAMAS

Serial No.24234 30-7-1975

This is to certify that the Bearer, Sheila Marie Ryan born on 10/9/1927 and holder of PASSPORT TRAVEL DOCUMENT No.025105 issued by Bahs Court whose signature appear below, has not been convicted of any criminal offence in this country.

(Sgd) S.M. Ryan
Signature of the Bearer

(Sgd)
Signature of Police
Superintendend

These are to request and require in the name of the Governor-General of the Commonwealth of the Bahamas all those whom it may concern to allow the bearer to pass freely without let or hindrance and to afford him or her every assistance and protection of which he or she may stand in need.

In the Supreme Court

Exhibit T.D.R.2 to document No.2 Passport of Mrs. S.M. Ryan dated 13th November 1974

Passport contains 32 pages
passeport contient 32 pages

PASSPORT
PASSEPORT

COMMONWEALTH OF
THE BAHAMAS

LE COMMONWEALTH
DES BAHAMAS

No. of passport) 025105
No.du passeport)

Name of bearer)
Nom du titulaire) Mrs. Sheila Marie Ryan

~~Accompanied by his wife~~

MAIDEN NAME PEMBERTON
née
~~Accompagne de ---- femme~~

(and by / children)
(et de / enfants)

National Status Nationalite

Citizen of the Commonwealth
of the Bahamas

DESCRIPTION SIGNALEMENT

Bearer Titulaire

Occupation) Housewife
Profession)

Bearer
Titulaire

Place of birth) Nassau
Lieu de naissance) Bahamas

PHOTO

Date of birth) 10th Sept.
Date de naissance) 1927

Country of)
Residence) Bahamas
Pays de)
Residence)

Height) 5ft. 7in.
Taille)

In the Supreme Court

Exhibit T.D.R.2 to document No.2 Passport of Mrs.S.M.Ryan dated 13th November 1974

Colour of eyes) Brown
Couleur des yeux)

Special peculiarities) None
Signes particuliers)

CHILDREN ENFANTS

Name Nom

Date of birth
Date de naissance

Sex

Usual signature of bearer (Sgd) S.M.Ryan

Countries for which this Passport is valid
Pays pour lesquels ce Passeport est valable

OBSERVATIONS

VALID FOR ALL COUNTRIES

RENEWALS
RENOUVELLEMENTS

The validity of this passport expires: NOV 13 1979
Ce passeport expire la:
unless renewed a moins de renouvellement

Issued at) PASSPORT OFFICE
delivre a) NASSAU, BAHAMAS

date) NOV 13 1974
date)

In the Supreme Court

Exhibit T.D.R.3 to document No.2 "Belonger" Certificate of T.D.Ryan dated 2nd February 1966

EXHIBIT T.D.R.3
"BELONGER" CERTIFICATE OF
T.D. RYAN

BAHAMA ISLANDS

C E R T I F I C A T E

THAT A PERSON BELONGS TO THE BAHAMA ISLANDS

WHEREAS Mr. Thomas D'Arcy Ryan of New Providence has satisfied the Immigration Board that he is a person of good character over the age of twenty-one years and has been ordinarily resident in the Bahama Islands for a period of eighteen years prior to his application and has declared his intention of making his permanent home in the Bahama Islands

NOW THEREFORE the Immigration Board in its discretion hereby grants to the said Thomas D'Arcy Ryan this certificate that he belongs to the Bahama Islands for the purpose of the Immigration Act 1963

Signed for and on behalf of the Immigration Board

(Sgd) Illegible
CHIEF IMMIGRATION OFFICER

Date 2.2.66

In the
Supreme Court

Exhibit T.D.R.4
to document No.2
Letter Permanent
Secretary to
T.D.Ryan
dated 16th June
1975

EXHIBIT T.D.R.4
LETTER PERMANENT SECRETARY
TO T.D. RYAN

MINISTRY OF HOME AFFAIRS
P.O.BOX N- 3002
NASSAU, N.P., BAHAMAS

16 June 1975

Our ref No. HOM/CIT/3406

Dear Mr. Ryan,

I refer to your application, dated 20 June, 1974 for registration as a citizen of The Bahamas under Article 5(2) of the Constitution.

2. I regret to inform you that your application has not been approved.

Yours sincerely,
(Sgd) Illegible
Permanent Secretary

Mr. Thomas D'Arcy Ryan
P.O. Box N- 1346
Nassau, Bahamas

No. 3

APPEARANCE FOR DEFENDANT

COMMONWEALTH OF THE BAHAMAS 1976

IN THE SUPREME COURT No. 285

Common Law Side

IN THE MATTER of the Constitution of the Commonwealth of the Bahamas

AND

IN THE MATTER of the entitlement of Thomas D'Arcy Ryan to be registered as a citizen of the Commonwealth of the Bahamas

BETWEEN

THOMAS D'ARCY RYAN Plaintiff

AND

THE ATTORNEY-GENERAL Defendant

MEMORANDUM OF APPEARANCE

Please enter an Appearance for the Attorney-General the Defendant herein.

Dated the 9th day of April 1976

(Sgd) Neville L. Smith

NEVILLE L. SMITH ESQ.,
Attorney for the Defendant,
Chambers,
Post Office Building,
East Hill Street,
Nassau, Bahamas

This Appearance was entered on behalf of the Defendant the Attorney-General

TO: The Registrar of the Supreme Court,
Bank Lane,
Nassau, Bahamas.

In the Supreme Court

No.4
Affidavit of L.M.Turnquest and exhibits thereto dated 23rd April 1976

No. 4

AFFIDAVIT OF L.M. TURNQUEST AND EXHIBITS THERETO

COMMONWEALTH OF THE BAHAMAS 1976

IN THE SUPREME COURT No. 285

Common Law Side

IN THE MATTER of the Constitution of the Commonwealth of The Bahamas

AND

IN THE MATTER of the entitlement of Thomas D'Arcy Ryan to be registered as a citizen of the Commonwealth of The Bahamas

BETWEEN

THOMAS D'ARCY RYAN Plaintiff

AND

THE ATTORNEY GENERAL Defendant

A F F I D A V I T

I, LESTER McKELLAR TURNQUEST of Moss Road in the Island of New Providence one of the Islands of the Commonwealth of The Bahamas, make oath and say as follows :-

1. I am the First Assistant Secretary in the Ministry of Home Affairs of the said Commonwealth.

2. The Minister of Home Affairs of the said Commonwealth is the virtual Defendant in this action.

3. It is part of my duty to process applications for citizenship made under the Constitution and the Bahamas Nationality Act, 1973.

4. On or about the 9th July, 1974, under cover of a letter written by Mr. Geoffrey Johnstone, an attorney with Messrs. Higgs and Johnson, an application by the Plaintiff for registration as a citizen of The Bahamas under the Bahamas

Nationality Act, 1973 and Article 5(2) of the Constitution (a copy of which application form is hereto attached) was received in the Ministry of Home Affairs.

5. The said application was refused and in the course of my duty on the 16th June, 1975, I wrote to the Plaintiff informing him that his application had not been approved.

6. I know that the Plaintiff swore to the fact in an affidavit that he accepted that the said letter of 16th June, 1975 notified him that the Minister had refused his said application to be registered as a citizen of The Bahamas.

7. Further, on the 16th February, 1976, again in the course of my duty I know that an application was received from the Plaintiff dated 10th February, 1976 under cover of a letter signed by Messrs. Dupuch and Turnquest, attorneys, in which the Plaintiff seeks the grant of a permanent residence certificate under section 12 of the Immigration Act, 1967.

8. I am instructed that the cause of action of the Plaintiff is now statute barred by reason of the provisions of section 2(a) of the Public Authorities Protection Act (Chapter 86).

9. I make this affidavit from my own knowledge and from information obtained by me in the course of my duties.

SWORN to by the Deponent the said Lester McKellar Turnquest on the 23rd day of April 1976) (Sgd) L.M.Turnquest

Before me,

(Sgd) Illegible

REGISTRAR

This Affidavit has been filed on behalf of the Defendant herein.

In the Supreme Court

Exhibit to document No.4 Application of T.D.Ryan for registration as a citizen dated 27th June 1974

EXHIBIT TO DOCUMENT NO.4
APPLICATION FOR REGISTRATION AS A CITIZEN

This application should be completed, subscribed and submitted in duplicate. Regulation 3

THE BAHAMAS NATIONALITY ACT, 1973

THE BAHAMAS NATIONALITY REGULATIONS, 1973

APPLICATION FOR REGISTRATION AS A CITIZEN OF THE BAHAMAS UNDER ARTICLE 5(2) or ARTICLE 7 OR ARTICLE 9 OF THE CONSTITUTION

WARNING: The giving of false information on this form or in support of this application can lead to a fine or to imprisonment

Name and address in block capitals.

1. I, THOMAS D'ARCY RYAN of P.O.Box N.1346, Nassau, Bahamas am a person of full age and capacity and was born at Brockville, Ontario Canada on September 24, 1925

Delete words in ( ) which do not apply

2. My father's full name(is) (~~was~~) Thomas Joseph Ryan and he was born at Brantford Ontario, Canada on March 11, 1895

3. My mother's full name (~~is~~) (was) Frances Josephine Whalen and she was born at Westport, Ontario, Canada on March 5, 1898 and her nationality is CANADIAN

4. If applicant's mother was born outside The Bahamas, state when she became a citizen of The Bahamas, and whether by registration or naturalisation

N/A

In the Supreme Court

Exhibit to document No.4 Application of T.D.Ryan for registration as a citizen dated 27th June 1974

5. I am (~~single~~)(married) (~~a widow~~) (~~a widower~~)(~~divorced from my wife/husband~~)

6. My (wife's/~~husband's~~) full name (is) (~~was~~) Sheila Marie Ryan (nee Pemberton)

7. I am a citizen of the following countries, that is to say, (Insert name of country or countries)

CANADA

Delete words in ( ) which do not apply

8. (a) (I possess Bahamian Status under the Immigration Act 1967)

~~(b) I was born in the Bahamas after 9th July 1973 but neither of my parents was a citizen of The Bahamas at the date of my birth~~

~~(c) I was born outside The Bahamas after 9th July 1973 and my mother was a citizen of The Bahamas at the date of my birth~~

9.I(~~have~~) (have not) previously renounced or been deprived of citizenship of The Bahamas. (If the applicant has renounced his or her citizenship of The Bahamas, here state the date on which the declaration of renunciation was made; and if he or she has been deprived of his or her citizenship, state the date on which, and the authority by whom the order of deprivation was made)

.....

.....

10. I hereby apply to be registered as a citizen of The Bahamas. I, THOMAS D'ARCY RYAN do solemnly and sincerely declare

In the Supreme Court

Exhibit to document No.4 Application of T.D.Ryan for registration as a citizen dated 27th June 1974

that the foregoing particulars stated in this application are true and I make this solemn declaration conscientiously believing the same to be true.

(Signature of Applicant) T. D'Arcy Ryan

Made and subscribed this Twenty-seventh day of June 1974 before me Geoffrey Adams Dinwiddie Johnstone at 83 Shirley Street in the City of Nassau

(Sgd) G.A.D.Johnstone Notary Public

(Justice of the Peace or other official title)

Address 83 Shirley Street, Nassau

(If the application is approved and if the applicant is not a Commonwealth citizen, the applicant will be required to take the oath of allegiance in the form set hereunder and to renounce his citizenship of any other country before a certificate of registration is granted).

OATH OF ALLEGIANCE

TO BE TAKEN BY AN APPLICANT WHO IS NOT A COMMONWEALTH CITIZEN

I,..... do swear that I will be faithful and bear true allegiance to Her Majesty, Queen Elizabeth the Second, Her Heirs and Successors according to law. So help me God.

Sworn and subscribed this.....day of..... 19.....before me.....

(Justice of the Peace or other official title)

Address.....

.....

(If the application is approved and if the applicant is a Commonwealth citizen he will be required to make the declaration in the form

set out hereunder and to renounce his citizenship of any other country before a Certificate of Registration is granted)

DECLARATION TO BE MADE BY AN APPLICANT WHO IS A COMMONWEALTH CITIZEN

I, THOMAS D'ARCY RYAN solemnly and sincerely affirm and declare that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of The Bahamas, Her Heirs and Successors according to law and that I will faithfully observe the laws of The Bahamas and fulfil my duties as a Citizen of The Bahamas.

Declared this.....day of.....
19.....before me.....

(Justice of the Peace or other official title)

Address.....

,.....

In the Supreme Court

No.5
Affidavit of T.D.Ryan and exhibits thereto dated 29th April 1976

No. 5

AFFIDAVIT OF T.D. RYAN
AND EXHIBITS THERETO

COMMONWEALTH OF THE BAHAMAS 1976

IN THE SUPREME COURT No.. 285

Common Law Side

IN THE MATTER of the Constitution of the Commonwealth of the Bahamas

AND

IN THE MATTER of the entitlement of Thomas D'Arcy Ryan to be registered as a Citizen of the Commonwealth of the Bahamas

BETWEEN

THOMAS D'ARCY RYAN Plaintiff

AND

THE ATTORNEY-GENERAL Defendant

A F F I D A V I T

I, THOMAS D'ARCY RYAN of Westward Villas in the Gambier District of the Island of New Providence one of the Islands of the Commonwealth of the Bahamas (hereinafter referred to as "The Bahamas") Company Manager, make Oath and say as follows :-

1. THAT I am the Plaintiff in these proceedings

2. THAT this Affidavit is Supplemental to my Affidavit Sworn on the 7th April, 1976.

3. THAT I have never been convicted of any criminal offence in any country whatsoever. There is now produced and shown to me marked "T.D.R.6" Certificate Number 13724 issued to me by the Criminal Inviestigation Branch of the Royal Bahamas Police Force dated the 14th June, 1974 certifying that I have not been convicted of any criminal

offence in the Bahamas.

4. THAT I am and have always been of good behaviour.

5. THAT I have not engaged in any activity whatsoever within or outside the Bahamas which is prejudicial of the safety of the Bahamas or to the maintenance of law and public order in the Bahamas.

6. THAT I have never been adjudged or otherwise declared bankrupt under the law in force in any country.

7. THAT I have and always have had sufficient means to maintain myself and I am not likely to become a public charge.

8. THAT there is no good or sufficient reason or reasons of public policy not conducive to the public good why I should not be registered as a Citizen of the Bahamas under the Constitution.

9. THAT at no time have I had a hearing or an interview with the Minister of Home Affairs or with anyone from his Ministry at which the matters referred to in Paragraphs 3 to 8 inclusive of this Affidavit were discussed.

SWORN at New Providence)
this 29th day of April,) (Sgd) T.D'Arcy Ryan
A.D., 1976)

Before me,

(Sgd) Illegible

NOTARY PUBLIC

This Supplemental Affidavit is filed on behalf of the Plaintiff.

In the Supreme Court

Exhibit T.D.R.6 to document No.5 Police Certificate of T.D.Ryan dated 14th June 1976

EXHIBIT T.D.R.6
POLICE CERTIFICATE OF T.D.RYAN

ROYAL BAHAMAS POLICE FORCE

CRIMINAL INVESTIGATION BRANCH
NASSAU, BAHAMAS

Serial No. 31724 14-6-1974

This is to certify that the Bearer Thomas D'Arcy Ryan born on 24.9.1925 and holder of PASSPORT TRAVEL DOCUMENT No. issued by citizenship whose signature appear below has not been convicted of any criminal offence in this Colony.

(Sgd) Thomas D'Arcy Ryan
Signature of Bearer

(Sgd) Illegible
Signature of Police Superintendent

In the Supreme Court

No.6 Affidavit of L.M.Turnquest and exhibits thereto dated 5th May 1976

No. 6

AFFIDAVIT OF L.M. TURNQUEST AND EXHIBITS THERETO

COMMONWEALTH OF THE BAHAMAS 1976

IN THE SUPREME COURT No. 285

Common Law Side

IN THE MATTER of the Constitution of the Commonwealth of The Bahamas

AND

IN THE MATTER of the entitlement of Thomas D'Arcy Ryan to be registered as a citizen of the Commonwealth of The Bahamas

BETWEEN THOMAS D'ARCY RYAN Plaintiff

AND

THE ATTORNEY GENERAL Defendant

In the Supreme Court

No.6
Affidavit of L.M.Turnquest and exhibits thereto dated 5th May 1976

A F F I D A V I T

I, LESTER McKELLAR TURNQUEST of Moss Road in the Island of New Providence in The Bahamas, MAKE OATH AND SAY AS FOLLOWS :

1. I am the First Assistant Secretary in the Ministry of Home Affairs of The Bahamas and make this Affidavit supplemental to my Affidavit sworn on the 23rd day of April, 1976.

2. I know and am well acquainted with Mr. H.C.Walkine, former Under Secretary in the Ministry of Home Affairs (now Permanent Secretary, Ministry of Works) and am familiar with his handwriting which appears frequently in the file which deals with the Plaintiff's application to be registered as a citizen of The Bahamas. Mr. Walkine was the officer dealing at the time with the Plaintiff's application as well as all other such applications and made notes and kept individual notes and records in the files dealing with each applicant. All the said files are submitted from time to time to the Minister himself.

3. I have custody of the said file on behalf of the Minister of Home Affairs as part of my responsibility in dealing with applications for citizenship made under the Constitution and The Bahamas Nationality Act, 1973.

4. From a perusal of the said file containing the application of the Plaintiff to be registered as a citizen of The Bahamas I know that on the 24th day of October 1974, Mr. Walkine invited the Plaintiff to attend at the office of the Ministry of Home Affairs to be interviewed and to bring along with him his wife, the passports of both the Plaintiff and his wife and Police certificate of the Plaintiff. A copy of the letter is hereto attached and marked "A".

5. From the notes made by Mr. Walkine of the interview held with the Plaintiff and his wife on the 7th day of November, 1974, I have seen that the Plaintiff was asked about and gave particulars of his whereabouts from 1947 up to and including the said 7th day

of November 1974. A copy of the notes made by Mr. Walkine out of the said interview appears on the form hereto attached and marked "B".

6. Although the Plaintiff was asked about his Police certificate as I earlier mentioned and the Plaintiff said that he first came to the Bahama Islands in 1947 after having been born in Canada in 1925 and also lived in Canada from 1949 to 1954 no evidence that he was never convicted in that country or any other country was ever produced by the Plaintiff.

7. As far as I can see from what appears in the notes of the Plaintiff's interview the Plaintiff was asked about and gave answers to the matters with which Mr. Walkine was concerned as he should have been in order to comply with the provisions of The Bahamas Nationality Act, 1973 and the Constitution.

8. It is not true for the Plaintiff to say that at no time did he have an interview with the Minister of Home Affairs or with anyone from the Ministry of Home Affairs at which the matters made relevant by the Constitution and the Bahamas Nationality Act, 1973 were dealt with.

9. I know that on the 27th day of May 1975 and the 28th day of May 1975 the Minister of Home Affairs personally considered the whole of the file and application of the Plaintiff and on the 28th day of May 1975 refused the application of the Plaintiff.

10. I was directed by the Minister to notify the Plaintiff that his said application has been refused and I wrote to the Plaintiff on the 16th day of June 1975 notifying him that his said application had not been approved.

11. I know that the said letter was promptly posted to the Plaintiff at the P.O. Box number N-1346, Nassau, Bahamas, given to the Minister by the Plaintiff in his application form.

12. I am aware that letters posted in Nassau to a P.O. Box usually reach their destination

in not more than 5 days from the date of posting.

SWORN to this 5th day of May 1976) (Sgd) L.M.Turnquest

Before me,

(Sgd) Illegible

REGISTRAR

In the Supreme Court

No.6
Affidavit of L.M.Turnquest and exhibits thereto dated 5th May 1976

EXHIBIT "A"
LETTER PERMANENT SECRETARY
TO HIGGS & JOHNSON

Exhibit "A" to Document No.6 Letter Permanent Secretary to Higgs & Johnson dated 24th October 1974

MINISTRY OF HOME AFFAIRS
P.O. BOX N-3002
NASSAU, BAHAMAS

24th October 1974

Our ref: HOM/CIT/3406

Dear Sirs:

I make reference to your letter, dated 27 June 1974 regarding an application by Mr. Thomas D'Arcy Ryan for registration as a citizen of The Bahamas under Article 5(2) of The Constitution.

Please contact this office preferably by telephone for the purpose of making an appointment for Mr. Thomas D'Arcy Ryan to be interviewed in connection with his application. If he is married, and his wife is alive she should accompany him.

Mr. Thomas D'Arcy Ryan and his wife are requested to bring their Passports with them. Mr. Ryan is also required to bring a Police Certificate.

Yours sincerely,
(Sgd) HLW
for Permanent Secretary

Messrs. Higgs & Johnson
Counsel & Attorneys-At-Law
P.O.Box N-3247, Nassau

In the Supreme Court

Exhibit "B" to Document No.6 Application of T.D.Ryan for registration as a citizen dated 7th November 1974

EXHIBIT "B"
APPLICATION OF T.D.RYAN FOR REGISTRATION AS A CITIZEN

Ref.No: HOM/CIT/3406 Date 7/11/74

APPLICATION BY MR. THOMAS D'ARCY RYAN FOR REGISTRATION AS A CITIZEN OF THE BAHAMAS UNDER ARTICLE 5(2) OF THE CONSTITUTION

NAME IN FULL: Thomas D'Arcy Ryan

PLACE OF BIRTH: Brockville, Ontario, Canada

DATE OF BIRTH: 24/9/25

OCCUPATION: Tour-Operator

EMPLOYER: Self-employed

MARITAL STATUS: Married - Living with wife

WIFE'S NAME IN FULL: Sheila Marie Ryan nee Pemberton (Bahamian)

PASSPORT NO: RX 103101

PLACE & DATE OF ISSUE: Kingston, Jamaica 3/7/69

DETAILS OF CHILDREN: (i) Thomas Ryan - aged 22 - born in Canada (ii) Patrick Ryan - aged 21- born in Canada (iii) William Ryan - aged 20- born in Canada (iv) Timothy Ryan - aged 19- born in The Bahamas (v) Anne Ryan - aged 18- born in Bahamas (vi) Lucia Ryan - aged 15 - born in Bahamas (vii) Julia Ryan - aged 14 - born in Canada

MEMBERSHIP IN CHARITABLE ORGANISATIONS, ETC. NONE

OWNERSHIP OF PROPERTY: Owns a home & lot of land in Westward Villas, N.P.

PERIOD OF RESIDENCE IN THE BAHAMAS: Since 1947

INCOME: $25,000.00 per annum

COMMENTS:

(i) I interviewed applicant today.

(ii) Applicant :-

(a) Is desirous of making The Bahamas his/~~her~~ permanent home.

In the Supreme Court

Exhibit "B" to Document No.6 Application of T.D.Ryan for registration as a citizen dated 7th November 1974

N.B.
Applicant was accompanied by his wife & I'm satisfied that she is his wife and they are living together

H.C.W.
7/11/74

(i) From 1957 to 1962 by E.D.Sasson Banking as Administrative Accountant

(ii) From 1962 to the present time self-employed

(Sgd)H.C.Walkine
7/11/74

(b) During period of residence in The Bahamas has been employed as follows:

(i) From 1947 to 1949 by the Montagu Beach Hotel as Front Office Mgs.

(ii) From 1949 to 1954 - returned to Canada to study Accountancy at Price & Co.

(iii) From 1954 to 1955 by Peat Marwick Mitchell & Co. as a Sr

(iv)

Illegible

No. 7

AFFIDAVIT OF T.D.RYAN

In the Supreme Court

No.7 Affidavit of T.D.Ryan dated 7th May 1976

COMMONWEALTH OF THE BAHAMAS 1976

IN THE SUPREME COURT No. 285

Common Law Side

IN THE MATTER of the Constitution of the Commonwealth of the Bahamas

AND

IN THE MATTER of the entitlement of Thomas D'Arcy Ryan to be registered as a citizen of the Commonwealth of the Bahamas

B E T W E E N : THOMAS D'ARCY RYAN Plaintiff

AND

THE ATTORNEY-GENERAL Defendant

In the Supreme Court

No.7
Affidavit of T.D.Ryan dated 7th May 1976

A F F I D A V I T

I, THOMAS D'ARCY RYAN of Westward Villas in the Gambier District of the Island of New Providence one of the Islands of the Commonwealth of the Bahamas (hereinafter referred to as "The Bahamas") Company Manager, make Oath as say as follows :-

1. THAT there are seven children born of my said marriage to Sheila Marie Ryan four of whom are under twenty-one (21) years of age of which three (3) were born in the Bahamas on the 22nd July, 1955, the 26th July, 1956 and the 1st May, 1959 respectively - the fourth having been born on the 10th June, 1960.

2. THAT among the effects of the Minister not approving my said application to be registered as a citizen of the Bahamas are :-

   (i) To deprive me of all the privileges and rights of a citizen of the Commonwealth of the Bahamas.

   (ii) To compel me to depart from the Bahamas; as a consequence to compel my wife and my children also to depart from the Bahamas.

   (iii) To compel me and my family to dispose of our home in Westward Villas, New Providence.

   (iv) To cause undue hardship to me at age 50 and to my family in compelling me and them to leave the Bahamas which I voluntarily chose as home some 29 years ago and now to relocate elsewhere.

   (v) To deprive me of my consequential entitlement to continue my investments in the Bahamas and to enjoy as income from the same.

   (vi) To deprive me of my consequential entitlement to be registered as a voter in the Bahamas

SWORN at New Providence)
this 7th day of May) (Sgd) T.D'Arcy Ryan
A.D. 1976)

Before me,

(Sgd) Illegible

NOTARY PUBLIC

This Supplemental Affidavit is filed on behalf of the Plaintiff.

In the Supreme Court

No.7
Affidavit of T.D.Ryan dated 7th May 1976

No. 8

JUDGMENT OF KNOWLES C.J.

In the Supreme Court

No.8
Judgment of Knowles C.J. dated June 1976

COMMONWEALTH OF THE BAHAMAS 1976 No.285

IN THE SUPREME COURT

Common Law Side

IN THE MATTER of the Constitution of the Commonwealth of the Bahamas

AND

IN THE MATTER of the entitlement of Thomas D'Arcy Ryan to be registered as a citizen of the Commonwealth of the Bahamas

B E T W E E N

THOMAS D'ARCY RYAN Plaintiff

AND

THE ATTORNEY-GENERAL Defendant

J U D G M E N T

Knowles, C.J.

This is the first case in which the power conferred by the Supreme Court (Amendment) Act, 1975 and the Rules made thereunder, that two

or more Justices of the Supreme Court may sit together to hear an application relating to the Constitution of the Commonwealth of the Bahamas, contained in the Schedule to the Bahamas Independence Order 1973 made by the Queen's Most Excellent Majesty in Council under section 1 of the Bahama Islands (Constitution) Act, 1963, was exercised. In consequence, my learned brother, Mr. Justice Graham, and I heard an application by Originating Summons on the part of the Plaintiff for a Declaration by the Court "that upon the true construction of the Constitution of the Commonwealth of the Bahamas the Plaintiff is entitled to be registered as a citizen of the Commonwealth of the Bahamas in accordance with the provisions of the said Constitution".

The hearing took twelve full days, and without doubt, the case is one of the most important cases that has ever come before this Court.

In this Judgment I shall follow the form adopted by Her Majesty's Privy Council in the recent case of Hinds and Others v. The Queen (1976) 2 W.L.R. 366, and use heading generally, to facilitate ease of reference.

FACTS OF THE CASE

The facts were not agreed by the parties, but, actually there was not a great deal of disagreement. They are derived from three affidavits sworn by the Plaintiff, and three affidavits sworn by Mr. Lester McKellar Turnquest, who is the First Assistant Secretary in the Ministry of Home Affairs who was the real Defendant, though, pursuant to the provisions of the Crown Proceedings Act, the Attorney General was made the actual Defendant.

Summarizing the contents of the Plaintiff's affidavits, he deposed that he was born on the 24th September, 1925 in Ontario, Canada; that on the 19th May, 1951 he married his wife, who was then Sheila Marie Pemberton, in the Bahamas, and who is now a citizen of the Bahamas by virtue of Article 3(1) of the Constitution; that on the 8th February, 1966 he was granted a Certificate that he belonged to the Bahamas for the purposes of the Immigration Act, 1963, which

Certificate has never been revoked; that he is and has been regularly resident in the Bahamas since 1947; that on the 20th June, 1974 in the manner prescribed by the Bahamas Nationality Act (B.N.A.) he applied to be registered as a citizen of the Bahamas under the provisions of Article 5(2) of the Constitution; that in November 1974 he and his wife attended the Ministry of Home Affairs in accordance with a directive issued therefrom, and was interviewed by a Mr. Walkine, who was then the Permanent Secretary; that on the 16th June, 1975 Mr. Lester M. Turnquest, for the Permanent Secretary, wrote to him a letter in the following terms:

"MINISTRY OF HOME AFFAIRS
P.O.BOX N-3002
NASSAU, N.P., BAHAMAS

16 June, 1975

Our ref No. HOM/CIT/3406

Dear Mr. Ryan,

I refer to your application, dated 20 June, 1974 for registration as a citizen of The Bahamas under Article 5(2) of the Constitution.

2. I regret to inform you that your application has not been approved.

Yours sincerely,

(Sgd) L.M.Turnquest
for Permanent Secretary

Mr. Thomas D'Arcy Ryan
P.O.Box N-1346
Nassau, Bahamas "

that he has never been convicted of any criminal offence in any country whatsoever (and he exhibited a copy of a certificate issued to him by the Criminal Investigation Department of the Royal Bahamas Police Force dated 14th June, 1974 certifying that he had not been convicted of any criminal offence in the Bahamas); that he was and always has been a good citizen of the Bahamas; that he has not been engaged in any activity whatsoever within or outside the Bahamas,

which is prejudicial to the safety of the Bahamas or to the maintenance of law and public order in the Bahamas; that he has never been adjudged or otherwise declared bankrupt under the law in force in any country; that he has and always has had sufficient means to support himself, and is not likely to become a public charge; that there was no good ground or sufficient reason or reasons of public policy not conducive to the public good why he should not be registered as a citizen of the Bahamas under the Constitution; that at no time did he have a hearing or an interview by which the Minister of Home Affairs or anyone from his Ministry in which the matters in the previous six sentences were discussed; that there were 7 children born of his said marriage, four of whom were under 21 years of age and of which three were born in the Bahamas; that, among the effects of the Minister not approving his application to be registered as a citizen of the Bahamas, were:

(i) to deprive him of all privileges and rights of a citizen of the Commonwealth of the Bahamas.

(ii) to compel him to depart from the Bahamas; as a consequence to compel his wife and his children also to depart from the Bahamas.

(iii) to compel him and his family to dispose of their home in Westward Villas, New Providence.

(iv) to cause undue hardship to him at the age of 50 and to his family in compelling him and them to leave the Bahamas, which he voluntarily chose as his home 29 years ago, and now to relocate elsewhere.

(v) to deprive him of his consequential entitlement to continue his investments in the Bahamas and to enjoy an income from the same.

(vi) to deprive him of his consequential entitlement to be registered as a voter in the Bahamas.

The three affidavits of Mr. Turnquest, filed

on behalf of the Defendant, may be summarized as follows:

That the Minister of Home Affairs was the virtual Defendant in this action; that it was part of his duties to process application for citizenship made under the Constitution and the B.N.A.1973; that, on or about 9th July, 1974, under cover of a letter written by Mr. Geoffrey Johnstone, an attorney, an application was made by the Plaintiff for registration as a citizen of the Bahamas under the B.N.A. 1973 and Article 5(2) of the Constitution, and was received by the Ministry of Home Affairs (and a copy of the application was annexed to the affidavit); that the said application was refused, and, in the course of his duties on the 16th June, 1975 he wrote the Plaintiff informing him that his application had not been approved; that on the 16th February, 1976, in the course of his duties, he became aware that an application dated the 10th February, 1976 from the Plaintiff was received by the Ministry of Home Affairs under cover of a letter signed by Messrs. Dupuch & Turnquest, attorneys, under which the Plaintiff sought a Certificate of Permanent Residence under section 12 of the Immigration Act, 1967; that he knew and was well acquainted with Mr. H.C. Walkine, the former Under Secretary in the Ministry of Home Affairs and was familiar with his hand-writing, which appeared frequently in the file which dealt with the Plaintiff's application to be registered as a citizen of the Bahamas; that Mr. Walkine was the officer dealing with the Plaintiff's application, as well as similar applications, and Mr. Walkine made and kept notes and records in the file relating to each applicant; that all of such files were submitted from time to time to the Minister himself; that he, Mr. Turnquest, now had custody of the file relating to the Plaintiff's application on behalf of the Minister of Home Affairs as part of his responsibilities in dealing with applications for citizenship; that, from a perusal of the said file, he became aware of the Plaintiff's application to be registered as a citizen and of Mr. Walkine's letter to the Plaintiff dated the 24th October, 1974 inviting him to attend at the Ministry to be interviewed and to bring along with him his wife, the passports of himself and his wife, and a Police Certificate concerning the Plaintiff.

In the Supreme Court

No.8
Judgment of Knowles C.J. dated June 1976

Mr. Turnquest's second affidavit contains a copy of the notes of the interview on the 7th November, 1974 between Mr. Walkine and the Plaintiff, and since I consider these notes to be of importance I now set them out in full:

"Ref No. HOM/CIT/3406 Date 7/11/74

APPLICATION BY Mr. Thomas D(Arcy Ryan FOR REGISTRATION AS A CITIZEN OF THE BAHAMAS UNDER ARTICLE 5(2) OF THE CONSTITUTION%

NAME IN FULL: Thomas D'Arcy Ryan

PLACE OF BIRTH: Brockville, Ontario, Canada.

DATE OF BIRTH: 24/9/25

OCCUPATION: Tour-Operator

EMPLOYER: Self-employed

MARITAL STATUS: Married- Living with wife

~~HUSBAND'S~~/WIFE'S NAME IN FULL: Sheila Marie Ryan nee Pemberton (Bahamian)

PASSPORT NO: RX 103101

PLACE & DATE OF ISSUE: Kingston, JAMAICA; 3/7/69

DETAILS OF CHILDREN: (i) Thomas Ryan - aged 22 - born in Canada (ii) Patrick Ryan - aged 21 - born in Canada (iii) William Ryan - aged 20 - born in Canada (iv) Timothy Ryan - " 19 - born in the Bahamas (v) Anne Ryan - " 18 - born in the Bahamas (vi) Lucia Ryan - " 15 - born in the Bahamas (vii) Julia Ryan - " 14 - born in Canada

MEMBERSHIP IN CHARITABLE ORGANISATIONS, ETC. NONE

OWNERSHIP OF PROPERTY: Owns a home and lot of land in Westward Villas, N.P.

PERIOD OF RESIDENCE IN THE BAHAMAS: Since 1947

INCOME: $25000.00 per annum.

COMMENTS:

(i) I interviewed applicant today.

(ii) Applicant:-

(a) Is desirous of making The Bahamas his/~~her~~ permanent home.

(b) During period of residence in The Bahamas has been employed as follows:

(i) From 1947 to 1949 by the Montagu Beach

Hotel as Front Office Mgr.

(ii) From 1948 to 1954 - returned to Canada to study Accountancy at Price Waterhouse & Co.

(iii) From 1954 to 1955 by Peat Marwick Mitchell & Co. as a Sr. Assistant

(iv) From 1955 to 1957 by Thomas Bros As Controller.

(v) From 1957 to 1962 by E.D.Sassoon Banking as Administrative Accountant.

(vi) From 1962 to the present time self-employed

(Sgd) H.C.Walkine
7/11/74

N.B.

Applicant was accompanied by his wife & I'm satisfied that she is his wife & that they are living together.

(Sgd) NCW 7/11/74"

Mr. Turnquest's second affidavit continues that, as far as he could see from what appears on the Plaintiff's file the Plaintiff was asked about, and gave answers to all the matters about which Mr. Walkine was concerned, as he should have been, in order to comply with provisions under the B.N.A. and the Constitution; that other matters were asked by Mr. Walkine which the Plaintiff answered, and that other matters appeared on his application form; that on the 27th and 28th day of May, 1975 the Minister of Home Affairs personally considered the whole of the file of the Plaintiff, and that on the 28th May, 1975 refused the application of the Plaintiff, and that he, Mr. Turnquest, was directed by the Minister to notify the Plaintiff that his application had been refused, and that, accordingly, he wrote the Plaintiff on the 16th June, 1975, notifying him that his application had not been approved; that, according to his personal knowledge and experience his letter to the Plaintiff would, in the ordinary course of post, be received by

the Plaintiff not later than the 21st June, 1975.

From the above-mentioned affidavits I make the following findings of fact: (i) that the Plaintiff was entitled to apply to be registered as a citizen of the Bahamas under the provisions of Article 5(2) of the Constitution; (ii) that he did so apply on or about the 20th June, 1974; (iii) that he was interviewed by Mr. H.C.Walkine, the Permanent Secretary to the Ministry of Home Affairs, on the 7th November, 1974, and that the copy Notes set out above show substantially the questions asked and the answers given at that interview; (iv) that the Minister of Home Affairs, himself, on the 27th and 28th May, 1975, considered the Plaintiff's application and the said Notes, and other information (if any) in the Plaintiff's file; and (v) that he purported to refuse the Plaintiff's application, and directed Mr. Turnquest to communicate a refusal to the Plaintiff; (vi) that Mr. Turnquest's letter dated the 16th June, 1975 was received by the Plaintiff on or about the 21st June, 1975; and (vii) that, some of the questions which Mr. Walkine should have put to the Plaintiff at the said interview in accordance with section 7 of the B.N.A., were in fact put to the Plaintiff and answered, contrary to the statement contained in paragraph 9 of the Plaintiff's affidavit, sworn on the 29th April, 1976.

ARTICLES OF THE CONSTITUTION

Article 2 states :

"2. This Constitution is the supreme law of the Commonwealth of The Bahamas and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution, shall prevail and the other law shall, to the extent of the inconsistency, be void."

Article 5 states :

"5. (1) Any woman who, on 9th July 1973, is or has been married to a person -

(a) who becomes a citizen of The Bahamas

by virtue of Article 3 of this Constitution; or

(b) who, having died before 10th July 1973, would, but for his death, have become a citizen of The Bahamas by virtue of that Article,

shall be entitled, upon making application and upon taking the oath of allegiance or such declaration in such manner as may be prescribed, to be registered as a citizen of The Bahamas:

Provided that the right to be registered as a citizen of The Bahamas under this paragraph shall be subject to such exceptions or qualifications as may be prescribed in the interests of national security or public policy.

(2) Any person who, on 9th July 1973 possesses Bahamian Status under the provisions of the Immigration Act 1967 and is ordinarily resident in the Bahama Islands, shall be entitled, upon making application before 10th July 1974, to be registered as a citizen of The Bahamas.

(3) Notwithstanding anything contained in paragraph (2) of this Article, a person who has attained the age of eighteen years or who is a woman who is or has been married shall not, if he is a citizen of some country other than The Bahamas, be entitled to be registered as a citizen of The Bahamas under the provisions of that paragraph unless he renounces his citizenship of that other country, takes the oath of allegiance and makes and registers such declaration as may be prescribed:

Provided that where a person cannot renounce his citizenship of the other country under the law of that country, he may instead make such declaration concerning that citizenship as may be prescribed.

(4) Any application for registration

under paragraph (2) of this Article shall be subject to such exceptions or qualifications as may be prescribed in the interests of national security or public policy.

(5) Any woman who on 9th July 1973 is or has been married to a person who subsequently becomes a citizen of The Bahamas by registration under paragraph (2) of this Article shall be entitled, upon making application and upon taking the oath of allegiance or such declaration as may be prescribed, to be registered as a citizen of The Bahamas:

Provided that the right to be registered as a citizen of The Bahamas under this paragraph shall be subject to such exceptions or qualifications as may be prescribed in the interests of national security or public policy.

(6) Any application for registration under this Article shall be made in such manner as may be prescribed as respects that application:

Provided that such an application may not be made by a person who has not attained the age of eighteen years and is not a woman who is or has been married, but shall be made on behalf of that person by a parent or guardian of that person."

SECTION 7 OF THE BAHAMAS NATIONALITY ACT 1973

"7. Any person claiming to be entitled to be registered as a citizen of The Bahamas under the provisions of Article 5, 7, 9 or 10 of the Constitution may make application to the Minister in the prescribed manner and, in any such case if it appears to the Minister that the applicant is entitled to such registration and that all relevant provisions of the Constitution have been complied with, he shall cause the applicant to be registered as a citizen of The Bahamas:

Provided that, in any case to which those provisions of the Constitution apply, the Minister may refuse the application for

registration if he is satisfied that the applicant -

(a) has within the period of five years immediately preceding the date of such application been sentenced upon his conviction of a criminal offence in any country to death or to imprisonment for a term of not less than twelve months and has not received a free pardon in respect of that offence; or

(b) is not of good behaviour; or

(c) has engaged in activities whether within or outside of The Bahamas which are prejudicial to the safety of The Bahamas or to the maintenance of law and public order in The Bahamas; or

(d) has been adjudged or otherwise declared bankrupt under the law in force in any country and has not been discharged; or

(e) not being the dependent of a citizen of The Bahamas has not sufficient means to maintain himself and is likely to become a public charge,

or if for any other sufficient reason of public policy he is satisfied that it is not conducive to the public good that the applicant should become a citizen of The Bahamas."

BASIC PRINCIPLES

1. It is now elementary that, since the 10th July, 1973, all persons and all laws in the Bahamas are subject to the Constitution, which came into force on that date. Though this fact can be stated very simply, it has had a profound and far-reaching effect upon the Bahamas, despite the fact that it was preceded in 1964 and 1969 by other Constitutions granted by the British Parliament, the vital difference being that the 1973 Constitution conferred on the Bahamas the status of Independence, whereas the previous Constitutions

left the Bahamas dependent upon the Mother Country, though the degree of that independence was rapidly diminishing.

So in the Privy Council case of The Bribery Commissioner v. Ranasinghe (1964) 2 All E.R.785, when the Board was considering the validity of a Speaker's certificate, showing that a bill by the majority required by the Constitution of Ceylon, at page 790, Lord Pearce could say :

> "The English authorities have taken a narrow view of the Court's power to look behind an authentic copy of the Act. In the Constitution of the United Kingdom, however, there is no governing instrument which prescribes the law-making powers and forms which are essential to those powers. There was therefore never such a necessity as arises in the present case for the court to take any close cognisance of the process of law-making."

(See also Adegbenro v. Akintola and Another (1963) 3 All E.R. 544).

Although we now have a "governing instrument", it is obvious that the public and private life of the community must continue in much the same way as before Independence, even though any act, whether it be public or private, is liable to be challenged as "unconstitutional".

A most instructive judgment as to the effect on the existing institutions of a former colonial territory, of the negotiation, introduction and establishment of a written Constitution, granting Independence is to be found in the Judgment of Lord Diplock, when delivering the majority Judgment of the Privy Council in Hinds v. The Queen (to which I have already referred), when he said at page 372:

> " Nevertheless all these constitutions have two things in common which have an important bearing on their interpretation. They differ fundamentally in their nature from ordinary legislation passed by the parliament of a sovereign state. They embody what is in substance an agreement reached between representatives of the various shades of political opinion in the state as to the

structure of the organs of government through which the plenitude of the sovereign power of the state is to be exercised in future. All of them were negotiated as well as drafted by persons nurtured in the tradition of that branch of the common law of England that is concerned with public law and familiar in particular with the basic concept of separation of legislative, executive and judicial power as it has been developed in the unwritten constitution of the United Kingdom. As to their subject matter, the peoples for whom new constitutions were being provided were already living under a system of public law in which the local institutions through which government was carried on, the legislature, executive and the courts, reflected the same basic concept. The new constitutions, particularly in the case of unitary states, were evolutionary not revolutionary. They provided for continuity of government through successor institutions, legislative, executive and judicial, of which the members were to be selected in a different way, but each institution was to exercise powers which, although enlarged, remained of a similar character to those that had been exercised by the corresponding institution that it had replaced.

Because of this a great deal can be, and in drafting practice often is, left to necessary implication from the adoption in the new constitution of a governmental structure which makes provision for a legislature, an executive and judicature. It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government. Thus the constitution does not normally contain any express prohibition upon the exercise of legislative powers by the executive or of judicial powers by either the executive or the legislature. As respects the judicature, particularly if it is intended that the previously existing courts shall continue to function, the constitution itself may

even omit any express provision conferring judicial power upon the judicature. Nevertheless it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature, by the executive and by the judicature respectively. To seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal or civil law would, in their Lordships' view, be misleading - particularly those applicable to taxing statutes as to which it is a well established principle that express words are needed to impose a charge upon the subject. In the result there can be discerned in all those constitutions which have their origin in an Act of the Imperial Parliament at Westminster or in an Order in Council, a common pattern and style of draftsmanship which may conveniently be described as "the Westminster model."

Before turning to those express provisions of the Constitution of Jamaica upon which the appellants rely in these appeals, their Lordships will make some general observations about the interpretation of constitutions which follow the Westminster model. All constitutions on the Westminster model deal under separate Chapter headings with the legislature, the executive and the judicature. The Chapter dealing with the judicature invariably contains provisions dealing with the method of appointment and security of tenure of the members of the judiciary which are designed to assure them a degree of independence from the other two branches of government. It may, as in the case of the Constitution of Ceylon, contain nothing more. To the extent to which the Constitution itself is silent as to the distribution of the plenitude of judicial power between various courts it is implicit that it shall continue to be distributed between and exercised by the courts that were already in

existence when the new constitution came into force; but the legislature, in the exercise of its power to make laws for the "peace, order and good government" of the state, may provide for the establistment of new courts and for the transfer of them of the whole or part of the jurisdiction previously exercisable by an existing court. What, however, is implicit in the very structure of a constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature, even though this is not expressly stated in the Constitution: Liyanage v. The Queen (1967 1 A.C. 259, 287 - 288.

The more recent constitutions on the Westminster model, unlike their earlier prototypes, include a Chapter dealing with fundamental rights and freedoms. The provisions of this Chapter form part of the substantive law of the state and until amended by whatever special procedure is laid down in the constitution for this purpose, impose a fetter upon the exercise by the legislature, the executive and the judiciary of the plenitude of their respective powers. The remaining chapters of the constitutions are primarily concerned not with the legislature, the executive and the judicature as abstractions, but with the persons who shall be entitled collectively or individually to exercise the plenitude of legislative, executive or judicial powers - their qualifications for legislative, executive or judicial office, the methods of selecting them, their tenure of office, the procedure to be followed where powers are conferred upon a class of persons acting collectively and the majorities required for the exercise of those powers. Thus, where a constitution on the Westminster model speaks of a particular "court" already in existence when the constitution comes into force it uses this expression as a collective description of all those individual judges who, whether

> sitting alone or with other judges or with a jury, are entitled to exercise the jurisdiction exercised by that court before the constitution came into force. Any express provision in the constitution for the appointment or security of tenure of judges of that court will apply to all individual judges subsequently appointed to exercise an analogous jurisdiction, whatever other name may be given to the "court" in which they sit: Attorney-General for Ontario v. Attorney-General for Canada (1925) A.C. 750."

(See also all three Judgments of the Bahamas Court of Appeal in The Governor-General of the Bahamas v. Burrows and Humes, 1974 No.10).

Because it is understood that, subject to the Constitution, the Courts will continue to operate substantially as they did prior to Independence, the Bahamas Constitution merely provides by Article 93(1) that "there shall be a Supreme Court for the Bahamas which shall have such jurisdiction and powers as may be conferred upon it by this Constitution or any other law."; and Article 98 contains a similar provision with regard to the Court of Appeal.

Similarly, Article 38 of the Constitution simply provides that "there shall be a Parliament of the Bahamas which shall consist of Her Majesty, a Senate and a House of Assembly".

The powers of Parliament are stated very briefly, and in familiar terms, in Article 52(1); "subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of the Bahamas".

In Liyanage v. The Queen, after referring to the Colonial Laws Validity Act, 1865, at page 284, Lord Pearce said:

> "Their Lordships cannot accept the view that the legislature while removing the fetter of repugnancy to English law, left in existence a fetter of repugnancy to some vague, unspecified law of natural justice."

Subject to the Constitution, the Act and the Order, existing laws are saved by section 4(1) of the Bahamas Independence Order, 1973, and this

section encompasses (inter alia) the Supreme Court Act, in section 29 of which the general jurisdiction of the Supreme Court is set out as follows :

> "29. The Court shall be a superior court of record, and, in addition to any other jurisdiction conferred by this or any other Act of the Legislature or by any Act of the Parliament of the United Kingdom, shall, subject as in this Act mentioned, possess and exercise the jurisdiction which is vested in, or capable of being exercised by -
>
> (a) Her Majesty's High Court of Justice in England; and
>
> (b) the Divisional Courts of that Court, as constituted by the Supreme Court of Judicature (Consolidation) Act, 1925 and any Act of the Parliament of the United Kingdom amending or replacing that Act."

In Hinds v. The Queen at page 380 of the Report, Lord Diplock stated that there were three kinds of jurisdiction that are characteristic of a Supreme Court where appellate jurisdiction is vested in a Court (as in the Bahamas), and that they were (1) unlimited original jurisdiction in all substantial civil cases; (2) unlimited original jurisdiction in all serious criminal offences; (3) supervisory jurisdiction over the proceedings of inferior courts. In my opinion, the Bahamas Supreme Court undoubtedly possesses such jurisdiction.

2. The Common Law

By section 2 of The Declaratory Act the Common Law of England, with certain exceptions, was declared to be in force in the Bahamas. I take that to mean the Common Law as it existed in England in 1799. For this proposition I rely upon the following paragraph to be found on page 545 of "Commonwealth Law and Colonial Law" by Sir Kenneth Roberts-Wray:

> " Under the common law, settlers take with them the law in force at the time of settlement. The law adopted by legislation is sometimes English law (in whole or in part)

> for the time being in force, or observed by the Courts in England. This, however, is exceptional. The normal practice is to apply the law in force in England on a particular date".

(See also "Halsbury's Laws of England" (4th Ed) Vol 6 at the end of paragraph 1196).

I respectfully agree with the view adopted by Sir K. Roberts-Wray that the Common Law "develops", and is not merely "declared" by judges (at page 565).

However, it may develop in different ways in different countries. This fact is set out, with authorities, in paragraph 1196 of the said volume of Halsbury's Laws:

> " Such development will not always be uniform with the common law of England, unless it is provided that the common law in force shall be that in England for the time being rather than at a specified date".

Judicial review of administrative action is, very largely, a development of the Common Law since 1799, and it does not necessarily follow that the Courts of the Bahamas should allow it to develop in this field in exactly the same way as it has developed in England and elsewhere. It can therefore be said that, to-day, to a certain extent, we are standing at the cross-roads, for the Bahamas Supreme Court is bound only by decisions of the Bahamas Court of Appeal, and probably by those of the Privy Council throughout its jurisdiction. (See Robert-Wray at pages 572 to 575). Of course, Judgments of other judges of the Supreme Court of the Bahamas, and of other parts of the British Commonwealth, particularly Judgments of English Courts, will have a highly persuasive authority. Also, we cannot disregard events of a judicial nature in the great country of the United States of America.

MISCELLANEOUS QUESTIONS

I turn now to three questions which arise out of the submissions of the Plaintiff's Counsel.

1. Was the Plaintiff's application for registration properly processed?

It has been submitted that the Minister and the Minister alone was authorized to deal with the Plaintiff's application from beginning to end. I cannot accept this submission. It is obvious that Government Departments could not function if the law required the Minister at the head of a Department to carry out all the work connected with a particular action. There is abundant authority for such a view, to which the Court's attention has been called by the Defendant's Counsel. So in Local Government Board v. Arlidge (1915) A.C.120 at page 133 Viscount Haldane, L.C. said:

> " In the case of the Local Government Board it is not doubtful what this procedure is. The Minister at the head of the Board is directly responsible to Parliament like other Ministers. He is responsible not only for what he himself does but for all that is done in his department. The volume of work entrusted to him is very great and he cannot do the great bulk of it himself. He is expected to obtain his materials vicariously through his officials, and he has discharged his duty if he sees that they obtain these materials for him properly. To try to extend his duty beyond this and to insist that he and other members of the Board should do everything personally would be to impair his efficiency. Unlike a judge in a Court he is not only at liberty but is compelled to rely on the assistance of his staff."

Vine v. National Dock Labour Board (1956) 3 All E.R. 939 was a case in which the legality of the delegation by a local Board to a disciplinary committee of certain duties and powers originally conferred on the National Dock Labour Board by an Act and an Order made thereunder, was considered. The House of Lords decided that the powers and duties could not be delegated, following Barnard v. National Dock Labour Board (1953) 1 All E.R.1113. The dismissal of a servant by the disciplinary committee was therefore a nullity.

Viscount Kilmuir, L.C., at page 943 stated:

"I now turn to the contention that the local board could delegate its functions to the disciplinary committee. I have had the advantage of seeing in print the opinion which my noble and learned friend, Lord Somervell of Harrow, is about to express and, on this part of the case, I find myself in complete agreement with it. It was urged that the very idea was negatived by the fact that this was a quasi-judicial act. I am not prepared to lay down that no quasi-judicial function can be delegated, because the presence of the qualifying word "quasi" means that the functions so described can vary from those which are almost entirely judicial to those in which the judicial constituent is small indeed (see Cooper v. Wilson (1937) 2 All E.R. 726 at p.740, per Scott L.J.). As so much has been said on this point I think it is right to say that there is a judicial element here in the sense discussed by Donovan, J., in R. v. Metropolitan Police Commissioner, Ex p. Parker (1953) 2 All E.R. 717. Nevertheless, that is not the end of the matter. It is necessary to consider the importance of the duty which is delegated, and the people who delegate. In this case, the duty is to consider whether a man will be outlawed from the occupation of a lifetime."

Wade on "Administrative Law" (3rd Ed) at page 65 has a statement to the same effect:

"Although, therefore, the courts are strict in requiring that statutory power shall be exercised by the persons on whom it is conferred, and by no one else, they make liberal allowance for the working of the official hierarchy, at least so far as it operates within the sphere of responsibility of ministers of the Crown. Powers conferred upon special statutory bodies are more jealously watched, as we have noticed. Yet the maxim delegatus non potest delegare, like so many of the other rules of administrative law, turns out to be no more than a qualified rule for the interpretation of Parliament's intentions."

In the present case we have the uncontradicted evidence of Mr. Turnquest that, Mr. Walkine, a

senior official of the Ministry of Home Affairs, interviewed the Plaintiff, and that the final "decision" was made by the Minister himself, and, in my opinion, the Plaintiff's objection on this ground fails.

2. The second question with which I wish to deal at this stage is this: Was the "decision" of the Minister properly communicated to the Plaintiff by Mr. Turnquest's letter of the 16th June, 1975?

Without hesitation, I answer this question in the affirmative. It may well be that the letter is not couched in the terms in which it would have been couched if it had been settled by a lawyer; and perhaps it would have read better if it had employed what Wade (at page 65) calls "the common official formula: 'I am directed by the Minister, etc.'." However, I have no doubt that the writer of that letter had the authority to communicate the Minister's "decision", and that the letter can mean only that the application for registration was "refused". Indeed, this seems to me to be exactly what the Plaintiff implies in paragraph 8 of his affidavit sworn on the 7th April, 1976.

3. The Plaintiff's Counsel has invited the Court to infer that the Minister acted in bad faith, but this cannot be done. Bad faith like fraud, can never be inferred; there must be positive proof. Moreover, it must be specifically alleged. So at page 294 of "Judicial Review of Administrative Action" (3rd Ed) by S.A. de Smith it is stated:

> "A court will not in general entertain allegations of bad faith made against the repository of a power unless bad faith has been expressly pleaded. If the good faith of a party to proceedings is impugned on the ground that his evidence given on affidavit is false, leave should be sought to cross-examine the deponent."

In consequence, I reject this submission.

CONSTRUCTION OF ARTICLE 5(2) OF THE CONSTITUTION

The Plaintiff's case is based, to a very

large extent, upon his construction of Article 5(2) of the Constitution, and, it would appear that the relief sought in his Originating Summons dated the 7th April, 1976, and the facts contained in his first affidavit sworn on the 7th April, 1976, are based upon this construction.

In effect, what he says is that this paragraph grants to those who fall within it (and I have no doubt that the Plaintiff is one of such persons) an indefeasible right to be registered, upon application to the Minister in the prescribed form.

In answer to this submission, the Defendant's Counsel submits that the entitlement cannot be indefeasible because paragraph (3) of the Article immediately subjects the entitlement conferred by paragraph (2) to the requirement of renunciation of any other citizenship which may exist (and does exist in the instant case). She continues that paragraph (4) further reduces the entitlement conferred by paragraph (2) to a mere application, and that that application is subject to the exceptions or qualifications which are set out in section 7 of the B.N.A.

In my judgment paragraph (2) cannot be read in isolation. It is a well-recognised principle of statutory interpretation that a statute should be read as a whole: a fortiori a section of an Act should be read as a whole. (See Maxwell on Interpretation of Statutes (4th Ed) at pages 58 et seqq. and Craies on Statute Law (7th Ed) at pages 98 et seqq.). At page 58 Maxwell says:

> "Individual words are not considered in isolation, but may have their meaning determined by other words in the section in which they occur."

At page 507 Craies states:

> "The general rules adopted for construing a written constitution embodied in a statute are the same as for construing any other statute."

So the constitution of the Australia Commonwealth has been construed as an Act of Parliament.

In Pearce on "Statutory Interpretation in Australia" (1974) at page 31, paragraph 43 is headed:

> "Noscitur a sociis: the meaning of a word or phrase is to be deprived from its context."

The paragraph contains these words:

> "Draftsmen of legislation, perhaps unwisely, usually try to present a document that is readable as well as accurate - and often this results in them relying on context to convey meaning also. The courts have recognised this and, when ascertaining the meaning of a word, have, in many cases, paid heed to the context in which the word appears....
>
> This approach can lead to the delimitation of the scope of a word (thereby working in much the same way as the eiusdem generis rule; see (44)). A word of wide possible connotation will be limited by the context in which it appears. Thus in Prior v. Sherwood (1906) 3 CLR 1054 the court held that a prohibition against book-making in any 'house, office, room or place' did not extend to a public lane. The wide possible meaning that could have been attributed to the word 'place' was limited by its use in conjunction with 'house', 'office' and 'room' which the court considered denoted an enclosed or definable area."

So in Canada Sugar Refining Co. v. R. (1898) A.C.735 at page 741 Lord Davey said:

> "Every clause of a statute should be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter."

This view is supported by the Bahamas Constitution itself, in Article 137(13). (But see Hinds v. The Queen page 372 Letter H).

Developing his argument, the Plaintiff's

Counsel has pointed out that the entitlements granted by other paragraphs of Article 5, and also by Article 7 and Article 10, contain a proviso making the entitlement in each case subject to exceptions and qualifications to be prescribed in the interests of national security or public policy, whilst there is no such proviso in paragraph (2). He has also pointed out that, whereas paragraph (2) of Article 5 speaks of an entitlement, paragraph (4) speaks of an "application".

These are weighty arguments, and were presented to the Court very persuasively. The Court was reminded that a change of language in a statute usually indicates a change of meaning. However, Maxwell indicates, at pages 279 and 286, that this is not necessarily the case:

> "This presumption as to identical meaning is, however, not of much weight. The same word may be used in different senses in the same statute and even in the same section.....
>
> Just as the presumption that the same meaning is intended for the same expression in every part of an Act is not of much weight, so the presumption of a change of intention from a change of language - which is of no great weight in the construction of documents - seems entitled to less weight in the construction of a statute than in any other case: for the variation is sometimes to be accounted for by the draftsman's concern for 'the graces of the style' and his wish to avoid the repeated use of the same words, sometimes by the circumstance that the Act has been compiled from different sources, and sometimes by the alterations and additions from various hands which Acts undergo in their progress through Parliament. Though the statute is the language of the three estates of the realm, it seems legitimate in construing it to take into consideration that it may have been the production of many minds and that this may better account for any variety of style and phraseology which is found than a desire to convey a different intention. Even where the variation occurs in different statutes, the

change is often not indicative of a change of intention."

The latter part of this quotation has particular significance in relation to the settlement of a Constitution, which is so aptly described in the Judgment of Lord Diplock in Hinds v. The Queen, to which I have already referred, and which is so familiar to everyone who has attended Constitutional Conferences in London (and I have attended two).

Had paragraph (2) of Article 5 stood alone, and if the explanation of paragraph (4) by the Plaintiff's Counsel that the exceptions and qualifications referred to therein could reasonably be applied to the application, I would have no difficulty in accepting the Plaintiff's Counsel's submission as to the meaning of paragraph (2) of Article 5. (I note, with respect, that, in the Akintola Case, Viscount Radcliffe states at page 547, that the learned Judges of the Privy Council, found themselves in a similar position).

However, in my view "the exceptions or qualifications" referred to in paragraph (4) can only refer to the entitlement or right conferred by paragraph (2). This, I believe, is the most natural meaning to be attributed to paragraph (4), and the requirement that the most natural meaning of the words of a statute should be adopted, and that every effort should be made to make good sense of a statutory provision ("ut res magis valeat quam pereat"), are cardinal principles of statutory interpretation.

I must confess that, to read "application" as though it meant "entitlement" or "right" does create some difficulty, and that the word "application" is not normally used in that way. However, I note that the Shorter Oxford Dictionary gives, as one of the meanings of the word "application": "3. The bringing of anything to bear practically upon another". Further, Jowitt's "The Dictionary of English Law" defines the word "application" as "a request, a motion to a Court or judge; the disposal of a thing". This last meaning is the one which I would adopt in interpreting the word "application" in paragraph (4) of Article 5.

That the term "application" can have the meaning which I have adopted is shown in definitions of the term set out on page 99 of "Words and Phrases Legally Defined" (2nd Ed) Volume 1:

"APPLICATION

/The Patents and Designs Act 1907, s.8A(2) (repealed; see now s.12 of the Patents Act 1949, as amended by s.1 of the Patents Act 1957) provided that if an "application" was not in order within the allowable period, it should become void at the expiration of twenty-one months from the date thereof or at the expiration of that period, whichever was the later./ "I agree that there are certain sections of the Acts in which the words 'the application' appear to be used as referring to the application form. For example, I think the application form is referred to in s.1(3) of the Acts, which provides that 'the application' must contain a certain declaration; again, when in s.3(2) it is provided that the Comptroller may require that 'the application', specification, or drawings be 'amended', it seems to me that the phrase 'the application' refers to the piece of paper, the application form. No doubt instances could be multiplied where the words 'the application' appear to refer to the form and not to the proceeding; but, in my view, in s.8A, sub-s.2 of the Act, what is referred to is not a piece of paper, but a legal proceeding." Re Kempe's Application (1942), 59 R.P.C.72, per Morton, J., at p.74.

CANADA - "The word 'application' has been judicially construed. 'Application' is defined in Stroud's Judicial Dictionary as a request, a motion to a Court or judge, disposal of a thing. The word 'application' in r.15, Ord.58, R.C.S., includes the hearing of the action, as well as any interlocutory proceeding: International Financial Society v. City of Moscow Gas Co. (1877), 7 Ch.D.241, C.A. "Peters v. Friesen, (1941) 1 W.W.R. 557, per cur., at p.562; affd., (1941) 2 W.W.R. 29.

In the 1877 case Thesiger, L.J., at page 247 said:

"And lastly, it being admitted that there are some final judgments and orders which do come within the words "in case of the refusal of the application"..... it seems to me to reasonably follow that all judgments or orders, whether final or interlocutory, should be included in these words."

This shows that "application" can have a much wider meaning than "application form", as in Re Kempe's Application.

The Defendant's Counsel has drawn the attention of the Court to page 63 of Thornton's "Legislative Drafting" (1970) where it says:

"(b) the content of the proviso could be presented as a separate subsection beginning -

Subsection (1) shall not apply to...."

In my view, therefore, paragraph (4) should be read as though it were contained in a proviso to paragraph (2) and the words "Any application for registration under paragraph (2) of this Article" should be read as being equivalent to the words "Provided that the right to be registered as a citizen under this paragraph".

I arrive at the same conclusion from a purely drafting point of view.

There are six categories of persons who are "entitled" to be registered as citizens. They are, in order of mention in Chapter II:-

A. The wife, former wife or widow at Independence of a birthright citizen: (Art. 5(1)).

B. The possessor of Bahamian Status at Independence. (Art.5(2)(3)(4)).

C. The wife, former wife or widow at Independence of a possessor of Bahamian Status who subsequently is registered as a citizen. (Art.5(5)).

D. A person born in the Bahamas after Independence of non-citizen parents. (Art.7(1)).

E. A person born outside the Bahamas after Independence with Bahamian mother (but not father). (Art.9(1)).

F. The wife (at time of application) of a Bahamian citizen. (Art.10).

Three of the above-mentioned six categories are wives (et cetera) (Art. 5(1); 5(5); 10). In those cases the draft follows one pattern. In the cases of the other three categories the draft follows another pattern (Art. 5(2)(4); 7(1)(2); 9(1)(2)(3)).

In the first case, that of the three categories of wives (et cetera) (Art.5(1); 5(5); 10), the entitlement to citizenship is immediately followed, in the same paragraph, by a proviso to the effect that the right to be registered "shall be subject to such exceptions or qualifications...". It is to be noted that each of these categories is dealt with in one paragraph (or in one Article cons isting of a single paragraph).

In the second case, that of the other three categories, ((i) Art.5(2)(3)(4); (ii) Art. 7(1)(2); (iii) Art.9(1)(2)(3)), provisions requiring renunciation of other citizenship follow immediately after the paragraph providing for entitlement to citizenship (see Art. 5(3); Art.7(1) proviso; Art.9(1) proviso and 9(2)). Consequently, the provision for "exceptions and qualifications" is in a separate paragraph (see Arts. 5(4); 7(2); 9(3)).

How does one set about drafting the exact equivalent of the proviso to Article 5(1), in the form of a separate paragraph?

The draftsman has chosen the shortest form (Arts. 5(4), 7(2), 9(3)) -

> "Any application for registration under.... shall be subject to such exceptions or qualifications....."

The only alternative (to avoid any argument) would be -

> "Notwithstanding anything contained in paragraph 2 of this Article, the right to

be registered as a citizen of The Bahamas under that paragraph shall be subject to such exceptions or qualifications....."

Faced with setting this out three times (in Arts. 5(4), 7(2) and 9(3) it is not surprising that the draftsman sought a shorter form of words.

From the point of view of the draftsman, there evidently was no difference between :-

(1) a right (which must be applied for) being subject to exceptions; and

(2) an application for a right being subject to exceptions.

I do not see any difference myself.

The draftsman should have avoided this change of expression. But it is a weakness in the drafting that does not affect the meaning.

There is no reason that I can fathom why, in the given six catefories of persons entitled to citizenship, the provision for the prescription of qualifications or exceptions should have one meaning in the case of the three categories of wives (et cetera) and another meaning in relation to the other three categories.

Paragraph 6

If the Plaintiff's interpretation of paragraph (4) of Article 5 were correct, then I would expect the "exceptions or qualifications" to be mentioned in paragraph (6) of Article 5. However, this is not the case.

Although I reject the Defendant's Counsel's interpretation of the word "application" in paragraph (4), I do accept her submission that the "exceptions or qualifications" referred to in paragraph (4) are contained in section 7 of the B.N.A., to which I shall be coming in due course, and I shall then consider the definition of the word "prescribed", contained in Article 137(1) of the Constitution.

SECTION 16 OF THE BAHAMAS NATIONALITY ACT 1973

The Defendant's Counsel contends that the action is barred by this section of the B.N.A., which reads as follows :

> "16. The Minister shall not be required to assign any reason for the grant or refusal of any application or the making of any order under this Act the decision upon which is at his discretion; and the decision of the Minister on any such application or order shall not be subject to appeal or review in any court."

This section is, to all intents and purposes, on all fours with section 26 of the British Nationality Act 1948.

It will be seen at once that the section falls into two parts: in the first part Parliament purports to relieve the Minister of the duty "to assign any reason for the grant or refusal of any application under this Act the decision of which is at his discretion"; and the second part of the section purports to exclude judicial review of a decision by the Minister.

The Plaintiff's Counsel has urged on the Court that the words "at his discretion" in the section constitute a term of art, and therefore that this section can apply only when those words are used in the Act in relation to the making of a decision by the Minister, and that, since those words do not appear in section 7 of the B.N.A., therefore section 16 can have no application to a decision made under section 7. I cannot accept this restrictive interpretation of the words in question.

I have no doubt that section 7 of the B.N.A. confers a discretion onthe Minister, whether it be described as "objective" or subjective". Apart from the concluding clause of the Proviso, the words "if it appears to the Minister", "may refuse" and "if he is satisfied", which appear in the section, are either identical or very similar to terms which have been judicially held to be words of discretion in a long line of cases in the reports. (See Liversidge v. Anderson (1942) A.C.206 ("reasonable cause to believe");

Nakkuda Ali v. Jayaratne (1951) A.C. 66 ("reasonable ground to believe"); Cedeno v. O'Brien (1964) 7 W.L.R. ("whom he had reason to suspect"); Maradana Mosque v. Mahmud (1966) 1 All E.R. 545 ("if he was satisfied"); R. v. Secretary of State for Home Affairs, Ex parte Soblen (1962) 3 All E.R. 373 ("if he deems it to be conducive to the public good"); Robinson v. Minister of Town and Country Planning (1947) 1 K.B. 702 ("if the Minister is satisfied"); Commissioners of Customs and Excise v. Cure & Deely Ltd (1961) 3 All E.R. 641).

The Defendant's Counsel has drawn to our attention that, although the words "at his discretion" are used in section 26 of the English Act (from which I strongly suspect they and the remainder of section 16 were derived by the draftsman of section 16), the words do not appear anywhere else in the English Act, and therefore, so far as the English Act is concerned, it would be impossible to treat the words as a term of art.

' "It is incumbent," said Willes J. in Mansell v. R., "on those who say that any word is a 'term of art', for which no equivalent can be substituted, to show that it has been so held." In other words, as was said by Pollock B. in Grenfell v. Inland Revenue Commissioners, if a statute contains language which is capable of being construed in a popular sense, such "a statute is not to be construed according to the strict or technical meaning of the language contained in it, but is to be construed in its popular sense, meaning, of course, by the words 'popular sense' that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it."' (Craies on Statute Law 7th Ed. at page 163).

It is therefore not surprising that, in the leading English text-book on the subject of Judicial Review of Administrative Action (3rd Ed.) by S.A. de Smith, the words "at his discretion" appearing in section 26 of the English Act are not construed as a term of art, but merely as a general discretion of the appropriate authority. (See page 325 of de Smith).

In the Supreme Court

No.8
Judgment of Knowles C.J. dated June 1976

The Court's attention has been drawn by the Plaintiff's Counsel to the definition of "prescribe" laid down in Blackstone's Commentaries, paragraphs 45 and 46:

> "It is likewife 'a rule prescribed'. Because a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it. But the manner in which this notification is to be made, is a matter of very great indifference. It may be notified by universal tradition and long practice, which supposes a previous publication, and is the case of the common law of England. It may be notified, viva voce, by officers appointed for that purpose, as is done with regard to proclamations, and such acts of parliament as are appointed to be publicly read in churches and other assemblies. It may lastly be notified by writing, printing, or the like; which is the general course taken with all our acts of parliament. Yet, whatever way is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them up on high pillars, the more effectually to ensnare the people."

Ordinarily, I would not hesitate to say that the word naturally connotes some degree of publicity; and this is what one would expect in a matter of this kind.

However, the Constitution contains its own definition of "prescribed" in Article 137(1):

> '"prescribed" means provided by or under an Act of Parliament',

and, of course, this definition where applicable, must prevail over all others, like every other part of the Constitution. At the same time, all definitions are made subject, inter alia, to the context.

The question therefore is this: Is section 7 of the B.N.A. a <u>provision</u> "by an Act of Parliament"?

It seems to me that that question must be answered in the affirmative, at least down to the end of paragraph (v) of the Proviso.

But what about the concluding paragraph of the Proviso?

As regards the concluding words of the Proviso, it has been argued that it would be strange indeed if Parliament, in paragraphs (a) to (e) of the Proviso, should "prescribe" certain specific grounds of refusal, and, then, in the concluding clause allow the Minister to add such other grounds "in the interest of public policy"as he should think fit. This is precisely what the contrary argument amounts to; but to enable the Court to escape this conclusion the Plaintiff must show either that (a) it is not a "provision" by Parliament or (b) that it is "ultra vires" because it is inconsistent with Article 5 of the Constitution in some way or (c) a Minister is not competent to deal with matters of public policy.

I feel bound to reject the first and third of the objections. It is obviously a "provision" by Parliament; it is difficult to conceive of a more comprehensive term; it is impossible to argue that Ministers are not competent to deal with matters of national security or public policy - they are matters which are, or should be, their primary concern. So in Padfield and Others v. Minister of Agriculture, Fisheries and Food and Others (1968) 1 All E.R. 694, a decision of the House of Lords, which is described by de Smith, at page 259, as "the most striking example of judicial activism in the area of administrative law", it was held that the Minister's discretion was not unfettered. Nevertheless at page 707 Lord Morris describes the decision as "essentially a policy decision" and Lord Upjohn says at page 717 "I must examine the reasons given by the Minister, including any policy on which they may be based."

After careful and anxious consideration I have come to the conclusion that I cannot now hold that the concluding words of the Proviso are ultra vires Article 5(4) of the Constitution, and therefore invalid. My

reasoning is as follows: Despite the widening of the term "prescribe" by the definition, one must always consider the context and purpose of a provision.

Maxwell on "The Interpretation of Statutes" devotes a whole chapter to the treatment of general words, and "provides" assuredly is a general word. At page 76 he says:

> "The words of a statute, when there is doubt about their meaning, are to be understood in the sense in which they best harmonise with the subject of the enactment. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject, or in the occasion on which they are used, and the object to be attained. Grammatically, words may cover a case; but whenever a statute or document is to be construed it must be construed not according to the mere ordinary general meaning of the words, but according to the ordinary meaning of the words as applied to the subject-matter with regard to which they are used; unless there is something which renders it necessary to read them in a sense which is not their ordinary sense in the English language as so applied."

At page 86 he says:

> "However wide in the abstract, general words and phrases are more or less elastic, and admit of restriction or extension to suit the legislation in question. The object or policy of this legislation often affords the answer to problems arising from ambiguities which it contains. For it is a canon of interpretation that all words, if they be general and not precise, are to be restricted to the fitness of the matter, that is, to be construed as particular if the intention be particular."

It is clearly arguable that the Constitution would not confer an entitlement, a right, upon a man, and then allow another authority, however exalted his or its authority, however noble his or its intentions, to take it away arbitrarily. In a matter of this kind, common sense might appear to require that the grounds of refusal

should be certain and ascertainable, not locked up in the bosom of an individual.

However, the parties have placed before the Court a copy of the Constitution of Barbados, 1966 and a copy of the Barbados Citizenship Act 1966. On comparing the Barbadian instruments with the Bahamian instruments, I have come to the conclusion, that, in so far as the two sets of instruments affect persons in a position like the Plaintiff's, they are remarkably similar. The language used is not always identical, but, in my opinion, the substantial meaning of the relevant provisions is virtually the same.

Section 3(2) of the Constitution of Barbados creates an entitlement in the same way as Article 5(2) of the Constitution of the Bahamas creates an entitlement. The former contains a Proviso which is substantially to the same effect as Article 5(4) of the latter.

Section 4(9) of the Barbados Citizenship Act sets out specific grounds upon which the Minister may refuse to register a person like the Plaintiff in terms virtually identical to paragraphs (i) to (v) of section 7 of the B.N.A.

However, section 4(9) of the Barbados Citizenship Act is expressly stated to be without prejudice to the generality of section 4(8), which confers upon the Minister a sweeping discretion to refuse registration "if he is satisfied that the interest of national security and public policy so require". This language is obiously similar (though not identical) to the final words of the Proviso to section 7 of the B.N.A., which read: "or if for any other sufficient reason of public policy he is satisfied that it is not conducive to the public good that the applicant should become a citizen of the Bahamas."

Inevitably, the Barbados Citizenship Act includes an "ouster" clause; this is found in section 12 of the Act, and is virtually identical to section 16 of the B.N.A.

This substantial similarity of the Barbadian and Bahamian provisions was not dealt with by counsel on either side, and the Court has had no information as to any judicial interpretation which the sweeping terms of section 4(8) of the Barbados Citizenship Act may have received. For all I know, they have not been challenged since they were passed 10 years ago. Nor have we been informed of the terms of other Constitutions based on the Westminster Model and their respective Nationality Acts. There may or may not be provisions in such other instruments which are relevant to this question.

In this state of affairs, it is incumbent upon me to adopt a cautious attitude, and, without further argument and materials, I am not prepared to hold that the final clause of the Proviso to section 7 of the B.N.A. is ultra vires the Constitution.

I now continue with my examination of section 16 of the B.N.A., which, as I have said, is virtually identical to section 26 of the British Nationality Act, 1948.

It would appear that there has been no judicial interpretation of section 26 of the English Act. But at page 316 de Smith seems to lean in favour of an interpretation which would exclude judicial review where the Minister or other authority has a discretion. Also, at pages 261 and 262, he states :

> "Broadly speaking, however, one can say that the courts will show special restraint in applying tests of legality where (i) a power is exercisable in 'emergency' conditions; (ii) an executive power, the exercise of which is not subject to appeal, is used to exclude remove or deport aliens or other non-patrial persons on policy grounds; or (iii) the 'policy' content of the power is large and its exercise affects large numbers of people."

In the present case, there is no evidence before the Court as to whether or not large numbers of people would be affected by the power, though it is obvious that there are others who are affected, and it could well be argued that the "policy" content of the power is large.

It was submitted that section 16 of the B.N.A. was ultra vires in respect of an application under Article 5(2) of the Constitution. In my opinion, the provisions of that section can easily be brought within the exceptions or qualifications of Article 5(4), like section 7 of the Act.

I cannot believe that the British Parliament, which authorized the Constitution, intended to reduce the powers of the hitherto sovereign Bahamian Parliament, by shearing it of the power to enact a section which is virtually identical to a section in its own Nationality Act. The existing Canadian Citizenship Act contains a somewhat analogous finality clause (section 31(5)), and so does the Canadian Citizenship Bill which passed the House of Commons on the 13th April, 1976, and is now before the Senate (clause 17(3)). (At the same time, I am well aware that, generally speaking, an applicant for citizenship in Canada, is by statute placed in a much more favourable position than an applicant under Article 5 of the Constitution and section 7 of the B.N.A., and the judicial element in the process is there considerably enhanced).

As regards the first part of section 16 I accept the following general statement by Michael Akehurst in his article entitled "Statement of Reasons for Judicial and Administrative Decisions", which is to be found in 33 Modern Law Review at page 154, and which is referred to with approval by de Smith on page 129 of his work:

> "The general rule is that there is no duty to state reasons for judicial or administrative decisions. A statement of reasons is not required by the rules of natural justice, and therefore there is no duty to state reasons for the decisions of courts, juries, licensing justices, administrative bodies and tribunals or domestic tribunals.
>
> Even in the days before the Jervis Acts of 1848, justices of the peace were never required to state reasons for their decisions. The record which was

returned to the King's Bench in certiorari proceedings contained the document which initiated the proceedings, the pleadings (if any), the evidence (only in criminal cases), and the adjudication, but not the reasons, unless the justices chose to state them. Since inclusion of the adjudication in the record was compulsory but inclusion of the reasons was not, it follows that a statement of reasons did not form a necessary part of the adjudication.

The rule that reasons need not be stated at the time of a judicial or administrative decision is reinforced by the rule that members of a tribunal cannot be compelled, during subsequent litigation, to give evidence about the reasons for their decision."

In this connection, it is note-worthy that the Court of Appeal refused to give reasons for the refusal of a certificate that a point of law of general importance had arisen for the purposes of leave to appeal to the House of Lords, in R. v. Cooper; R. v. McMahon (1975) 61 Cr. App. R.215.

As regards the second limb of section 16, these provisions are called variously privative, final, pre-clusive and ouster clauses. I shall use the last-named expression.

After careful consideration and a review of all the authorities which have been cited to the Court, I have come to the conclusion that section 16 of the B.N.A. does not entirely exclude judicial review. I respectfully adopt the conclusion, set out on page 41 of a paper entitled "Judicial Review of Administrative Action In Guyana" by Chucks Ikpaluba, lecturer in law at the University of the West Indies, and published in December 1972, after he had considered most of the authorities cited in this Court, as well as certain West Indian authorities which were not cited to us:

"From the foregoing one comes to the inescapable conclusion that the courts construe privative clauses strictly and that they regard them as inoperative if any of the grounds for judicial review is available.

> In effect the courts will review administrative powers, even on the fact of statutory restrictions, where the administrator or tribunal exceeds its duties, acts without authority, acts in bad faith, breaches the rules of justice or misconstrues its powers, and that immediately it becomes manifest from the administrative act that any of those jurisdictional defects is present, the Courts will interfere without the aid of any statute."

In Wade's "Administrative Law" (3rd Ed.) at pages 149-150 there is a similar comment on such clauses:

> "In order to preserve their control the courts have made it a firm rule to put a narrow construction on the finality clauses which are commonly found in statutes. If it is provided that some decision 'shall be final' or 'shall be final and conclusive', this is interpreted to mean that there is no further appeal, but that the decision is still subject to judicial control if it is ultra vires, or even if it merely shows error on the face of the record. 'Parliament only gives the impress of finality to the decisions of the tribunals on condition that they are reached in accordance with the law.' The same principle applies usually to certiorari and to the grant of a declaration. This robust attitude virtually deprives finality clauses of meaning for this purpose, since there is no right of appeal anyway unless expressly given by statute. But these clauses may be important for other purposes, for example when the question is whether the finding of one tribunal may be reopened before another."

Garner's comments on pages 158 and 159 of his Administrative Law (4th Ed.) are also interesting in this connection :

> " 'Not to be questioned in any legal proceedings whatsoever.' - This very sweeping exclusory phrase appears in several statutes of importance, usually

within a context where Parliament has provided a specific though limited remedy, and has then also provided that except for the specified remedy, a person aggrieved by the administrative action in question (which itself is usually of a judicial nature) shall not be entitled to question the validity of that action in any legal proceedings..... This was the provision in issue in Smith v. East Elloe R.D.C. (1956) 1 All E.R.855 where it was argued that this provision was not effective to exclude the right of a person aggrieved by a compulsory purchase order to bring an action in the High Court for a declaration that the order was ultra vires after the expiration of the period of six weeks, in circumstances where it was alleged that the order had been made "wrongfully and in bad faith". In the course of his judgment in the House of Lords, Viscount Simonds was of the opinion that the Court was bound by the "plain words" of the statute:

> "There is nothing ambiguous about paragraph 16 (of the First Schedule of the 1946 Act); there is no alternative construction that can be given to it; there is, in fact, no justification for the introduction of limiting words such as 'if made in good faith': and there is the less reason for doing so when those words would have the effect of depriving the express words 'in any legal proceedings whatsoever' of their full meaning and content."

These words were considered by the House of Lords in Anisminic v. Foreign Compensation Commission.....Their Lordships were satisfied that a privative clause of this kind could not oust the jurisdiction of the court to declare a determination to be a nullity where it was void ab initio. If the decision was ultra vires, contrary to natural justice or arrived at in bad faith (specialised examples of ultra vires) it was no determination at all, and therefore the privative clause could not exclude the power of the court to say so.

Although East Elloe was criticised in

Anisminic it should be noted that in the latter case the statute made no provision whatever for irregularities in a decision of the tribunal to be cured. In East Elloe on the other hand, a statutory procedure was provided for an illegal decision to be called into question - within a specified time limit. It is submitted, therefore, that East Elloe should not be treated as having been overruled."

Finally, Working Paper No.40 of The Law Commission in England on "Remedies in Administrative Law" at pages 91 and 92 makes a plea for clarification in this field:

"The second aspect of existing statutory provisions which we wish to consider concerns the effectiveness and justifiability of clauses barring judicial review, either totally or after some special period of time shorter than the period allowed generally for challenge by certiorari. Ultimately, of course, the degree to which challenge in the courts should be excluded or restricted is a matter of policy which lawyers alone cannot decide. But quite apart from the question whether particular exclusion clauses are justified, we think that the whole situation should be reviewed on the ground that after the recent decision of the House of Lords in Anisminic v. Foreign Compensation Commission, this area of law is in some considerable doubt and confusion."

A typical case where the tribunal exceeded its duties and acted without authority, and a leading case on this topic of ouster clauses, is the Anisminic Case (1969) 2 A.C.147, which has been the subject of a most instructive article in (1969) 85 L.Q.R. 198 by H.W.R. Wade, where he summarizes the case as follows :

" The Foreign Compensation Commission is a statutory tribunal constituted by the Foreign Compensation Act 1950 for the purpose of adjudicating claims on funds paid by foreign governments to the Government

of the United Kingdom in compensation for the expropriation or destruction of British property abroad. Anisminic Ltd. claimed some £4m. for the loss of a manganese mine in the Sinai peninsula in consequence of the Suez hostilities in 1956. Under a treaty of 1959 the United Arab Republic paid over £27.5m. to the United Kingdom as compensation for this and other specified properties, but claims had to be made good to the Foreign Compensation Commission. In a provisional determination the Commission rejected Anisminic Ltd.'s claim on the ground that they had sold their undertaking to an agency of the U.A.R. Government before the date of the treaty, and did not therefore comply with a provision of an Order in Council requiring that claimants and their successors in title should be British nationals at that date. But, as the majority of the House of Lords ultimately held, this determination was erroneous. The Commission were misled by what Lord Wilberforce called "unfortunate telescopic drafting." The requirement about the nationality of successors in title did not apply where the original owner was the claimant. Moreover, the majority held, the Commission's mistake meant that it went into matters which it had no jurisdiction to consider. Thus the case could be brought within the principle that statutes which forbid recourse to the courts will not protect action which is ultra vires. This last principle was affirmed unanimously, and had also been affirmed in the lower courts. But in the last previous case to come before the House of Lords, the House and the lower courts alike had overlooked the principle's existence."

The "ouster clause" read: "The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law." Moreover, section 11(3) of the Tribunals and Inquiries Act 1958 expressly excepts determinations of this Commission (and section 26 of the British Nationality Act 1948) from the operation of section 11, which provides that statutes should not oust the remedies of certiori, prohibition and mandamus.

Professor Wade states, on page 200 of the article:

> " For three centuries, however, the courts have been refusing to enforce statutes which attempt to give public authorities uncontrollable power. If a ministry or tribunal can be made a law unto itself, it is made a potential dictator; and for this there can be no place in a constitution founded on the rule of law. It is curious that Parliament shows no consciousness of this principle. But the judges, acutely conscious of it, have succeeded in preventing Parliament from violating constitutional fundamentals. In effect they have established a kind of entrenched provision which the legislature, whatever it says, is compelled to respect. The essence of this provision is that no executive body or tribunal should be allowed to be the final judge of the extent of its own powers. But while entrenching this principle for sound constitutional reasons, the judges have naturally disclaimed any intention of rebelling against the legislature. They have prudently concealed the constitutional aspect in a haze of technicality about jurisdiction and nullity."

At pages 170 & 171 Lord Reid pointed out that an ouster clause protects every determination which is not a nullity, but that it is unreasonable to construe as a real determination, something which merely purported to be a determination, but which was not.

Professor Wade quotes a passage of Farwell, L.J. in R. v. Shoreditch Assessment Committee (1910) 2 K.B. at 880, which was approved by Lords Morris, Pearce and Wilberforce:

> "Subjection in this respect to the High Court is a necessary and inseparable incident to all tribunals of limited jurisdiction; for the existence of the limit necessitates an authority to determine and enforce it: it is a

contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure - such a tribunal would be autocratic, not limited....."

At page 203 Professor Wade says :

> "Where on the other hand, a sweeping ouster clause bars access to the courts on all questions, the dangers of uncontrollable power are far more obvious. The instinct of English courts is then to refuse all compromise on any kind of jurisdictional question. Nor is this an English idiosyncrasy. It is one of the "universals" of the judicial function."

Then he continues :

> "It is remarkable that this bold and (it is submitted) wise judicial policy has never previously been discussed at any length in a reported case, although it has three hundred years of history behind it. Perhaps a discreet silence was thought best. At any rate, the cases merely repeat tersely that questions of jurisdiction are not affected by ouster clauses. An early decision of 1670 is in fact one of the most explanatory. A statute of 1571 provided that commissioners of sewers should not be compellable to make any return of their actions or be fined or molested in body, lands or goods for acting as such. On the advice of counsel the Whitechapel commissioners, accused of rating lands in Wapping outside their jurisdiction, paid no attention to writs of certiorari from the King's Bench. They soon found themselves molested both in body and in goods, for they were imprisoned and fined for their contempt. Kelynge C.J. said:
>
> > 'this court cannot be ousted of its jurisdiction without special words; here is the last appeal, the King himself sits here, and that in person if he pleases, and his predecessors have so done; and the King ought to

> have an account of what is done below in inferior jurisdictions. 'Tis for the avoiding of oppressions, and other mischiefs. To deny and oppose this, and to set up uncontrollable jurisdictions below, tends manifestly to a commonwealth; and we ought, and we shall take care that there be no such thing in our days.'

Assuming that "commonwealth" was in 1670 a disparaging term signifying dictatorship or lawlessness, one can see exactly the same sense as in Farwell L.J.'s remarks 240 years later and as in the House of Lords' opinions today.

Parliament took the hint about "special words", and express "no certiorari" clauses soon became common. But the courts firmly disregarded them in issuing certiorari to quasn for excess of jurisdiction. What may be the earliest report of such a case is no more than a note of Lord Kenyon: "The statute of 3 & 4 W. & M.s.23 says, no certiorari shall issue to remove any order made on that Act. But the order in this case is out of the jurisdiction of the justices, and, therefore, may be removed by a certiorari." This rule was firmly established in a long line of later decisions."

Here, then, is some evidence that judicial review of "ouster clauses" was a part of the English Common Law which was imported by our Declaratory Act, and "saved" by section 4(1) of The Bahamas Independence Order, 1973.

In his article in the Law Quarterly Review Professor Wade roundly states (at page 207):

> "In the Anisminic case their Lordships have now repudiated the East Elloe case ((1956) 1 All E.R. 855), for the very reason that the relevant case-law was never cited."

This was precipitate, for in R. v. Secretary of State for the Environment, ex parte Ostler the Court of Appeal followed the 1956 decision and applied an "ouster clause" in the Highways Act, 1959 Schedule 2, holding that the clause precluded any judicial review where the decision was administrative or executive and within the jurisdiction.

A full report of this case, which was decided on the 16th March, 1976, is not yet available, but, by courtesy of the Bar Library at the Royal Courts of Justice in the Strand, London, I have had the advantage of reading the Judgments of the Master of the Rolls, Goff, L.J. and Shaw, L.J.

The Master of the Rolls pointed out that the provision was more in the nature of a limitation period than of a complete ouster. He distinguished the Anisminic case from Smith v. Elloe on three grounds, the second of which was as follows :

> "Second, in the Anisminic case, the House was considering a determination by a truly judicial body, the Foreign Compensation Tribunal, whereas in the Smith v. East Elloe case the House was considering an order which was very much in the nature of an administrative decision. That is a distinction which Lord Reid himself drew in Ridge v. Baldwin, in 1964 Appeal Cases, page 72. There is a great difference between the two. In making a judicial decision, the tribunal considers the rights of the parties without regard to the public interest. But in an administrative decision (such as a compulsory purchase order) the public interest plays an important part. The question is, to what extent are private interests to be subordinated to the public interest."

However, in order to go behind an "ouster clause", there must be jurisdictional error. If there is such an error, the "determination" or "decision" is a nullity.

In the article Professor Wade states:

"The House of Lords also made much use of

> the term "nullity", since the term "jurisdiction" has been confused by the hoary fallacy that there can be no jurisdictional error where the tribunal has jurisdiction to embark on its inquiry in the first place. This fallacy has many times been refuted, and it is satisfactory that Lord Reid now refutes it again by explaining the remarks which he made in the Armah case."

This illuminating article ends with this paragraph :

> "The House of Lords had made it perfectly clear that nullity is the consequence of all kinds of jurisdictional error, e.g., breach of natural justice, bad faith, failure to deal with the right question, and taking wrong matters into account. Although this merely confirms long-established law, it should help to resolve the tangle caused by paradoxical suggestions that action in excess of jurisdiction may be voidable as opposed to void. As Lord Reid observed, there are no degrees of nullity....Lord Wilberforce said: 'There are dangers in the use of this word (nullity) if it draws with it the difficult distinction between what is void and what is voidable, and I certainly do not wish to be taken to recognise that this distinction exists or to analyse it if it does.' Not the least welcome feature of the new decision is that it ought to obviate this confusing and unnecessary exercise."

This brings me to a consideration of the elusive expression "Natural Justice".

NATURAL JUSTICE

In Ridge v. Baldwin (1964) A.C.40 the House of Lords was concerned with the dismissal of the Chief Constable of Brighton by the Watch Committee.

Lord Reid reviewed the authorities bearing on the matter, and came to the conclusion that

in Nakkuda Ali v. Jayaratne (1951) A.C.66, the Privy Council, in holding that a licensing authority did not act judicially in cancelling a licence, was based on a serious misapprehension of the older authorities and therefore could not be regarded as authoritative. At the same time, he held that the duty to act in conformity with natural justice could simply be inferred from a duty to decide "what the rights of an individual should be" (at pages 75 and 76).

In commencing his review, he said at page 64 of the report:

> "The authorities on the applicability of the principles of natural justice are in come confusion....The principle audi alteram partem goes back many centuries in our law and appears in a multitude of judgments of judges of the highest authority. In modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured, therefor it does not exist."

(The Latin maxim, "audi alteram partem", I take to mean "hearing the other side").

He also said at page 72 of the report:

> "We do not have a developed system of administrative law - perhaps because until fairly recently we did not need it. So it is not surprising that in dealing with new types of cases the courts have had to grope for solutions, and have found that old powers, rules and procedure are largely inapplicable to cases which they were never designed or intended to deal with. But I see nothing in that to justify our thinking that our old methods are any less applicable today than ever they were to the older types of case. And if there are any dicta in modern authorities which point in that direction, then, in my judgment, they should not be followed."

At page 132 of the report Lord Hodson states three features of natural justice which, he says, stand out :

(i) the right to be heard by an unbiased tribunal;

(ii) the right to have notice of charges of misconduct;

(iii) the right to be heard in answer to those charges.

In Schmidt and Another v. Secretary of State for Home Affairs (1969) 1 All E.R.904, at page 909 Lord Denning, M.R. said :

> "The speeches in Ridge v. Baldwin show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say."

He then endorsed a statement of Lord Parker, C.J. that Immigration officers were under a duty to act fairly in regard to an immigrant.

This case also settled the point that, failure to give a fair hearing renders the decision void, not voidable.

Unfortunately, in Durayappah v. Fernando (1967) 2 A.C. 337, after deciding that a stranger could not complain of a failure to give a fair hearing (which is unexceptionable), the Privy Council adopted the dissenting opinions in Ridge v. Baldwin that the dismissal was voidable only at the Court's discretion. I trust that I may respectfully regard this adoption as obiter dictum.

(See also R. v. Southampton Justices (1975) 2 All E.R. at page 1079).

What, however, is the position where the decision, as here, involves a large element of policy? In my opinion, the principle

requring a fair hearing applies with equal force. So, at page 208, Wade in his "Administrative Law" says :

> "It is true that the great majority of the decisions deal with cases where some deficiency or default on the part of the person affected has to be found. But they contain no hint (apart from Lord Reid's) that the principle audi alteram partem is restricted to such cases, and Lord Loreburn's celebrated formulation is really a direct denial of any such restriction. The principle is that drastic powers cannot lawfully be exercised against particular people without giving them the opportunity to state their case. It should make no difference whether the occasion for the exercise of the power is personal default or an act of policy. Good administration demands fair consultation in either case, and this the law can and should enforce."

I would not, for one moment, suggest that an administrative body should conduct its inquiries like a Court of Law; but, as Wade says at page 212: "Whatever sort of hearing is given, it must always include 'a fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view'. A hearing where the party does not know the case he has to meet is no hearing at all".

The position in the United States seems to be somewhat similar, though not identical, to that in Great Britain. Schwartz and Wade in "Legal Control of Government" at page 249 summarize the American Experience as follows:

> "The right to a hearing has been used by the American courts as the foundation for a veritable judg-made code of administrative procedure which is enforced on judicial review. It includes all the opportunities and formalities discussed in our earlier account of administrative procedure: the right to an oral hearing which follows the essentials of courtroom procedure; to be apprised of the case on the other side; to present evidence and

argument; to rebut adverse evidence by cross-examination and other appropriate means; to have a reasoned decision; to have a transcribed record of the hearing, which constitutes the exclusive record for decision; and to appear with counsel. As stressed in our previous discussion, one of the principal problems for the American system is how far these rights, developed in connection with the traditional type of regulatory administration, should be transposed into the newer areas of social welfare, which are coming to occupy more and more of the administrative spectrum."

I understand that this subject, as it relates to the United States, is fully dealt with in Jaffe on "Judicial Control of Administrative Action", but my efforts to secure a copy of this book have been unsuccessful.

In Brandt v. A.G. of Guyana (1974) 17 W.I.R. 448 in Guyana Court of Appeal held that it was incumbent upon the President of Guyana to hear representations from a alien, who was about to be deported, and give reasons for the decision to deport him. But there was an Ordinance which required all this to be done, and so the Court's decision is not entirely relevant to the present situation.

However, the decision of the Federal Supreme Court of the West Indies, presided over by Sir Eric Hallinan, C.J. (a former member of the Bahamas Court of Appeal), in Sowatilla v. Fraser and Another (1960-61) 3 W.I.R. 70, is very much in point. There, in a dispute between the appellant and a co-operative society, the Commissioner of Co-operative Development upheld the contention of the society. The appellant claimed (inter alia) that the Commissioner had failed to give him an opportunity to call all his witnesses and to present his whole case. The Court allowed the appeal, declaring the decision void and, (ex abundanti cautela), setting it aside.

It is interesting to note that there was

an "ouster clause" that fell to be considered.

Hallinan, C.J., observed (at page 74) that he had come to the conclusion that "certiorari" would lie from the Commissioner "for a jurisdictional defect" arising from a serious failure of natural justice (which he appears to have found in that case). The other members of the Court, Lewis, J., and Marnan, J., concurred.

There have been several Privy Council decisions in the 1960s in which the "audi alteram partem" rule was applied to set aside administrative actions.

First came Kanda v. Government of Malaya (1962) A.C. 322, where the Board, finding a conflict between the existing law and the Constitution, held that the former would be modified by the Board so as to accord with the latter. It was also held that the failure to supply the appellant with a copy of an adverse report, amounted to a failure to afford the appellant "a reasonable opportunity of being heard" in answer to the charge, and to a denial of natural justice. Apparently, the Constitution did not contain an "ouster clause" like section 16 of the B.N.A. It is also note-worthy that this was an application for a declaration.

In delivering the judgment of the Board, Lord Denning said at page 338 :

> "Applying these principles, their Lordships are of opinion that Inspector Kanda was not in this case given a reasonable opportunity of being heard. They find themselves in agreement with the view expressed by Rigby J. in these words:
>
> > 'In my view, the furnishing of a copy of the findings of the board of inquiry to the adjudicating officer appointed to hear the disciplinary charges, coupled with the fact that no such copy was furnished to the plaintiff, amounted to such a denial of natural justice as to entitle this court to set aside those proceedings on this ground. It amounted, in my view, to a failure to afford the plaintiff a reasonable opportunity of being heard

in answer to the charge preferred against him which resulted in his dismissal.'

The mistake of the police authorities was no doubt made entirely in good faith. It was quite proper to let the adjudicating officer have the statements of the witnesses. The Regulations show that it is necessary for him to have them. He will then read those out in the presence of the accused. But their Lordships do not think it was correct to let him have the report of the board of inquiry unless the accused also had it so as to be able to correct or contradict the statements in it to his prejudice."

Lord Denning then went on to state that the failure by the Commissioner of Police to observe this rule of natural justice rendered his decision void.

In Shareef v. Commissioner for Registration of Indian and Pakistani Residents (1966) A.C.47, where the appellant had applied in Ceylon for registration as a citizen under the provisions of an Act which are not entirely dissimilar to Article 5 (but which specifically require the observance of the principles of natural justice), the Privy Council again held that such principles had not been observed, because certain prejudicial information had not been disclosed to the applicant, and he had not been given an opportunity of answering it. In consequence, the Order of the Supreme Court of Ceylon was set aside, the order of a Deputy Commissioner was quashed, and the case was remitted to the Supreme Court for the purpose of the re-hearing of the appellant's application for registration. (See page 63). In other words, the decisions made in Ceylon were deemed to be void.

Board of Trustees of the Maradana Mosque v. Mahmud (1967) A.C.13 was a similar case, again in the Privy Council, again resulting, in effect, in the quashing by the Board of a Ministerial order (which I assume is equivalent to declaring it void). In this case, the Minister of Education became satisfied thatan

unaided school in Ceylon was being administered in contravention of an Act, and that therefore it should be deemed to be an "assisted school", and that he should be its Manager. The Minister gave the appellants, the former managers, an opportunity to answer certain charges, but not others, and, in a broad-cast statement, he made it clear that these other charges had played an important part in his decision. The Board held that the Minister, in failing to notify the appellants that any complaint was being made in relation to the other charges, or of giving them an opportunity to meet these other charges, had violated the rules of natural justice, by which he was bound in exercising functions which were of a judicial or quasi-judicial nature, and not merely administrative. (See pages 24-25).

The actual advice of the Privy Council was that the appeal should be allowed and the decree of the Supreme Court of Ceylon set aside, and the case remitted to the Supreme Court that it might issue a mandate in the nature of a writ of certiorari quashing the Order of the Minister.

de Smith finds it difficult to reconcile this decision, with the decision of the Privy Council in Nakkuda Ali v. Jayaratne (1951) A.C. 66, and I must confess that I feel a similar difficulty.

Dealing with the content of the "audi alteram partem" rule, and the duty of disclosure, de Smith states at page 179 :

> "If relevant evidential material is not disclosed at all to a party who is potentially prejudiced by it, there is prima facie a breach of natural justice, irrespective of whether the material in question arose before, during or after the hearing. This proposition can be illustrated by a large number of modern cases involving the use of undisclosed reports by administrative tribunals and other adjudicating bodies. If the deciding body is or has the trappings of a judicial tribunal and receives or appears to receive evidence ex parte which is not

fully disclosed, or holds ex parte inspections during the course or after the conclusion of the hearing, the case for setting the decision aside is obviously very strong; the maxim that justice must be seen to be done can readily be invoked."

In Jeffs v. New Zealand Dairy Production & Marketing Board (1967) A.C. 551 (in this paragraph referred to as "the Board"). The Privy Council held that, while the Board could regulate its procedure as it thought fit, e.g., by hearing the interested parties orally or by receiving written statements from them, or by appointing a person to hear and receive evidence or submissions from interested parties for its own information, (as I think the Minister of Home Affairs may do in the instant case) (for which see Rex v. Local Government Board, Ex parte Arlidge (1914) K.B.160), in determining zoning questions affecting the rights of individuals it was under a duty to act judicially, and it had failed to discharge that duty in that it had reached its decision without consideration of, and in ignorance of, the evidence, and had thus failed to hear the interested parties.

Previous decisions show that the duty "to hear the interested parties" includes the duty to bring to their attention any unfavourable information which might influence the ultimate decision.

Durayappah v. Fernando (1967) 2 A.C. 337 is also a Privy Council authority for the proposition that there is an implied duty to observe natural justice, though the appeal was dismissed on a technical point.

On the other hand, Vidyodaya University Council v. Silva (1964) 3 All E.R.865 and Pillai v. Singapore City Council (1968) 1 W.L.R. 1278 appear, at first sight, to be inconsistent with the above Privy Council decisions. However, in the former case, the principle of the "full hearing" was not applied because of the relationship of master and servant. On this ground, at page 867, Lord Morris distinguished Ridge v. Baldwin and Vine v. National Dock Labour Board.

(or is akin to a jurisdictional defect) and renders an order or determination void. That this is the better opinion is indicated by the following propositions: formulae purporting to exclude judicial review are ineffective to oust review of determinations tainted by breach of the rule; a determination thus tainted can be collaterally impeached by mandamus; recourse to administrative or domestic appellate procedures is not a necessary preliminary to impugning the determination in the courts; prior recourse to such procedures is not to be construed as a waiver of the breach; nor can such an appeal in the strict sense cure the vice of the original determination for one cannot appeal against a nullity and the appellate proceedings should also be treated as void."

In Fairmount Investments Ltd v. Secretary of State for the Environment (1975) J.P.L. 285, Susack, J. refused to quash a compulsory purchase order although it had been argued that the final decision to confirm had been influenced by evidence and issues not previously examined at the formal inquiry. The order had been made under sections 42 and 43 of The Housing Act and the inspector had taken into consideration the fact that on the evidence of settlement which he had observed on his inspection, rehabilitation as an alternative to demolition was not financially feasible. The Court of Appeal recently reversed the decision and granted leave to appeal to the House of Lords.

H.M. Purdue in the Journal of Planning and Property Law for 1975 and 1976 discusses the bearing of the decisions on Natural Justice and the post inquiry procedure, and at the conclusion of his article he states :

"The scope for judicial review of planning decisions is normally limited by the courts' own reluctance to interfere with decisions of the Secretary of State on grounds that they are substantially matters offact and degree. It is only in regard to procedural matters that conversely, whether there has been a breach of the rules of natural justice,

tends to be equally a question of fact and degree for the courts. It is submitted that the Court of Appeal was right to judge this particular case as having violated the rules.
.....it must be hoped that the House of Lords will lay down clear and concise criteria (if this is possible) as to the application of the rules of natural justice in this area. In formulating such criteria it is respectfully suggested that terms such as evidence are more misleading than helpful in such a context; and that the central point is the extent to which the inspector can properly take into account points (whether described as evidence or issues or in any other language) pertinent to the outcome of the inquiry without these points having been investigated by the parties. It may even be that the House of Lords may decide that precise rules are not desirable and be content to rule that administrative procedures such as these must be "fair" to all the parties!"

Aliens have been treated in a special manner by the Courts. A recent example of their attitude is to be found in R. v. Secretary of State for the Home Affairs Department and Others, Ex parte Safira Begum, reported in the Times Newspaper on the 28th May, 1976. In this case, it was held by a Divisional Court of the Queen's Bench Division that, if an Immigration Officer, acting in good faith, was not satisfied that a would-be entrant had established the basis for entry into the United Kingdom on which she relied, that was the end of the matter, and the Court could not interfere with his decision.

In this instance, the applicant arrived at Heathrow London without entry clearance or visa, and stated to the Immigration Officer that she had come to marry a Pakistani gentleman, to whom she had already been married by a religious ceremony in Pakistan, though the marriage was not recognized in Pakistan. It appears that the prospective husband, although an immigrant settled in the United Kingdom was not a 'patrial', whom Lord Denning has designated 'the new man'.

In the present instance, however, the Plaintiff is not an alien, and he belongs to a

category of persons who is given special recognition in the Constitution.

(See also R. v. Chief Immigration Officer Heathrow and Another, The Times, 18th June, 1976).

HAS THE PLAINTIFF BEEN GIVEN A FAIR HEARING?

I feel that, on the authorities, and on the evidence before the Court, my answer to that question must be in the negative. As I have already said, I assume that the Notes made by Mr. Walkine substantially set out what took place at the interview, and I also assume that the police certificate was produced by the Plaintiff and placed on the file. I observe that the Notes state that the Plaintiff had not participated "in charitable organizations, etc." I do not know what the et cetera comprehended, and the Court has no means of ascertaining what is meant.

I appreciate that this could be a ground upon which a particular Minister, in the exercise of his discretion, might feel justified in refusing an application to be registered as a citizen, though the Immigration Board might feel otherwise if they were considering an application for a Certificate of Permanent Residence under The Immigration Act, 1967 section 12. (Indeed, a person might well qualify for Permanent Residence and not for citizenship). Another Minister, in all the circumstances of the case, might take a different view - public policy is a horse which will differ in hue and antics from time to time; as will the rider. However, there is no evidence before the Court that the Plaintiff was required to explain this matter, which the Minister might well have regarded as being unfavourable to him or to explain any other unfavourable factors. In any case, I do not see how this matter could be brought under any of the categories in paragraphs (i) to (v) of the Proviso to section 7 of the B.N.A., though it might well come under the concluding words to the Proviso, assuming those words to be valid, which assumption I make for the reasons set out above. Still, there is no evidence that anything regarded as unfavourable was put to

the Plaintiff for explanation, and I feel that I must resolve the uncertainty in the Plaintiff's favour and assume that nothing considered unfavourable was specifically brought to the Plaintiff's attention, and that he was not given an opportunity to explain them, if he could.

If I am right in this conclusion, then the purported decision of the Minister was a nullity; in other words, in law, it never occurred.

THE PUBLIC AUTHORITIES PROTECTION ACT

This would automatically answer the Defendant's Counsel's ingenious argument based on section 2(a) of The Public Authorities Protection Act. Had there been a hearing which complied with the rules of natural justice, I might have felt bound to hold that these proceedings were barred by this Act. Since, however, I have arrived at the conclusion that, in law, the Minister has not yet acted, there was no act, neglect or default to start the six months period running.

THE CANADIAN EXPERIENCE

In a matter of this kind, which is not only of great importance to the community, but is also a novelty to a large extent, one naturally looks for assistance to jurisdictions imbued with Common Law principles, in addition to English and West Indian authorities. Of course, no authorities which conflict with decisions of the Privy Council are of any assistance at all. Subject to this "proviso", I have had the advantage of reading "Administrative Law and Practice" by Robert F. Reig, Q.C., which, I understand, is the leading text-book of the subject in Canada, and which I have found enormously helpful. I propose now to set out some of the fruits of my researches in this field.

The importance of classifying administrative functions is greatly emphasized by Reid. At page 121 he states :

> "The principal approaches to the classification of the functions of tribunals are those which accept one, or a combination,

of the following elements as being dispositive:

(a) the nature of the process;
(b) the nature of the power;
(c) the nature of the result;
(d) the duty to act judicially.

Examples of other approaches may be found, in which none of the elements in (a) to (d) above are considered, but they are insubstantial beside the large body of jurisprudence which divides into these four groups. Sometimes, of course,no particular reasons is assigned, which does nothing to reduce the prevailing confusion."

As regards the first approach Reid states :

"Thus, in adopting approach (a) the court assumes that the nature of the process that the tribunal must follow is of paramount importance. On this basis, if the tribunal is required by its governing legislation to follow a hearing process or one that is analogous to the judicial, its function would be classified as "quasi-judicial" but if the legislation does not require a hearing process, the tribunal's function would, for that reason, be classified as "non-judicial". This, in effect, means "administrative". For the purposes of approach (a) the elements in approaches (b) and (c) are therefore ignored."

He continues :

"Similarly the use of approach (b) requires acceptance of the nature of the power conferred upon the tribunal as being the governing, or critical, element to the exclusion of other factors. By this reasoning, if the tribunal arrives at its decision through the application of "policy" rather than "law", or if it enjoys an unfettered and subjective discretion, its function should be classified as "administrative", and whether "rights" are affected is immaterial. Similarly, the process

followed, or required to be followed, by the tribunal in order to exercise its discretion is ignored. The converse position is that, if required to decide by reference to law, or an objective standard, the function will be classified as 'quasi-Judicial'."

As regards approach (c), he states :

"Thus, if rights are affected, the function will be classified as 'quasi-judicial'. The basis for this is the view that when rights are affected there is a duty to act judicially and this implies judicial functions."

On page 139 Reid states :

"Certain functions of certain ministers have been held to be judicial or quasi-judicial."

In the 1976 supplement to this work, a number of recent examples where the authority was held to act judicially is given (at pages 17 and 18). Of particular relevance is the case of Re Lazarov and Secretary of State of Canada (1973) F.C. 927, where it was held that the Minister's decision on the question of citizenship was administrative in nature, but that he was required to exercise his discretion in a judicial manner, in view of the importance of the matter.

There is no doubt in my mind that the function in the present instance is at least quasi-judicial, and probably judicial.

The result of such a finding is thus expressed by Reid at page 162:

"The rules of natural justice, and all that they imply; the doctrine of the duty to act judicially and the maxim audi alteram partem, and the code of basic procedure expressed in these concepts are applicable, without question, to the exercise of quasi-judicial powers. The practical consequences may be very great; a hearing may be required where none was stipulated for in the

> statute, and the nature of the hearing itself will be governed by the over-riding necessity for fair play. This may mean, in a given case, that a right to cross-examine would be recognized which would not, were the function administrative, and so on down the list of components of a fair hearing."

These components are set out in considerable detail in chaper 2, and one is stated to be "the failure to disclose as denial of justice or jurisdiction".

Perhaps the "duty to disclose" could have been dealt with in greater depth. However, the English cases, which I have cited, explain this duty with extreme clarity. Of course, a literal translation of the maxim "audi alteram partem", (that is, hearing the other side), does not necessarily involve disclosing unfavourable information, but it has been so interpreted by the Courts in England and Canada, and justice obviously requires it.

In Canada, the courts deal with "ouster" clauses (which Reid terms "privative" clauses) in much the same way as in England and the West Indies. Thus he says at pages 186 and 187 :

> "There are thus numerous authorities to the effect that privative clauses in various forms will not prevent the review or the quashing of jurisdictional error. "Exclusive jurisdiction to determine all matters" thus is made to depend upon whether jurisdiction is established. Jurisdiction may not be established by a wrong decision on a collateral matter, nor will it authorize "arbitrary" actions. "Finality and conclusiveness" exist only in respect of decisions "where (the tribunal's) jurisdiction is established", i.e., non-collateral decisions. Similarly, an ultra vires act is not protected. Jurisdiction, although once established, might be lost through error, and even a privative clause in the widest terms will not prevent the court from quashing. A privative clause may be ineffective

against a denial of natural justice, which is now generally accepted as an error of jurisdiction. Thus a provision that a decision or order was "final and conclusive and not open to question, or review" was ineffective."

I note that in Toronto Transit Commission v. Toronto (1969) 2 O.R. 645 it was held that a "privative" clause may effectively bar an action for a declaration. I am not prepared to take such a narrow view of this Court's jurisdiction to grant relief when justice requires that some relief be granted, though in an application of this kind all remedies that can properly be included should be pursued to avoid failure on procedural grounds.

I have not been able to discover any Canadian authority which states as plainly as de Smith, at page 209, that a denial of a principle of natural justice results in a nullity. There may well be such authority, but I think that that is a clear deduction from the authorities cited by Reid.

In regard to the appropriate order which should be made in the present case, and having regard to the relief applied for, Reid is also helpful. At pages 301 to 303 he states :

"In general, courts will similarly decline to substitute their opinions for those of tribunals when the question arises in ancillary or incidental proceedings. It is trite, for instance, that certiorari proceedings are not appeals and the court may not substitute its own opinion "on the merits" or on the main issue for that of the tribunal.

Similarly, by mandamus the court may cause the exercise of a statutory power but it may not seek to cause its exercise to any particular end. This limitation forecloses the court from, overtly at least, substituting its own opinion for that of the tribunal. Where there were facts to support a decision the court could not overrule it in mandamus proceedings even though its opinion might have been different on the same facts.

Similarly, where no appeal provisions exist, and the question is raised by way of an action to recover a subsidy, the statute may be read to imply that the court has no power to substitute its opinion for that of the tribunal. The same is true of declaratory actions. In an action for an injunction the court refused to say whether a domestic tribunal, in erasing a practitioner's name from the register, came to the right conclusion."

What then should be my Judgment in the present case?

The Plaintiff has asked for a declaration that he should be registered as a citizen of The Bahamas, by-passing the Minister altogether. I do not think that the Court has jurisdiction to make such a declaration; in any case, it would, in my opinion, be quite inappropriate in the present circumstances. The Minister, not the Court, has been given a discretion. The Court cannot exercise it for him, though the Court will review a purported decision where there is a jurisdictional defect, as I believe there is here.

In Padfield and Others v. Minister of Agriculture, Fisheries and Food and Others (1968) 1 All E.R. at page 706 Lord Morris, in a dissenting judgment, said:

"If the Minister proceeded properly to exercise his judgment then, in my view, it is no part of the duty of any Court to act as a court of appeal from his decision or to express any opinion as to whether it was wise or unwise."

To the same effect, in the same case, Lord Upjohn, one of the majority said :

"Unless he has done so (that is, acted unlawfully) the court has no jurisdiction to interfere. It is not a court of appeal and has no jurisdiction to correct the decision of the Minister acting lawfully within his discretion, however much the court may disagree with its exercise."

A similar remark was made by Lord Parker, C.J.

in R. v. Lympne Airport Chief Immigration Officer (1968) 3 All E.R. at page 166.

When an administrative authority is granted a discretion, it is impliedly given power to come to a wrong conclusion. This is emphatically stated by Wade. At page 93, under the heading "The power to err", he asks: "But what if the ministry or statutory authority is acting within its powers? If it merely makes mistakes, will the court's arm be long enough to reach it?"

He continues :

> "The general answer, of course, is in the negative. A tribunal acting within its jurisdiction, or an official exercising the discretion committed to him, must be at liberty to go wrong. It is inherent in discretionary power that it includes the power to make mistakes. Authorities of all kinds are subject to the same principle, which has often been judicially approved in the following form.
>
> Where the proceedings are regular on their face and the inferior tribunal had jurisdiction, the superior court will not grant the order of certiorari on the ground that the inferior tribunal had misconceived a point of law. When the inferior tribunal has jurisdiction to decide a matter, it cannot (merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or misdirects itself as to the weight of the evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction.
>
> 'The reason is', added Lord Goddard, 'that if Parliament has chosen to make the lower tribunal or body the absolute judges of the matter before it and to give no appeal, this court cannot interfere in a matter regarding which the lower court has been clothed with jurisdiction by Parliament'."

Finally, on this point, in the Anisminic Case, at page 171, after citing some jurisdictional defects (including a failure to comply

with the requirements of natural justice), Lord Reid puts the matter quite clearly when he states: "But if it decides a question remitted to it for a decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly".

Therefore, in Padfield's Case the House of Lords remitted the matter to the Queen's Bench Division with a direction to require the Minister to consider the appellant's complaint according to law.

Similar orders for re-consideration by the administrative authority were made in R. v. Secretary of State for the Home Department ex parte Phansopkar & Begum (1975) 3 A.E.R. 497 and R. v. Lympne Airport Chief Immigration Officer. No doubt, other instances of that kind could be added.

In Maradana Mosque v. Mahmud the Privy Council merely quashed the order of the Minister: they made no positive order, like the Declaration applied for in the present case. There were similar results in Ridge v. Baldwin and Others and in the Anisminic Case.

Particularly instructive in this connection is the Judgment of a Divisional Court of the Queen's Bench Division (consisting of Lord Parker C.J., Cooke and Bridge J.J., the last-named of whom is now a Judge of the Court of Appeal) in Mountview Properties Ltd v. Devlin and Others (1970) Planning & Compensation Reports 689. In that case, although a rent assessment committee failed to give reasons for their decision pursuant to the duty imposed upon them by section 12(1) of The Tribunals and Inquiries Act 1958, it was held that that was not per se a ground on which the Court could quash the decision. Instead, on an application for an order of certiorari quashing the decision, the Court remitted the case to the committee with a direction to them to state their reasons fully and adequately.

I note that, in the Report of the Law Commissioner (for England and Wales) on remedies in administrative law, recently

presented to the British Parliament (Cmnd.6407), it has been recommended that "where a Court considers that there are grounds for quashing a decision, it should have the power to remit the case back to the deciding authority for re-consideration".

Where there has, in effect, been no decision at all, such a power, must, in my opinion exist both in England and in the Bahamas.

10

In all the circumstances, and relying upon the wide powers conferred upon the Court by section 37 of the Supreme Court Act, I would remit the matter to the Minister for a determination of the Plaintiff's application, according to law.

DATED the 23rd day of June, 1976

(Sgd) Leonard J. Knowles
CHIEF JUSTICE

No. 9

JUDGMENT OF GRAHAM J.

COMMONWEALTH OF THE BAHAMAS 1976
IN THE SUPREME COURT No.285

Common Law Side

IN THE MATTER of the Constitution of the Commonwealth of The Bahamas

AND

IN THE MATTER of the entitlement of Thomas D'Arcy Ryan to be registered as a citizen of the Commonwealth of The Bahamas

B E T W E E N:

THOMAS D'ARCY RYAN Plaintiff

AND

THE ATTORNEY-GENERAL Defendant

J U D G M E N T

S.H.Graham, J. :-

This is an action through an Originating Summons brought by the plaintiff Thomas D'Arcy Ryan against the Attorney-General as defendant seeking a declaration by the court that he is entitled to be registered as a citizen of the Commonwealth of The Bahamas, in accordance with and upon true construction of the Constitution of the Commonwealth of The Bahamas. As I understand it, therefore, the raison d'etre of this case is the assertion of what the plaintiff claims to be a right of his arising out of the provisions of the Constitution. To this action the registry assigned the number of No.285 of 1976 on the Common Law Side of the court.

There had been proceedings commenced earlier to which the registry had assigned No.183 of 1976. These went no further than seeking the leave of the court to bring an action for the relief of

In the Supreme Court

No.9
Judgment of Graham J. dated 23rd June 1976

certiorari and mandamus as well as a declaration. On the insistence of learned counsel who appeared for the Attorney-General and the somewhat reluctant agreement of counsel for the plaintiff Notice of Discontinuance of those earlier proceedings has been filed. I now set out the facts.

Thomas D'Arcy Ryan, the plaintiff was born on the 24th September, 1925, in Brockville, Leeds Co., Ontario, Canada. He is a citizen of Canada. He lives at Westward Villas in the Gambier District of the Island of New Providence, Bahamas. He owns a house and a lot of land there. He is self-employed as a tour operator and he gives his income as $25,000 p.a. He is and has been, except for a break from 1949 to 1954, ordinarily resident in the Commonwealth of The Bahamas since December 1947. On the 19th May, 1951, he was married here in Nassau to Sheilah Marie Pemberton, a lady born in The Bahamas on 10th September, 1927 and she is accordingly and by virtue of Article 3(1) of the Schedule to The Bahamas Independence Order 1973 (herein called the Constitution) a citizen of The Bahamas. Three of seven children of the marriage were born in The Bahamas, and are under 21 years of age. On the 8th February, 1966 he was granted a Certificate under the Immigration Act 1963 that he belongs to the Bahama Islands. This Certificate states that he had satisfied the Immigration Board that he was a person of good character.

From and since the provisions of Article 128 of the 1969 Constitution of the Commonwealth of The Bahamas persons holding such a Certificate are among those referred to as persons possessing Bahamian Status. The Immigration Act of 1963 has been replaced by the Immigration Act of 1967 (No.25 of 1967), which has been amended by the Immigration Amendment Act 1975 (no.25 of 1975). The Certificate of belongership issued to Mr. Ryan however has not been revoked; so he is an applicant possessing Bahamian Status. This is not disputed.

On the 27th June, 1974, the plaintiff made an applicstion under Article 5(2) of the Constitution to be registered as a citizen of The Bahamas. That application was made on and through Form 2, the Form prescribed under

Regulation 3 of The Bahamas Nationality Regulations 1973. The concluding statement on that Form, which statement is in brackets reads as follows :-

> "If the application is approved and if the applicant is not a Commonwealth Citizen the Applicant will be required to take the oath of Allegiance in the form set hereunder and to renounce his citizenship of any other country before a Certificate of Registration is granted."

With this Form is attached another page containing two requirements: firstly, Oath of Allegiance to be taken by an Applicant who is not a Commonwealth Citizen; and secondly, Declaration to be made by an applicant who is a Commonwealth Citizen.

It is clear from this Form and the Constitutional and statutory Provisions which will be set out hereafter, that the procedure contemplated is the reasonable and sensible one that: firstly, a person applies, then he is informed if his application is approved; if it is approved he must then renounce his citizenship of any other country and, if he is not a Commonwealth Citizen, take the Oath of Allegiance. The renunciation of citizenship is not a condition precedent to the consideration and approval of an application. There is no need for an applicant to make renunciation before his application, and so run the risk of finding himself stateless in the event that his application was refused.

On the 24th October, 1974, a letter was sent from the Ministry of Home Affairs to the plaintiff's attorneys. The purpose of this letter was the arrangement of an interview with the plaintiff who was to bring along his wife, their passports,and "a Police Certificate". There has been produced to the Court with the consent of both sides, a copy of a Certificate from the Bahamas Police dated 14/6/74 and it certifies that Mr. Ryan has not been convicted of any criminal offence in this territory. On the 7th November, 1974, the plaintiff and his wife attended at the Ministry of Home Affairs where he was interviewed by a Mr. H.C. Walkine, who it would appear was at that time

an Under-Secretary in the Ministry, and the officer dealing with the plaintiff's Application as well as all other such applications. There has been filed in the proceedings a document containing notes of the interview made by Mr. Walkine, and a copy thereof is attached to this Judgment. In his supplementary Affidavit dated 5th May 1976, Mr. Turnquest gives in paragraphs 5 to 10 thereof, the following account :-

"5. From the notes made by Mr. Walkine of the interview held with the plaintiff and his wife on the 7th day of November, 1974, I have seen that the plaintiff was asked about and gave particulars of his whereabouts from 1947 up to and including the said 7th day of November 1974. A copy of the notes made by Mr. Walkine out of the said interview appears on the form hereto attached and marked "B".

6. Although the plaintiff was asked about his Police Certificate as I earlier mentioned and the plaintiff said that he first came to the Bahama Islands in 1947 after having been born in Canada in 1925 and also lived in Canada from 1949 to 1954 no evidence that he was never convicted in that country or any other country was ever produced by the plaintiff.

7. As far as I can see from what appears in the notes of the plaintiff's interview the plaintiff was asked about and gave answers to the matters with which Mr. Walkine was concerned as he should have been in order to comply with the provisions of the Bahamas Act, 1973 and the Constitution.

8. It is not true for the plaintiff to say that at no time did he have an interview with the Minister of Home Affairs or anyone from the Ministry of Home Affairs at which the matters made relevant by the Constitution and the Bahamas Nationality Act, 1973 were dealt with.

9. I know that on the 27th day of May 1975 and the 28th day of May 1975 the Minister

of Home Affairs personally considered the whole of the file and application of the plaintiff and on the 28th day of May, 1975 refused the application of the plaintiff.

10. I was directed by the Minister to notify the plaintiff that his said application has been refused and I wrote to the plaintiff on the 16th day of June 1975 notifying him that his said application had not been approved."

A careful reading of this affidavit, and Exhibit B thereto which contains Mr. Walkine's notes, shows that, notwithstanding paragraph 7 of that affidavit, the plaintiff was not asked about and was afforded no opportunity to deal with vital topics contained in the proviso to Section 7 of The Bahamas Nationality Act 1973 (B.N.A. 1973) which topics may have furnished grounds for refusal of his application. This is further borne out by the plaintiff's Supplemental Affidavit sworn on the 29th April, 1976, which, though worded somewhat widely, I accept in relation to the omissions appearing from Walkine's notes. In particular, it is also to be noted that there is in the affidavits no evidence, nor was there any suggestion made in the course of the hearing, that any matter of national security or public policy was considered as a ground for the refusal of the application.

On the 16th June, 1975, Mr. Turnquest wrote and signed for the Permanent Secretary to the Ministry a letter addressed to the plaintiff which was in the following terms:-

MINISTRY OF HOME AFFAIRS
P.O. Box N-3002
Nassau, N.P. BAHAMAS

16 June, 1975

Our Ref No. HOM/CIT/3406

Dear Mr. Ryan,

I refer to your application, dated 20 June, 1974 for registration as a citizen of

The Bahamas under Article 5(2) of the Constitution.

2. I regret to inform you that your application has not been approved.

Yours sincerely,
(Signed) L.M. Turnquest
(for) Permanent Secretary

Mr. Thomas D'Arcy Ryan
P.O. Box N-1346
Nassau, Bahamas.

This was some 10 months after receipt of the application by the Ministry. This letter has been received and accepted by the plaintiff as a refusal by the Minister to grant him citizenship. Any reasons for the refusal remain secret as neither the letter nor any other document gives any. On this feature, it is enought to point out that, if the Minister was acting or purporting to act in pursuance of Section 16 of The Bahamas Nationality Act 1973 (B.N.A. 1973) it is expressly declared therein that he is not bound to give any reason for his decision. So while the Act does not enjoin, it permits, silence as to reasons for refusal.

Reasons, however, are not necessarily synonymous with grounds and though there was also no statutory obligation to inform the plaintiff of any grounds on which refusal might be considered, failure to appreciate the difference notes above might cause such a magnetization to secrecy as, firstly, to inhibit counsel from relying upon grounds which, if established would facilitate justice; and secondly, deprive the Court of that basic fundamental to theadministration of justice expressed in the oath of witnesses who are required to speak not merely the truth but also "the whole truth". There are, of course, certain established rules and exceptions for the protection of the Executive which the Courts recognise and accept, and the Minister remains free to preserve his silence as to reasons. It is axiomatic, however, that as full a picture, as is reasonably practicable, aids the administration of justice and it is not surprising

therefore that in some of the English cases cited, the statutory tribunal gave the Court its reasons, though not required to do so.

I must now say something about the Belongership or Bahamian Status which the plaintiff sought to have replaced by Bahamian Citizenship. Before the attainment of independence by various territories which formed parts of what used to be called earlier the British Empire and latterly the British Commonwealth, there was one common citizenship based upon the complementary concepts of allegiance to the Monarch by persons born with the Commonwealth, and of protection by the Monarch of those persons at home and abroad. Those persons were styled British subjects, they had British citizenship; and they would carry British passports.

The British Nationality Act 1948 which came into force on 1st January, 1949 recognized the fact that at the time some of the component parts of the Commonwealth were self-governing while others were not. The provisions of the Act provide "a method of giving effect to the principles that each of the self-governing countries of the Commonwealth should by its own legislation determine who are its citizens, that those citizens should be declared to be British subjects, and that citizens of the other territories within the Commonwealth should be recognised as British subjects". (3 Halsbury's Laws Volume 1 para. 1024).

The self-governing independent territories on the one hand could and did enact their own citizenship laws. They also issue their own passports. On the other hand there remained those territories that were not self-governing and to whom the term colonies is applied in the Act. In respect of them the concept of a common citizenship with the United Kingdom was preserved and so the act created citizenship of the United Kingdom and Colonies which, after January 1949 and until independence, was the citizenship of persons born in The Bahamas or born, for example, in territories similarily circumstanced like Barbados or Jamaica.

It is to be noted, however, that unless a self-governing country ordains otherwise in the exercise of its sovereign powers, both its Citizens and the Citizens of the United Kingdom and Colonies remain British subjects. Further, until independence and the subsequent exercise of covereign power to enact a citizenship law and provide for the issue of passports, there might be a British passport issued in Barbados, Jamaica, or The Bahamas. But generally speaking there was no such thing as a Barbadian, Jamaican or Bahamian passport, properly so called. There may be and are such, however, after independence.

Now the status of British subject, embracing as it does persons born in so many different countries of the Commonwealth enabled the holders thereof from time to time, and at various places, to meet one of the basic fundamental usually required of persons who wish to vote at elections. In order to be registered as a voter one must be a British subject. (Section 8(1)(a) of the Representation of the People Act 1969 No.40 of 1969 now amended to Section 22 and the Fourth Schedule to the B.N.A. 1973). The right to vote is usually attached to citizenship but the unique history of the Commonwealth producing a dual concept in the status British subject enabled the Plaintiff, who is a Canadian citizen, to enjoy the right to vote here previous to 1973. Henceforth, unless he becomes a citizen of The Bahamas, he will have no right to vote.

The foregoing speaks only of persons born within a particular domain of the monarch, and such a person was described by the adjective derived from the name of his place or birth. Thus Bahamians, Barbadians or Jamaicans were persons born in The Bahamas, Barbados or Jamaica. They were citizens of the United Kingdom and Colonies and had the status of British subject. It was everyday experience, however, that there might be resident here numbers of persons from countries outside The Bahamas who were or might wish to be associated as closely with The Bahamas, as Bahamians themselves. They would wish to make it their home.

For British subjects the avenue to such closer association with The Bahamas lay through

Section 13 (1)(d) and Section 14. of the Immigration Act 1963 Cap. 239 volume V of the Laws of The Bahamas replaced respectively by Section 2(2)(d) and Section 12 of the Immigration Act 1967 No.25 of 1967. This legislation made provision for the status and grant of a Certificate of Belongership. For aliens the avenue lay through naturalization under the British Nationality Act 1948. Upon the appropriate grant, both categories were then deemed, like native born Bahamians, to be persons belonging to The Bahamas. They became persons of Bahamian Status, a term which is defined in Article 128 of the 1969 Constitution.

This status in addition to the right to vote, to which I have earlier adverted, carried with it the following incidents: the freedom of abode, the freedom to travel to and from the territory without let or hindrance, and the freedom to work in The Bahamas. Those were and are valuable incidents and the plaintiff has enjoyed them from 1966 to at least 1973 if not later.

The above outline as to citizenship and Bahamian Status shows that these are matters that call for consideration when a colony is becoming a self-governing country or, in more popular language, attains independence. I take judicial notice of the fact that The Bahamas attained independence on 10th July, 1973. Legally this was effected by the passage of certain legislation.

First, there was The Bahamas Independence Act, 1973 an Act of the United Kingdom Parliament (1973 C 27) which, in addition to provisions necessary for establishing the fully responsible status of The Bahamas, contained in its Sections 2 and 3, (which repay careful study) provisions as to the cessation and retention of citizenship of the United Kingdom and Colonies. These sections clearly contemplate further legislation dealing with citizenship and Bahamian Status and providing, in particular for the creation of a citizenship of the Bahamas.

Then there comes The Bahamas Independence Order 1973 the Schedule to which contains the Constitution. The preamble to the Constitution

proclaims an abiding respect for the Rule of Law and Article 2 establishes the Constitution as the supreme Law of The Bahamas. It reads as follows :-

> "This Constitution is the supreme law of the Commonwealth of The Bahamas and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution, shall prevail and the other law shall, to the extent of the inconsistency, be void."

This means what it says.

Article 38 establishes a Parliament with three constituent parts. It reads as follows:-

> "There shall be a Parliament of The Bahamas which shall consist of Her Majesty, a Senate and a House of Assembly."

Thus a bill does not become an Act, or has not been passed by Parliament until each of the three component parts of Parliament has completed performance of its constitutionally allotted function.

Article 52(1) reads as follows :-

> "(1) Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of The Bahamas."

The formula empowering a Parliament to "make laws for the peace order and good government" of a country occurs in many constitutions, has been the subject of judicial interpretation and is accepted as the expression whereby parliament is made sovereign in the field of legislation. The combined effect of this article, together with Section 1 of, and Schedule 1 to, the Bahamas Independence Act 1973 is to confer on the Parliament of The Bahamas legislative authority, both territorially and extra-territorially, as plenary and as ample, (within the limits only of the Constitution) as the United Kingdom Parliament in the plenitude of its power possessed or could bestow. (Hodge v. R. (1883) 9 App. Case 117; 131 Riel v. R. (1885) 10 App. Case 675, 678; Ibralebbe v. R

(1964) A.C. 900,923). In the United Kingdom there is no supreme law with which an Act of Parliament might be deemed to be inconsistent, for there is no written Constitution and these differences must be borne in mind when considering some of the English authorities which have been cited, and the issue of Ultra Vires which has been raised. So long as our Parliament acts within the provisions and requirements of the Constitution it may enact laws with full freedom.

Article 5 of the Constitution reads as follows :

> (1) Any woman who, on 9th July 1973 is or has been married to a person -
>
> (a) who becomes a citizen of the Bahamas by virtue of Article 3 of this Constitution; or
>
> (b) who, having died before 10th July 1973, would, but for his death, have become a citizen of The Bahamas by virtue of that Article, shall be entitled, upon making application and upon taking the oath of allegiance or such declaration in such manner as may be prescribed, to be registered as a citizen of The Bahamas:
>
> Provided that the right to be registered as a citizen of The Bahamas under this paragraph shall be subject to such exceptions or qualifications as may be prescribed in the interest of national security or public policy.
>
> (2) Any person who, on 9th July, 1973 possesses Bahamian Status under the provisions of the Immigration Act 1967 (a) and is ordinarily resident in the Bahama Islands, shall be entitled, upon making application before 10th July 1974, to be registered as a citizen of The Bahamas.
>
> (3) Notwithstanding anything contained in paragraph (2) of this Article, a person who has attained the age of eighteen years or who is a woman who is or has been married shall not, if he is a citizen of some country other than

The Bahamas, be entitled to be registered as a citizen of The Bahamas under the provisions of that paragraph unless he renounces his citizenship of that other country, takes the oath of allegiance and makes and registers such declaration as may be prescribed

Provided that where a person cannot renounce his citizenship of the other country under the law of that country he may instead make such declaration concerning that citizenship as may be prescribed.

(4) Any application for registration under paragraph (2) of this Article shall be subject to such exceptions or qualifications as may be prescribed in the interests of national security or public policy.

(5) Any woman who on 9th July is or has been married to a person who subsequently becomes a citizen of The Bahamas by registration under paragraph (2) of this Article shall be entitled, upon making application and upon taking the oath of allegiance or such declaration as may be prescribed, to be registered as a citizen of The Bahamas:

Provided that the right to be registered as a citizen of The Bahamas under this paragraph shall be subject to such exceptions or qualifications as may be prescribed in the interests of national security or public policy.

(6) Any application for registration under this Article shall be made in such manner as may be prescribed as respects that application:

Provided that such an application may not be made by a person who has attained the age of eighteen years and is not a woman who is or has been married, but shall be made on behalf of that person by a parent or guardian of that person.

There came into effect on Independence Day also the B.N.A. 1973 which, in its preamble as well as its terms, indicates its affinity with other laws which were enacted as part of the legislative exercise connected with independence.

Sections 7 and 8 of the B.N.A. 1973 read as follows :-

"7. Any person claiming to be entitled to be registered as a citizen of The Bahamas under the provisions of Article 5, 7, 9 or 10 of the Constitution may make application to the Minister in the prescribed manner and, in any such case if it appears to the Minister that the applicant is entitled to such registration and that all relevant provisions of the Constitution have been complied with, he shall cause the applicant to be registered as a citizen of The Bahamas:

Provided that, in any case to which those provisions of the Constitution apply, the Minister may refuse the application for registration if he is satisfied that the applicant -

(a) has within the period of five years immediately preceding the date of such application been sentenced upon his conviction of a criminal offence in any country to death or to imprisonment for a term of not less than twelve months and has not received a free pardon in respect of that offence; or

(b) is not of good behaviour; or

(c) has engaged in activities whether within or outside The Bahamas which are prejudical to the safety of The Bahamas or to the maintenance of law and public order in The Bahamas; or

(d) has been adjudged or otherwise declared bankrupt under the law in force in any country and has not been discharged; or

(e) not being the dependent of a citizen of The Bahamas has not sufficient means to maintain himself and is likely to become a public charge or if for any other sufficient reason of public policy he is satisfied that it is not conducive to the public good that the applicant should become a citizen of The Bahamas.

8. A person registered under Section 5, 6 or 7 of this Act shall be a citizen of

The Bahamas by registration as from the date on which he is registered."

And Section 16 of this Act in the following terms :-

> "The Minister shall not be required to assign any reason for the grant or refusal of any application or the making of any order under this Act the decision upon which is at his discretion; and the decision of the Minister on any such application or order shall not be subject to appeal or review in any court."

In presenting the case for the plaintiff Mr. Wallace Whitfield divided his argument into two parts. Firstly, he submitted that :-

1. Article 5 (2) of the Constitution vested in the plaintiff an absolute and unqualified right to registration as a citizen and Article 5(4)(6) simply provided for the machinery to regulate this right to registration.

2. Section 7 of the B.N.A. 1973, in particular the proviso thereto, merely attempts to give power to the Minister to refuse an application for such registration.

3. Article 5 (4) (6) are the authority of the Constitution relating to the processing or machinery of registration and any prescription made thereunder cannot qualify or abrogate the clear entitlement conferred by Article 5(2). Any law inconsistent with relevant provisions of the Constitution, which is the Supreme law, is null void and of none effect by virtue of Article 2 of the Constitution.

4. Article 5(4) authorises Parliament to require in respect of an application under Article 5(2) different things from different classes of persons. For example if the Commissioner of Police were an applicant, because of his sensitive position there might be certain exceptions, and the requirements of his application modified accordingly.

There are some 26 classes of persons falling under Article 5(2). He has found no enactment meeting this criterion on or construction of Article 5(4); and

5. Section 7 of the B.N.A. 1973 instead of dealing with the application deals with the entitlement and this is not authorised by Article 5(4). If the word "application" in Article 5(4) is a mistake only Parliament can alter it.

Alternatively, he submitted that even if the plaintiff falls within Section 7 of the B.N.A. 1973,

6. He is nevertheless entitled to succeed because he meets the conditions of the proviso to Section 7 and the decision of the Minister is a nullity within the principles in Anisminic Ltd v. The Foreign Compensation Commissioner etc. (1969) 1 A.E.R. 208, 235 243-244, because in arriving at his decision the Minister did not observe the rules of natural justice or treat the plaintiff fairly. In support of this submission he cited a number of other authorities. The provisions of Section 16 of the B.N.A. 1973 he argued did not apply and therefore the jurisdiction of the Court was not ousted.

7. The Constitution does not authorise the discretion that the latter portion of the proviso to Section 7 of the B.N.A. 1973 contains.

8. The right under Article 5(2) is protected by Article 54 and cannot be cut down except by the procedure laid down in Article 54. Therefore Section 7 and 16 of the B.N.A. 1973 are ultra vires and void.

For those reasons the plaintiff was entitled, he submitted, to the declaration sought.

The argument for the defence was neatly and conveniently summarised for the Court by Mrs. Sawyer early in the opening of her address, as comprising the following questions, and

answers or submission.

1. Whether or not the plaintiff, a person of Bahamian Status who applied before 10th July, 1974 to be registered under Article 5(2) of the Constitution is entitled as of right to be registered as a citizen of The Bahamas.

2. If yes, is the alleged right subject to such matters of national security and public policy as may be prescribed?

3. Whether or not the letter signed by Mr. Turnquest constitutes notice of a lawful refusal to register the plaintiff?

4. Whether or not the action for a declaration is barred by Section 2(a) of the Public Authorities Protection Act (Chapter 86)?

5. Does Section 16 of the B.N.A. 1973 oust the jurisdiction of the Court with regard to decision made under the B.N.A. 1973?

6. In any event, can the Court grant the declaration sought by plaintiff? She submitted that it could not.

In the course of her argument she submitted in particular that Article 5 (2)(3)(4) of the Constitution and Section 7 of the B.N.A. 1973 must all be read together; and, so read, the plaintiff had under the legislation only a spes or expectation of, and not a right to, registration. She seemed to place some reliance also on the fact that the plaintiff has not yet renounced citizenship of Canada. With this latter I have dealt earlier on.

The terms of Article 5(2) of the Constitution have been set out above. The paragraph posits three requirements to establish entitlement to be registered as a citizen of The Bahamas. These three requirements are :-

(a) Possession on 9th July, 1973 of Bahamian Status under the provisions of the Immigration Act 1967,

(b) Being ordinarily resident in The Bahamas, and

(c) Making application before 19th July, 1974.

The plaintiff fulfils all of these.

In the Byrnes Law Dictionary 1923 which used to be published by Sweet and Maxwell there is to be found the following definition of the word entitle. "In its usual sense entitle is to give a right; therefore a person is said to be entitled to property when he has a right to it".

So, generally speaking, the word entitle in Article 5(2) confers a right to be registered as a citizen of The Bahamas when the requirements of the paragraph are met. This construction is strengthened by the dictionary which Article 5 itself provides because it will be noted for example that each of the provisos to Article 5(1) and Article 5(5) respectively uses the word right in reference to the entitlement mentioned in the immediately preceding paragraph to which it refers.

A careful reading of Article 5(3) shows that its true effect is that if an applicant falling under Article 5(2) has his application approved he must renounce any other citizenship which he might hold before he can be registered as a citizen of The Bahamas. I have already indicated above that the legislation does not require him to make the renunciation before the consideration of his application.

Article 5(4) subjects an application under Article 5(2) to legislation providing for exceptions or qualifications in the interest of national security or public policy. The parties agree that the word "application" in Article 5(4)(6) must not be equated with the word "right" which occurs in the provisos to Article 5(1)(b) and to Article 5(5), but refers to the formal application which a person might make under Article 5(2). Parliament is not required by Article 5(4) to provide for exceptions or

qualifications to Article 5(2); it merely may do so. If Parliament, in the undoubted exercise of its right, chose not to pass any legislation affecting Article 5(2); or if any purported legislation was ineffective, then the right under Article 5(2) would stand unqualified and a person qualifying under Article 5(2) would be entitled to be registered as a citizen of The Bahamas provided he renounced any other citizenship and, otherwise complied with Article 5(3). It is most important to note that in the provisions of Article 5 of the Constitution nothing is expressed as left to the discretion of anyone. Giving full effect to the provisions of Article 5(2)(3)(4) the position is that the Constitution provides a right of registration for persons possessing Bahamian Status under the provisions of the Immigration Act 1967, subject :-

(a) To any qualification or exceptions in the application properly enacted by Parliament under Article 4 and,

(b) In the case of persons holding another citizenship, renunciation thereof and in certain cases the taking of the Oath of Allegiance, and the making of a Declaration.

It is not an absolute or automatic right; it is a conditional right the application for which may be subject to prescribed exceptions or qualifications; but it is none the less a right, and, so far as the Constitution expresses itself, this is not at the discretion of anyone. If this right has been cut down or transmuted to what the defence terms a mere "spes or expectation"; and if this spes is at the discretion of the Minister, this alteration must be sought in some other legislation.

In the context of this case a significant difference would be brought about by legislation which alters this right provided for in the Constitution into a mere expectation. The only authority put forward which may have affected this change is Section 7 of the B.N.A. 1973, already cited. With this there must also be read Section 16 of that Act as the two sections are closely connected in this case. Assuming, though not deciding at this point, the validity

to these two sections, it is desirable to examine their provisions more closely.

Section 7 of the B.N.A. 1973 consists of two parts: the first part which may be termed the registration provision; and the second part which is a proviso to the registration provision. The first part may be construed in two ways; one resulting in the entitlement given under Article 5(2)(3) and (4) remaining intact as the qualified right which I have described above; the other resulting in a far reaching alteration thereto and making the provisions something more like a privilege to be bestowed by the Minister. Bearing in mind the entire context of the case, that is to say: the nature and incidents of Bahamian Status the fact that this Status is enshrined in the Constitution, the general principles of construction applicable in such cases, and the relevant authorities, I reach the conclusion that the former construction is the correct one. I now set out the reasoning for this in a comparative way.

In relation to Article 5(2)(4) of the Constitution, the first part of Section 7 requires a claimant thereunder to make to the Minister in the prescribed form an application which must comply with "all relevant provisions of the Constitution". If the application does so comply, this compliance establishes his entitlement and then the Minister "shall cause the applicant to be registered as a citizen of The Bahamas". This construction is consistent with the provisions of Article 5(2) which establishes the entitlement to registration in the Constitution itself.

The words "if it appears to the Minister that the Applicant is entitled" appearing in this part of Section 7 simply mean that when the Application comes in the minister must see that it is in order: that is to say, see that the application meets those provisions which the Constitution and any valid prescriptions thereunder require, in order to establish an entitlement. Those words must not be read so as to cut down and substitute for the objective

entitlement set out in Article 5(2)(4) the subjective opinion of the Minister, for this would be an inconsistency with the Constitution. Article 2 of the Constitution, indeed would render it null and void. So up to this point the right created by Article 5(2) remains as such; in relation to the Minister, it is not a matter at his discretion. Furthermore, I may add that, as I will show later, the Court, in the circumstances of this case, is constrained by express provision in the Constitution against the construction which would alter Article 5(2)(4) into a discretionary privilege.

If the foregoing is correct, then it is clear that, in the absence of valid legislation providing therefore, the Minister has no authority to refuse the application of a person who satisfies Article 5(2) and any valid prescriptions regulating the same. As I understand the case the legislation which might so empower the Minister is the proviso to Section 7. It will be seen that the proviso sets out five grounds (a) to (e) and a sixth or what I will call a sweeping up ground, upon which the Minister may refuse an application "if he is satisfied" that any of them exists. The grounds (a) to (e) would, ordinarily and by themselves, be unexceptionable. The sweeping up clause, which might similarily be unexceptionable in other legislation, is here a device enabling the Minister to refuse an applicationon grounds undisclosed in that they are not declared in the legislation, which is what the word "prescribed" in Article 5(4) of the Constitution requires. This clause fails to prescribe. In practice, however, it could supersede all the other grounds. These contents of the proviso, coupled with the discretion to refuse, would in their total effect modify or even abrogate the right to be registered under Article 5(2). The discretion, however, is a discretion to refuse on any of the grounds prescribed in the proviso, and on no others.

There are three possibilities as to how the Minister made his decision of refusal :-

(1) That he made it on one or more grounds in the proviso;

(2) That he made it on some ground or grounds outside the proviso;

(3) That he made it on no grounds at all.

The express provision for silence as to reasons in Section 16 does not enable a decision under (2) or (3) to be validly made. A refusal under (2) or (3) is nowhere authorised and would be a nullity.

As to (1) it is to be noted that there is no express statutory provision requiring the Minister to hold any inquiry. Nevertheless, the contents of the proviso by their very nature cast upon the Minister a duty to investigate and in so doing to give the plaintiff an opportunity of answering correcting or contradicting any ground that might be considered against him. There are many authorities supporting this proposition.

In the case of Durayappah v. Fernando (1967) 2 A.C. 337 the Privy Council had to deal with a case from India where the Minister had dissolved a Municipal Council. He had power to do this "if it appears" to him that certain things had ensued. Complaints having been made against the Council the Minister sent a Commissioner to investigate and report. The Commissioner investigated but did not ask any question or give any member of the Council an opportunity of expressing his views on any matter. The dissolution by the Minister was challenged on the ground inter alia that he had not observed the audi alteram partem rule. In the course of the judgment the Court at page 349 said :-

> "Upon the question of audi alteram partem the Supreme Court followed and agreed with the earlier decision of Sugathadasa 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'.

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:

> '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 omission of the legislature'. "

The Court went on to consider the various matters to be borne in mind for the application of the rule and at page 349 stated as one of these "the status enjoyed.....by the complainant of injustice".

The case of Ridge v. Baldwin (1974) A.C.40 especially the judgment of Lord Reid at pages 75-79 makes it clear that the duty to give a party an opportunity to be heard may be inferred from the nature of the functional power to be exercised by the competent authority.

Once the need to investigate arises, then in a case like this the investigation must be conducted fairly. In the 3rd Edition on Judicial Review of Administrative Action by S.A. de Smith the learned author traces the varying approaches revealed by the decisions of the Courts on natural justice and the audi alteram partem rule from earlier times to the present day formula of a "duty to act fairly". But whatsoever the rubric, the rule, even if with varying fortunes, has always existed. In Board of Education v. Rice (1911) A.C.179 at 182. Lord Loreburn L.C. said :-

"Comparitively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds... Sometimes it will involve a matter of law as well as matter of fact, or even depend upon the matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. 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. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."

A more recent restatement of the principle was made by Lawton L.J. in Maxwell v. Dept. of Trade (1974) 2 W.L.R. 338 at 348-349. He said :-

"For many decades now the British public have become accustomed to reading about inquiries started by the government of the day or Minister. Sometimes the inquiries are held, as was the one in this case, under powers given by a statute; others are held because a Minister wants to find out something. The subject matter of inquiry may range from questions touching the integrity of Ministers (the Lynskey inquiry), and national security (the Vassall inquiry) to questions whether a youth was assaulted by two police officers (the Thurso inquiry). Some inquiries are held in public and a few take on some of the characteristics of a state trial; others are held in private. Whenever inquiries are held the British public expects them to be conducted fairly; and on many occasions in the past 60 years the courts have said that they must be conducted fairly.

From time to time during that period lawyers and judges have tried to define what constitutes fairness. Like defining an elephant, it is not easy to do, although fairness in practice has the elephantine quality of being easy to recognise. As a result of these efforts a word in common usage has acquired the trappings of legalism: 'acting fairly' has become 'acting in accordance with the rules of natural justice', and on occasion has been dressed up with Latin tags. This phrase in my opinion serves no useful purpose and in recent years it has encouraged lawyers to try to put those who hold inquiries into legal strait jackets. It is pertinent in this connection to recall what Lord Shaw of Dunfermline said in Local Government Board v. Arlidge (1915) A.C. 120, 138:

> 'And the assumption that the methods of natural justice are ex necessitate those of courts of justice is wholly unfounded....In so far as the term 'natural justice' means that a result or process should be just, it is a harmless though it may be a high-sounding expression; in so far as it attempts to reflect the old jus naturale it is a confused and unwarranted transfer into the ethical sphere of a term employed for other distinctions; and, in so far as it is resorted to for other purposes, it is vacuous'.

For the purposes of my judgment I intend to ask myself this simple question: did the inspector act fairly towards the plaintiff?"

His Lordship then went on to show that the inspector in that case had given the plaintiff an opportunity for correcting or contradicting any relevant statement prejudicial to his view. (as propounded in Board of Education v. Rice)

The question arose again in R. v. Race Relations Board (1975) 1 W.L.R. 1686 and at pages 1693-1694 Lord Denning M.R. restated the rules which should apply to an investigating body. He said :-

"The Board, in a respondent's notice, raised this contention; that the duty of the board, in investigating complaints of discrimination, is only to make such inquiries as they bona fide consider necessary and not to act judicially and/or fairly.

That contention goes, I think, too far. In recent years we have had to consider the procedure of many bodies who are required to make an investigation and form an opinion. Notably, the Gaming Board, who have to inquire whether an applicant is fit to run a gaming club: see Reg. v. Gaming Board for Great Britain, Ex parte Benaim and Kaida (1970) 2 Q.B. 417; inspectors under the Companies Act 1948 who have to investigate the affairs of a company and make a report: see in re Pergamon Press Ltd. (1971) Ch. 388; and Commissioners of Inland Revenue who have to determine whether there is a prima facie case; see Wiseman v. Borneman (1971) A.C. 297. In all these cases it has been held that the investigating body is under a duty to act fairly: but that which fairness requires depends upon the nature of the investigation and the consequences which it may have on persons affected by it.

The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only. Moreover, it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them.

But, in the end, the investigating body itself must come to its own decision and make its own report."

These authorities make clear the rules applicable to any body which has a duty to investigate and it does not matter whether the duty arises under express statutory provision or impliedly, as explained in Cooper v. Wandsworth ((1963) 14 C.B.N.S. 180, 194). Furthermore, it would not do to give the party certain grounds and then make a decision on other grounds which were withheld from him. For while it might partly be true to say that he had a hearing, it would not be a fair hearing because the decision was reached on grounds upon which he could not truthfully be said to have been given an opportunity to comment. Applying these principles to the facts of this case stated earlier, I find the plaintiff did not receive a fair hearing; in other words, the rules of natural justice were not observed.

The above finding is based on a consideration of the authorities which apply in this territory. Nevertheless, it is worthy of note, in this connection, that the spirit of this rule requiring a fair hearing in the determination of civil rights is reflected not only in Article 20(8) of the Constitution, but also Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which the United Kingdom, having acceded to, extended to the Bahamas on October 23, 1953, and Article 10 of the Universal Declaration of Human Rights adopted in 1948 by the General Assembly of the United Nations, of which body the Bahamas is now a member.

The provision in Section 16 that the Minister need give no reasons for his decision is nothing new or special. It is simply an express statement of the general rule that, in the absence of statutory requirement, there is no duty to state reasons for judicial or administrative decisions. This, however, has never meant, and should not be taken to mean, any derogation from the audi alteram partem rule which is not applicable in respect of reasons for a decision, but is concerned with ensuring that a party has an opportunity to know and deal with the grounds, upon which he is charged, or by a decision upon which he might be adversely affected.

What consequences flow from the failure in the instant case to act fairly? I will deal with the answer to this question at the same time as the submission for the defence that the Court's jurisdiction is ousted by virtue of Section 16 and the language of the proviso to Section 7 of the B.N.A. 1973. The proviso is couched in discretionary terms; Section 16 is similar to Section 26 of the British Nationality Act 1948 which latter, the learned Editors of the 2nd Edition of Halsburys Statutes Volume 28 point out in the notes at page 154, has no application to registration under Section 6 (1) or (2) as this provides that such applicants "shall be entitled".

Frequently various discretionary formula have been held to oust the Court's discretion. This, however, is not automatic. For example in Commissioners of Customs and Excise v. Cure and Deely Ltd. (1962) 1 Q.B. 340 at 366 Sachs J. as he then was, said :-

> "The arguments on the first and main issue having been so lucid, it is now practicable to state my conclusions relatively compactly. In the first place I reject the view that the words "appear to them to be necessary" when used in a statute conferring powers on a competent authority, necessarily make that authority the sole judge of what are its powers as well as the sole judge of the way in which it can exercise such powers as it may have. It is axiomatic that, to follow the words used by Lord Radcliffe in the Canadian case 'the paramount rule remains that every statute is to be expounded according to its manifest or expressed intention'. It is no less axiomatic that the application of that rule may result in phrases identical in wording or in substance receiving quite different interpretations according to the tenor of the legislation under consideration.
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> As an apt illustration of such a result it is not necessary to go further than Liversidge v. Anderson and Nakkuda Ali v. Jayaratyne, in which cases the words

"reasonable cause to believe" and "reasonable grounds to believe" received quite different interpretations".

Earlier in the same case at page 364 he adverted to the technique behind the use of discretionary formulae :-

> "I had in mind a submission made on behalf of the commissioners as to the use of the formula 'appears to them necessary'. That formula was suggested to be a 'drafting mechanism employed for the exclusion of the jurisdiction of the court' on the footing that 'modern drafting technique is to use words which do not exclude jurisdiction in terms but positively repose arbitrary power in a named authority'. The art of excluding the subject from benefits by a positive definition which does not specifically refer to the exclusion is, of course, one that has been brought to a high degree of perfection in Whitehall: and it attracts profound respect for the craftsmanship of those whose duty it is to employ it. On the other hand, it does not always lead to a quick appreciation by others of the effect of legislative provisions".

I would, most respectfully, interpolate here that those observations of Lord Justice Sachs are impliedly a reminder, to all those whose privilege or duty it is to scrutinise proposed legislation, of the old adage that the price of liberty is eternal vigilance.

It will be seen, however, that Section 16 expressly says that the decision of the Minister on any application which is at his discretion shall not be subject to appeal or review in any court. This refers only to such discretions as are expressly given to the Minister. The first thing to note, therefore, is that in the context of this case the preclusive clause does not apply to, and cannot protect or remove from the review of the Court, the exercise by the Minister of any discretion which the Minister might assume on a consideration of matters other than those prescribed in the proviso to Section 7.

Further, a decision based upon such an assumption of discretion would be without legal or constitutional foundation and therefore null, void and of none effect. It would leave the applicants conditional right to registration unaffected. It remains therefore to consider the preclusive clause in Section 16 only in relation to the contents of the proviso. In doing so I turn first to some authorities on the general question of ouster of the jurisdiction of the Courts.

It isa fundamental rule of great importance that a statute should not be construed as taking away the jurisdiction of the court unless there is clear and unambiguous language to that effect. This rule is supported by many eminent authorities of which the following may be cited. In Lee v. The Showmen's Guild of Great Britain (1952) 2 Q.B. 329, 354 Romer L.J. said :-

> "The proper tribunals for the determination of legal disputes in this country are the courts, and they are the only tribunals which, by training and experience, and assisted by properly qualified advocates, are fitted for the task. The courts jealously uphold and safeguard the prima facie privilege of every man to resort to them for the determination and enforcement of his legal rights".

In Pye Granite Co.Ltd. v. Minister of Housing and Local Government (1960) A.C.260, 286 Viscount Simonds reaffirmed the rule in the following passage :-

> "It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is, as McNair J. called it in Francis v. Yiewsley and West Drayton Urban District Council, a fundamental 'rule' from which I would not for my part santion any departure".

The question had been considered much earlier in many cases of which I will refer to two. In R. v. Shoredich Assessment Committee

Ex parte Morgan (1910) 2 K.B. 859 at 880 Farwell L.J. expressed the rule thus :-

> "No tribunal of inferior jurisdiction can by its own decision finally decide on the question of the existence or extent of such jurisdiction: such question is always subject to review by the High Court which does not permit the inferior tribunal either to usurp a jurisdiction which it does not possess, whether at all or to the extent claimed, or to refuse to exercise a jurisdiction which it has and ought to exercise. Subjection in this respect to the High Court is a necessary and inseparable incident to all tribunals of limited jurisdiction; for the existence of the limit necessitates an authority to determine and enforce it: it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure - such a tribunal would be autocratic, not limited - and it is immaterial whether the decision of the inferior tribunal on the question of the existence or non-existence of its own jurisdiction is founded on law or fact".

Then, in Rex v. Nat Bell Liquours Ltd. (1922) 2 A.C. 128 at 159-160 Lord Sumner said:-

> "Long before Jervis's Acts, statutes had been passed which created an inferior court, and declared its decisions to be 'final' and 'without appeal' and again the Court of King's Bench had held that language of this kind did not restrict or take away the right of the court to bring the proceedings before itself by certiorari. There is no need to regard this as a conflict between the court and Parliament; on the contrary, the latter, by continuing to use the same language in subsequent enactments, accepted this interpretation which is now clearly established and is applicable to Canadian legislation, both Dominion and Provincial, when regulating the rights of certiorari and of appeal in similar terms".

These authorities imply and point to the crystallization of a rule that recognises two aspects of the term jurisdiction, when dealing with the Courts in relation to statutory or inferior tribunals, the legislation creating which tribunals contains also a preclusive clause. The first aspect is the jurisdiction to determine the matter which the legislation has actually confided to the statutory tribunal; the second aspect is the jurisdiction to determine the existence and extent of the tribunals limited jurisdiction and its observance of the law.

With regard to first, the tribunal is autonomous; with regard to the second, the decisions show that if the Court's supervisory powers in this sphere are to be ousted the words of the preclusive clause must make this clear. In the result, the authorities show that the usual preclusive formulae have not, in the context of many cases, been clear enough. It is in pursuit of these principles that the Courts have reviewed the decisions of statutory tribunals, notwithstanding a preclusive clause, and sometimes declared their decisions to be a nullity.

These principles were clarified and applied by the House of Lords in Anisminic Ltd. v. Foreign Compensation Commission (1969) 2 A.C. 147. See especially pages 207 to 208 in the judgment of Lord Wilberforce, that of Lord Reid at 171, and that of Lord Pearce at page 195. Lord Wilberforce at page 208 said :-

> "The courts, when they decide that a 'decision' is a 'nullity', are not disregarding the preclusive clause. For, just as it is their duty to attribute autonomy of decision of action to the tribunal within the designated area, so as the counterpart of this autonomy, they must ensure that the limits of that area which have been laid down are observed (see the formulation of Lord Sumner in Rex v. Nat Bell Liquours Ltd. (1922) A.C.128, 156). In each task they are carrying out the intention of the legislature,

and it would be a misdescription to state it in terms of a struggle between the courts and the executive. What would be the purpose of defining by statute the limit of a tribunal's powers if, by means of a clause inserted in the instrument of definition, those limits could safely be passed?"

Earlier in the report, but in consonance with the same principles, Lord Pearce at page 195 showed how a purported decision could be a nullity :-

"It is.....for the courts to decide the true construction of the statute which defines the area of a tribunal's jurisdiction. This is the only logical way of dealing with the situation and it is the way in which the courts have acted in a supervisory capacity.

Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.

Further, it is assumed, unless special provisions provide otherwise, that the tribunal will make its inquiry and decision according to the law of the land. For that reason the courts will intervene when it is manifest from the record that the tribunal, though keeping within its mandated area of jurisdiction, comes to an erroneous decision through an error of law. In such a case the courts have intervened to correct the error".

Applying these principles to the facts of this case my finding is that the decision of the Minister is a nullity and the jurisdiction of the Court is not ousted by any of the preclusive formulae.

That finding is based upon an assumption of the validity of Section 16 and the proviso to Section 7, and it arises out of the arguments as put to the Court with a large number of authorities cited. There is another matter, however, which I must now consider. Up to the time of the beginning of the reply for the plaintiff it appeared, having regard to the defence submission that Section 7 must be read together with Article 5(2)(3)(4) that the case for the defence rested on a decision by the Minister under the proviso to Section 7. However, as Mr. Wallace Whitfield, in developing his reply, was submitting that there was no evidence to support a finding of a decision under that proviso, Mrs. Sawyer interjected and stated quite clearly that the defence was not asking the Court to infer that any of the matters dealt with in the proviso applied to the plaintiff. If none of the matters in the proviso apply to the plaintiff, then it follows the Minister's refusal rested on extraneous considerations.

Where the law or the constitution has prescribed the matters to be considered or the course to be followed by a statutory authority or tribunal, it is not permissible for that authority or tribunal to step outside of the matters prescribed and justify this departue by a reliance on policy. Furthermore, it is important to note that policy and politics are not synonymous terms.

This is illustrated in the judgment of Farwell L.J. in the case of R. v. Board of Education (1910) 2 K.B. 165, 175-183. In that case the Board of Education made a decision supporting a differentiation by the local authority between salaries of teachers in provided schools and those in non-provided schools, notwithstanding the provisions of the Education Act 1902. Policy was mentioned as a ground to support their decision. At page 181 of the report Farwell L.J. said :-

> "If the Board did know the law to be as it is now admitted to be, they must have acted upon a consideration of something extraneous and extrajudicial which ought not to have effected their decision, and this was suggested by the Attorney-General when he said that the Board were in a difficulty and that questions of policy were involved. If this means that the Board were hampered by political consideration, I can say that such considerations are preeminently extraneous, and that no political consequence can justify the Board in allowing their judgment and discretion to be influenced thereby".

Extraneousness as above described by Farwell L.J. could also, in the context of the instant case, involve discrimination which is forbidden and defined by Article 26(2)(3) of the Constitution. In Associated Provincial House Ltd. v. Wednesbury Corpn. (1948) 1 K.B.223 at 229, the Court said:-

> "a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider".

The only matters, which the Minister may have been authorised to consider for refusal of the plaintiff's application, are those in the proviso. Only in relation to those might he have a discretion.

It is apposite at this point to examine what guidance the authorities give for dealing with silence or negativity assumed by a party to legal proceedings. In Minister of National Revenue v. Wrights' Canadian Ropes Ltd. (1947) A.C. 109, 123 a case concerning an appeal from an income tax assessment, the Privy Council said:-

> "Their Lordships find nothing in the language of the Act or in the general law which would compel the Minister to state his reasons for taking action.....But this does not mean that the Minister by keeping silent can defeat the taxpayer's appeal .....The Court is always entitled to examine

> the facts which are shown by evidence to have been before the Minister when he made his determination. If those facts are.....insufficient in law to support it, the determination cannot stand.....".

Then in Padfield v. Minister of Agriculture (1968) 1 A.E.R. 694 a decision in the House of Lords, it was held that the fact that a Minister gave no reasons for his decision, whether or not to exercise a discretionary power conferred on him by statute, would not prevent the Court from reaching a conclusion in a proper case that a prerogative order should issue. At page712 of the case Lord Hudson said :-

> "True it is that the Minister is not bound to give his reasons for refusing to exercise his discretion in a particular manner, but when, as here, the circumstances indicate genuine complaint for which the appropriate remedy is provided, if the Minister in the case so directs, he would not escape from the possibility of control by mandamus through adopting a negative attitude without explanation. As the guardian of the public interests he has a duty to protect the interests of those who claim to have been treated contrary to the public interest".

And there are similar passages at pages 701 and 714 of the report. Then in Secretary of State for Employment v. Associated Society of Locomotive Engineers et al (1972) 2 A.E.R. 949 at 968 Lord Denning stated that though not in all cases, yet in most he would apply completely the proposition that in the ordinary way a Minister should give reasons and if he gives none the Court may infer that he had no good reasons. Should the approach of the Courts shown by the authorities cited above be applied in the instant case?

The answer is indicated by the combination of three factors :-

1. No evidence has been adduced for the defence to support a finding either directly

or inferentially that the Minister based his refusal on any of the matters placed at his discretion in the proviso.

2. Such evidence as is before the Court, in particular that in the affidavits of the plaintiff, goes to show that none of the grounds for refusal set out in the proviso existed.

3. The Court has been informed by Counsel that the defence is not asking the Court to infer that any of the matters dealt with in the proviso apply to the plaintiff. This last appears unique.

In the light of the foregoing, I find that none of the grounds for refusal set out in the proviso apply to the plaintiff and that accordingly the refusal of the Minister was based on no good grounds; that is to say, on no grounds authorised by law. As he did not act in pursuance of matters placed at his discretion by law, his decision was, for these reasons also, a nullity; and the Court's discretion could not be ousted under Section 16 which only applies to discretions or authorised matters.

I pass now to the submission that the instant action is barred by Section 2 of the Public Authorities Act, Chapter 86 of the Laws of The Bahamas. This action against the defendant is not "for any act done by him (or the Minister) in pursuance, or execution or intended execution of any Act, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act duty or authority". In so far as any action or inaction by the Minister has been called in question, this has been incidental to inquiring into the basic question which is whether, arising out of the Constitution and relevant legislation, the plaintiff has a right to be registered as a citizen.

In the cases, nearly all tortious, which were cited in support of the invocation of the limitation, the matter before the Court had its origin in some act or default of the public authority. This was so in Hogg v. Scott (1949) 1 K.B. 759 where the Court, indeed, granted a declaration. Such is not the position here. Accordingly, I hold that the action is not barred.

I come next to examine the submission that, having regard to Article 54 of the Constitution, Section 7 or at least the proviso thereto and Section 16 of the B.N.A. 1973 are invalid and ultra vires the Constitution. This requires a closer examination of that Article as well as others in the Constitution.

Article 54 deals with alteration of the Constitution and the relevant portions provide as follows :-

> (1) Subject to the provisions of this Article, Parliament may, by an Act of Parliament passed by both Houses, alter any of the provisions of this Constitution or (in so far as it forms part of the law of the Bahamas) and of the provisions of The Bahamas Independence Act, 1973.
>
> .....
>
> (3) In so far as it alters -
>
> (a) this Article;
> (b) Articles 2, 3, 4, 5.....
> (d) any of the provisions of The Bahamas Independence Act 1973,
>
> a Bill for an Act of Parliament under this Article shall not be passed by Parliament unless :-
>
> (i) at the final voting thereon in each House it is supported by the votes of not less than three-quarters of all the members of each House, and
>
> (ii) the Bill, after its passage through both Houses has been submitted to the electors qualified to vote for the election of members of the House of Assembly and, on a vote taken in such manner as Parliament may prescribe the majority of the electors voting having approved the Bill.
>
> (4) In this Article -
>
> (a) references to any of the provisions of

this Constitution or the Bahamas Independence Act 1973 include references to any law that amends or replaces that provision; and

(b) references to the alteration of any of the provisions of this Constitution or The Bahamas Independence Act 1973 include references to the amendment, modification, or re-enactment with or without amendment or modification, of that provision, the suspension or repeal of that provision and the making of a different provision in lieu of that provision.

(5) No Act of Parliament shall be construed as altering this Constitution unless it is stated in the Act that it is an Act for that purpose.

Article 137 provides as follows :-

In this Constitution, unless it is otherwise provided or required by the context -

"Act" or "Act of Parliament" means any law made by Parliament.

It is important to recall at this point that the power vested by Article 52 (mentioned earlier) in Parliament to "make laws for the peace order and good government of The Bahamas" is expressed in that Article to be "subject to the provisions of this Constitution". Full effect must therefore be given to Article 54 with the result that the provisions for a referendum constitute the electorate a part of the legislative body in respect of any desired alteration of the matters stated in those provisions. The requirements for any alteration of Article 5 (2) would run thus: passage through each House by a majority of at least three-quarters; approval by a majority of the electorate in a referendum; and then the Royal Assent. The bill or at least the Act, should state that it is a measure for the purpose of altering the Constitution. The clear intention of the Constitution is that this right in Article 5(2) cannot be altered in the manner that would do for an amendment, for example, of the Dogs Licence Act.

There was a time when, legislative power having been conferred under the "peace order and good government" formula without more, much argument arose between two schools of thought. One asserted that the instrument defining the Constitution was by its very nature fundamental or organic, and therefore could not be altered by subsequent legislation which was inconsistent with that Constitution. It was also argued that amendments to the Constitution should "show their colours". The other school of thought argued that the admitted sovereignty of Parliament under the usual formula was the deciding factor and that, therefore, inconsistent law amends. This latter view prevailed with the Courts, and effect was given to it in McCawleys case (1920) A.C. 691. (See especially page 709 of the report).

In that state of the authorities it has been left to the legislature and the draftsmen to provide for any assertion of the supremacy of the Constitution and for any limits upon the sovereign power by express wording for thos purposes in the Constitution itself. The cases show that the Courts give effect to such provision. Constitutions so framed have given rise to the dichotomy of a "controlled" constitution and "entrenched" provisions. The technique includes expressly providing :-

(a) That the Constitution is the supreme law of the land, prevailing over all other laws;

(b) That any law inconsistent therewith shall be void;

(c) That the power of alteration or amendment of the Constitution must conform with certain special requirements in respect of various matters in the Constitution.

The rules now applicable in the circumstances possible are reflected in the case of Bribery Commissioner v. Ranasinghe (1964) 2 A.E.R. 785, a case from Ceylon in which the validity of certain legislation was challenged for failure to comply with the requirement of a

Speaker's Certificate, as laid down in the Constitution. In delivering the judgment of the Privy Council Lord Pearce, after reviewing the cases, said at page 792 of the report :-

> "These passages show clearly that the Board in McCawley's case took the view which commends itself to the Board in the present case, that a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law. This restriction exists independently of the question whether the legislature is sovereign as is the legislature of Ceylon, or whether the Constitution is "uncontrolled", as the Board held the Constitution of Queensland to be. Such a Constitution can indeed be altered or amended by the legislature, if the regulating instrument so provides and if the terms of those provisions are complied with: and the alteration or amendment may include the change or abolition of those very provisions. The proposition which is not acceptable is that a legislature, once established, has some inherent power, derived from the mere fact of its establishment, to make a valid law by the resolution of a bare majority which its own constituent instrument has said shall not be a valid law unless made by a different type of majority or by a different legislative process. This is the proposition which is really involved in the argument.
>
> It is possible now to state summarily what is the essential difference between the McCawley case and this case. There the legislature, having full power to make laws by a majority, except on one subject that was not in question, passed a law which conflicted with one of the existing terms of its Constitution Act. It was held that this was valid legislation, since it must be treated as pro tanto an alteration of the Constitution, which was neither fundamental in the sense of being beyond change nor so construed as to require any special legislative process to pass on the topic dealt with. In the present case, on

the other hand, the legislature has purported to pass a law which, being in conflict with s.55 of the Order in Council, must be treated, if it is to be valid, as an implied alteration of the constitutional provisions about the appointment of judicial officers. Since such alterations, even if express, can only be made by laws which comply with the special legislative procedure laid down in s.29 (4), the Ceylon legislature has not got the general power to legislate so as to amend its Constitution by ordinary majority resolutions, such as the Queensland legislature was found to have under s.2 of its Constitution Act, but is rather in the position, for effecting such amendments, that that legislature was held to be in by virtue of its s.9 namely compelled to operate a special procuedure in order to achieve the desired result".

The legislation was held to be invalid and ultra vires.

The case of Attorney-General for New South Wales v. Trethowan (1932) A.C.526 is also relevant. In that case the relevant law provided that any bill for the abolition of the Legislative Council must after passage by Parliament be approved in a referendum before being presented for the Royal Assent. The Privy Council held that Bills passed for this purpose could not be lawfully presented unless and until they had been approved by a majority of the electors voting. The Court held that the provision for a referendum "had the effect of making the legislative body consist thereafter of the King, the Legislative Council, the Assembly and the people for the purpose of Constitutional enactments therein described".

In a later case, Kariapper v. Wijesinha (1967) 3 A.E.R. 485, the Privy Council decided that an Act, which was inconsistent with the Constitution of Ceylon was to be regarded as amending the Constitution because there was not to be found, in the constitutional restriction imposed on the power of amendment, any provision which denied that the Act its constitutional effect.

From these authorities there emerges a clear rule that when a constitution contains provisions as to how it may be altered or how the law-making power may be exercised each and everyone of those conditions must be complied with, otherwise the legislation will be invalid. The provisions of the Constitution of the Bahamas which have been set out earlier, reflect an awareness of these authorities on the part of the framers of the Constitution. For example Article 2 expressly provides that subject to the Constitution a law inconsistent with the Constitution shall be void to the extent of the inconsistency.

I have already mentioned the valuable incidents that attach to Bahamian Status, and indicated the close association with The Bahamas as a home which was one of its premises. The concept of home is intimately connected with the concept of family life and it is an obvious possibility that persons of Bahamian Status may have intermarried with Bahamians by birth and otherwise established with The Bahamas the close ties of a home. The facts in this case show the plaintiff to be such a person. The fears felt by him as to his family life are set out in his affidavit sworn on the 7th May, 1976. I do not construe these as inevitable results, but they are not irrelevant. It seems to me, however, that there is some persuasive guidance for Courts when called upon to deal with issues involving family life.

In R. v. Home Secretary Ex.p. Phansopkar (1975) 3 W.L.R. 322, 339 a case in which there was a threat to family life, Scarman L.J. after referring to Magna Carta and the European Convention which though not municipal law has, as I have mentioned earlier, been extended to The Bahamas, continued :-

"Article 8 of the Convention provides:-

'(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law in the interests of national security, public safety or

the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

It may of course, happen under our law that the basic rights to justice undeferred and to respect for family and private life have to yield to the express requirements of a statute. But in my judgment it is the duty of the Courts, so long as they do not defy or disregard clear unequivocal provision, to construe statutes in a manner which promotes, not endangers those rights. Problems of ambiguity or omission, if they arise under the language of an Act, should be resolved so as to give effect to, or at the very least so as not to derogate from the rights recognised by Magna Carta and the European Convention".

In that case the Court of Appeal ordered that Mandamus should go to compel the Home Secretary to hear and determine in England the application for a certificate of patriality made by a wife who was a Commonwealth Citizen instead of sending her back to apply in India. Though I find, as to renunciation by The Bahamas of that Convention, nothing of which a court could take judicial notice, I am of the view that the Convention has no binding force in this country. Nevertheless the careful balance between legal requirements and respect for family life indicated by Scarman L.J. is a valuable pointer for the Courts in circumstances like those of the instant case.

Against this general background I further consider Article 5(2)(3) and (4) of the Constitution and Sections 7 and 16 of the B.N.A. 1973. In the light of the matters above stated there are ample reasons why, in dealing with this important topic, the intention of the Constitution should be to preserve to the holders of Bahamian Status the valuable incidents and interests attaching thereto, by providing for an easy transition from that Status to the Status of citizenship.

Article 5(2) has done this by giving the holders of Bahamian Status a right to be registered as citizens subject to the condition in Article 5(3) and as regards the application, the provisions of Article 5(4) to which reference has already been made. That right has been entrenched in the Constitution. Any alterations to it must accord with the Constitution.

Throughout Article 5 there is clear authority for the creation of exceptions and qualifications to some of the rights declared in the Article in the interests of national security or public policy. Such authority is, in my view, a safeguard both reasonable and necessary in a sovereign state, though its expressed restriction in Article 5(4) to the application instead of the right, appears unique, and is not free from difficulty. Learned Counsel for the plaintiff suggested that no legislation has been passed in pursuance of Article 5(4) providing for any exceptions or qualifications in any application for registration as a citizen under Article 5(2). Even if this were so, it does not follow that Sections 7 and 16 of the B.N.A. 1973 could not be otherwise enacted, because the power to legislate arises under Article 52 and not under Article 5(4) which merely provides for the regulation of any application made in pursuance of article 5(2).

Whether in pursuit of Article 5(4) or for any other purpose, when it desired, however, to make alterations to Article 5(2) such alterations must be made in conformity with the requirements of Article 54 which requirements have already been set out. Alteration is defined in Article 54(4)(b) as including references to any modification of a provision of the Constitution. It is clear that the proviso to Section 7 of the B.N.A. 1973 in its total effect constitutes a purported alteration or modification of the right provided for in Article 5(2). Indeed this is fundamental to the argument for the defence that all this legislation must be read together, and that so read the plaintiff has no right to be registered but a mere spes or expectation to be registered. Such a change of the right under Article 5(2) into an expectation would be brought about by

the alteration contained in the proviso to Section 7 and the change is sought to be further strengthened by Section 10 in its application to Section 7. In my view the clear effect of this legislation is to modify Article 5(2) through the avenue of qualification under Article 5(4) expressed to be upon an application, but in such a way that a person of Bahamian Status would have no right to registration; instead, his registration would rest wholly upon the discretion of the Minister upon whom a power of refusal has been conferred.

The total effect of the proviso is not merely to create qualifications or exceptions, which is all that Article 5(4) allows, but to transmute or destroy the right under Article 5(2). You cannot qualify or except, in respect of what does not, or has ceased to, exist. The proviso therefore conflicts with Article 5(4) in the latter's application to Article 5(2), and is a serious alteration.

This alteration can be carried out, provided it is done in compliance with the relevant requirements of the Constitution. The legislature is sovereign, but the Constitution is supreme. The proper concern of the Court, when dealing with such a Constitution where there are entrenched provisions, was explained by Lord Diplock in delivering the majority judgment of the Privy Council in the recent "Gun Court" case from Jamaica: Hinds v. The Queen (1976) 2 W.L.R. 366, 374 E-G. He said :-

> "The purpose served by this machinery for "entrenchment" is to ensure that those Provisions which were regarded as important safeguards by the political parties in Jamaica, minority and majority alike, who took part in the negotiations which led up to the constitution should not be altered without mature consideration by the Parliament and the consent of a larger proportion of its members than the bare majority required for ordinary laws. So in deciding whether any provisions

of a law passed by the Parliament of Jamaica as an ordinary law are inconsistent with the Constitution of Jamaica neither the Courts of Jamaica nor their Lordships Board are concerned with the propriety or expediency of the law impugned. They are concerned solely with whether those provisions however reasonable and expedient, are of such a character that they conflict with an entrenched provision of the Constitution and so can be validly passed only after the Constitution has been amended by the method laid down by it for altering that entrenched provision".

In my view the same principle applies in the instant case. As to the requirement for passage through both Houses of the Legislature by a three quarters majority, there is no evidence on way or another. As to the requirement of a referendum, the defence concedes that there was none. As to the provision that such an Act should state that it is an Act for the purpose of altering the Constitution, I take, as authorised by Section 71(1) of the Evidence Act, judicial notice of the B.N.A. 1973 and there is nowhere in that Act any such statement. This provision in Article 54 (5) is the constraint to which I referred earlier when dealing with the construction of the first part of Section 7 of the B.N.A. 1973. It is a far reaching provision; for, not only does it impliedly require any legislation which would alter the Constitution to show its colours, but it prohibits the Courts and anyone else who has a duty to construe an Act of Parliament from making any construction thereof which would alter the Constitution unless it is stated in the Act that such is its purpose.

In the circumstances, therefore, it is not open to the Court to construe Section 7 of the B.N.A. in any way which would alter the right to registration contained in Article 5(2) of the Constitution, or turn this into the expectation contended for by the defence. The proviso itself, being in effect a modification or alteration of Article 5(2) as has been earlier described, and not having been enacted in compliance with one at least of the relevant requirements of Article 54, on principle and on

the authorities cited earlier is invalid and ultra vires the Constitution.

Having found earlier that as a matter of fact none of the disqualifications in the proviso, if valid, applies to the plaintiff; and now that, as a matter of law, the proviso is invalid and cannot be construed to apply to the plaintiff; on each of these findings, the only remaining basis for dealing with his application is article 5(2). The evidence shows that he meets the requirements of this. I hold, therefore, that the plaintiff is entitled to be registered as a citizen of The Bahamas.

It remains to decide whether a declaration, the only remedy sought by the plaintiff, being a discretionary remedy, such discretion should be exercised in the plaintiff's behalf. It appears that this remedy is suitable to decide questions of personal Status. See the cases of Bulmer v. Attorney-General (1955) Ch.588 and Attorney-General v. Prince Ernest Augustus of Hanover (1957) A.C. and the Third Edition of de Smith on Judicial Review of Administrative Action pages 437-439 and page 326, in Note 83 to which, the author expresses the view that "the question whether a person is a citizen of the United Kingdom and Colonies may be determined independently by the Courts in an action for a declaration brought against the Attorney-General".

Taking all the circumstances into consideration I have come to the view that the discretion should be exercised in the plaintiff's behalf. The Court has power to grant a declaration subject to conditions. (Dewhurst v. Salford Guardians (1925) Ch. 655, 672). Accordingly I would grant the following declaration :-

That the plaintiff is entitled to be registered as a citizen of the Commonwealth of the Bahamas subject to his compliance with the requirements of Article 5(3) of the Constitution.

DATED the 23rd day of June, 1976.

S.H.Graham
J.

In the Supreme Court

No.10
Final Judgment
dated 23rd
June 1976

No. 10

FINAL JUDGMENT

COMMONWEALTH OF THE BAHAMAS 1976

IN THE SUPREME COURT No.285

Common Law Side

IN THE MATTER of the entitlement of Thomas D'Arcy Ryan to be registered as a citizen of the Commonwealth of the Bahamas.

Plaintiff

AND

THE ATTORNEY-GENERAL Defendant

FINAL JUDGMENT OF COURT

The result of the two Judgments is this. I would remit the matter to the Minister, to consider the Plaintiff's application, according to law.

My learned brother, Mr. Justice Graham, would grant a declaration that the Plaintiff is entitled to be registered as a citizen of the Commonwealth of the Bahamas, subject to his compliance with the requirements of Article 5(3) of the Constitution.

Since my learned brother and I have not been able to agree upon the Judgment which should be made in this action, the application is dismissed, pursuant to Rule 4 of The Supreme Court (Special Jurisdiction) Rules, 1976.

No order as to costs is made.

DATED this Twenty-third day of June, 1976.

(Sgd) Leonard J. Knowles
Leonard J. Knowles, C.J.
CHAIRMAN

No. 11

NOTICE OF APPEAL OF T.D. RYAN

COMMONWEALTH OF THE BAHAMAS 1976

IN THE COURT OF APPEAL No. 8

Civil Side

IN THE MATTER of the Constitution of the Commonwealth of the Bahamas

AND

IN THE MATTER of the entitlement of Thomas D'Arcy Ryan to be registered as a Citizen of the Commonwealth of the Bahamas

B E T W E E N :

THOMAS D'ARCY RYAN Plaintiff/ Appellant

AND

THE ATTORNEY-GENERAL Defendant/ Respondent

NOTICE OF APPEAL

TAKE NOTICE that the Court of Appeal will be moved so soon as Counsel can be heard on behalf of the above-named Appellant for an order that the Order and the Judgment herein of the Supreme Court on the 23rd day of June, A.D. 1976 whereby it was ordered :-

1. THAT the Plaintiff's/Appellant's application for a declaration that upon the true construction of the Constitution of the Commonwealth of the Bahamas the Appellant is entitled to be registered as a Citizen of the Commonwealth of the Bahamas in accordance with the provisions of the said Constitution be dismissed.

2. AND those parts of the Judgment of the Honourable Chief Justice Sir Leonard J.Knowles

given on the 23rd day of June, A.D.1976 whereby it was adjudged :-

(1) (at page 8 of the said Judgment)

".....I make the following findings of the fact.....and (vii) that, some of the questions which Mr. Walkine should have put to the Plaintiff at the said interview in accordance with section 7 of the B.N.A., were in fact put to the Plaintiff and answered, contrary to the statement contained in paragraph 9 of the Plaintiff's affidavit, sworn on the 29th April, 1976....."

(2) (at page 23 of the said Judgment)

".....However, in my view "the exceptions or qualifications" referred to in paragraph (4) can only refer to the entitlement or right conferred by paragraph (2)....."

(3) (at page 23 of the said Judgment)

".....Further, Jowitt's "The Dictionary of English Law" defines the word "application" as "a request, a motion to a Court or judge; the disposal of a thing". This last meaning is the one which I would adopt in interpreting the word "application" in paragraph (4) of Article 5....."

(4) (at pages 24 and 25 of the said Judgment)

".....In my view, therefore, paragraph (4) should be read as though it were contained in a proviso to paragraph (2) and the words "Any application for registration under paragraph (2) of this Article" should be read as being equivalent to the words "Provided that the right to be registered as a citizen under this paragraph."

(5) (at page 27 of the said Judgment)

".....I do accept.....that the "exceptions or qualifications" referred to in paragraph (4) are contained in

Section 7 of the B.N.A....."

(6) (at page 28 of the said Judgment)

".....I have no doubt that section 7 of the B.N.A. confers a discretion on the Minister, whether it be described as "objective" or subjective".

(7) (at pages 30 and 31 of the said Judgment)

"....The question therefore is this: Is Section 7 of the B.N.A. a provision "by an Act of Parliament"? It seems to me that that question must be answered in the affirmative, at least down to the end of paragraph (v) of the Proviso. But what about the concluding paragraph of the proviso? As regards the concluding words of the Proviso, it has been argued that it would be strange indeed if Parliament in paragraph (a) to (e) of the Proviso, should "prescribe" certain specific grounds of refusal, and then, in the concluding clause allow the Minister to add such other grounds "in the interest of national security or public policy" as he should think fit.

This is precisely what the contrary argument amounts to; but to enable the Court to escape this conclusion the Plaintiff must show either that (a) it is not a "provision" by Parliament or (b) that it is "ultra vires" because it is inconsistent with Article 5 of the Constitution in some way....."

"I feel bound to reject the first... of the objections. It is obviously a "provision of Parliament, it is difficult to conceive of a more comprehensive term;....."

".....After careful and anxious consideration I have come to the conclusion that I cannot now hold that the concluding words of the Proviso are ultra vires Article 5(4) of the Constitution, and therefore invalid."

(8) (at page 34 of the said Judgment)

".....I am not prepared to hold that the final clauses of the Proviso to section 7 of the B.N.A. is ultra vires the Constitution....."

(9) (at page 36 of the said Judgment)

"....After careful consideration and a review of all the authorities which have been cited to the Court, I have come to the conclusion that section 16 of the B.N.A. does not entirely exclude judicial review....."

(at page 46 of the said Judgment)

".....the decision.....here, involves policy?

(10) (at pages 54 and 55 of the said Judgment)

".....I observe that the Notes state that the Plaintiff had not participated "in charitable organisations, etc." I do not know what the et cetera comprehended, and the Court has no means of ascertaining what is meant. I appreciate that this could be a ground upon which a particular Minister, in the exercise of his discretion, might feel justified in refusing a application to be registered as a citizen ....."

"....Another Minister, in all the circumstances of the case, might take a different view - public policy is a horse which will differ in hue and antics from time to time; as will the rider....."

(11) (at page 55 of the said Judgment)

"....In any case, I do not see how this matter could be brought under any of the categories in paragraphs (i) to (v) of the Proviso to section 7 of the B.N.A. though it might well come under the concluding words to the Proviso....."

(12) (at page 60 of the said Judgment)

"....What then should be my Judgment in the present case?

The Plaintiff has asked for a declaration that he should be registered as a citizen of the Bahamas, by-passing the Minister altogether. I do not think that the Court has jurisdiction to make such a declaration; in any case, it would, in my opinion, be quite inappropriate in the present circumstances. The Minister, not the Court has been given a discretion. The Court cannot exercise it for him, though the Court will review a purported decision where there is a judisdictional defect, as I believe there is here....."

AND

(13) (at page 62 of the said Judgment)

".....In all the circumstances, and relying upon the wide powers conferred upon the Court by section 37 of the Supreme Court Act, I would remit the matter to the Minister for a determination of the Plaintiff's Application, according to law."

FOR AN ORDER THAT

(1) Such parts of the said Judgment dismissing the Plaintiff's/Appellant's said Application be rescinded and set aside; AND

(2) Such parts of the said Judgment to remit the matter to the Minister to determine the Plaintiff's/Appellant's Application to be registered as a Citizen of the Commonwealth of the Bahamas according to law be rescinded and set aside; AND

(3) The Plaintiff/Appellant is entitled to be registered as a Citizen of the Commonwealth of the Bahamas subject to his compliance with the requirements of paragraph 3 of Article 5 of the said Constitution; AND

In the Supreme Court

No.11
Notice of Appeal of T.D.Ryan dated 8th July 1976

(4) The Defendant/Respondent do pay or cause to be paid to the Plaintiff/Appellant the costs incurred by him in the Court below and also the costs incurred by him in respect of this Appeal.

AND FURTHER TAKE NOTICE that the grounds of this Appeal are :-

(1) That the learned Chief Justice erred and misdirected himself by holding that the Court had no jurisdiction to make the declaration sought;

(2) That the learned Chief Justice erred and misdirected himself by holding that such a declaration was inappropriate in the circumstances; and that the Minister and not the Court had a discretion;

(3) That the learned Chief Justice erred and misdirected himself by holding that he would remit the matter to the Minister for a determination of Plaintiff's/ Appellant's Applicationaccording to law;

(4) That the learned Chief erred and misdirected himself in the construction of paragraph 4 of Article 5 of the Constitution by holding;

(a) that the word "application" as used in paragraph 4 meant "the disposal of a thing", and

(b) that the words "any application for registration under paragraph 2 of this Article" as used in paragraph 4 should be read as being equivalent to the words "Provided that the right to be registered as a citizen under this paragraph".

(5) That the learned Chief Justice erred and misdirected himself by holding that the objective entitlement set out in paragraph 2 and 4 of Article 5 of the said Constitution is satisfied by the subjective opinion of the Minister.

(6) That the learned Chief Justice erred and misdirected himself by holding that Section 7

of the Bahamas Nationality Act was sic valid and intra vires the said Constitution.

(7) That the learned Chief Justice erred and failed to direct himself that the Defendant/Respondent was not asking the Court to infer that any of the matters dealt with in the Proviso to Section 7 of the Bahamas Nationality Act applied to the Plaintiff/Appellant.

(8) That the learned Chief Justice erred and misdirected himself by holding that:

(a) (at page 46 of the said Judgment) "....the decision.....here, involves a large element of policy."

(b) (at page 55 of the said Judgment) having at page 54 referred to Mr. Walkine's note of the interview that the Plaintiff/Appellant had no membership in charitable organisations, etc.)

.....I appreciate that this could be a ground upon which a particular Minister, in the exercise of his discretion, might feel justified in refusing an application to be registered as a citizen....."

(9) That the learned Chief Justice erred and failed to direct himself properly or at all as to the effect of Articles 2, 52, 54 and 137 upon Article 5 and Section 7 of the Bahamas Nationality Act.

(10) That the learned Chief Justice erred and misdirected himself in that despite from the evidence before the Court the Minister had no lawful grounds to refuse the Application of the Plaintiff/Appellant the learned Chief Justice

(1) refused to grant the declaration sought

(2) failed to rule that the Minister in the absence of evidence to the contrary acted unlawfully.

(3) ruled that the matter should be remitted back to the Minister for a determination of the Plaintiff's/Appellant's Application according to law.

(11) That the learned Chief Justice erred and misdirected himself in his construction of Section 37 of the Supreme Court Act when he ruled (at page 62 of his said Judgment) ".....and relying upon the wide powers conferred upon the Court by Section 37 of the Supreme Court Act, I would....."

(12) The learned Chief Justice erred and misdirected himself in his construction of the Supreme Court (Special Jurisdiction) Rules when he ordered that the action is dismissed and no order is to be made for costs despite the rulings of both Justices of the Court to the effect that the Plaintiff's/Appellant's rights under the law had been infringed by the actions of the Minister.

(13) That in all the circumstances of the case the learned Chief Justice erred and misdirected himself in failing to make a declaration as made by Mr. Justice Samuel Graham that the Plaintiff/Appellant is entitled to be registered as a Citizen of the Commonwealth of the Bahamas subject to his compliance with the requirements of Article 5 (3) of the Constitution.

(14) That in all the circumstances of the case the learned Chief Justice erred and misdirected himself in law and the rulings and orders made by the said Chief Justice should be rescinded as set aside.

DATED this 8th day of July, A.D. 1976

(Sgd) Cecil V. Wallace Whitfield

Cecil V.Wallace Whitfield, Esq.,
Chambers,
The Mosmar Building,
Queen Street,
Nassau, Bahamas.

TO: The Attorney-General
and/or the Defendant/Respondent
Chambers, East Hill Street, Nassau, Bahamas.

No.12

NOTICE OF APPEAL BY THE ATTORNEY-GENERAL

In the Court of Appeal

No.12
Notice of Appeal by the Attorney-General dated 29th July 1976

COMMONWEALTH OF THE BAHAMAS 1976
IN THE COURT OF APPEAL No.8
Civil Side

IN THE MATTER of the Constitution of the Commonwealth of The Bahamas

AND

IN THE MATTER of the entitlement of Thomas D'Arcy Ryan to be registered as a Citizen of the Commonwealth of The Bahamas

B E T W E E N:

THOMAS D'ARCY RYAN Appellant

AND

THE ATTORNEY-GENERAL
Respondent

NOTICE BY RESPONDENT OF INTENTION TO CONTEND THAT THE DECISION OF MR. JUSTICE GRAHAM BE VARIED

TAKE NOTICE that upon the hearing of the above appeal the Respondent herein intends to contend that the decision of Mr. Justice Samuel H.Graham dated the 23rd day of June, 1976 should be varied as follows :

1. That the discretion should not be exercised in the Plaintiff's (Appellant's) behalf;

2. That the Plaintiff (Appellant) is not entitled to be registered as a citizen of the Commonwealth of The Bahamas subject to his compliance with the requirenents of Article 5(3) of the Constitution;

3. That the proviso to section 7 of the

Bahamas Nationality Act, 1973 is not invalid or ultra vires the Constitution;

4. That the decision of the Minister was not a nullity

5. That the Court's discretion is ousted by section 16 of the Bahamas Nationality Act, 1973;

6. That the action is barred by section 2 of the Public Authorities Act.

AND TAKE NOTICE that the grounds on which the Respondent intends to rely are as follows:

1. That the learned Mr. Justice Graham erred in law in concluding that Article 5(3) of the Constitution was merely a condition to the provisions of Article 5(2);

2. That the learned Mr. Justice Graham erred in law and misdirected himself on the facts in concluding that the Appellant is entitled to be registered as a citizen of The Bahamas;

3. That the learned Mr. Justice Graham erred in law in deciding that the proviso to section 7 of the Bahamas Nationality Act, 1973 was invalid and ultra vires the Constitution;

4. That the learned Mr. Justice Graham erred in law and misdirected himself on the facts in deciding that the decision of the Minister to refuse the application of the Appellant was a nullity;

5. That the learned Mr. Justice Graham erred in law in deciding that the jurisdiction of the Court was not ousted by section 16 of the Bahamas Nationality Act, 1973;

6. That the learned Mr. Justice Graham erred in law in deciding that the action for a declaration was not barred by section 2 of the Public Authorities Protection Act.

Dated the 29th day of July, 1976.

(Sgd) Illegible

Attorney for the Respondent

In the Court of Appeal

No.12
Notice of Appeal by the Attorney-General dated 29th July 1976

TO: Cecil V.Wallace Whitfield, Esq.
Attorney for the Appellant,
Chambers,
The Mosmar Building,
Queen Street,
Nassau, Bahamas.

TO: The Registrar of the Court of Appeal,
Parliament Street,
Nassau, Bahamas

In the Court of Appeal

No.13
Judgment of Hogan P. dated 16th March 1976

No. 13

JUDGMENT OF HOGAN P.

COMMONWEALTH OF THE BAHAMAS 1976
IN THE COURT OF APPEAL No.8
CIVIL SIDE

THOMAS D'ARCY RYAN Appellant

V

THE ATTORNEY GENERAL Respondent

J U D G M E N T

On 20th June 1974 the appellant applied to be registered as a citizen of the Bahamas under the provisions of Article 5(2) of the Constitution. On 27th and 28th May 1975, his application was considered by the Minister for Home Affairs personally. The Minister subsequently directed the First Assistant Secretary in the Ministry to notify the appellant that his application had been refused; and, on 16th June 1975, the First Assistant Secretary wrote to the appellant informing him that his application "had not been approved".

On 7th April 1976, the appellant took out

an originating summons. The relief sought was

> ".....a declaration that upon the true construction of the Constitution .....the (appellant) is entitled to be registered as a citizen of the..... Bahamas in accordance with the provisions of the said Constitution.".

On 26th April 1976 the matter came before the Chief Justice and Graham J. sitting together under powers conferred by rule 3 of the Supreme Court (Special Jurisdiction) Rule 1976 which came into force on 7th April 1976. The hearing lasted twelve full days; and, on 23rd June 1976, the learned judges delivered separate judgments.

The view of the Chief Justice was that the appellant had not been given a fair hearing; that the purported decision of the Minister was therefore a nullity; but that the court did not have jurisdiction to make the declaration sought; and that the matter should be remitted to the Minister to consider the appellant's application "according to law".

Graham J. also thought that the purported decision of the Minister wasa nullity but he went further and, holding that certain provisions on which the respondent relied were ultra vires, he would have granted the declaration sought, subject to the appellant complying with Article 5(3) of the Constitution.

Rule 4 of the Supreme Court (Special Jurisdiction) Rules 1976 reads :-

> "If on the hearing of any application .....under these Rules before two Justices, the two Justices differ, the application.....shall stand dismissed."

The final judgment of the Court below was that the appellant's application be dismissed. Against that dismissal the appellant has appealed and seeks the declaration originally requested whilst the Respondent has filed a notice stating that Graham J. erred in finding certain provisions ultra vires and that both the

Chief Justice and he erred in holding the Minister's decision to be a nullity.

The Statutes

The appellant was born in Ontario on 24th September 1925 and he is a Canadian Citizen; but from 8th February 1966 till 27th October, 1975 he was the possessor of what came to be known as Bahamian status; and, before summarising further the facts relating to the appellant's case, it will be convenient to indicate how this concept of Bahamian status was embodied in Bahamian law for some twelve years prior to 1975. For this purpose I would refer to Graham J.'s summary of theposition of British subjects in the British Commonwealth as a whole and of the common citizenship of the United Kingdom and Colonies which linked the United Kingdomand the dependent territories. He spoke of the description normally given to individuals born within a particular domain of the monarch and continued :-

> "Thus Bahamians, Barbadians or Jamaicans were persons born in the Bahamas, Barbados or Jamaica. They were citizens of the United Kingdom and Colonies and had the status of British subject. It was everyday experience, however, that there might be resident here numbers of persons from countries outside the Bahamas who were or might wish to be associated as closely with the Bahamas, as Bahamians themselves. They would wish to make it their home.
>
> For British subjects the avenue to such closer association with the Bahamas lay through section 13(1)(d) and section 14 of the Immigration Act 1963 Cap.239 Vol.V of the Laws of the Bahamas replaced respectively by section 2(2)(d) and section 12 of the Immigration Act 1967 No.25 of 1967. This legislation made provision for the status and grant of a Certificate of Belongership. For aliens the avenue lay through naturalisation under the British Nationality Act 1948. Upon

the appropriate grant, both categories were then deemed, like native born Bahamians, to be persons belonging to the Bahamas. They became persons of Bahamian status, a term which is defined in Article 128 of the 1969 Constitution.

This status in addition to the right to vote, to which I have earlier adverted, carried with it the following incidents: the freedom of abode, the freedom to travel to and from the territory without let or hindrance, and the freedom to work in the Bahamas. Those were and are valuable incidents and the plaintiff has enjoyed them from 1966 to at least 1973 if not later."

Section 13(1) and Section 14 of the Immigration Act 1963, so far as relevant, read :-

" 13(1) For the purposes of this Act, a person shall be deemed to belong to the Bahama Islands if :-

(a).....
(b).....
(c).....
(d) he is a person to whom a certificate has been granted under the provisions of Section 14 of this Act;"

"14(1).....the Board may, in their absolute discretion, grant a certificate that he belongs to the Bahama Islands for the purposes of this Act to any person who applies for the same in the prescribed manner and who :-

(a) is of good character;
(b) is not less than twenty-one years of age;
(c) has been ordinarily resident in the Bahama Islands for a period of not less than 5 years immediately prior to his application; and
(d) in his application has stated his intention of making the Bahama Islands his permanent home.

(2).....

(3) In deciding whether a certificate should be granted under sub-section (1) of this section in respect of any applicant, the Board shall consider whether :-

(a) the economic situation in the Colony is such that the grant of a certificate to the person concerned will prejudice the protection afforded under this Act to other persons engaging in the same gainful occupation in which the applicant is engaged or in which he is likely to engage;

(b) the applicant has established a close personal connection with the Bahama Islands;

(c) the applicant's character and previous conduct are unexceptional; and

(d) the applicant's continued residence in and association with the Colony may afford some advantage to the Colony.".

Section 15 provides that such a certificate would "cease to be valid" if the person concerned became ordinarily resident outside the Bahamas for seven years and might be revoked by order of the Board, already mentioned, on any one of four specified grounds; but it was also provided that no order of revocation could be made unless the person concerned had been given notice in writing of the grounds on which it was proposed to be made and the person concerned had been afforded "an opportunity of being heard". The Board in question was established under the provisions and for the purposes of the Act.

Section 16 of the 1963 Act also made provision for the grant by the Board, in its absolute discretion, of a certificate of permanent residence to any person applying for the same who (a) was of good character;

(b) undertook not to engage in any gainful occupation without permission and (c) stated his intention of residing permanently in the Bahamas.

The Immigration Act 1963 was repealed by the Immigration Act 1967 (No.25 of 1967); but the provisions relating to the grant and revocation of a certificate of belongership were re-enacted in substantially the same form (ss.12 and 13); and provision was also made (s.14) for the grant of a certificate of permanent residence. The effect of certificates granted under the repealed provisions was preserved.

The term Bahamian status was first used in the 1969 Constitution of the Bahamas with reference to those who had received certificates of belonging; and an appropriate amendment to s.2 of the Immigration Act 1967 was made by Statutory Instrument No.28 of 1969.

The Bahamas attained independence on 10th July 1973, by virtue of The Bahamas Independence Act 1973 (c.27 of 1973). Sections 2 and 3 of this Act provided for the cessation and retention of citizenship of the United Kingdom and Colonies, and the sections contemplated further legislation dealing with citizenship.

The current Constitution of the Commonwealth of the Bahamas (referred to throughout this Judgment as "The Constitution") was set out as the schedule to the Bahamas Independence Order 1973, which was made on 20th June 1973 and came into operation on the appointed day, viz 10th July 1973. Chapter II of the Constitution deals with citizenship. I shall return to it presently, but it is pertinent to mention now the main provisions of the Immigration (Amendment) act 1975 which came into force on 27th October 1975. It repealed Part IV of the 1967 Act (i.e. ss.12-15 - the sections dealing with the grant and revocation of Bahamian Status and certificates of permanent residence) and re-enacted (as ss.12-15) provisions relating to the grant and revocation of certificates of permanent residence. It also repealed s.2(2) of the principal Act - the subsection which enumerated various classes of persons "deemed to belong" to the Bahama Islands. The amending Act went on to introduce new provisions relating

to persons who possessed Bahamian status on 9th July 1974, and who were ordinarily resident in the Bahamas but who were not citizens of the Bahamas. Section 5(5) of the amending Act provides that any such person who has applied for registration as a citizen of the Bahamas before the commencement of the amending Act shall have the same status (other than the right to vote at any election) which he formerly enjoyed as a person possessing Bahamian status until (a) where the application for citizenship is granted, the date on which he is registered as a citizen and (b) where the application is not granted, a date three months after he is so informed of the decision.

It is no part of our task on this appeal to determine the effect of this later legislation, but for individuals like the appellant, whose applications have been made and refused, the effect could clearly be serious.

I return to Chapter II of the Constitution and more particularly Articles 3-10 which deal with the acquisition of citizenship. In this case, we are not concerned with Articles 3, 4, 6 and 8 which cover thos categories of persons who "become" citizens of the Bahamas by operation of law provided certain conditions are satisfied. We are concerned with Articles 5, 7, 9 and 10, particularly Article 5 which reads as follows :-

> "5(1) Any woman who, on 9th July 1973 is or has been married to a person -
>
> (a) who becomes a citizen of the Bahamas by virtue of Article 3 of this Constitution; or
>
> (b) who, having died before 10th July 1973 would, but for his death, have become a citizen of the Bahamas by virtue of that Article,
>
> shall be entitled, upon making

application and upon taking the oath of allegiance or such declaration in such manner as may be prescribed, to be registered as a citizen of the Bahamas:

Provided that the right to be registered as a citizen of the Bahamas under this paragraph shall be subject to such exceptions or qualifications as may be prescribed in the interests of national security or public policy.

(2) Any person who, on 9th July 1973, possesses Bahamian status under the provisions of the Immigration Act 1967 and is ordinarily resident in the Bahama Islands, shall be entitled, upon making application before 10th July 1974, to be registered as a citizen of The Bahamas.

(3) Notwithstanding anything contained in paragraph (2) of this Article, a person who has attained the age of eighteen years or who is a woman who is or has been married shall not, if he is a citizen of some country other than the Bahamas, be entitled to be registered as a citizen of the Bahamas under the provisions of that paragraph unless he renounces his citizenship of that other country, takes the oath of allegiance and makes and registers such declaration as may be prescribed.

Provided that where a person cannot renounce his citizenship of the other country under the law of that country he may instead make such declaration concerning that citizenship as may be prescribed.

(4) Any application for registration under paragraph (2) of this Article shall be subject to such exceptions or qualifications as may be prescribed in the interests of national security or public Policy.

(5) Any woman who on 9th July 1973 is or has been married to a person who subsequently becomes a citizen of the Bahamas by registration under paragraph (2) of this Article shall be entitled, upon making application and upon taking the oath of allegiance or such declaration as may be

prescribed, to be registered as a citizen of the Bahamas;

Provided that the right to be registered as a citizen of the Bahamas under this paragraph shall be prescribed in the interests of national security or public policy.

(6) Any application for registration under this Article shall be made in such manner as may be prescribed as respects that application....."

Articles 7 and 9 make provision for the acquisition of citizenship by those who are born in the Bahamas but whose parents are not citizens and for those who are born outside but whose mother is a citizen. In each case there is provision for renouncing citizenship of another country and a sub article in the same terms as sub article 5(4) above.

Article 10 reads :-

"10. Any woman who, after 9th July 1973, marries a person who is or becomes a citizen of the Bahamas shall be entitled, provided she is still so married, upon making application in such manner as may be prescribed and upon taking the oath of allegiance or such declaration as may be prescribed, to be registered as a citizen of the Bahamas:

Provided that the right to be registered as a citizen of the Bahamas under this Article shall be subject to such exceptions or qualifications as may be prescribed in the interests of national security or public policy."

The word "prescribed" is defined in Article 137 as meaning "provided by or under an Act of Parliament".

The Bahamas Nationality Act 1973 (referred to throughout this case as "the BNA") was assented to on 5th July 1973 and, according to the Preamble, the intention was that it should

come into operation simultaneously with the coming into operation of the Constitution i.e. on 10th July 1973.

It is described as -

"An Act to provide for the Acquisition, certification, Renunciation, and Deprivation of Citizenship of the Bahamas and for purposes incidental thereto or connected therewith".

And the Preamble reads :

"Whereas it is proposed that, upon the attainment of fully independent status by the Commonwealth of the Bahamas, the Constitution will contain certain provisions relating to citizenship of the Bahamas, including provisions for the acquisition of citizenship by birth and descent :-

And whereas it is considered expedient to provide by law for the acquisition of such citizenship by registration, naturalisation and otherwise for the certification, renunciation and deprivation of such citizenship, and for other matters relating to citizenship generally with the intent that such law shall come into operation simultaneously with the coming into operation of the said Constitution:

And whereas by virtue of subsection (2) of section 4 of the Bahamas Independence Order 1973 such a law may be enacted by the Legislature of the Bahama Islands before the attainment of fully independent status so as to have effect as if that law had been made under the said Constitution by the Parliament of the Bahamas:
"Now therefore....."

Section 4(2) of the Bahamas Independence Order 1973, so far as relevant, reads :-

"4(2) Where any matter that falls to be prescribed or otherwise provided for under the Constitution by Parliament.....is prescribed or provided for by.....an existing law or is otherwise prescribed or

provided for immediately before the appointed day by or under the existing order, that prescription or provision shall, as from that day, have effect .....as if it had been made under the Constitution by Parliament....."

"Existing law" is defined in the section as meaning

"Any law having effect as part of the law of the Bahama Islands immediately before the appointed day (including any law made before the appointed day and coming into operation on or after that day)".

It would, therefore, appear that the BNA must be regarded as "existing law" within the definition of that expression in section 4 of the Bahamas Independence Order 1973; as such, however, it would appear to be subject to Article 2 which reads as follows

"2. The Constitution is the supreme law of the Commonwealth of the Bahamas and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

It will be necessary to consider later the effect of that Article but first it is desirable to set out the terms of section 7 of the BNA as enacted. They read :-

"7. Any person claiming to be entitled to be registered under the provisions of Articles 5, 7, 9 or 10 of the Constitution may make application to the Minister in the prescribed manner and, in any such case, if it appears to the Minister that the applicant is entitled to such registration and that all relevant provisions of the Constitution have been complied with he shall cause the applicant to be registered as a citizen of the Bahamas:

Provided that in any case to which those provisions of the Constitution apply, the Minister may refuse the application for registration if he is satisfied that the applicant -

(a) has within the period of five years immediately preceding the date of such application been sentenced upon his conviction of a criminal offence in any country to death or to imprisonment for a term of not less than twelve months and has not received a free pardon in respect of that offence: or

(b) is not of good behaviour: or

(c) has engaged in activities whether within or outside the Bahamas which are prejudicial to the safety of the Bahamas or to the maintenance of law or public order in the Bahamas; or

(d) has been adjudged or otherwise declared bankrupt under the law in force in any country and has not been discharged; or

(e) not being a dependent of a citizen of the Bahamas has not sufficient means to maintain himself and is likely to become a public charge,

or if for any other sufficient reason of public policy he is satisfied that it is not conducive to the public good that the applicant should become a citizen of the Bahamas."

Section 19 of the BNA provides that the Minister may make regulations "prescribing anything which by the provisions of Chapter II of the Constitution.....are to be or may be prescribed"; and regulation 3(5) of the Bahamas Nationality Regulations 1973 which were published on 31st August 1973 prescribed a form which, somewhat surprisingly, seems to make very little provision for information relating to the matters enumerated as reasons for refusal in s.7 of the BNA.

The Facts

Turning from this summary of the relevant legislation to the facts it appears that the appellant came to the Bahamas in 1947 and was employed for two years by the Montagu Beach Hotel as Front Office Manager. He returned to Canada in 1949 to study accountancy with Price Waterhouse and Co. During his subsequent residence in the Bahamas he was employed as a senior assistant accountant by Peat Marwick and Mitchell & Co. From 1955 to 1957 he was employed by Thompson Brothers as Controller, and from 1957 to 1962 by E.D.Sassoon Banking as administrative accountant. From 1962 to the present time he has been self-employed as a tour-operator.

In May 1951 at St.Francis Xavier's Cathedral in Nassau he married Sheila Marie Pemberton. She was born in the Bahamas and is a citizen of the Bahamas by virtue of Article 3(1) of the Constitution. There are seven children of the marriage.

On 8th February 1966 he was given a "belonger" certificate which is in the following terms :-

> "Whereas Mr Thomas D'Arcy Ryan of New Providence has satisfied the Immigration Board that he is a person of good character over the age of twenty-one years and has been ordinarily resident in the Bahama Islands for a period of 18 years prior to his application and has declared his intention of taking up his permanent home in the Bahama Islands.
>
> Now therefore the Immigration Board in its discretion hereby granted to the said Thomas D'Arcy Ryan this certificate that he belongs to the Bahama Islands for the purpose of the Immigration Act 1963".

A copy of the prescribed form of application for citizenship (Form 2) which was submitted to the Ministry of Home Affairs by the appellant is attached to this judgment.

By letter dated 24th October 1974, he was informed that it would be necessary for him and his wife to attend at the Ministry for an interview and they were requested to bring their passports with them and also a "Police Certificate".

On 7th November 1974 he and his wife were interviewed at the Ministry by a Mr. H.C. Walkine who was then an Under-Secretary in the Ministry. Mr. Walkine made a note of the interview on what appears to be a sheet of paper which had certain questions already typed on it. The answers were recorded in ink. A copy of this document is attached to this judgment. Once more little regard seems to have been paid to the matters specifically enumerated in the proviso to s.7 of the BNA.

In the proceedings in the court below the appellant filed a copy of a certificate dated 14th June 1974 from the Nassau Police to the effect that he had not been convicted of any criminal offence in the Bahamas; but it does not appear that he produced a similar certificate to the Ministry officials during his interview on 7th November 1974 or that he was ever asked to do so; and Mr. Turnquest (First Assistant Secretary in the Ministry) said in his affidavit dated 5th May 1976 that :-

> "no evidence that (the appellant) was never convicted in (Canada) or any other country was ever produced by (the appellant)".

In his affidavit dated 29th April 1976, the appellant states :-

> "I have never been convicted of any criminal offence in any country whatsoever .....I am and always have been of good behaviour....I have not engaged in any activity whatsoever within or outside the Bahamas which is prejudicial to the safety of the Bahamas or to the maintenance of law and public order in the Bahamas..... I have never been adjudged or otherwise declared bankrupt under the law in force in any country.....I have and always have had sufficient means to maintain myself and I am not likely to become a public charge.....there is no good or

> sufficient reason or reasons of public policy not conducive to the public good why I should not be registered as a citizen of the Bahamas under the Constitution".

This clearly was sworn with reference to the matters enumerated in the proviso to s.7 of the BNA. The last sentence is slightly confused. The word "not" in front of "conducive" should, it seems, be omitted but the intent is clear enough. In his affidavit of 5th May 1976, Mr. Turnquest states :-

> "As far as I can see from what appears in the notes of the (appellant's) interview, (the appellant) was asked about and gave answers to the matters with which Mr. Walkine was concerned as he should have been in order to comply with the provisions of the Bahamas Nationality Act and the Constitution."

The Arguments and Conclusions

We have been furnished, thanks to the admirable industry of counsel, with an extensive array of authorities on the primary issue raised by this appeal i.e. whether, assuming section 7 of the Bahamas Nationality Act is wholly intra vires, the determination of the application was nevertheless, in the circumstances of this case, a nullity.

They included, inter alia, an illuminating and extensively researched case from Guyana, a number of West Indian authorities, decisions of the Privy Council, the House of Lords and other English courts as well as useful references to Australian, Canadian and New Zealand cases. Amongst the treaties to which we have had recourse are Professor de Smith's "Judicial Review of Administrative Action"; a very useful paper on the same subject in Guyana by Mr. Okpaluba, lecturer in law at the University of the West Indies; and a penetrating article by Lord Devlin in the Times of October 1976, which reminds us that the public has shown no more desire "to be governed by judges than to be judged by administrators" so that we should be scrupulous in keeping within the appropriate boundary.

Amidst such a wealth of authority it would be surprising if, from time to time, divergence had not emerged: de Smith (3rd Ed. p.255), amongst others, has expressed reservations about war-time and immediate post-war decisions where reluctance to impede the war-effort may have played a part. Certainly in recent years the courts of the common law tradition have adopted a more robust approach than at one time seemed likely. This is well illustrated by the current tendency to adopt what was, at the time, Lord Atkin's minority view in Liversidge v. Anderson 1942 A.C. 206 that the expression "has reason to believe" normally implies an objective rather than a subjective test. See for example the Trinidad Court of Appeal in Cedano v O'Brien 1966, 7 W.I.R. 192, and the Solicitor General's acceptance of this approach in Secretary of State for Employment v A.S.L.E.F. [1972] 2 A.E.R. 949.

Nevertheless, in so doing, the courts appear not so much to be breaking new ground as to be returning to earlier and well established authority. Thus, in the recent Guyana case of Brandt (1971), 17 W.I.R. 448, much reliance was placed on the much older case from Trinidad of de Verteuil v Knaggs [1918] A.C. 557, and the Australian case of In re Yates (1925) 37 C.L.R. 36, to both of which I will return.

The basic principle of the courts approach to such matters had been broadly stated a few years previously by Farwell L.J. in Rex v. Board of Education (1910) 2 K.B.165 where, after referring to the current tendency to remit questions for determination to Government departments, he continued :-

> "Such department when so entrusted becomes a tribunal charged with the performance of a public duty, and as such amenable to the jurisdiction of the High Court within the limits now well established by law. If the tribunal has exercised the discretion extended to it bona fide, not influenced by extraneous or irrelevant considerations, and not arbitrarily or illegally, the Courts cannot interfere: they are not a Court of Appeal from the tribunal, but they have power to prevent

> the intentional usurpation or mistaken assumption of a jurisdiction beyond that given to the tribunal by law, and also the refusal of their true jurisdiction by the adoption of extraneous considerations in arriving at their conclusions or deciding a point other than that brought before them, in which cases our Courts have regarded them as declining jurisdiction. Such tribunal is not an autocrat free to act as it pleases, but is an inferior tribunal subject to the jurisdiction which the Courts of Kings Bench for centuries, and the High Court since the Judicature Acts, has exercised over such tribunals."

A year later, in describing the duties of such an authority, Lord Loreburn L.C. had this to say on appeal, Board of Education v. Rice 1911 /A.C./ 179 :-

> "Comparatively recent statutes have extended, if they have not originated the practice of imposing upon departments, or officers of state, the duty of deciding or determining questions of various kinds.....sometimes it will involve matters of law as well as matters of fact or even depend upon matters of law alone. In such cases the (department or officer) will have to ascertain the law and also to ascertain the facts. 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 everyone who decides anything.".

That broad blunt pronouncement might need a measure of refinement in certain exceptional circumstances but as a basic statement of principle it has been frequently quoted and approved. Although primarily directed at situations where there are two protagonists or adversaries it would seem no less apposite when the claim of an individual is put in jeopardy by information or argument derived from any other source. Elsewhere Lord Loreburn had said that the department in question could obtain information in any way they thought best "always giving a fair

opportunity to those who are parties to the controversy for contradicting or correcting any relevant statement prejudicial to their view".

One might perhaps, have expected to find some broad distinction in principle between those instances where the authority is required to find the existence of certain circumstances or determine certain questions before acting and those instances where it is simply empowered to act for the purpose of achieving a specified object or in such manner as it thinks best: see Demetriades v. Glasgow Corporation [1951] 1 A.E.R. 457, where an authority was authorised to use requisitioned land "for such purpose and in such manner as that authority thinks expedient". An attempt was made to restrain the authority from cutting down trees. The matter went to the House of Lords and the head note reads in part :-

> "In the absence of averment of bad faith, ulterior motive, or, possibly, perverseness, on the part of the authority, the jurisdiction of the courts was excluded and the competent authority was the judge of the use which it should make of the land and of what it should do in connection with such use for the purpose of the requisition.".

Undoubtedly individual cases have adverted to this difference in the nature of the power and responsibility conferred and have been influenced by it but to extract from the cases a general acceptance of a clear-cut division in principle between the two is not now easy, except, perhaps, in relation to the remedies available.

Farwell L.J. made his pronouncement in a case where a local authority was required to maintain and keep efficient all schools within its area and question arose as to whether, for this purpose, the authority could properly contribute more to some schools than to others which had additional sources of support.

In another case, Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation

[1947] 2 A.E.R.680, where a discretion had been conferred on an authority in the broadest terms - it was empowered to authorise cinemas to open on Sundays subject to such conditions as it thought fit to impose - the court was asked to intervene on the ground that a condition about children not being admitted was ultra vires. According to the headnote, the court would have intervened if it could be shown that the authority had taken account of extraneous matter or, conversely, not taken account of matters to which it should have had regard, and if, having avoided either such error, it had nevertheless made a decision so unreasonable that no reasonable authority could have come to it; such interference would not, however, be that of an appellate court overriding a decision of the local authority but the act of a judicial authority concerned only to see whether the local authority had contravened the law by acting in excess of the powers conferred by Parliament.

This headnote is taken almost word for words from the last paragraph of the judgment of Lord Greene, M.R. with whom the other members of the Court of Appeal agreed.

Earlier, in dealing with the last mentioned ground justifying interference, he had said :-

> "Counsel in the end agreed that his proposition that the decision of the local authority can be upset if it is found to be unreasonable, really means that it must be proved to be unreasonable in the sense, not that it is what the court considers unreasonable, but that it is what the court considers is a decision that no reasonable body could have come to, which is a different thing altogether.".

Into the category of powers conferred for the purpose simply of achieving an administrative object would go the war-time decision in Carltona Ltd. v. Commissioner of Works and others [1943] 2 A.E.R. 560. The

case would also appear to come close to those decisions Professor de Smith had in mind when he said that, in their anxiety not to impede the war effort, the courts, apart from perfunctory dicta about the need for good faith, had on occasions, declined to give "a literal interpretation" to a formula which prima facie enabled them to review the reasonableness of grounds for exercising a discretionary power (supra p.255).

By the English Defence Regulations the competent authority had been given power to take possession of any land if it appeared necessary or expedient so to do in the interests of public safety, defence of the realm etc. The Carltona Company contended that if the requisitioning authority had brought their minds to bear on the matter they could not possibly have come to the conclusion that it was necessary to requisition the premises in question for any of the purposes specified. Lord Greene M.R., with whom the other members of the court of appeal agreed, had this to say:-

> "That argument is one which in the absence of an allegation of bad faith - and I may say that there is no such allegation here - is not open in this court. It has been decided as clearly as anything can be decided that, where a regulation of this kind commits to an executive authority the decision of what is necessary or expedient and that authority makes the decision, it is not competent to the courts to investigate the grounds or the reasonableness of the decision in the absence of bad faith. It if were not so it would mean that the courts would be made responsible for carrying on the executive government of the country on those important matters. Parliament, which authorised the regulation, commits to the executive the discretion to decide and with that discretion if bona fide exercised no court can interfere. All that the court can do is to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the legislation and to see that these powers are exercised in good faith. Apart from that the courts have no power at all to inquire into the

reasonableness, or policy, the sense, or any other aspect of the transaction.".

It seems that in this context Lord Greene was using the word reasonable in its broader sense and not in the narrower sense which he and counsel were agreed in the Provincial Picture House case could justify intervention. Whilst it may be unlikely that an equal measure of judicial self-restraint would be repeated "except in conditions of grave emergency" (ibid 256) the case might also be distinguished by the very substantial "policy" content of the discretion from those where the very nature of the question to be decided in itself required a more judicial or quasi-judicial approach.

Subsequent decisions, particularly in the Privy Council and the House of Lords, show many examples of the latter which, the appellant submitted, come close to the issue arising in the instant case.

For example, in Minister of National Revenue v. Wright's Canadian Ropes Ltd [1946] A.C. 109,122, where the Minister was authorised to disallow any expense which he "in his discretion" might determine was not "reasonable or normal" in the business of the taxpayer, the Privy Council said :-

> "The word "discretion" is in truth scarcely appropriate in this context since what the Minister is required to do before he can make a disallowance is to "determine" that an expense is in excess of what is reasonable or normal for the business carried on by the taxpayer. The reference to "discretion" in this context does not, in the opinion of their Lordships mean more than that the Minister is the judge of what is reasonable or normal.".

But where a true executive discretion is involved or where prompt and expeditious action is required to rid a country of an unwanted alien the courts have, on occasions, shown themselves ready to do no more than ensure that any statutory requirements are observed. As Luckhoo C. pointed out in Brandt's

case (supra p.457) it is not the function of the courts to frustrate the will of the Legislature as expressed in valid statutory provisions.

In ex parte Venicoff [1920] A.E.R. p.157 the English Divisional Court had rejected an argument that before deporting an alien the Secretary of State should hold an inquiry and give the person affected an opportunity of knowing the grounds on which the order was to be made and a fair opportunity of meeting them. That decision was endorsed more recently by the English Court of Appeal in ex parte Soblen [1962] 3 A.E.R. 641 but both Lord Denning M.R. and Donovan L.J., as he then was, placed reliance on the fact that parliament had on occasions subsequentto 1920 made orders affecting aliens in similar terms and without attempting to alter the law as laid down in the Venicoff case. Moreoever Lord Denning expressly reserved his opinion whether after a deportation order is made and before it is executed an alien may not, in some circumstances, have a right to be heard whilst Donovan L.J. emphasized (p.663) that :-

> "The power vested in the Home Secretary to order deportation is a power to do an executive or administrative and not a judicial act.".

An instance where the statute conferring the power fettered it with a condition is to be found in Nakkuda Ali v. F. de S. Jayaratne [1951] A.C.66 where the Controller of Textiles in Ceylon acting under a Defence regulation which authorised him to cancel a licence if he had reasonable grounds to believe the holder unfit to hold a licence, purported to revoke Nakkuda Ali's licence. The latter sought to quash this cancellation by obtaining a writ of certiorari. Lord Radcliffe, delivering the judgment of the Privy Council, said that the words in the Regulations "has reasonable grounds to believe" imposed a condition that there must in fact exist such reasonable grounds, known to the Controller, before he could exercise the power of cancellation. Lord Radcliffe continued (p.77):-

> "But it does not seem to follow necessarily from this that the Controller must be acting judicially in exercising the power.

> Can one not act reasonably without acting judicially? It is not difficult to think of circumstances in which the Controller might, in any ordinary sense of the words, have reasonable grounds of belief without having ever confronted the licence holder with the information which is the source of his belief. It is a long step..... to say that because a man is enjoined that he must not take action unless he has reasonable grounds for believing something he can only arrive at that belief by a course of conduct analogous to the judicial procedure. And yet, unless that proposition is valid, there is really no ground for holding that the Controller is acting judicially or quasi-judicially when he acts under this regulation. If he is not under a duty so to act then it would not be according to law that his decision should be amenable to review and, if necessary, to avoidance by the procedure of certiorari.".

This view of the court's capacity to intervene came under criticism from Lord Reid in the later and widely known case of Ridge v. Baldwin [1963] 2 A.E.R. 66, where he said that nothing short of a decision of the House of Lords directly in point would induce him to accept the position that "although an enactment expressly requires an official to have reasonable grounds for his decision, our law is so defective that a subject cannot bring up such a decision for review.".

But Nakkuda Ali's case seems to say merely that an executive or administrative power is not amenable to certiorari. Indeed Lord Reid went on to quote the paragraph set out just above and continued :-

> "I would agree that in this and other defence regulation cases the legislation has substituted an obligation not to act without reasonable grounds for the ordinary obligation to afford to the person affected an opportunity to submit his defence.".

Lord Hodson also appears to have had some reservations about the Nakkuda decision (see p.79 ibid), which was, consequently thought to have understated the powers of the courts but in Durayappah v. Fernando [1967] 2 A.C. 337 349 Lord Upjohn, delivering the judgment of a strong Board on an appeal from Ceylon, said they did not necessarily agree with Lord Reid's criticism. This must leave considerable doubt as to the weight to be attached to that criticism, but as already indicated, this could mean little more than acceptance of the view that certiorari was not, in the circumstances, an appropriate remedy. It certainly does not seem to have deterred Lord Denning, with whom Lord Wilberforce and Phillimore L.J. sitting in the English Court of Appeal agreed, from giving decisive value to the criticism, when hearing the case of R. v. Gaming Board of Great Britain, ex parte Benaim and another [1970] 2 A.E.R. 525, 535. In that case the owners of Crockfords were complaining that the Board which considered their request for a certificate leading to a gaming licence had not observed the rules of natural justice. Lord Denning, with whom the other members of the court agreed, had this to say :-

> "Counsel for the applicants put his case, I think too high. It is an error to regard Crockford's as having any right of which they are being deprived. They have not had in the past, and they have not now, any right to play these games of chance - roulette, chemin-de-fer, baccarat and the like - for their own profit. What they are really seeking is a privilege - almost, I might say, a franchise - to carry on gaming for a profit, a thing never hitherto allowed in this country. It is for them to show that they are fit to be trusted with it.
>
> If counsel for the applicants went too far on his side, I think that counsel for the board went too far on the other. He submitted that the board are free to grant or refuse a certificate as they please. They are not bound, he says, to obey the rules of natural justice any more than any other executive body.....
> .....

I cannot accept this view. I think that the board are bound to observe the rules of natural justice. The question is: what are those rules?

It is not possible to lay down rigid rules as to when the principles of natural justice are to apply; nor as to their scope and extent. Everything depends on the subject matter; see what Tucker L.J. said in Russell v Duke of Norfolk and Lord Upjohn in Durayappah v Fernando. At one time it was said that the principles only apply to judicial proceedings and not to administrative proceedings. That heresy was scotched in Ridge v Baldwin. At another time, it was said that the principles do not apply to the grant or revocation of licences. That, too, is wrong. R v Metropolitan Police Cmr., ex parte Parker and Nakkuda Ali v F de s. Jayaratne are no longer of authority for any such proposition. See what Lord Reid and Lord Hodson said about them in Ridge v Baldwin. So let us sheer away from these distinctions and consider the task of the board and what they should do. The best guidance is, I think, to be found by reference to the cases of immigrants. They have no right to come in, but they have a right to be heard. The principle in that regard was well laid down by Lord Parker C.J. in Re: K (H) (an infant) when he said:

> "....even if an immigration officer is not acting in a judicial or quasi-judicial capacity he must at any rate give the immigrant an opportunity of satisfying him of the matters in the subsection, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly.".

Whatever the position in regard to licences or privileges of that kind, subsequent

decisions on immigrants and those claiming a national or residential status certainly seem to bear out Lord Denning's approach but before noting them it is desirable to see what impetus they gained from Ridge's case, where questions arose as to whether, in purporting to dismiss a Chief Constable, the Watch Committee of Brighton had observed the essential requirements of relevant regulations of which Lord Morris of Borth y Gest had this to say in the House of Lords (p.102):-

> "They included and incorporated the principles of natural justice which, as Harman L.J. said, is only fair play in action. It is well established that the essential requirements of natural justice at least include that before someone is condemned he is to have an opportunity of defending himself and in order that he may do so that he is to be made aware of the charge or allegations or suggestions which he has to meet.....My Lords, here is something which is basic to our system: the importance of upholding it far transcends the significance of any particular case.".

Later (at p.108) Lord Morris continued :-

> "In Wood v Wood, Kelly C.G. speaking of the rule expressed in the maxim 'audi alteram partem' said: 'This rule is not confined to the conduct of strictly legal tribunals but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals' ".

Lord Morris went on to refer to the view of Byles J. in Cooper v Wandsworth Board of Works 14 C.B.N.S. at p.194 that where the statute was silent on any procedure for a hearing in such circumstances the "justice of the common law" would require it.

Lord Hodson, having referred (at p.994) to the opinion in the lower court, the Court of Appeal, that no judicial or quasi judicial hearing was necessary for the "executive" action

of dismissing and having mentioned particularly the view of Davies L.J. that the words "where they think" in the relevant statute gave the committee more freedom of action than such words as "on sufficient grounds shown to his satisfaction", which had been used in de Verteuil's case (supra) turned to the older case of Capel v. Child 149 E.R. 235 where a bishop was authorised to act if it appeared to his "satisfaction" either of his own knowledge or otherwise that certain duties were inadequately performed. There Baron Bayley said :-

> "When the bishop proceeds on his own knowledge, I am of opinion that it cannot possibly and within the meaning of this Act, appear to the satisfaction of the bishop and of his knowledge, unless he gives the party an opportunity of being heard, in answer to that which the bishop states on his own knowledge to be the foundation on which he proceeds".

Lord Hodson went on to say that, on the Committee's discretion to dismiss, there was imposed a clog in that it could not "be exercised arbitrarily without regard to natural justice."

A similar approach emerges from the decision of the Privy Council in Naradana Mosque v Badi-ud-Bin Mahomed etc [1966] 1 A.E.R. where a Minister was authorised to act if he was "satisfied" that a school was being administered in contravention of any statutory provision and it was shown that such a contravention or alleged contravention had played a material part in his decision to act. The Board held that the school had not been "fairly treated" because they were not notified of the alleged contravention and consequently the Minister's order was quashed.

This view is supported by the case of Shareef v. Commissioner for Registration of Indian and Pakistan Residents [1965] 3 W.L.R. 704; an appeal from Ceylon against a refusal of a request for registration as a citizen. The case must be approached with some care as the relevant legislation made provision for an inquiry which could be conducted by the Commissioner for Registration "in any manner,

not inconsistent with the principles of natural justice, which to him may seem best adapted to elicit proof" etc. In holding such an inquiry a Deputy Commissioner failed to disclose to an applicant the full details of the case against the genuineness of a document presented by him and he was never given a proper opportunity of answering this case. On appeal the Privy Council said :-

> "The deputy commissioner in fulfilling his duties under the Act occupies an anomalous position. In his position as a member of the executive he regulates the investigation into the matters into which he considers it his duty to inquire and as an officer of state he must take such steps as he thinks necessary to ascertain the truth. When conducting an inquiry under section....he is acting in a semi-judicial capacity. In this capacity he is bound to observe the principles of natural justice. In view of his dual position his responsibility is increased to avoid any conduct which is contrary to the rules of natural justice. These principles have often been defined and it is only necessary to state that they require that the party should be given fair notice of the case made against him and that he should be given adequate opportunity at the proper time to meet the case against him (Ridge v. Baldwin)".

Their Lordships went on to hold that the applicant had not been treated fairly and quashed the Deputy Commissioner's order.

A year later in the Durayappah case [1967] 2 A.C. 337, 345, 349, mentioned by Lord Denning above, a Minister was given power to dissolve a Municipal Council if it appeared to him that the Council had, inter alia, defaulted in its duties. On appeal the Privy Council addressed itself to the question whether the Minister, before exercising his powers, was bound "to observe that rule of natural justice, which is neatly and briefly stated in the recently resuscitated latin expression 'audi alteram partem'."

The Board continued :-

"While it was an issue in the lower courts, it is now no longer disputed that the Minister acted in complete good faith and that in fact he would have given the Council the opportunity of being heard but for the urgency of the case, as he or his advisers regarded it, and it is not in doubt that if he was bound to observe the principle "audi alteram partem" he failed to do so. Their Lordships will only state that while great urgency may rightly limit such opportunity timeously, perhaps severely, there can never be a denial of that opportunity if the principles of natural justice are applicable."

Having disagreed with the view expressed in a lower court that words such as "if it appears to the satisfaction of...." standing alone excluded a duty to act judicially, the Board went on to refer to Cooper's case and Capel's case, already mentioned, and, having approved the refusal in Ridge v. Baldwin (supra) to attempt an exhaustive classification of the cases where the principle of "audi alteram partem" should be applied, their Lordships continued :-

"Outside the well-known classes of case, no general rule can be laid down as to the application of the general principle in addition to the language of the provision. In their Lordships opinion there are three matters which must always be borne in mind when considering whether the principle should be applied or not. These three matters are: first, what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when a right to intervene is proved, what sanctions in fact is the latter entitled to impose upon the other. It is only upon a consideration of all these matters that the question of the application of the principle can properly be determined."

Although this and earlier cases emphasise the importance of looking at the substance of what is at stake and the actual issues to be decided as well as at the particular form of words used, the language remains of vital importance because it provides the basis of the inquiry. Both criteria played their part in the cases, already mentioned, of Yates and de Verteuil though it is, perhaps, more the substance of the former and the language of the latter that makes for similarity with our present case.

Yates must be approached with some caution because under the legislation in question, the Australian Immigration Acts 1901-1925, the Minister, when he was satisfied as to certain matters, could summon an individual not born in Australia to appear before a board to show cause why he should not be deported. Even when expressing views that appear to be independent of it, this statutory opportunity to show cause may well have coloured the judges' approach to the question of what disclosure should be made by the Minister.

Before issuing such a summons the Minister had to be satisfied that the individual in question had been concerned in acts directed towards hindering or obstructing, to the prejudice of the public, the transport of goods or the provisions of services etc.

Although the five judges of the Australian High Court differed on certain points they appear to have been unanimous in support of the conclusions of Isaacs J. summarised as follows (37 C.L.R. 36 at p.108) :-

> "On the true construction of the section it is a necessary condition, before any person affected can be lawfully required to show cause to a Board or suffer deportation, that he should be informed with reasonable definiteness of the particular acts of which the Minister is satisfied and for which the Minister, subject to failure to appear before a Board or to the Board's recommendation, proposes to deport him."

Crane J.A., although he was amongst the minority which would not have interfered with the

President's Order in Brandt's case, said (supra p.521) one could not question the soundness of that construction because there were so many acts mentioned, any one of which might satisfy the Minister, it was absolutely necessary for the man to know which before he could show cause.

This may seem to tie the conclusion tightly to the subsequent procedural opportunity of showing cause but Isaacs J., who read the leading judgment, had put it in broader terms when he said (supra p.101) :-

> "But if the Minister must first find 'acts', and must afterwards base his deportation order on those same 'acts' (plus the recommendation or the failure to attend), how in the name of common justice can it be denied that the accused is entitled to know with sufficient precision what those alleged 'acts' are, and know that they are the 'acts' which the Minister himself has found?"

In the de Verteuil case (1918) A.C.557, there was no question of a statutory opportunity to show cause or any other special form of procedure. All the statute said was:-

> "If at any time it appears to the Governor on sufficient ground shown to his satisfaction that all or any of the immigrants indentured on any plantation should be removed therefrom, it shall be lawful for him to transfer....."

Lord Parmoor giving the judgment of the Privy Council had this to say (supra p.560):-

> "....the acting Governor could not properly carry through the duty entrusted to him without making some inquiry whether sufficient grounds had been shown to his satisfaction that immigrants indentured on the La Gloria estate of the appellant should be removed. Their Lordships are of opinion that in making such an inquiry there is, apart from special circumstances, a duty of giving to any person against whom the complaint is made a fair opportunity to make any relevant statement

which he may desire to bring forward and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice. It must, however, be borne in mind that there may be special circumstances which would justify a Governor, acting in good faith, to take action even if he did not give an opportunity, to the person affected to make any relevant statement, or to correct or controvert any relevant statement brought forward to his prejudice. For instance, a decision may have to be given in an emergency, when promptitude is of great importance; or there might be obstructive conduct on the part of the person affected."

It appears that whilst their Lordships took the view, as noted by Bollers C.J. in Brandt's case (supra), that the common law would allow exception for cases of emergency or obstruction by the person concerned, they would not permit the need for provision in respect of these exceptions to interfere with the recognition of the right to information in the normal case. Indeed recent trends might suggest that it is currently thought prudent to introduce emergency legislation for the exceptional cases.

It is time now to return to s.7 of the BNA and to consider its terms in the light of the principles expressed in the judgments I have endeavoured to analyse. The functions conferred on the Minister, like those conferred on the President in Brandt's case (supra, see judgment of Luckhoo C. at pp.467 and 468), fall into parts or stages. At the second stage the Minister is given a discretion whether or not to refuse registration but before he can exercise any such discretion, i.e. before refusing or not, he must first satisfy himself about the existence of the prescribed pre-conditions and at that stage clearly he is acting in a judicial or quasi-judicial capacity with an obligation to observe the requirements of natural justice including the principal of "audi alteram partem". All the tests suggested in the Durayappah case (supra) are satisfied. The appellant claimed to enjoy a status which conferred important rights. If the Minister decided that he was, as a result of the statute,

precluded from registration the appellant lost those rights or their equivalent.

The importance attached at one time in England and elsewhere to the distinction between a judicial or semi-judicial power and an administrative or executive power may have owed much to the limitations on the remedy by writ of certiorari which was thought not to be available in respect of a purely ministerial act (Halsbury's Laws of England 4th Ed. Vol.1 para 83). The importance of the distinction may have diminished with the recognition of a more general duty to act fairly and the development of the remedy by declaration but, in any event, when satisfying himself about the pre-conditions, the functions of the Minister in the instant case were clearly judicial or semi-judicial.

In the circumstances of this case the rule of natural justice embodied in "audi alteram partem" required that the appellant be informed of the acts or omissions which, in the opinion of the Minister, would, unless refuted, preclude his registration. The opportunity given to the appellant to fill up a form and to see Mr. Walkine, when, it would seem, the appellant merely answered questions without being given any indication of the matters just mentioned, was quite insufficient to fulfil the requirement.

Consequently, I am satisfied, as was the Chief Justice and Graham J. that in refusing registration without giving the appellant the opportunity of dealing with the considerations on which that refusal rested, the appellant was not treated fairly and that the failure to observe the principles of natural justice in this respect vitiates the decision of the Minister which must, on this account, be treated as a nullity.

Like Lord Pearce in Anisminic Ltd. v. Foreign Compensation Tribunal etc [1969] 1 A.E.R. 208, 234 I do not think it necessary to enter into discussion as to whether the decision was void or, being voidable, would only become a true nullity on being quashed.

See also Lord Evershed and Lord Devlin in Ridge v. Baldwin (supra at p.88 and p.120). I am disposed to think the decision was void ab initio and, as the difference could lead to no practical consequences in the present case, I propose to treat it as such.

However, before deciding what consequences should flow from that conclusion it is desirable to consider not only the submission that, in view of the evidence put forward in the lower court, the Minister's decision would, in any event, have been a nullity for other reasons but also the submission, which found favour with Graham J., that the proviso to s.7 of the BNA is ultra vires. It will be convenient to take the latter submission first.

Whilst arguing that the whole proviso was bad, counsel before us recognised that a distinction could well be drawn between sub-paragraphs (a) to (e) and the omnibus provision at the end. Whilst I have reservations about one aspect of the sub-paragraphs to which I will refer in a moment, that aspect has not been fully explored before us and as I see no other reason to question the validity of the sub-paragraphs it will, I think, be convenient to consider counsel's arguments as if they were addressed to the alternative contention that the concluding general prohibition is ultra vires the Constitution: in other words that Article 5 did not contemplate that the Minister or anyone else would have power to refuse registration

> "if for any other sufficient reason of public policy he is satisfied that it is not conducive to the public good that the applicant should become a citizen of the Bahamas."

As already indicated, those who possessed Bahamian status enjoyed important rights. See observations of Lord Denning M.R. on similar rights in R.v Secretary of State for the Home Department, ex P. Phansopkar [1975] 2 AER 497. In the normal way one would have expected to see those rights dealt with and preserved in a new constitution. To a substantial extent this was done here by Sub-Article 5(2) of the Constitution which conferred an entitlement, on

application, to registration as a citizen if ordinarily resident. This was, to some extent, cut down by sub-Article 5(4) which said the "application" should be :-

> "subject to such exceptions or qualifications as may be prescribed in the interests of national security or public policy."

Counsel for the appellant has argued that this restriction is limited to the actual application itself and does not affect the right to registration. One might indeed have expected, as a matter of drafting, that reference at this point would have been made to the registration rather than to the application. Arguments have been put forward on the other side to show not only that the restriction applies to the registration as well as the application but that the use of the word "application" at this point was the more appropriate. I do not think it necessary to analyse the submissions made in support of the latter part of this argument. Although the learned Chief Justice endorsed one of them. none seemed to me entirely satisfactory and the reason for using the term "application" at this point remains obscure, at least to me. Nevertheless the intention seems to have been to refer to the whole process initiated by the application and to authorise the legislature to limit, by prescribing exceptions or qualifications, the right to registration. Even if this attaches different meanings to the same word in different parts of the Article no other construction really makes sound sense.

Whilst, as already noted, the word "prescribed" has, subject to its context, been defined as meaning "provided by or under an Act of Parliament", the word, in this context, clearly contemplates a setting out or laying down of the exception or qualification and this has to be done and done publicly by a legislative enactment. In other words there must be a perceptible exception or qualification against which the individual application can be measured and assessed.

S.19 of the BNA gave to the Minister power to prescribe anything which was to be prescribed under Part II of the Constitution but there is no suggestion that he has exercised this power in relation to Article 5(4). In any event the legislating authority whether it be Parliament or the Minister has to make up its or his mind and be satisfied that the qualification or exception is being prescribed in the interests of national security or public policy. It is the act or function of prescribing that must have this character and quality. Whether an individual application does or does not fall within the prescribed exception or qualification is another matter. Whether it is a justifiable question - and a question involving an objective test - that should ultimately be determinable only by a court raises issues that have not been fully explored before us and I do not propose to enter on them. Suffice to say that, in my view, sub-Articles 5(2) and (4) contemplated the exercise of a legislative function laying down the exceptions or qualifications which appear to the legislating authority to be appropriate, followed by what is in essence a judicial or quasi-judicial decision determining whether an individual application falls within or without such exceptions or qualifications. The constitution did not contemplate that the formulation of the qualification or exception and the determination whether an individual fell within it should be encompassed by a single executive act shrouded in silence and revealed only in its results.

Thus to telescope the process, by purporting to authorise a Minister to determine-and to determine by an ad hoc decision made in the privacy of his own mind - what exceptions or qualifications are in the interests of public policy or national security and, by the same act, to decide whether they apply to a particular application, seems to me a departure from the provisions of the Constitution and in conflict with it. Consequently it is made void by Article 2 of the Constitution.

A question similar in some respects came before the Privy Council in an appeal from Ceylon, Ratnagopal v. Attorney General [1970] A.C.974. The relevant legislation empowered the Governor

General to appoint a Commission of Inquiry into, inter alia, any matter in respect of which an inquiry would, in the opinion of the Governor General, be in the interests of public safety or welfare. A commissioner was appointed with power to inquire into tenders and contracts which he thought of sufficient importance "in the public welfare" to warrant an inquiry. The Privy Council held the appointment was ultra vires of the Act because it purported to delegate to the Commissioner the power of selection and consequently "the scope of the inquiry, instead of being limited by the Governor General, as in the terms of the Act it should be, is to decided by the Commissioner."

Whilst that may be regarded as an application of "delegatus non potest delegare" it was basically a matter of construction and an attempt to use a power in a way not contemplated by the instrument from which it was derived.

In the instant case the purported alteration or transmutation of the power to legislate for certain matters into the creation of a capacity in the executive arm to take ad hoc decisions, partly judicial or quasi-judicial and partly discretionary, in a series of individual cases seems to me no less ultra vires than the appointment in the Ratnagopal case.

I turn then to the submission that, apart from the failure to give the appellant an adequate opportunity to deal with the impediments, if any, to his registration, the decision of the Minister was wrong for other reasons.

In the circumstances of this case and in the light of the authorities it appears that the reasons must show that the Minister (a) took account of extraneous matter (b) did not take account of matters he was required to consider or (c) came to a conclusion which no authority acting reasonably could have reached.

The appellant is immediately faced with the difficulty that the Minister has given no

reasons and the argument that, having regard to the terms of the legislation, he is not bound to give any.

A similar difficulty faced the applicant in the case of Padfield v Minister of Agriculture Fisheries & Food [1968] 1 A.E.R. 694, 699, 701, where the Minister in the exercise of his discretion declined to refer a complaint to a statutory committee of investigation. The Court of Appeal had set aside an order of the Divisional Court directed to the Minister. In the House of Lords, Lord Reid said :-

> "if the Minister, by reason of his having misconstrued the Act, or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court
> .....
>
> It was argued that the Minister is not bound to give any reasons for refusing to refer a complaint to the committee, that if he gives no reasons his decision cannot be questioned, and that it would be very unfortunate if giving reasons were to put him in a worse position. I do not agree, however, that a decision cannot be questioned if no reasons are given. If it is the Minister's duty not to act so as to frustrate the policy and objects of the Act and if it were to appear from all the circumstances of the case that that has been the effect of the Minister's refusal, then it appears to me that the court must be entitled to act."

Lord Reid went on to say that the Minister's discretion was impliedly limited in the sense that it could not be used to frustrate the Act and, as it had not "been properly exercised according to law", he would require the Minister to consider the complaint according to law.

Lord Hodson (ibid 0.710) thought the Minister had a complete discretion and the only question was whether it had been exercised "lawfully", which meant taking account of matters

to which the Minister "ought to have regard" and not allowing himself "to be influenced by something extraneous and extra-judicial which ought not to have affected" his decision.

Lord Hodson concluded :-

"It has been suggested that the reasons given by the Minister need not and should not be examined closely, for he need give no reason at all in the exercise of his discretion. True it is that the Minister is not bound to give his reasons for refusing to exercise his discretion in a particular manner, but when, as here the circumstances indicate genuine complaint for which the appropriate remedy is provided, if the Minister in the case in question so directs, he could not escape from the possibility of control by mandamus through adopting a negative attitude without explanation. As the guardian of the public interest he has a duty to protect the interests of those who claim to have been treated contrary to the public interest."

Lord Pearce said :-

"I do not regard a Minister's failure or refusal to give any reason as a sufficient exclusion of the Court's surveillance. If all the prima facie reasons seem to point in favour of his taking a certain course to carry out the intentions of Parliament in respect of a power which it had given him in that regard, and he gives no reason whatever for taking a contrary course, the court may infer that he has no good reason and that he is not using the power given by Parliament to carry out its intentions".

Lord Upjohn took a similar view. He said the courts could interfere only if the Minister acted unlawfully which for the purpose of the case could be stated as (a) a refusal to consider the matter (b) misdirecting himself in point of law, (c) taking into account some

wholly irrelevant or extraneous consideration or (d) wholly omitting to take into account a relevant consideration. Having drawn a distinction between the decisions of private bodies like club committees and a public officer charged with a public duty, his lordship continued :-

> "...if (the Minister) does not give any reason for his decision it may be, if circumstances warrant it, that a court may be at liberty to come to the conclusion that he had no good reason for reaching that conclusion....".

Lord Morris of Borth y Gest, who alone dissented, disagreed on the facts of the particular case but stated the law in terms very similar to those of Lord Upjohn.

Reliance was placed on this case in Secretary of State v. A.S.L.E.F. [1972] 2 A.E.R. 949, a case of considerable national importance involving 170,000 railwaymen and heard under great stress of urgency.

The Secretary of State successfully sought an order for a ballot on the ground that it appeared to him there were reasons for doubting whether the workers involved had been adequately consulted. The matter came before the courts under the provisions of the Industrial Relations Act 1971 but questions were raised that are relevant to the issues now before us, more particularly as to the need for the Minister to have or give reasons for his action. In the Court of Appeal Lord Denning M.R. had this to say (p.968):-

> "It is said that it must 'appear' to the Minister that there are 'reasons' for doubting whether the workers are behind their leaders: and that the Minister has given no reasons. We have been referred to several recent cases, of which Padfield v Minister of Agriculture Fisheries and Food is the best example, in which the courts have stressed that in the ordinary way a Minister should give reasons, and if he gave none the court may infer that he had no good reasons. Whilst I would apply

that proposition completely in most cases and particularly in cases which affect life, liberty or property, I do not think that it applies in all cases...

The Solicitor General suggested to us some reasons for doubting whether the wishes of the individual men were behind this (the proposed industrial action).....I do not say that those reasons are right, but they are such as a reasonable Minister might entertain; and, if they are such - if the Minister could on reasonable grounds form the view and opinion that he did - as I read the law and the statutes this court has no jurisdiction or power to interfere with his decision".

Buckley L.J. took the view (p.970) that in the relevant legislation the expression "if it appears to the Secretary of State that...." prescribed a subjective condition: a contrast with the approach of the Trinidad Court of Appeal in Cedano v O'Brien (1964) 7 W.I.R. where, upholding the view of Georges J., as he then was, in the lower court, they held that "having reason to suspect" involved an objective test. Notwithstanding the subjective nature of the condition, Buckley L.J. said the possibility that the Secretary of State had misdirected himself should not be ignored but, he continued, (p.970) :-

"There are, so far as I can see, no means for compelling the Secretary of State to explain on what grounds it appears to him that the conditions .....are satisfied. This is not a case in which there is any duty imposed on the Secretary of State to do something which the court could compel him to do by a writ of mandamus. It may well be that in the interests of good industrial relations frankness may often be a desirable policy to pursue, but if for any reason the Secretary of State chooses not to disclose his reasons I can see nothing in the section which compels him to do so.

It leaves it, therefore, to anybody

who wants to say that the Secretary of State has acted on insufficient material or with an improper appreciation of the position to establish that no reasonable man in the position of the Secretary of State could have reached the conclusions which the Minister says he has reached without misdirecting himself in some material respect".

Buckley L.J. went on to say that the evidence did not establish this. In conclusion he observed that in determining whether there was doubt as to the wishes of the workers the Secretary of State would, to a considerable extent, have to make a "political appreciation" of the position. This contrasts with the view of Farwell L.J. in R. v Board of Education (supra p.181) endorsed by Lord Upjohn in Padfield's case (supra p.717) that political considerations were pre-eminently extraneous. It could be that political considerations might be germane to one issue and not to another but the facts in the three cases would not seem to lend themselves readily to a reconciliation on that basis.

The third member of the Court of Appeal in the A.S.L.E.F. case, Roskill L.J., was not prepared to hold that the tests involved were wholly subjective and preferred the approach adopted in Padfield's case (supra). He continued (p.982) :-

"The Court will, I apprehend, interfere in a case where there could in the nature of things be no evidence on which a reasonable Secretary of State could have formed the reasons for the doubt claimed to exist and to justify an application. In my judgment, this point was effectively answered by the Solicitor General yesterday afternoon. He was not giving the Secretary of State's actual reasons. Whether or not the Secretary of State gives those reasons is, as Buckley L.J. has said, a matter of policy for him. It may be wise in some cases to give them, it may be unwise not to give them. That is not a matter with which this court is concerned. The Solicitor General put forward

not as the Secretary of State's actual reasons but as evidence before the court which was also available to the Secretary of State, evidence on which a reasonable Secretary of State could have formed the view that there were reasons to doubt whether the workers who were taking, or were expected to take, part were or would be taking part in accordance with their wishes.".

Consequently he was of the opinion that the application failed because it was not shown that a reasonable Secretary of State could not have reached the conclusions in question.

These views were, in effect, endorsed a few months ago in the case of Secretary of State for Education v. Tameside Metropolitan District Council [1976] 3 A.E.R. 665 where the Secretary of State, in pursuance of S.68 of the English 1944 Education Act, sought an order against a local authority which he thought was acting unreasonably so that, in effect, two bodies claiming the power to exercise a discretion or form an opinion on fact were involved.

In the court of Appeal, Lord Denning M.R. said (p.671) :-

"Much depends on the matter about which the Secretary of State has to be satisfied. If he is to be satisfied as a matter of opinion, that is one thing. But if he has to be satisfied that someone has been guilty of some discreditable or unworthy or unreasonable conduct, that is another .....then the Minister should obey all the elementary rules of fairness.....He should give the party affected notice of the impropriety or unreasonableness and a fair opportunity of dealing with it.....the Minister must direct himself properly in law.....He must exclude from his consideration matters which are irrelevant to that which he has to

consider and the decision to which he comes must be one which is reasonable in this sense that it is, or can be, supported with good reasons or at any rate be a decision which a reasonable person might reasonably reach."

Lord Denning then went on to refer to the statement of Lord Hailsham of Marylebone L.C. from in Re W. (an infant) 1971, 2 A.E.R. 49, 56 that :-

"Two reasonable persons can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable.".

Also in the Court of Appeal Scarman L.J. quoted from Professor de Smith's "Judicial Review of Administrative Action" as follows :-

"Secondly, a court may hold that it can interfere if the competent authority has misdirected itself by spplying a wrong legal test to the question before it, or by misunderstanding the nature of the matter in respect of which it has to be satisfied.....Thirdly a court may state its readiness to interfere if there are no grounds on which a reasonable authority could have been satisfied as to the condition precedent.".

Broadly the approach of the Court of Appeal was endorsed in the Lords where Lord Wilberforce expounded on the relative functions of the Secretary of State and the Courts. He said (p.681):-

"The section is framed in a 'subjective' form - if the Secretary of State 'is satisfied'.....Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts then, although the evaluation of these facts is for the Secretary of State alone, the court must enquire whether those facts exist, and have been taken into account,

whether the judgment has been made upon a proper self direction as to these facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge.".

Having then referred to ASLEF (supra) Lord Wilberforce continued:

"The section has to be considered within the structure of the Act. In many statutes a Minister or other authority is given a discretionary power and in these cases the court's power to review any exercise of the discretion, though still real, is limited. In these cases it is said that the courts cannot substitute their opinion for that of the Minister: they can interfere on such grounds as that the Minister has acted right outside his powers or outside the purpose of the Act, or unfairly, or upon an incorrect basis of fact. But there is no universal rule as to the principles on which the exercise of a discretion may be reviewed: each statute or type of statute must be individually looked at.".

Lord Diplock said (p.695) that the local authority could be said to have exercised its discretion "unreasonably" only if it had purported to act in a way no sensible authority with a due appreciation of its responsibilities would have adopted. It was, he said, for the Secretary of State to decide that question and the court could not substitute its own opinion but it was for the court to determine whether it had been "established" that the Secretary of State, in answering it had directed himself properly in law etc. Having then referred to Associated Provincial Picture Houses (supra) Lord Diplock continued :-

"....put more compendiously, the question

for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly? There has never been the least suggestion in this case that the Secretary of State acted otherwise than in good faith.".

Nevertheless the decision of the Secretary of State was set aside and it would seem that the approach adopted in Carltona has been in some measure superseded.

Although the remedies available may still differ to some extent, the courts in England are now apparently ready to apply to the exercise of ministerial or discretionary powers, at least in peace time, tests almost as rigorous in many respects as those which, at one time, were thought to be reserved for judicial or quasi-judicial functions.

Although that element of natural justice summed up in the latin phrase "audi alteram partem" may not apply with the same universality to the former, in both a material misdirection in law, and, in certain circumstances, even in fact, may induce the courts to intervene as may reliance on extraneous matter or failure to take account of relevant factors. As for the giving of reasons, whilst the courts recognise that there are instances where no obligation is laid on the authority to give reasons yet the power, on occasions, to infer that there were no good reasons when none are offered must tend to impel a minister or other authority to state his reasons.

Whilst this may be the general position it is necessary to consider the effect of an ouster clause such as that in s.16 of the BNA which reads as follows :-

> "The Minister shall not be required to assign any reason for the grant or refusal of any application or the making of any order under this Act the decision upon which is at his discretion and the decision of the Minister on any such application or order shall not be subject to appeal or review to any court."

The first thing to note about this section is that it applies only to the second stage of the Minister's functions, when his discretion arises. It has no application to the earlier judicial or semi-judicial stage. Moreover the express right to refuse reasons would seem to add little to the normal construction that unless some special provision or circumstance imposes an obligation to give reasons an authority exercising an administrative discretion is not obliged to do so.

The effect of a similar but wider provision - wider because not limited to discretionary decisions - was considered by the English House of Lords in Anisminic Ltd. v The Foreign Compensation Commission (1969) 1 A.E.R. 208. The clause reads :-

> "The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law".

Lord Morris of Borth y Gest, in agreement with the other Law Lords, accepted that this clause would not oust the jurisdiction of the court if the Commission had acted "without or in excess of jurisdiction" but he was in a minority in thinking the Commission had continued to travel within its jurisdiction even though, whilst so doing, it had erred in law." Of the majority who thought the Commission had made an error that reduced their order to a nullity which derived no protection from the ouster clause, it is, I think, necessary to refer only to Lord Reid and Lord Pearce. The former said :-

> "....there are many cases where (a tribunal) has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question

remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive."

Lord Pearce said :-

"Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry..... Or.....while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice .....thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.".

The House then proceeded to hold that, as the decision of the Commission was, for one of the reasons mentioned, a nullity, it derived no protection from an ouster clause.

This appears to be a sufficient indication of the relevant law for our purpose and I do not think it necessary to refer to Smith v East Elloe Rural District Council (1956) 1 A.E.R. 855, which gave their Lordships some difficulty and the later case of Ostler as these turned on time clauses which have no bearing on the instant case.

Quite apart then from the fact that s.16 is limited to the exercise of the Minister's discretionary authority it appears that a void exercise of the power should attract no such protection. There remains however the argument that the Minister is under no legally enforceable obligation to give reasons.

As against that we have seen that where an

authority decides to rely on its right not to give any reasons, a court may, in certain circumstances, infer that there were no good reasons. It appears that this could and would be done when the court has before it a body of evidence which carries the conviction, or at least points strongly to the conclusion, that there could be no valid reason: but, far from that being so in the present case, the respondent argues, the court really has little or no evidence at all before it because the affidavits are conflicting and, on 29th April 1976, the court below directed that if there was such a conflict the affidavits should be treated aspleadings. No subsequent reference seems to have been made to this direction and it is clear from the judgments that the judges in the court below did rely on the affidavits as disclosing facts. Indeed it appears that there was no material conflict between them on primary facts and that any differences were related to deductions interpretation or description e.g. whether what occurred at the interview with Mr. Walkine could be fairly described as a discussion of any of the matters mentioned in s.7 of the BNA. There was certainly a good deal of common ground in the affidavits and elsewhere. Like the court below, I think we can take account of it.

Counsel for the respondent also maintained that the Minister was never asked for his reasons but I don't think that materially affects the position. Clearly, at the latest when these proceedings began it was imperative for the respondent to bring forward any reasons which he was ready and willing to disclose. More formidable is the contention that, no matter how desirable it might be for the purpose of retaining public confidence and maintaining the executive's reputation for fair dealing that disclosure should be made, there is no legal obligation under the statute or otherwise to state the Minister's reasons and that it will be sufficient to refute this part of the argument if possible reasons are put forward in argument without necessarily committing the Minister to any of them. This,

in effect, was what was done in the A.S.L.E.F. case and if the facts as known to the court are compatible with one or more acceptable reasons which would justify the refusal of registration it would be very difficult to hold that no Minister acting reasonably could have reached the conclusion he did or that he erred in the matters he considered.

With this, no doubt, in mind Counsel has suggested two possible reasons: that the Minister thought the applicant might become a charge on public funds or that the minister might have foreseen the possibility of the Government deciding to "Bahamianize" the business of tour operating.

As regards the first of these suggestions, I don't think on the facts disclosed to this Court a Minister acting reasonably could have come to any such conclusion. As for the second, and putting aside for the moment any argument about the propriety of anticipating a policy that is merely contingent, it seems to me that, whilst the Government of the Bahamas could, no doubt, exclude non-Bahamians from the business of tour operating by the enactment of appropriate legislation directed to that end, nevertheless, in the absence of such legislation, to use for that purpose the powers conferred on the Minister by Art.5 of the Constitution and by the BNA would be completely at variance with the tenor and intent of these enactments. It would not be a bona fide use of those powers. This might well have been the conclusion even if the offending part of s.7 was intra vires but with the deletion of that part the matter is put beyond argument. As things stand the Minister could not properly refuse registration for that reason.

I hesitate to think that the statement in Mr. Turnquest's affidavit (supra) that the appellant produced no evidence that he had not been convicted in Canada or elsewhere was being advanced as a reason for refusing registration. To invite the appellant to complete a form that makes no mention of this matter, to interview him, apparently without raising it, and then to say, because you have given me no information on this point I will refuse registration, is

not an approach that I would ascribe to any responsible authority unless compelled to do so. In any event it would be mistaken because the statute does not directly throw onto the claimant the onus of proving the absence of such convictions etc. The Minister has the right and the duty to inquire, to investigate and to satisfy himself as to the position but that is a different matter and, in the absence of inquiry, could not in itself justify an inference adverse to the appellant.

One further matter requires consideration, the argument that the Appellant's claim is defeated by the Public Authorities Protection Act, Cap.86, which imposes a time limit of six months on any proceeding for an act, neglect or default by a public authority.

What the applicant is seeking here is the recognition of his rights under the Constitution. He cannot be lawfully deprived of those rights or have them limited in time merely by a failure to comply with his request or by an act which is void and of no effect. This is not what was contemplated by the expression "act, neglect or default" as used in the Public Authority Protection Act which, in my view, has no relevance to the present proceedings.

I think the appeal should be allowed primarily because :-

(a) the Minister failed to observe the requirements of natural justice when he rejected the appellant's request for registration and, as a result, the rejection was a nullity:

(b) the following words which appear in S.7 of the Bahamas Nationality Act 1973 are ultra vires :-

"or if for any other sufficient reason of public policy he is satisfied that it is not conducive to the public good that the applicant should become a citizen of the Bahamas": and

(c) on the facts disclosed to this court no reasonable minister acting with a due sense of his responsibilities under the legislation would, at the inception of these proceedings, have been justified in refusing the appellant's application for registration as a citizen.

Is the appellant then entitled to the declaration he sought? A somewhat similar question came before the Chancery Division of the English High Court in Shotten v Hammond and others (Times 26.10.76), where it was held that a Trades Union had failed to exercise a discretion in accordance with natural justice and, consequently, had wrongly kept a man out of office. Oliver J., whilst considering whether to remit the matter to the Union and direct a re-hearing in accordance with the rules of natural justice, said there was no precedent for a mandatory order to a domestic tribunal "by a court exercising its discretion in a particular way" but that the case was an unusual one and the court was not powerless to grant an effective remedy. He continued:-

> "When trustees had a discretion but refused to exercise it or exercised it wrongly, the court would direct or, in an appropriate case, take upon itself the execution of the trust. The court was reluctant to interfere in a union's domestic affairs: but where there was, under the union's rules, a discretion which was wrongly exercised the court had to help a plaintiff in the assertion of his contractual rights and direct that to be done which ought to be done or treat it as already done without giving the union yet a further opportunity for deliberation.".

A mandatory order was issued but in Anisminic (supra p.234) Lord Pearce drew attention to the increasing tendency of the courts to make declarations without issuing prerogative writs. Moreoever, in the instant case counsel for the respondent very firmly repudiated any suggestion that effect would not be given by the executive to the court's conclusions on the points at issue subject, of

course, to any right of appeal.

No attempt has been made to controvert the appellant's assertions that he does not fall within any of the exceptions specified in (a) to (e) of the proviso to s.7 in the BNA and, so far as this case is concerned, the time for controverting them is past. The Minister has chosen to bring forward by affidavit a number of facts. It seems reasonable to conclude that these are the facts on which he sought to base his action and on which that action should be assessed and judged. In these circumstances and on the facts as disclosed to us registration could be refused only by acting perversely and we should not purport to create an opportunity for that. Consequently I think the proper course is to make a declaration that the appellant was entitled, at the inception of these proceedings, to registration upon compliance with sub-Article 5(3) of the Constitution.

I would allow the appeal and make the declaration indicated with costs to the appellant here and in the court below.

In conclusion I would like to pay tribute to the two admirable judgments in the court below, which have done so much to clarify and illuminate the issues for us, and also express appreciation of the very thorough and competent way in which the case has been presented on both sides.

DELIVERED the 16th day of March, 1977

(Sgd) Michael Hogan

Michael Hogan, P.

In the Court of Appeal

No.14
Judgment of Duffus J.A. dated 16th March 1977

No. 14

JUDGMENT OF DUFFUS, J.A.

COMMONWEALTH OF THE BAHAMAS 1976
IN THE COURT OF APPEAL No.8

CIVIL SIDE

THOMAS D'ARCY RYAN Appellant

V

THE ATTORNEY GENERAL Respondent

JUDGMENT OF DUFFUS, J.A.

This case concerns the right to become a citizen of the Commonwealth of the Bahamas. The Islands of the Bahamas were granted independence on the 10th July 1973. Her Majesty in Council in exercise of the powers vested in Her by virtue of the Bahama Islands (Constitution) Act 1963 and all other powers enabling Her to do so, granted the Islands independence and brought the Constitution of the Commonwealth of the Bahamas into effect.

Citizenship is dealt with under Chapter II of the Constitution, and may be classified under three main heads :-

1. Persons who become citizens by virtue of birth;

2. Women who become citizens by marriage;

3. Persons who become citizens by virtue of registration.

The Appellant, Ryan, comes under the last category. He claims the right to be registered as a citizen by virtue of Article 5(2) of the Constitution. The decision in his matter depends on the interpretation of Article 5, the relevant portions of which state :-

"5(2) Any person who, on 9th July, 1973,

possesses Bahamian Status under the provisions of the Immigration Act 1967 and is ordinarily resident in the Bahama Islands, shall be entitled, upon making application before 10th July 1974, to be registered as a citizen of the Bahamas.

5(3) Notwithstanding anything contained in paragraph (2) of this Article, a person who has attained the age of eighteen years or who is a woman who is or has been married shall not, if he is a citizen of some country other than the Bahamas, be entitled to be registered as a citizen of the Bahamas under the provisions of that paragraph unless he renounces his citizenship of that other country, takes the oath of allegiance and makes and registers such declaration as may be prescribed:

Provided that where a person cannot renounce his cit zenship of the other country under the law of that country he may instead make such declaration concerning that citizenship as may be prescribed

5(4) Any application for registration under paragraph (2) of this Article shall be subject to such exceptions or qualifications as may be prescribed in the interests of national security or public policy.

5(6) Any application for registration under this Article shall be made in such manner as may be prescribed as respects that application:"

The Appellant belonged to that class commonly known as a "belonger". He was granted a certificate under the Immigration Act of 1963 to the effect that he belonged to the Bahama Islands. This certificate is of interest. It states :

"CERTIFICATE THAT A PERSON BELONGS TO THE BAHAMA ISLANDS

Whereas Mr. Thomas D'Arcy Ryan

of New Providence
has satisfied the Immigration Board that he is a person of good character over the age of twenty-one years and has been ordinarily resident in the Bahama Islands for a period of eighteen years prior to his application and has declared his intention of making his permanent home in the Bahama Islands.
Now therefore the Immigration Board in its discretion hereby grants to the said Thomas D'Arcy Ryan this certificate that he belongs to the Bahama Islands for the purpose of the Immigration Act 1963.
Signed for and on behalf of the Immigration Board.

(Signed)

Date 8.2.1966 Chief Immigration Officer"

The Immigration Act 1963 was repealed by the Immigration Act, 1967, but the provisions for the grant of a "belonger" Certificate were re-enacted by the 1967 Act, and the grant of a certificate under the 1963 Act had effect as if granted under the corresponding provisions of the 1967 Act. (See Section 47 of the Immigration Act, 1967). When the 1973 Constitution came into effect, the Appellant was then a person possessing Bahamian status, under the provisions of the Immigration Act of 1967. The Appellant did not automatically become a citizen of the Commonwealth of the Bahamas. He still retained his status as a "belonger", although this was of course now subject to the Constitution and the fact that the Bahamas as a colony no longer existed. He was however given the right under the Constitution to apply to be registered as a citizen of the Bahamas, provided that he applied before the 10th July, 1974.

The Appellant duly applied under the provisions of Article 5(2) to be registered as a citizen of the Bahamas. This application was dated the 27th June, 1974. This application was considered by the Minister of Home Affairs and he was informed by the Permanent Secretary of that Ministry by a letter dated the 16th Jun, 1975 that his application had not been approved. It is this refusal that is the subject of this action.

By his summons dated the 7th April 1976 the Appellant sought a declaration that "upon the true construction of the Constitution of the Commonwealth of the Bahamas the Plaintiff is entitled to be registered as a citizen of the Commonwealth of the Bahamas in accordance with the provisions of the said Constitution."

Before considering the main issues of the Appeal, I would first set out the relevant statute law dealing with the Appellant's position as a "belonger" since the grant of independence.

The Constitution is the supreme law of the Commonwealth. Section 2 of the Constitution states :-

> "2. This Constitution is the supreme law of the Commonwealth of the Bahamas and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution, shall prevail and the other law shall, to the extent of the inconsistency, be void."

Existing laws are provided for by Section 4 of the Bahamas Independence Order 1973, the relevant portion of which states :-

> "4(1) Subject to the provisions of this section, the existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Bahamas Independence Act 1973 and this Order.
>
> 4(2) Where any matter that falls to be prescribed or otherwise provided for under the Constitution by Parliament or by any other authority or person is prescribed or provided for by or under an existing law (including any amendment to any such law made under this section) or is otherwise prescribed or provided for immediately before the appointed day by or under the existing Order, that prescription or provision shall, as from that day, have effect (with

such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Bahamas Independence Act 1973 and this Order) as if it had been made under the Constitution by Parliament or, as the case may require, by the other authority or person."

And "existing law" is defined by Sub-section (6) as :-

"4(6) In this section "existing law" means any Law having effect as part of the law of the Bahama Islands immediately before the appointed day (including any law made before the appointed day and coming into operation on or after the day)."

The Constitution also provides for the making of new laws by Parliament. The provisions follow the usual form given by written Constitutions in the Commonwealth. Article 52 states inter alia :-

"52(1) Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of the Bahamas."

Article 54 provides the method for alteration of the Constitution. There is no question in this case of the Constitution having been altered, but it may be noted that in so far as citizenship is concerned, an alteration of the Constitution would require a vote of not less than that of three quarters of the members of each house, and then be subject to a referendum of a majority of the electors voting.

Parliament is also given specific powers of law making by various Articles in the Constitution. Thus in this particular case, Parliament is given the power as set out in Article 5(4) (supra) to prescribe exceptions or qualifications in the interest of national security or public policy. "Prescribe" in this instance would by the interpretation clause Article 137 of the Constitution mean "provided

by or under an Act of Parliament".

The power of Parliament to act in citizenship matters is also set out by Article 13, which states :-

"13. Parliament may make provision -

(a) for the acquisition of citizenship of the Bahamas by persons who do not become citizens of the Bahamas by virtue of the provisions of this Chapter;

(b) for depriving of his citizenship of the Bahamas any person who is a citizen of the Bahamas otherwise than by virtue of paragraphs (1) or (2) of Article 3 or Articles 6 or 8 of this Constitution; or

(c) for the certification of citizenship of the Bahamas for persons who haveacquired that citizenship and who desire such certification."

It will be seen by Article 13 that Parliament has wide control over persons who acquire citizenship by registration or marriage, and that it is only persons who have acquired citizenship by birth under Articles 3(1), 3(2) and Articles 6 or 8 that have entrenched rights under the Constitution that can only be interfered with if the Constitution itself was altered.

The Appellant's Bahamian status over the years appears to have been as follows :-

(1) He was a Canadian citizen, residing in the Bahamas, then

(2) He was granted a certificate that he belongs to the Bahama Islands under Section 14 of the Immigration Act of 1963. He was therefore deemed under the provisions of section 13 of that Act to belong to the Bahama Islands. He became a "belonger".

(3) The Immigration Act of 1963 was repealed by the Immigration Act, 1967, but by virtue of section 47 of that Act, the Appellant's status as a belonger remained and Section 12 and Section 2(2) of that Act applied to him.

(4) On Independence Day, 10th July, 1973, he, at first, retained his Bahamian status although he was given the entitlement under Article 5(2) to apply to be registered as a citizen.

(5) He applied to be registered but his application was refused on the 16th June 1975.

(6) He still however retained his belonger status, until eventually he lost this status by virtue of Section 4 of the Immigration (Amendment) Act, 1975, (No.26 of 1975); this depends on whether the Minister's refusal to register was valid.

The Immigration (Amendment) Act of 1975, repealed Part IV of the principal act, that is the Immigration Act, 1967. The repealed Part IV includes Section 12 which applied to the Appellant's'belonger' status. Section 4 of the 1975 Amendment Act applied to persons in the Appellant's position. Section 4(1) states :-

"4(1) This section shall apply to any person who possessed Bahamian status on 9th July, 1974 under the principal Act as then in force who -

(a) is ordinarily resident in the Bahamas; and

(b) is not a citizen of the Bahamas."

Sub-sections (2) and (3) provide that such a person could apply by the 1st May, 1976, or such later date as the Minister may appoint for the grant of a certificate of permanent residence. These provisions are not relevant. Sub-section (4) then provides, inter alia :-

"(4) Any person to whom this section applies

shall have the same status (other than the right to vote in any election) which he enjoyed immediately before the commencement of this Act by virtue of his possession of Bahamian status until -

(a) in the case of a person who makes due application under this section -

(i) where a certificate is granted, the date on which the certificate is granted;

(ii) where a certificate is not granted, a date three months after the date on which the Board serves notice in writing on the person concerned in accordance with section 5 of this Act that a certificate has not been granted to him;

(b) in the case of a person who does not make application under this section, the 1st day of May, 1976 or such later date as the Minister may appoint under sub-section (2) of this section

(5) Notwithstanding subsection (4) of this section, a person to whom this section applies who has applied for registration as a citizen of the Bahamas before the commencement of this Act shall have the same status (other than the right to vote in any election) which that person formerly enjoyed as a person possessing Bahamian status until -

(a) where the application is granted, the date on which that person is registered as a citizen of the Bahamas;

(b) where the application is not granted, a date three months after the date on which the Minister responsible for Nationality and Citizenship serves notice in writing

on the person concerned in accordance with section 5 of this Act that citizenship has not been granted to him."

The Appellant in this case would come under this last category that is a "Belonger" who has applied for registration as a citizen and whose application has been refused. The position would therefore appear to be that the Appellant, subject of course to the result of this action, would cease to be a "Belonger" or have any status in the Bahamas three months after the service on the Appellant of the letter from the Permanent Secretary of the Ministry of Home Affairs dated the 16th June 1975.

The Appellant's application for registration was dealt with by the Minister of Home Affairs, the Minister responsible for Citizenship, and in doing so the Minister acted in accordance with the provisions of the Bahamas Nationality Act, 1973 (No.18 of 1973).

This Act is entitled "Act to Provide for the Acquisition, Certification, Renunciation and Deprivation of Citizenships of the Bahamas and for Purposes Incidental or Connected Therewith."

The preamble sets out the purpose of the Act and this states :-

"WHEREAS it is proposed that, upon the attainment of fully independent status by the Commonwealth of the Bahamas, the Constitution will contain certain provisions relating to citizenship of the Bahamas, including provisions for the acquisition of citizenship by birth and descent :-

AND WHEREAS it is considered expedient to provide by law for the acquisition of such citizenship by registration, naturalisation and otherwise, for the certification, renunciation and deprivation of such citizenship and for other matters relating to citizenship generally with the intent that such law shall come into

operation simultaneously with the coming into operation of the said Constitution.

AND WHEREAS, by virtue of sub-section (2) of section 4 of the Bahamas Independence Order 1973 such a law may be enacted by the Legislature of the Bahama Islands before the attainment of fully independent status so as to have effect as if that law had been made under the said Constitution by the Parliament of the Bahamas:"

Section 7 of the Act states :-

"7. Any person claiming to be entitled to be registered as a citizen of the Bahamas under the provisions of Article 5, 7, 9 or 10 of the Constitution may make application to the Minister in the prescribed manner and, in any such case if it appears to the Minister that the applicant is entitled to such registration and that all relevant provisions of the Constitution have been complied with, he shall cause the applicant to be registered as a citizen of the Bahamas:

Provided that, in any case to which those provisions of the Constitution apply, the Minister may refuse the application for registration if he is satisfied that the applicant -

(a) has within the period of five years immediately preceding the date of such application been sentenced upon his conviction of a criminal offence in any country to death or to imprisonment for a term of not less than twelve months and has not received a free pardon in respect of that offence; or

(b) is not of good behaviour; or

(c) has engaged in activities whether

within or outside of the Bahamas which are prejudicial to the safety of the Bahamas or to the maintenance of law and public order in the Bahamas; or

(d) has been adjudged or otherwise declared bankrupt under the law in force in any country and has not been discharged; or

(e) not being the dependent of a citizen of the Bahamas has not sufficient means to maintain himself and is likely to become a public charge,

or if for any other sufficient reason of public policy he is satisfied that it is not conducive to the public good that the applicant should become a citizen of the Bahamas."

The facts in this case have been fully and clearly set out by My Lord the President, and I would refer to his judgment. The summons was heard before the Chief Justice and Mr. Justice Graham who each delivered carefully considered judgments. Each judge agreed that the proceedings before the Minister were a nullity, but in the final result the judges came to different conclusions and would have given conflicting orders, so that in accordance with Rule 4 of the Supreme Court (Special Jurisdiction) Rules 1976, the application was dismissed.

There are now two appeals before us. First there is the appeal by the Appellant Ryan. This appeal is against certain parts of the Chief Justice's judgment, and seeks an order setting aside the order dismissing the application, and also that part of the Chief Justice's judgment remitting the matter to the Minister for determination and in lieu thereof asks for the declaration sought to the effect that the Appellant is entitled to be registered as a citizen of the Commonwealth of the Bahamas. The Appellant supports the judgment of Graham J. and asks that the declaration be made in accordance with his judgment.

The Respondent Attorney General filed a

cross-Appeal. He attacked the decision of Graham J. and also that of the Chief Justice in so far as it declared that the decision of the Minister was a nullity. The Respondent supports the Minister's decision refusing the application. The Respondent also claimed that the court's jurisdiction was ousted by Section 16 of the Bahamas Nationality Act, and that the action was barred by Section 2 of the Public Authorities Act.

The Appellant filed fourteen grounds of Appeal and the Respondent had seven grounds of Appeal.

The main issues were:

(a) Was the proviso in Section 7 of the Bahamas Nationality Act ultra vires the Constitution?

(b) Were the proceedings before the Minister a nullity?

(c) If so, what order should be made on the summons?

Mr. Wallace Whitfield, leading advocate for the Appellant, submitted that Article 5(2) gave the Appellant the right to be registered as a citizen; the operative words are "shall be entitled.....to be registered as a citizen of the Bahamas". He submitted that paragraph (4) of Article 5 only applied to the 'application' for registration and not to the right. That is "the exceptions or qualifications" applied to the form of the application, i.e. information that may only be required from a particular class of person and not from others: and accordingly he submitted that the proviso to Section 7 of the Bahamas Nationality Act which referred to the "right of registration" and gave the Minister power to refuse registration in certain cases was 'ultra vires' the Constitution.

The learned Trial Judges differed in their views on this difficult issue. Graham J. held that the whole of the proviso to Section 7

was invalid and 'ultra vires' the Constitution, and after full consideration, he found :-

> "In the circumstances, therefore, it is not open to the Court to construe Section 7 of the BNA in any way which would alter the right to registration contained in Article 5(2) of the Constitution, or turn this into the expectation contended for by the defence. The proviso itself, being in effect a modification or alteration of Article 5(2) as has been earlier described, and not having been enacted in compliance with one at least of the relevant requirements of Article 54, on principle and on the authorities cited earlier is invalid and ultra vires the Constitution."

The Chief Justice took a different view. He found that provisions (a) to (e) were 'intra vires' the Constitution, but he left open the question as to the validity of the concluding sentence of Section 7 which states "or if for any other sufficient reason of public policy". In his judgment the Chief Justice found that Article 5(4) having regard to the meaning of the word "prescribed" in the interpretation clause, Article 137(1), which states "prescribed" means provided by or under an Act of Parliament, gave Parliament the power to decree the provisions in clauses (a) to (e) of the provisos, but he said, inter alia.

> "The question therefore is this: Is Section 7 of the BNA a provision "by an Act of Parliament"? It seems to me that that question must be answered in the affirmative, at least down to the end of paragraph (e) of the proviso.
>
> But what about the concluding paragraph of the proviso?
>
> As regards the concluding words of the proviso, it has been argued that it would be strange indeed if Parliament, in paragraphs (a) to (e) of the proviso, should "prescribe" certain specific grounds of refusal, and then, in the

concluding clause allow the Minister to add such other grounds "in the interest of public policy" as he should think fit."

Then after further consideration the Chief Justice went on to say :-

"It is clearly arguable that the Constitution would not confer an entitlement, a right, upon a man, and then allow another authority, however exalted his or its authority, however noble his or its intentions, to take it away arbitrarily. In a matter of this kind, common sense might appear to require that the grounds of refusal should be certain and ascertainable, not locked up in the bosom of an individual."

Then finally after considering similar provisions in the Constitution of Barbados, the Chief Justice decided :-

"In this state of affairs, it is incumbent upon me to adopt a cautious attitude, and, without further argument and materials, I am not prepared to hold that the final clause of the proviso to Section 7 of the BNA is ultra vires the Constitution."

The answer to this question must be found within the terms of the Constitution itself. Parliament was established under the Constitution and its authority and powers is derived from the Constitution. Its power to legislate is provided for generally by Article 52(1). This states :-

"Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of the Bahamas."

In addition to this general power, Parliament is given other specific powers to legislate. Thus specific authority to legislate is given by Article 5(4) in that the

right to register as a citizen is subject to such exceptions or qualifications as may be prescribed, that is laid down by Parliament, in the interests of national security or public policy. Specific power for Parliament to legislate is also given by Article 5(6) and by Article 13. There are other similar provisions in the Constitution but these are the relevant ones to this issue, as Parliament did act under these various powers in enacting the Bahamas Nationality Act, 1973.

As I have already pointed out, the general intention of the Constitution is to entrench and protect the rights of persons who are citizens by birth, and their rights can only be taken away by an alteration to the Constitution as set out in Article 54. Parliament are however given fairly complete control over persons who are citizens by registration. Thus under Article 13(b) Parliament can make provision to deprive any person who is a citizen of the Bahamas otherwise than by virtue of paragraphs (1) and (2) of Article 3 or Articles 6 or 8 of the Constitution of his citizenship. These four classes of citizens refer to persons who are citizens by virtue of their own or their father's birth.

The provisions of Article 5 must be considered together to arrive at the general intention and interpretation. Paragraph (2) gives the right to apply for registration, but this is immediately qualified by paragraphs (3) and (4). Paragraph (3) first qualifies the right and requires the renunciation of citizenship of any other country, if this is possible, and at any rate provides for the taking of the oath of allegiance and such other declaration as may be prescribed, and then paragraph (4) authorises Parliament to provide for further restrictions in the interests of national security or public policy. The word "prescribe" here carries the meaning set out in Article 137 of the Constitution. Paragraph (6) then goes on to further provide for Parliament to lay down the manner of application. I cannot with respect find any merit in Mr. Wallace - Whitfield's submission that the exceptions and qualifications as set out in paragraph (4)

only apply to the form of the application and not to the applicant's right to be registered. The entitlement to be registered is clearly bound up with the application to be registered and to be subject to the further conditions as set out in paragraphs (3) and (4).

That this is so is also borne out by reference to all the other classes of citizenship requiring registration. There are five other instances where the entitlement to be registered is subject to such exceptions or qualifications as may be prescribed in the interests of national security or public policy. I refer to Article 5(1), Article 5(5), Article 7, Article 9 and Article 10. It is a fact that Articles 5(1), 5(2) and 10 refer to wives, and provide that it is "the right to be registered" that is subject to the exceptions or qualifications, whilst Article 5(2), Article 7 and Article 9 refer to the "application for registration" as being subject to the exceptions or qualifications. I do not consider that this change of wording means that these applications are to be differently dealt with. In each case the intention must be to prevent undesirable persons becoming citizens and in each case the Constitution gives Parliament power to make provisions to exclude such persons from citizenship.

I think that the difference has been caused by the fact that wives are not required by the Constitution torenounce their former citizenship, whilst other persons who are entitled, on application to become citizens have first to renounce any other citizenship before registration as a citizen of the Bahamas; so that the draftsman had in effect to addanother proviso to the paragraph giving the entitlement for citizenship, and chose this manner of expression. Thus the requirements as set out in Article 5(2) (3) and (4) are differently worded to the requirements in Article 7 and Article 9. I am of the view that the exceptions or qualifications as mentioned in

all the six instances are of similar import and have the same meaning, that is that in all six instances Parliament is given the power to prescribe such exceptions or qualifications in the interest of national security or public policy as would protect the grant of citizenship and prevent undesirable persons from becoming citizens.

I would further consider the provisions of section 7 of the Bahamas Nationality Act, Section 7 is divided into two parts. There is no question as to the validity of the first part. This provides that any person claiming to be entitled to be registered as a citizen under Article 5, 7, 9 or 10 may make application in the prescribed manner. It is to be noted here that the application has to be made in a prescribed manner, and that this is set out in the Bahamas Nationality Regulations 1973. The first part of Section 7 then goes on to state that if it appears to the Minister that the applicant is entitled to be registered and all the relevant provisions of the Constitution have been complied with he shall cause the applicant to be registered as a citizen.

Then follows the much disputed proviso. I have already set out in Section 7 in full. The proviso starts "Provided that, in any case to which these provisions of the Constitution apply, the Minister may refuse the application for registration if he is satisfied that the applicant" and then follows the five different circumstances in which the Minister may act (a) to (e), and the general sweeping up provision "or if for any other sufficient reason of public policy he is satisfied that it is not conducive to the public good".

The validity of this proviso depends on the interpretation of Article 5(4). As I have stated yhe word "application" has to be construed in a broad sense as including "the right to be registered" and it is Parliament who have to prescribe the "exceptions or qualifications". "Prescribed" means provided "by or under an Act of Parliament" so that the exceptions or qualifications could be provided

either directly by the Statute itself or by regulations made under the authority of the Act. This would bring us to the further consideration whether Parliament can delegate to a Minister the power to decide what these exceptions or qualifications are when dealing with an applicant?

A great deal depends on the meaning to be given to "prescribe". The ordinary meaning of "prescribe" as applied to its context here must be "to make or to set out" the exceptions or qualifications that would apply to the applicant's right to citizenship. In this judgment the Chief Justice referred to the definition of "prescribe" in Blackstone's commonlaw, and the following short extract is pertinent to this issue :-

> "It is likewise 'a rule prescribed'. Because a bare resolution confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it."

The definition of "prescribed" in Article 137 also carries this meaning. The words "provided by or under" denote a definite and permanent rule, something that is set out for the information of the public and followed by those in authority.

The words are "by" or "under" so that the exceptions or qualifications can either be set out in the Act of Parliament itself or, be provided "under" that is "by means of" or "on the authority" of the Act. I am of the view that this could be done by Regulations made by the Minister under Section 19 of the Act. Section 19 states inter alia:-

> "19. The Minister may make regulations generally for giving effect to the provisions of this Act, and in particular and without prejudice to the generality of the foregoing may make regulations for all or any of the following purposes:-

(a) prescribing anything which by the provisions of Chapter II of the Constitution or of this Act are to be or may be prescribed."

This would be effective to give the Minister power to make Regulations, but Regulations have to be in writing and to be published in the Gazette and laid before Parliament in accordance with the Statutory Instruments Act (Chapter 4). Rules and Regulations, like laws, must be made known to the public. They cannot be kept, with respect to Blackstone and the Chief Justice, a secret locked away in the files of the Ministry.

I agree with the Chief Justice that clauses (a) (b) (c) (d) and (e) of the proviso are intra vires the Constitution, but the general "sweeping up" clause is a different matter. This part of the proviso gives the Minister the widest possible powers to decide what is a sufficient reason of public policy. This part of the section does not attempt to prescribe any exceptions or qualifications, it merely repeats what is said in Article 4(4) that it must be a reason in the interest of public policy.

My view is that this portion of the proviso in Section 7 is"ultra vires" the Constitution. It is not an exception or qualification prescribed by or under an Act of Parliament. As I have pointed out the position may have been different if the Minister had made regulations setting out the reasons on which he could act. "Public policy" covers a very wide field, it might be a matter of religion, race, or nationality, or to except persons of certain occupations, age, or physique. There would be no limit to matters which might be a reason of public policy, but what is important is that these matters must be prescribed, i.e. be determined and made known to the public. The Constitution does not give the Minister an absolute discretion to admit or refuse citizenship as he thinks fit.

I then come to the consideration of the facts and issues in this case. Both the learned

Judges came to the conclusion that the proceedings before the Minister were a nullity.

There appear to be two possible reasons for the proceedings being a nullity :-

1. That the Appellant was not given a chance to be heard.

2. That the Minister appears to have acted under that part of the proviso which was "ultra vires" the Constitution and therefore illegal.

I will consider the first possibility i.e.the doctrine of 'audi alteram partem'. The question of the control of the Courts over the acts of independent tribunals, or ministries or other administrative bodies has been the subject of numerous decisions. The answer must depend on the circumstances in each case and particularly on the relevant statutes.

There is a very wide selection of case law to guide the Courts. The following extract from the judgment of Lord Reid in the Anisminic case (Anisminic v. Foreign Compensation 1969 1 A.E.R.208 at p.213 clearly sets out the general principles :-

> "It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the enquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its

decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."

The facts in this case have been fully set out, but I would again just summarise the essential facts.

The Appellant had been an inhabitant of the Bahamas for many years, he had been granted the status of a "Belonger", under the Constitution he was on independence given the right to apply to be registered as a citizen of the Bahamas, his application was subject to certain exceptions or qualifications. He duly applied within the specified period and this application was refused by the Minister. He was interviewed by the Permanent Secretary of the Ministry, but the answers he gave were all such as would have satisfied any of the lawful prescribed exceptions. He was not informed of there being any adverse report or consideration and not given any opportunity to explain or deny any allegation that would have deprived him of his right to citizenship. The Minister has not stated why he refused the application. His attorney stated in open Court at the hearing that she did not know of any allegation sufficient to warrant the Minister acting under the exceptions (a) to (e) of the proviso in Section 7 of the Bahamas Nationality Act 1975.

The question here is whether, on these facts, there was a breach of natural justice? Was the matter decided behind the Appellant's back on facts unknown to him and on which he was not given the opportunity to be heard?

I would here refer to the following useful extract from the judgment of Lord Denning (M.R.) in the Court of Appeal decision in Re Gaming Board ex parte Benaim (1970) 2 A.E.R. 528 at 533) :-

> "It is not possible to lay down rigid rules as to when the principles of natural justice are to apply; nor as to their scope and extent. Everything depends on the subject matter; see what Tucker L.J. said in Russell v. Duke of Norfolk and Lord Upjohn in Durayappah v. Fernando at one time it was said that the principles only apply to judicial proceedings and not to administrative proceedings. That heresy was scotched in Ridge v. Baldwin. At another time it was said that the principles do not apply to the grant or revocation of licences. That, too, is wrong. R v. Metropolitan Police Comr. ex parte Parker and Nakkuda Ali v. M.F.D.S. Jayaratne are no longer of authority for any such proposition. See what Lord Reid and Lord Hodson said about them in Ridge v. Baldwin. So let us sheer away from these distinctions and consider the task of the board and what they should do. The best guidance is, I think, to be found by reference to the cases of immigrants. They have no right to come in, but they have a right to be heard. The principle in that regard was well laid down by Lord Parker C.J. in Re K (H) (an infant) when he said
>
> "....even if an immigration officer is not acting in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the

subsection, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly." "

I would on this issue refer finally to the decision of the Privy Council in a case from Ceylon, Durayappah and Fernando, (1967 2 A.C. 337 at 348) and to the following extracts from their Lordships' reasons for dismissing this appeal :-

"Outside the wellknown classes of cases, no general rule can be laid down as to the application of the general principle in addition to the language of the provision. In their Lordships' opinion there are three matters which must always be borne in mind when considering whether the principle should be applied or not. These three matters are: first, what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when a right to intervene is proved, what sanctions in fact is the latter entitled to impose upon the other. It is only upon consideration of all these matters that the question of the application of the principle can properly be determined. Their Lordships therefore proceed to examine the facts of this case upon these considerations."

I would apply the three considerations suggested in this judgment to this case.

First the status enjoyed by the Appellant. He was a "Belonger", a person belonging to the Bahamas. This status was vital to his whole manner of life and this also affected the lives of his wife and children.

The second consideration, when can the

Minister interfere with this right? The answer is when the exception or qualification provided for by Article 5(4) of the Constitution applies to the Appellant.

The third consideration is what sanctions in fact is the Minister entitled to enforce on the other? and the answer is to deprive him of his citizenship, of his right to live and work in the Bahamas and of all the other benefits that belong to a citizen.

My view clearly is that the rules of natural justice do apply here. The Appellant has been deprived of his right to citizenship for some unknown reason, unknown to the Appellant and also to the Court, and he has not been given the opportunity of being heard in defence of his undoubted right. I agree with the learned Judges of the Supreme Court that for this reason the proceedings before the Minister were a nullity.

There is also the further consideration of the effect of the last part of the proviso being 'ultra vires' and illegal. The Minister has not disclosed the reason for his refusal of the Appellant's application. It is agreed that the application was in order and that the Appellant was entitled to be registered as a citizen except his application fell within one of the exceptions or qualifications set out in Section 7 of the Bahamas Nationality Act, 1973, but the Court has not been informed whether the reason came within one of the exceptions or qualifications set out in paragraphs (a) to (e) of the proviso or whether it came within the last paragraph of the proviso, the "sweeping up" clause which was in my view 'ultra vires' the Constitution and therefore illegal and of no effect. I will further refer to this aspect of the case.

I now consider the difficult question of the order to be made. The Appellant in his summons seeks a declaration that he

"is entitled to be registered as a citizen of the Commonwealth of the Bahamas in accordance with the provisions of the Constitution". He also seeks "further or other relief" and costs.

In his judgment Graham J. would have granted the declaration sought, whilst the Chief Justice acting under the wide powers given by Section 37 of the Supreme Court Act would have remitted the matter to the Minister for a determination of the Appellant's application, according to law.

I would first examine these two orders, and deal first with that of Graham J. He bases his findings first in that he held as a matter of fact that none of the exceptions or disqualifications set out in the proviso to Section 7 of the Bahamas Nationality Act, 1973, apply to the Appellant, and secondly he finds that all the provisions in the proviso including clauses (a) to (e) as well as the last general clause were "ultra vires" and illegal.

The learned Judge bases his finding of fact on three factors. I quote from his judgment :-

"The answer is indicated by the combination of three factors :-

1. No evidence has been adduced for the defence to support a finding either directly or inferentially that the Minister based his refusal on any of the matters placed at his discretion in the proviso.

2. Such evidence as is before the Court, in particular that in the affidavits of the Plaintiff, goes to show that none of the grounds for refusal set out in the proviso existed.

3. The Court has been informed by Counsel that the defence is not asking the Court to infer that any of the matters dealt with in the proviso apply to the Plaintiff. This last appears unique.

The Judge then went on to say :-

> "Having found earlier that as a matter of fact none of the disqualifications in the proviso, if valid, applies to the plaintiff; and now that, as a matter of law, the proviso is invalid and cannot be construed to apply to the plaintiff; on each of these findings, the only remaining basis for dealing with his application is Article 5(2). The evidence shows that he meets the requirements of this. I hold, therefore, that the plaintiff is entitled to be registered as a citizen of the Bahamas."

The Chief Justice on the other hand, whilst agreeing that the Minister's refusal was a nullity, was of the view that the Court had no jurisdiction to make the declaration sought, and that it would in his opinion, be quite inappropriate to make such a declaration in the circumstances of this case, and he went on to point out that it was the Minister and not the Court who had by law been given the discretion to deal with the application for registration as a citizen. The Chief Justice would order this matter to be remitted to the Minister for a determination of the Appellant's application according to law. He would do so under the general powers given the Court by Section 37 of the Supreme Court Act Chapter 35. This states, inter alia :-

> "In every civil cause or matter law and equity shall be administered concurrently. And the Court in exercise of the jurisdiction vested in it shall have power to grant and shall grant either absolutely or on such reasonable conditions as shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to or in respect of and every legal or equitable claim or defence properly brought forward by them respectively in such cause or matter, so that as far as

possible all matters in controversy between the said parties respectively may be completely and finally determined....."

With respect I do not, however, consider that these very wide powers would, in a summons for a declaration, justify an order remitting the matter back to the Minister to be further dealt with.

The power to make a declaration is in wide and general terms. (Order 15 Rule 16 of the English Rules. In the case of Ibeneweka v. Egbuna (1964) 1 W.L.R. 219 P.C. - the Privy Council in considering a case from Eastern Nigeria where the English rule applied, pointed out that the provision was a discretion to be exercised according to the facts of each individual case and that "Beyond the fact that the power to grant a declaration should be exercised with a proper sense of responsibility and a full realization that judicial pronouncements ought not to be issued unless there were circumstances that called for their making, there was no legal restriction on the award of a declaration."

The following extract from the judgment of Lord Denning in Taylor v National Assistance Board (1957 A.E.R. 183 at 185) particularly applies to the facts of this case :-

"The remedy by declaration is available at the present day so as to ensure that a board or other authority set up by Parliament makes its determinations in accordance with the law; and this is so, no matter whether the determinations are judicial or disciplinary, or, as here, administrative determinations: see R v. London County Council, Ex p. Schonfield (1) ((1956) 1 All E.R.753 n.) and the recent decision of the House of Lords in Vine v. National Dock Labour Board (2) ((1956) 3 All E.R. 939). The remedy is not excluded by the fact that the determination of the Board is by statute made "final". Parliament gives the impress of finality to the decisions of the board only on the condition that they are reached in accordance

with the law; and the Queen's courts can issue a declaration to see that this condition is fulfilled."

The Minister has not stated his reason for refusing the application. This may have been due to the provisions of Section 16 of the Bahamas Nationality Act which states :-

"16. The Minister shall not be required to assign any reason for the grant or refusal of any application or the making of any order under this Act the decision upon which is at his discretion; and the decision of the Minister on any such application or order shall not be subject to appeal or review in any court."

Both the learned Judges of the Supreme Court dealt very fully with this section and also with the provisions of Section 2 of the Public Authorities Protection Act Cap.86 and the matter has also been dealt with in the judgments of the other members of this court. I entirely agree that these sections only apply when the Minister acts under the law. If the Minister acts illegally and as in this case not in accordance with the Constitution and the law, then the court has jurisdiction to act.

On the facts in this case, the Appellant has established that he was entitled to be registered as a citizen under Article 5(2) of the Constitution except any of the exceptions or qualifications prescribed by virtue of Article 5(4) applied to his application. We are satisfied that the Minister's refusal was a nullity.

The applicant has also, in my opinion, established that none of the exceptions (a) to (e) of the proviso to Section 7 of the Bahamas Nationality Act applied to him. This was not denied by the Respondent. The Respondent did file several affidavits setting out the various facts on which he relied in opposing the declaration sought but he made no attempt to show that any of the exceptions (a) to (e) applied to the appellant, and

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No.14
Judgment of Duffus J.A. dated 16th March 1977

although it is not agreed and not altogether clear as to what did transpire at the hearing, it does appear that the Respondent did not oppose the appellant's case on this issue. It must, in my view, follow that the Minister acted under the provisions of the general clause which was 'ultra vires' the Constitution and accordingly that his refusal was a nullity.

I am also satisfied that in the circumstances of this case that the applicant was at the commencement of these proceedings entitled to registration upon compliance with Article 5(3) of the Constitution and I agree with the order proposed by my Lord the President.

16 March, 1977

(Sgd) Duffus J.A.

In the Court of Appeal

No.15
Judgment of Blair-Kerr J.A. (Undated)

No. 15

JUDGMENT OF BLAIR-KERR J.A.

COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL (CIVIL SIDE)

Civil Appeal No. 8 of 1976

Thomas D'Arcy Ryan — Appellant

The Attorney-General — Respondent

J U D G M E N T

When considering the constitutional history of what is now the Commonwealth of the Bahamas (so far as relevant to this appeal) a convenient starting point is the British Nationality Act 1948 which, to a large extent, replaced the British Nationality and Status of Aliens Acts 1914 to 1943. As stated by Mr. Justice Graham in

his admirable historical outline, the 1948 Act recognised that each of the self-governing countries of the Commonwealth would, by its own legislation, determine who would be its citizens; and, as regards those territories which were not self-governing (and the Bahamas was included in this category), the concept of a common citizenship with the United Kingdom was preserved. Section 1 declared that every person who was a citizen of the United Kingdom and Colonies or who, under legislation in any one of the then self-governing countries of the Commonwealth, was a citizen of that country, would have the status of British subject.

The 1948 Act made provision for citizenship by birth or descent, citizenship by registration, and citizenship by naturalisation. Section 4 declared that every person born within the United Kingdom and Colonies after the commencement of the Act "shall be a citizen of the United Kingdom and Colonies by birth"; and s.5 declared that (subject to various exceptions) every person born after the commencement of the Act "shall be a citizen of the United Kingdom and Colonies by descent if his father is a citizen of the United Kingdom and Colonies at the time of his birth".

Citizenship by registration was available to citizens of the then self-governing countries of the Commonwealth and Eire (s.6); and, for aliens and British protected persons, the process was by naturalisation (s.10). In a colony, the functions of the Secretary of State as regards registration and the grant of a certificate of naturalisation were exercisable by the Governor of the particular colony (ss.8 and 10).

By the Immigration Act 1963 an entirely new concept (that of belonging to the Bahamas) was given statutory recognition. This Act was repealed and replaced by the Immigration Act 1967; but the "belongership" provisions were re-enacted in substantially the same form. Section 13(1) of the 1963 Act and

section 2(2) of the 1967 Act enumerated the various categories of persons who were "deemed to belong" to the Bahamas. These included:

(a) a British subject born in the Bahamas;
(b) a British subject born outside the Bahamas either of whose parents was born in the Bahamas;
(c) a British subject by naturalisation under the 1914 or 1948 United Kingdom Acts; and
(d) a person to whom a certificate that he belonged to the Bahamas had been given to him under s.14 of the 1963 Act or s.12 of the 1967 Act.

As regards paragraph (d) above, any British subject who was:

(a) of good character
(b) over 21 years of age
(c) had been ordinarily resident in the Bahamas for at least five years; and
(d) had signified his intention to make the Bahamas his permanent home

was eligible to apply for the grant of a certificate of Belonger Status, later referred to in the 1969 Constitution as Bahamian Status.

The validity of such a certificate was dependent upon the recipient remaining a British subject and not becoming ordinarily resident outside the Bahamas; and under s.13, the Board of Immigration was empowered to revoke the certificate on any one of four specified grounds provided the person against whom the order was proposed to be made was given notice in writing of the proposed grounds of revocation and was given an opportunity of being heard.

From a perusal of the 1967 Immigration Act, Articles 11 and 12 of the 1969 Constitution, and s.8 of the Representation of the People Act 1969, it is clear that a person possessing Bahamian status had the right to reside in any part of the Bahamas, did not require special permission to engage in gainful occupation, could travel freely to and from the Bahamas, and had the right to vote at elections -

virtually all the rights normally associated with the grant of citizenship in an independent self-governing country.

The first step taken towards the grant of full independence to the Bahamas was the enactment of the Bahamas Independence Act 1973 by the United Kingdom legislature. Section 1 of this enactment provided that

> "on and after the 10th July 1973" (the appointed day) "H.M.Government in the United Kingdom shall have no responsibility for the Government of the Bahamas."

The Colonial Laws Validity Act 1865 ceased to apply; and the full legislative power of the Bahamas Legislature was recognised by para. 2 of Schedule 1 to the Act which provided that

> "no law and no provision of any law made on or after the appointed day by (the Legislature of the Bahamas) shall be void or inoperative on the ground that it is repugnant to the law of England.....".

The Act made provision for the cessation and retention of citizenship of the United Kingdom and Colonies in certain circumstances and contemplated the enactment of an Order in Council whereby a person "becomes or is entitled to become" a citizen of the Bahamas after the appointed day by reason of his being a citizen of the United Kingdom and Colonies by virtue of a certificate of naturalisation or registration effected by the Governor or by reason of his possessing Bahamian status [s.2 (5)]. The phrase "becomes or is entitled to become" appears to contemplate the enactment of legislation whereby persons would become Bahamian citizens by birth or descent and that it would be open to other categories of persons to become citizens upon making application therefor.

The Bahamas Independence Order 1973 was made on 20th June 1973 and came into operation on "the appointed day" (10th July 1973). The Schedule to this Order contains the

Constitution. Articles 3-13 (Chapter II) deal with citizenship. Paragraphs (1) and (2) of Article 3 and Articles 6 and 8 deal with the acquisition of citizenship by birth or descent. Persons in those categories became, or shall become citizens of the Bahamas. Article 3(3) declared that citizens of the United Kingdom and Colonies by registration under the 1948 United Kingdom Act also "became" citizens of the Bahamas automatically. Similarly, under Article 4, citizens of the United Kingdom and Colonies by virtue of their having been naturalised under the 1948 Act, or any earlier U.K. legislation, became citizens of the Bahamas.

Articles 5, 7, 9 and 10 provide for the acquisition of citizenship by registration. Six categories of persons are mentioned in those four Articles. In his judgment the Chief Justice has neatly summarised the six categories thus:-

A. The wife, former wife, or widow at Independence of a birthright citizen [Art. 5(1)]

B. The possessor of Bahamian status at Independence [Art. 5(2) (3) and (4)]

C. The wife, former wife or widow at Independence of a possessor of Bahamian status who subsequently is registered as a citizen [Art. 5(5)]

D. A person born in the Bahamas after Independence of non-citizen parents [Art. 7(1)]

E. A person born outside the Bahamas after Independence with Bahamian mother (but not father) [Art. 9(1)]

F. The wife (at time of application) of a Bahamian citizen [Art. 10.]

I shall consider Articles 5, 7, 9 and 10 further presently; but, having regard to the fact that the appellant's application for citizenship under Art. 5(2) has not been approved, one naturally asks oneself whether persons possessing Bahamian status prior to 1973 still retain that status.

In this regard it is to be noted that

Articles 25 and 26 of the 1973 Constitution (freedom of movement and protection from discrimination) are in substantially the same terms as Articles 11 and 12 of the 1969 Constitution, except that all references to Bahamian status have been omitted from Articles 25 and 26 of the 1973 Constitution, and the words "citizen of the Bahamas" substituted therefor.. Indeed, the only reference to persons possessing Bahamian status in the 1973 Constitution is in Art. 5(2) under which such persons are entitled to apply to be registered as citizens.

The Immigration Act 1967 was amended in a number of respects by the Bahamas Nationality Act 1973 (referred to in the Court below and during the hearing of this appeal as "the BNA"). The amendments are enumerated in Schedule 4 of the latter enactment. They involve sections 7(1)(c), 8, 16(5), 17(1)(a), 36(1) and 42(2) of the 1967 Act, and their effect was to give citizens the same rights as persons possessing Bahamian status. For example in s.17(1) of the 1967 Immigration Act, the words "citizens of the Bahamas and" were added to para (a), so that the categories of persons entitled to enter and leave the Colony now included "citizens of the Bahamas and persons deemed to belong to the Bahama Islands". Section 8(1) of the Representation of the People Act was also amended by the addition of the words "is a citizen of the Bahamas or" in para (b), so that one of the qualifications for registration as a voter was now that the person "is a citizen of the Bahamas or possesses Bahamian status".

From a perusal of the 1967 Immigration Act and the Representation of the People Act, as these enactments stood between 1973 and 1975, it would appear that the intention of the Legislature was to declare that citizens would have all the rights and privileges conferred by statute on persons possessing Bahamian status.

However, there appears to have been a change of attitude in 1975. The Immigration

(Amendment) Act 1975 came into force on 27th October. This Act repealed Part IV (ss.12-15) and sub-sections (2) and (3) of section 2 of the 1967 Act. It also repealed all the amendments to ss.7(1)(c), 8, 16(5), 17(1)(a), 36(1) and 42(2) of the 1967 Act which were effected by the BNA. The Representation of the People Act was amended by the deletion of the words "possesses Bahamian status" wherever they occurred in the Act. Moreover, s.4 of the Immigration (Amendment) Act 1975 imposed time limits on the duration of Bahamian status. If a person possessing that status applied for a certificate of permanent residence before 1st May 1976, the section states that he "shall have" his Bahamian status (other than the right to vote) until the certificate of permanent residence is granted, and, if it is not granted, until three months thereafter. If he did not apply for a certificate of permanent residence before 1st May 1976, his Bahamian status ceased on that date unless the time limit was extended by the minister [s.4(4)(b)]. If the possessor of Bahamian status had applied for registration as a citizen before 10th July 1974, s.4(5) states that he "shall have" his Bahamian status (other than the right to vote) until his application for citizenship is granted and, if not granted, until three months thereafter.

Having regard to all the amendments to the Immigration Act 1967, and the Representation of the People Act which were effected in October 1975, and to the fact that the only reference in the 1973 Constitution (which supercedes the 1969 Constitution) is in Article 5(2), it seems to me that certificates of Bahamian status, or Belonger status, issued prior to 10th July 1973 are now worthless documents, and that there is now no such thing as Bahamian status.

Returning to Articles 5, 7, 9 and 10 of the Constitution and to the six categories of persons mentioned therein, a general entitlement to registration is conferred on persons in each category in identical language, namely

> ".....shall be entitled upon making application.....to be registered as a citizen of the Bahamas"

But, in each case, there is a qualification, also in identical language, either by way of a proviso or by a separate paragraph. I refer to the words:

> "....subject to such exceptions or qualifications as may be prescribed in the interests of national security or public policy."

These words occur six times; but where, as regards categories A, C and F (above), the "right to be registered" is declared to be so subject [Arts. 5(1), 5(5) and 10], as regards categories B, D and E (above), it is the "application for registration" which is declared to be so subject [Arts. 5(4), 7(2) and 9(3)].

Counsel for the appellant submitted that to read the word 'application' in Art. 5(4) as meaning 'right' would be contrary to all rules of statutory interpretation; that the word 'application' must have the same meaning wherever it occurs in Art.5; that it is clear from the words 'any application for registration under paragraph (2)' which occur in Art. 5(4), that 'application' must mean the application form used by an applicant for registration i.e. his request to be registered because the word obviously has that meaning in para (2) of the Article and in paragraph (6).

When asked how an application form could ever be subject to exceptions or qualifications prescribed in the interests of national security or public policy, counsel submitted that when the constitution was enacted, the United Kingdom Legislature could not have known what questions an applicant for registration might be required to answer because no application form had then been prescribed by the Bahamas Parliament, and that the United Kingdom Legislature might well have considered that it might be contrary to national security or public policy for, say, a Commissioner of Police to be requested

to answer certain questions because of what counsel described as the delicate and confidential nature of the applicant's public duties. At least that is how I understood the argument to run.

With respect, I find myself unable to agree with this submission. If the United Kingdom Legislature was anticipating the possibility that the form in which an application for registration would be submitted might depend to some extent upon the status of the applicant, it seems to me that Art. 5(6) would have been the appropriate place to deal with a matter of this kind. In any event, the Bahamas Parliament was given ample power by Art. 5(6) as it stands to prescribe as many forms of application, and to vary them, as it deemed appropriate. But, apart altogether from that, the details to be included in any application form is not, as it seems to me, a matter with which the United Kingdom Legislature would be concerned when framing a constitution. I am clearly of the opinion that the word 'application' in Art. 5(4) does not mean 'application form'.

Counsel for the respondent did not suggest that for 'application' we should read 'right'. Her submission was that despite the words 'shall be entitled.....to be registered' in Arts. 5(2), 7(1) and 9(1), an applicant does not have an accrued right to registration because of Art. 5(3), the proviso to Art. 7(1) and the proviso to Art. 9(1); that renunciation of any other citizenship which an applicant might possess is a condition precedent to any right arising under Art.5(2) 7(1) and 9(1) and that (here I am quoting counsel's actual words) "by the time we arrive at Arts. 5(4), 7(2) and 9(3), all the draftsman of the Constitution was dealing with was the right to apply i.e. an application."

This comes a little closer to my view of these provisions in the Constitution; but I would have expressed matters differently. It may be that the draftsman considered that the expression 'application for registration' was more appropriate in three instances having regard to the fact that, by Art. 5(3), and the

provisos to Arts. 7(1) and 9(1), applicants are required to renounce any other citizenship of which they may be possessed before any right to registration accrues; but I do not think that this explains the change in phraseology from 'right to be registered' to 'application for registration'. After all, an applicant under Arts. 5(1) or 5(5) or 10 has to take the oath of allegiance before she is entitled to be registered.

My view of Articles 5, 7, 9 and 10 is this: Let us suppose that the Parliament of the Bahamas had not prescribed any exceptions or qualifications under the provisos to Arts. 5(1), 5(5) and 10, and Arts. 5(4), 7(2) and 9(3), any person falling within any one of the six categories of persons mentioned would have been entitled, upon making application in the prescribed manner, (and otherwise complying with the particular article under which the application was made) to be registered as a citizen. For example, a wife, former wife or widow of a person who became a citizen under Art.3 (or would, but for his death, have so become) is eligible to apply under Art. 5(1). Subject to her taking the oath of allegiance, or its equivalent, she would have a right to be registered as a citizen. But she does not have an absolute right to be registered until she does take the oath of allegiance or its equivalent. Under Art. 5(2), the possessor of Bahamian status must apply before 10th July, 1974. The onus is upon him to satisfy the authorities that he possesses Bahamian status and that he is ordinarily resident in the Bahamas - a question of fact, or rather an inference to be drawn from primary facts and not always an easy question to decide. The applicant need not renounce any citizenship of which he may be possessed when he makes his application; but he must do so, take the oath of allegiance and register such declaration as may be prescribed, before he has a right to be registered as a citizen. And so on throughout the provisions relating to the other four categories of persons "entitled" to citizenship by registration.

However, the Legislature has prescribed

exceptions or qualifications. (Let us assume for the moment that such exceptions or qualifications were prescribed in the interests of national security or public policy and that they are intra vires the Constitution). For example, let us assume that Parliament has declared, in effect, that it is contrary to public policy that an undischarged bankrupt should be granted citizenship. The authority responsible for the grant of citizenship has to be satisfied that the applicant is not an undischarged bankrupt. If it turns out that the applicant is an undischarged bankrupt, he has no right to be registered as a citizen; and the Minister, in his discretion, may refuse registration.

The Chief Justice has drawn attention to passages in Maxwell on Interpretation of Statues (4th Ed.), which I think are apposite to the present question. Although a change of language usually indicates a change of meaning, Maxwell says (pp.279 and 286) :-

> "This presumption as to identical meaning is, however, not of much weight. The same word may be used in different senses in the same statute and even in the same section.....Just as the presumption that the same meaning is intended for the same expression in every part of an Act is not of much weight, so the presumption of a change of intention from a change of language - which is of no great weight in the construction of documents - seems entitled to less weight in the construction of a statute than in any other case: for the variation is sometimes to be accounted for by the draftman's concern for 'the graces of the style' and his wish to avoid the repeated use of the same words, sometimes by the circumstance that the Act has been compiled from different sources, and sometimes by the alterations and additions from various hands which Acts undergo in their progress through Parliament. Though the statute is the language of the three estates of the realm, it seems legitimate in construing it to take into consideration that it may have been the production of

many minds and that this may better account for any variety of style and phraseology which is found than a desire to convey a different intention. Even where the variation occurs in different statutes, the change is often not indicative of a change of intention."

The impression I get from reading Chapter II of the Constitution is that Articles 3 - 10 have passed through many hands. The drafting of these provisions appears to leave something to be desired. For example, why were categories A, B and C all lumped together in one Article, Article 5?. Why is the reference to "exceptions or qualifications" sometimes in the form of a proviso and sometimes in a separate paragraph? Why is renunciation of citizenship dealt with under a separate paragraph in Art. 5, and as a proviso in Articles 7 and 9; and so on?

Like the Chief Justice, I cannot myself see why, as regards the six categories of persons "entitled" to citizenship, the provision regarding exceptions and qualifications should have one meaning in the case of categories A, C and F (wives, widows etc.) and another meaning in the case of categories B, D and E.

The word 'application' as it occurs in various places throughout Article 5 should not be viewed in isolation. Under Art. 5(2) the person possessing Bahamian Status makes his application i.e. he completes the prescribed form and submits it to the appropriate authority. Art. 5(6) again refers to the manner in which the application shall be made. But, it seems to me that the words "application for registration" in Art. 5(4) connote the whole process involved up to the time of the actual decision whether or not to grant to an applicant the status of citizenship by registering his name in the appropriate register. In other words, the disposal of the whole matter.

In the context of Articles 5, 7, 9 and 10 it matters not, in my view, that, in three

instances, it is declared that the right to registration (which must be applied for) is subject to exceptions and that, in the other three instances, it is the application for registration which is declared to be so subject.

Article 2 of the Constitution reads :-

> "This Constitution is the Supreme law of the Commonwealth of the Bahamas and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

Article 54 provides that Parliament may by Act of Parliament alter any of the provisions of the Constitution; but that, in the case of certain articles (and these include Articles 5, 7, 9 and 10), the Bill must be passed by a three-quarters majority of all the members of each House and must thereafter be approved by a majority of the electorate.

One of the submissions made in the Court below, and in this appeal, was that the proviso to s.7 of the BNA purports to alter the Constitution; that there was no evidence that the BNA was enacted by a three-fourths majority of all the members of each House, and that the proviso to s.7 is therefore void.

Section 4(2) of the Bahamas Independence Order 1973, so far as relevant, reads :-

> "Where any matter that falls to be prescribed or otherwise provided for under the Constitution by Parliament .....is prescribed or provided for by an existing law.....that prescription or provision shall.....have effect..... as if it had been made under the Constitution by Parliament....."

"Existing law" is defined in s.4(6) of the Order as meaning :

> ".....any law having effect as part of the

law of the Bahama Islands immediately before the appointed day (including any law made before the appointed day and coming into operation on or after that day)."

The Preamble to the Bahamas Nationality Act 1973 (the BNA) reads as follows :-

"Where it is proposed that, upon the attainment of fully independent status by the Commonwealth of the Bahamas, the Constitution will contain certain provisions relating to citizenship of the Bahamas, including provisions for the acquisition of citizenship by birth and descent :-

And whereas it is considered expedient to provide by law for the acquisition of such citizenship by registration, naturalisation and otherwise, for the certification, renunciation and deprivation of such citizenship, and for other matters relating to citizenship generally with the intent that such law shall come into operation simultaneously with the coming into operation of the said Constitution;

And whereas by virtue of subsection (2) of section 4 of the Bahamas Independence Order 1973 such a law may be enacted by the Legislature of the Bahama Islands before the attainment of fully independent status so as to have effect as if that law had been made under the said Constitution by the Parliament of the Bahamas:

NOW THEREFORE, BE IT ENACTED....."

The Act was made before the appointed day (10th July 1973). It was assented to on 5th July 1973 and came into operation on the appointed day. It therefore falls within the definition of "existing law".

The Jamaican (Constitution) Order in Council is similar to the Bahamas Independence Order, 1973; and in Hinds v. The Queen (1) Lord Diplock, in referring to certain laws

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passed by the Jamaican Parliament before the Constitution came into force, said (p.372) :-

> ".....were passed before the law-making powers exercisable by members of the legislature of Jamaica by an ordinary majority of votes were subject to the restrictions imposed on them by the Constitution.....no law in force immediately before (the appointed day) can be held to be inconsistent with the Constitution....The constitutional restrictions on the exercise of legislative powers apply only to new laws....."

Whatever view one takes of the proviso to s.7 of the BNA, it seems to me that there is no substance in the submission that it is void because Parliament, in enacting the proviso, may have failed to comply with the provisions of Art. 54.

Of course, Article 2 of the Constitution applies to the BNA as it does to all other laws; and an existing law has also to be viewed in the light of s.4(3) of the Bahamas Independence Order.

Article 13 of the Constitution defines the word "prescribed" as meaning "provided by or under an Act of Parliament"; and Article 13 of the Constitution reads in part :-

> "Parliament may make provisions -
>
> (a) for the acquisition of citizenship of the Bahamas by persons who do not become citizens of the Bahamas by virtue of the provisions of this chapter". (i.e.Chapter II).

It will be noted that in paragraph 2 of the Preamble to the BNA that Parliament declared that it considered it "expedient to provide by law for the acquisition of.....citizenship by registration" despite the fact that this is dealt with by Arts. 5 - 10 of the Constitution.

On the hearing of this appeal, submissions

were made as to the meaning of the word "become" in Art.13. Counsel for the respondent submitted that, by using the word "become" in Art. 13(a), the intention of the United Kingdom Legislature was that the Bahamas Parliament should be free to make provision for the acquisition of citizenship by registration because the word "become" (as opposed to "entitled to become") occurs only in Arts. 3, 4, 6 and 8 i.e. the Articles which provide for citizenship by birth and descent.

With respect, I am unable to agree with this submission. If the United Kingdom Legislature had intended the word "become" to have this restricted meaning, Art. 13(a) would have read:

> "....who do not become citizens of the Bahamas by virtue of Arts. 3, 4, 6 or 8 of this Chapter."

In Art. 13(b), the Legislature was careful to restrict the power of Parliament in the matter of deprivation of citizenship to persons other than citizens by virtue of Arts. 3(1) and 3(2) and Articles 6 and 8 (birthright citizens).

Section 7 of the BNA reads :-

> "Any person claiming to be registered as a citizen of the Bahamas under the provisions of Arts. 5, 7, 9 or 10 of the Constitution may make application to the Minister in the prescribed manner and, in any such case, if it appears to the Minister that the applicant is entitled to such registration and that all relevant provisions of the Constitution have been complied with, he shall cause the applicant to be registered as a citizen of the Bahamas:
>
> Provided that, in any case to which those provisions of the Constitution apply, the Minister may refuse the application for registration if he is satisfied that the applicant -

(a) has within the period of five years immediately preceding the date of such application been sentenced upon his conviction of a criminal offence in any country to death or to imprisonment for a term of not less than twelve months and has not received a free pardon in respect of that offence; or

(b) is not of good behaviour; or

(c) has engaged in activities whether within or outside of the Bahamas which are prejudicial to the safety of the Bahamas or to the maintenance of law and public order in the Bahamas; or

(d) has been adjudged or otherwise declared bankrupt under the law in force in any country and has not been discharged; or

(e) not being the dependent of a citizen of the Bahamas has not sufficient means to maintain himself and is likely to become a public charge,

or if for any other sufficient reason of public policy he is satisfied that it is not conducive to the public good that the applicant should become a citizen of the Bahamas."

Counsel for the appellant submitted that the proviso to s.7 was ultra views the Constitution. His first submission may be summarised thus :-

> Under Art. 5(2) a person possessing Bahamian status has an entrenched and indefeasible right to be registered; Art. 5(4) refers only to the machinery of registration, that is to say to the request for registration or, putting it in another way, the application form; the entitlement to registration conferred by Art. 5(2) is stripped of all meaning by s.7 of the BNA; and because it is inconsistent with Art.2 of the Constitution, it is void.

In the alternative, counsel submitted that if the Court were against him as regards his submission as to the meaning of the word "application" in Art. 5(4) and the Court were to hold that the five matters prescribed in paragraphs (a) - (e) of the proviso were not ultra vires the Constitution, the Court should nevertheless hold that the concluding words of the proviso were ultra vires because Parliament had not prescribed anything as required by Art. 5(4), but had simply delegated the power of prescription to the Minister who had prescribed nothing relating to exceptions or qualifications.

In the alternative, counsel for the appellant submitted that if the Court were against him as regards his first and second submissions, we should hold that only matters which are eiusdem generis with the five matters prescribed in paragraphs (a) - (e) fall within the ambit of the concluding words of the proviso.

My note of the submission of counsel for the respondent reads thus :-

> The word 'notwithstanding' and the phrase 'shall not be entitled' in Art. 5(3) result in Art. 5(3) operating as a superior provision and no right is conferred by Art. 5(2) as read with Art. 5(3); until renunciation of any other citizenship, no right accrues under Art. 5(2); Art. 5(4), as read with Art. 13(a), empowered Parliament to pass legislation affecting applications under Art. 5(2); as Art. 5(2), as read with Art. 5(3), gives an applicant no right, the grant of citizenship is at the discretion of the State and that discretion is entirely unfettered; the Sovereign Parliament of the Bahamas had power to prescribe the five matters in para. (a) - (e) of the proviso and these were exceptions and qualifications to any application under Art. 5(2), and Parliament had power to delegate, in the general terms of the concluding words of the proviso

to s.7 of the BNA, power to refuse applications because a Sovereign Parliament may delegate power in matters involving public policy to any Minister because Parliament is not suited to carry on the Executive functions of a Government; it is unthinkable that the State should be forced to register anyone applying under Art. 5(2); the applicant might be a notorious criminal; it is for the State to say who shall be citizens.

I do not think it is necessary to say much more than I have already said concerning the first submission of counsel for the appellant. The force of that submission depends entirely on the view one takes of the meaning of the phrase 'application for registration' in Art. 5(4). As I have said, those words appear to me to connote the whole process involved up to the time of the actual decision whether or not to grant to the applicant the status of citizenship. Parliament was given power to prescribe exceptions or qualifications to any entitlement conferred by Art. 5(2); and, assuming any legislation containing such exceptions and qualifications is not ultra vires the Constitution, it cannot possibly be said that Art. 5(2) confers an "entrenched and indefeasible" right to registration.

If the United Kingdom Legislature had simply enacted s.1 of, and Schedule 1 to, The Bahamas Independence Act 1973, and had not enacted The Bahamas Independence Order 1973 and the Constitution, there could have been no possible objection to Parliament enacting s.7 of the BNA. A sovereign Parliament, unfettered by a written constitution, is supreme. But, the powers of Parliament are not entirely unfettered. Parliament is empowered to alter the Constitution by procedure laid down in Art.54; but, so far as I am aware, it has not chosen to do so; and, therefore, the validity of legislation enacted by Parliament on any topic in respect of which provision has been made in the Constitution, must be judged against the background of Article 2 and all other provisions of the Constitution.

The word "prescribed" which appears in

Art. 5(4) and elsewhere throughout the Constitution, is defined in Art. 137 as meaning "provided by or under an Act of Parliament"; and in the proviso to s.7 of the BNA, Parliament has prescribed five exceptions or qualifications to the right to registration. Was such prescription in the interests of national security or public policy? In my view, the answer to that question is 'yes'. I see no reason why, on the authority of Art. 5(4), Parliament should not declare that citizenship may be refused in the case of criminals of the kind described in para (a), whether the matter is viewed from the point of view of national security or public policy. The same may be said of paras. (b), (c), (d) and (e). It cannot reasonably be said that it is in the interests of a country's national security to admit as citizens persons who are not of good behaviour or persons who have engaged in activities of any kind which may reasonably be said to be prejudicial to the safety of the Bahamas or to the maintenance of law and public order; and public policy may reasonably be said to be a good ground for refusing to grant citizenship to undischarged bankrupts and persons likely to become a charge on public funds.

But, in my view, the concluding words of the proviso to s.7 of the BNA are ultra vires the Constitution because they do not "prescribe" as required by Art. 5(4). The definition of the word "prescribed" in Art. 137 does not assist the respondent. It merely specifies the methods whereby matters may be prescribed, that is to say by an Act, or under an Act, of Parliament. But the concluding words of the proviso do nothing but repeat, in somewhat different language, what Art. 5(4) of the Constitution says may be prescribed. They prescribe nothing. Counsel for the respondent submitted that 'prescribe' is not synonymous with 'define'. I agree. But it does imply that the exceptions and qualifications to the right to registration should be clearly specified in one way or another.

Paragraph (a) of s.19 of the BNA states

that the Minister may, by regulations, prescribe

> ".....anything which by the provisions of Chapter II of the Constitution.... are to be or may be prescribed."

In delegating to the Minister power to refuse registration

> ".....if for any sufficient reason of public policy he is satisfied that it is not conducive to the public good that the applicant should become a citizen of the Bahamas" (s.7)

presumably Parliament did not consider that it would be necessary for the Minister, by regulations, to prescribe exceptions and qualifications which would further fetter the entitlement to registration; but, on the face of it, para (a) of s.19 of the BNA purports to confer on the Minister power to do so.

The question does not arise on this appeal because the Minister has not in fact prescribed any exceptions or qualifications to the entitlement to registration; but if, in the future, the Minister does, by regulation, prescribe further exceptions or qualifications, in my view the validity of any such regulations may be open to question. As the learned President has said, the prescription of exceptions or qualifications contemplates the exercise of a legislative function, whereas the determination whether a particular applicant for registration falls within such exceptions or qualifications contemplates the exercise of a judicial, or at least quasi-judicial, function. The constitutionality of conferring upon a Minister both legislative and judicial functions of this nature appears to be open to question. In the absence of further argument, I would put it no higher than that.

On 8th February 1966, the appellant was granted a certificate that he belonged to the Bahama Islands for the purpose of the Immigration Act 1963. This certificate stated that he had

satisfied the Immigration Board that he was a person of good character, that he had been ordinarily resident in the Bahama Islands for 18 years and that he had declared his intention of making his permanent home in the Bahama Islands. The 1963 Act was repealed and replaced by the Immigration Act 1967; but s.47 of the 1967 Act provided that certificates issued under the 1963 Act would have effect as though they had been issued under the 1967 Act; and the appellant's certificate had not been revoked when he applied for citizenship in June 1974.

I think that this Court may reasonably assume that, before granting to the appellant the certificate conferring Bahamian status, the Board of Immigration had considered the matters enumerated in paras (a) - (d) in s.14 (3) of the 1963 Act (which was in the same terms as s.12(2) of the 1967 Act as that sub-section stood before its repeal in 1975); and that the Board were satisfied that appellant's character and previous conduct were unexceptionable, that he had established a close personal connection with the Bahamas, that there was no objection to his engaging in gainful occupation, and that his continued residence and association with the Bahamas might afford this country some advantage. It is also reasonable to assume that, when considering the appellant's application for citizenship, the Minister had before him a copy of the appellant's "belonger" certificate and the results of such investigations as the Board of Immigration may have carried out in order to satisfy itself regarding the four matters in s.14(3) of the 1963 Act which they were under a statutory duty to consider.

The appellant applied for citizenship in June 1974 using Form 2, the form prescribed under reg. 3(5) of the Bahamas Nationality Regulations 1973. I have attached a copy of his application to this judgment. In perusing this prescribed form, what strikes one forcibly is how little information a person possessing Bahamian status is required to furnish - merely his name, address, age, place of birth, similar biographical details in relation to his parents, his marital status, the country of which he is a

citizen, a declaration that he possesses Bahamian status and a further declaration as to whether or not he has ever previously renounced or been deprived of citizenship of the Bahamas. The form reminds him that if his application is approved, he will be required to renounce his citizenship of any other country before a certificate of registration is granted. Although a condition precedent to the grant of citizenship is that the applicant should be ordinarily resident in the Bahamas /Art. 5(2) of the Constitution/, the application form does not require an applicant to make a declaration as to this, much less to supply details from which the Minister could reasonably come to the conclusion that the applicant is ordinarily resident in the Bahamas. Moreover, the form is silent as regards the various matters enumerated in the proviso to s.7 of the BNA. In any event, we are entitled to assume that the Minister had before him the appellant's application form.

On 24th October 1974, the appellant was informed by the Ministry that he and his wife should come to the Ministry to be interviewed bringing with them their passports and, in the case of the appellant, a police certificate. He and his wife were in fact interviewed on 7th November 1974 by the then Under-Secretary for Home Affairs.

The record of that interview is a matter of vital importance in this appeal; and I attach a copy of it to this judgment. It is not known whether the same questions are asked of every applicant for registration; but the record of the interview with the plaintiff consists of a single fullscap sheet on which a number of questions had apparently been typed prior to the interview and the answers given during the interview were recorded by the Under-Secretary. Again, one is struck by the paucity of the information which an applicant is required to furnish - name, place and date of birth, occupation, employer, marital status, wife's name, her passport number and place and date of issue, details of the applicant's children, membership in charitable organisations etc., ownership of property, period

of residence in the Bahamas, and his income. There is a space on the form to enable the person who conducts the interview to add his owncomments. These were also apparently typed in part before the interview, thus:

> "(i) I interviewed applicant today.
>
> (ii) Applicant :-
>
> (a) Is desirous of making the Bahamas his permanent home
>
> (b) During period of residence in the Bahamas has been employed as follows :-"

(the appellant supplied details of his employment in Canada and the Bahamas for the period 1948-1974). The Under-Secretary completed his comments in his own handwriting thus:-

> "Applicant was accompanied by his wife and I'm satisfied that she is his wife and that they are living together."

The form makes no reference to any of the matters enumerated in the proviso to s.7 of the BNA.

We are entitled to assume that the Minister had before him the record of the interview made by the Under-Secretary. It is not known what further information, if any, was placed before the Minister. The appellant had obtained from the Bahamas police a certificate dated 14th June 1974 to the effect that he had not been convicted of any criminal offence in the Bahamas. We know that he was requested to bring the certificate with him, but there is nothing in the record to indicate whether he was asked to, or whether he did, produce the certificate at the interview. At any rate, the appellant was informed by letter dated 16th June 1975 (i.e. one year after he had made his application) that it had not been approved.

By Originating Summons dated 7th April 1976, the appellant sought a declaration that, upon the true construction of the Constitution, he "is entitled to be registered as a citizen" in accordance with the provisions of the

Constitution. When the matter came before the court, only two affidavits had been filed - one by the appellant and one by the First Assistant Secretary in the Ministry; and, according to the judges' notes of the proceedings, it was originally agreed that the application would be argued on that basis. However, as the hearing progressed, counsel for the appellant wished to file a further affidavit to the effect that none of the matters enumerated in the proviso to s.7 of the BNA applied to him. The affidavit ran thus :-

> ".....I have never been convicted of any criminal offence in any country whatsoever .....I am and have always been of good behaviour.....I have not engaged in any activity whatsoever within or outside the Bahamas which is prejudicial (tO) the safety of the Bahamas or to the maintenance of law and public order in the Bahamas.... I have never been adjudged or otherwise declared bankrupt under the law in force in any country.....I have and always have had sufficient means to maintain myself and I am not likely to become a public charge....There is no good reason or reasons of public policy not conducive to the public good why I should not be registered as a citizen of the Bahamas under the Constitution."

The appellant's affidavit concluded thus:

> "....at no time have I had a hearing or an interview with the Minister of Home Affairs or with anyone from his Ministry at which the matters referred to in paragraphs 3-8 inclusive of this affidavit were discussed."

The court ruled on counsel's application as follows :-

> "We are of the opinion that all the matters in controversy between the parties cannot be determined without further evidence.....we give leave to Mr. Wallace-Whitfield to file the affidavit.....and to the Director of Legal Affairs to file

an affidavit in reply, if he desires. If there is a conflict as to fact between the affidavits, we order that all affidavits shall stand as pleadings."

A further affidavit by the First Assistant Secretary was filed on behalf of the respondent. This read in part :-

"........no evidence that (the appellant) was never convicted in (Canada) or any other country was ever produced by the (appellant). As far as I can see from what appears in the notes of the (appellant's) interview the (appellant) was asked about and gave answers to the matters with which (the Under-Secretary) was concerned as he should have been in order to comply with the provisions of the Bahamas Nationality Act 1973 and the Constitution. It is not true for the (appellant) to say that at no time did he have an interview with the Minister.....or with anyone from the Ministry.....at which the matters made relevant by the Constitution and the Bahamas Nationality Act 1973 were dealt with."

The application proceeded and no further mention was made of the affidavits' being treated as pleadings. The deponents were not cross-examined on their affidavits and no viva voce evidence was called by either side. Judgment was given on 23rd June 1976; and clearly the judges treated the affidavits as evidence.

On the hearing of this appeal, counsel for the respondent submitted that there was a conflict of affidavit evidence; that the judges never rescinded their order that, in such an eventuality, affidavits should be treated as pleadings; that as neither side had called viva voce evidence, there was no evidence whatsoever before the court below; and that consequently the judges were not entitled to make any findings of fact; in particular that there was no evidence that the matters in the proviso to s.7 of the

BNA were not discussed at the interview on 7th November 1974.

For myself, I do not think that this Court should accept this submission. Despite the judges' ruling when the additional affidavit evidence was filed, the hearing, from beginning to end, was conducted on the footing that the affidavits would be treated as evidence. There was no request by either side for the deponents to be cross-examined; and, as it seems to me, it is too late in the day to put forward a submission of this kind.

Moreoever, I am not sure that there is a material conflict of evidence. The appellant states that he was never asked about any of the matters in the proviso to s.7. In reply to that, the First Assistant Secretary in one breath says that, as far as he can see from the notes of the interview, the appellant was asked about everything he should have been asked about, and, in the next breath, he says that the appellant's assertion is not true. The first Assistant Secretary does not assert positively that the matters mentioned specifically in the proviso to s.7 of the BNA were in fact discussed. That is understandable. He was not present at the interview. What is not so understandable is why the respondent did not file an affidavit by the Under-Secretary who actually conducted the interview.

One other matter seems to call for comment atthis stage. Counsel for the respondent was recorded by the Chief Justice as making the following statements from the Bar :-

(1) "I know of no sufficient reason which entitled the Minister to act under final paragraph of s.7".

(2) "Defence cannot say whether or not the Minister had in mind matters covered by final words of proviso to s.7. I do not know the grounds on which the application was refused. I cannot say whether the Minister had in mind matters falling under (a) to (e) of the proviso when he refused the application".

The statements said to have been made by counsel were recorded in slightly different language by Mr. Justice Graham thus :-

(1) "concedes that she does not know of anything falling under rest of provisions. 'or if.....Bahamas, which might have been a ground for refusal of Minister."

(2) "Defence is not asking Court to infer that any of the matters in the proviso to s.7 of BNA 1973 might have applied to applicant."

(3) "Defence....do not know the ground or grounds (if any) on which the application was refused. The defence is not in a position to say whether the Minister had in mind matters (a-e) of the proviso."

Whatever was said by counsel for the respondent (presumably in response to questions from the Bench) it appears to have had a very considerable effect on the judges in the Court below, especially on Mr. Justice Graham who says in his judgment:-

"The Court has been informed by Counsel that the defence is not asking the Court to infer that any of the matters dealt with in the proviso apply to the plaintiff. This last appears unique.

In the light of the foregoing I find that none of the grounds for refusal set out in the proviso apply to the plaintiff and that accordingly the refusal of the Minister was based on no good grounds; that is to say, on no grounds authorised by law."

In regard to the judges' notes to which I referred, my note of what counsel for the respondent said to us on the hearing of this appeal, reads :-

"I made no concessions. I said I did not know the Minister's reasons. I was saying I could not asked the Court to guess."

This seems to be substantially to the same effect as the note made by the Chief Justice; and, with respect, I doubt whether anything said by counsel for the respondent may be said to amount to a concession that "none of the grounds for refusal set out in the proviso apply to the Plaintiff". It is one thing to say: "I am not asking you to infer; I don't know". It is another to say: "I concede that nothing in the proviso applies to the appellant."

But, in any event, for myself I do not think that this Court should base its decision on alleged "concessions" by counsel especially when it appears that there is some doubt as to what was actually said.

The position therefore appears to be this: A person possessing Bahamian status prior to 1975, had virtually all the rights normally associated with the grant of citizenship in an independent self-governing country. Such a person would have had every reason to expect that, on Independence, his application for citizenship would be granted provided, of course, that he did not fall within any of the categories of persons enumerated in paras (a) - (e) of the proviso to s.7 of the BNA.

The appellant applied for citizenship prior to 10th July 1974. Throughout these proceedings, it has never been suggested that he is not normally resident in the Bahamas. His Bahamian status had not been revoked; and there is no suggestion that it could have been revoked, or that it ceased to be valid, under s.13 of The Immigration Act 1967 prior to the repeal of that provision in 1975. Therefore, if none of the exceptions in paras (a) - (e) of s.7 of the BNA apply, the appellant has a right to be registered as a citizen. The Minister has no discretion in the matter. It is only after the Minister is satisfied that one or more of the matters enumerated in paras (a) - (e) have been established, that his discretion arises. He may still register such an applicant; but he has been given a discretion to refuse registration.

From the inception of these proceedings, the respondent had adopted a peculiarly ambivalent attitude towards the question of whether the appellant should have been informed of the reason or reasons why the Minister refused to register him as a citizen. At one stage, emphasis was placed on s.16 of the BNA which states that

> "The Minister shall not be required to assign any reason for the grant or refusal of any application or the making of any order under this Act the decision upon which is at his discretion."

But, in the absence of any statutory provision imposing a duty on administrative tribunals to give reasons for their decisions, the general rule is that there is no duty to state reasons. Section 16, therefore, adds nothing to the general rule.

On the hearing of this appeal, counsel for the respondent repeatedly asserted that the Minister had never been asked to give his reasons, the implication being that the Minister would have been perfectly happy to give his reasons if he had been asked to do so.

So far as I am aware, the appellant, or his advisors, did not write to the Ministry requesting a statement of the Minister's reasons; but, after these proceedings were instituted and the appellant had made a statement on oath to the effect that he had never had a hearing at which the matters referred to in the proviso to s.7 of the BNA were discussed, the way was clear for the Minister to give the Court a statement of his reasons. The First Assistant Secretary (who was not present at the appellant's interview on 7th November 1974) merely denied the appellant's assertion and suggested that it was apparent from the notes of the interview that the Under-Secretary had asked the appellant about "the matters with which (the Under-Secretary) was concerned.....in order to comply with the provisions of (the BNA) and the Constitution."

In his judgment, the Chief Justice appears to speculate as to what the Minister's reasons might have been. There are references to the appellant's answer to the question whether he was a member of charitable organisations. But failure to belong to a charitable organisation has not been prescribed as an exception.

During the hearing of the appeal, counsel for the respondent (although she emphasised that she had no instructions as to the Minister's reasons) endeavoured to support the First Assistant Secretary's assertion that the questions put to the appellant at his interview were relevant to the matters referred to in the proviso to s.7 of the BNA. For example, it was suggested by counsel that, for all we know, the Minister may have thought that a person whose income was $25,000 might well become a charge on the public; and that although the Courts might think that the Minister reached a wrong conclusion, that was not a ground for treating the Minister's decision as a nullity. I suppose counsel had in mind what Lord Reid said in Anisminic v The Foreign Compensation Commission (2) (p.214), to the effect that if a tribunal decides a question without committing any of those errors which result in the decision being a nullity, it is as much entitled to decide the question wrongly as it is to decide it rightly.

In endeavouring to support the First Assistant Secretary's assertion, counsel also submitted that, for all the Court knew, the Minister's decision may have been made pursuant to an agreed policy of Bahamianisation which would fall within the concluding words of the proviso to s.7 in the sense that the appellant being a Canadian citizen, it might not have been considered "conducive to the public good" that such a person should carry on the business of being a tour operator. At least that is how I understood her submission. But, if the concluding words of the proviso are ultra vires, this would not have been a reason of public policy prescribed by or under an Act of Parliament.

Counsel for the respondent submitted that the courts had no grounds for their assumption

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that the record of the interview on 7th November 1974 contained all the questions which were discussed; that there may well have been discussion about matters in the proviso to s.7 of the BNA; and that the courts had no grounds for assuming that the Minister did not have a good reason for refusing registration. This, of course, was a return to the approach that the Minister was not bound to give reasons, and an abandonment of the approach that the Minister would have given his reasons if he had been asked to do so. It was, in effect, a submission that because no reasons had been given, the Courts must assume that the Minister had good reasons for refusing registration.

But that is not the law. In Padfield v The Minister of Agriculture (3) Lord Upjohn said :-

> ".....without throwing any doubt on what are well-known as the club expulsion cases, where the absence of reasons has not proved fatal to the decision of explusion by a club committee, a decision of the Minister stands on quite a different basis; he is a public officer charged by Parliament with the discharge of a public discretion affecting Her Majesty's subjects; if he does not give any reason for his decision it may be, if circumstances warrant it, that the court may be at liberty to come to the conclusion that he had no good reason for reaching that conclusion and directing a prerogative order to issue accordingly. The Minister in my opinion has not given a single valid reason for refusing to order an inquiry into the legitimate complaint (be it well founded or not)of.....; all his disclosed reasons for refusing to do so are bad in law."

Counsel for the respondent attempted to distinguish Padfield on the ground that the decision came after the enactment of the Tribunals and Inquiries Act 1958, s.12 of which imposed a duty on certain tribunals to

(3) [1968] 1 AER 694 at 719

give reasons for their decisions if requested to do so.

It would appear that the decision of the House of Lords in Padfield was given on 14th February 1958, whereas The Tribunals and Inquiries Act came into force on 1st August 1958. But, apart from that, breach of statutory duty was not the foundation of Lord Upjohn's statement. He states quite clearly that (club cases apart) failure on the part of a public officer to give reasons for the exercise of his discretion in a matter affecting Her Majesty's subjects, may if circumstances warrant it, result in a court of law concluding that he had no good reasons for his decision.

As Lord Hudson said in Padfield (p.712):-

> "True it is that the Minister is not bound to give his reasons for refusing to exercise his discretion in a particular manner; but when, as here, the circumstances indicate genuine complaint, for which the appropriate remedy is provided, if the Minister in the case so directs, he would not escape from the possibility of control by mandamus through adopting a negative attitude without explanation."

The part of the affidavit of the First Assistant Secretary which I find rather disturbing is his statement that there was no evidence that the appellant had never been convicted in Canada or any other country. The appellant did say in his affidavit that he had never been convicted "in any country whatsoever". But that, of course, was a statement made to the court; and we must assume, I suppose, that there was no evidence either way at the time of the interview, as to whether the appellant had ever been convicted anywhere.

The First Assistant Secretary appears to suggest that the onus was upon the appellant to prove that he had never been convicted in any part of the world. It is not clear whether. in the view of the Ministry, an affidavit from the appellant to this effect would have been

sufficient to discharge this alleged burden or whether an applicant for registration is required to go further and produce confirmatory evidence emanating from sources other than himself.

It matters not. An applicant for registration under Art. 5(2) of the Constitution is entitled to be registered as a citizen if he proves that he had Bahamian status, that he is ordinarily resident, submitted his application before 10th July 1974, and, upon being notified that his application had been approved, renounces any other citizenship of which he may be possessed, takes the oath of allegience and makes any prescribed declaration. There is no onus on an applicant to prove that he has never been convicted in any part of the world or to prove that he is of good behaviour, or that he has not engaged in activities in any part of the world which may reasonably be said to be prejudicial to the safety of The Bahamas or to the maintenance of law and public order, or that he has never been adjudged bankrupt or that he is not likely to become a public charge. There is nothing in the Constitution or in the BNA to suggest that it is for an applicant to prove any of those negatives before his right to registration arises; and if, in this case, the Minister or his subordinates thought otherwise (and as regards para (a) of the proviso it would appear that they may have thought otherwise) then they erred in law.

I agree entirely with Mr. Justice Graham that the contents of the proviso, by their nature, cast upon the Minister a duty to investigate; and if his investigations produced evidence of any matter referred to in the proviso which appeared to be relevant to the appellant's application, it was the duty of the Minister to give the appellant an opportunity of answering, correcting or contradicting any ground which might have been considered as sufficient to justify a refusal to register.

The principles of natural justice have been stated with great clarity by the learned

President, and I do not propose to elaborate on this topic at length. I would only refer to Schmidt and Another v S. of S. for Home Affairs (4) At p.909, Lord Denning said :-

> "The speeches in Ridge v Baldwin show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends whether he has some right or interest or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say."

The appellant is not an alien applying for citizenship by naturalisation. He is a person who, by virtue of his Bahamian status, enjoyed virtually all the rights and privileges normally associated with citizenship. Putting it at its lowest, he had a legitimate expectation that his application for citizenship would be granted. Indeed, if none of the exceptions in the proviso to s.7 of the BNA applied to him, and he otherwise complied with Arts. 5(2) and 5(3) he had a right to be registered. Fair play (and, after all, that is all natural justice is) demanded that he be not deprived of that expectation or right, as the case may be, without hearing what he had to say.

In Anisminic, Lord Reid said :-

> "It has sometimes been said that it is only when a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith.

(4) [1969] 1 AER 904

It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act....."

And Lord Pearce said (p.195) :-

"....it is assumed, unless special provisions provide otherwise, that the tribunal will make its inquiry and decision according to the law of the land. For that reason, the courts will intervene when it is manifest from the record that the tribunal, though keeping within its mandated area of jurisdiction, comes to an erroneous decision through an error of law. In such a case the Courts have intervened to correct the error."

The courts are not in a position to saywith certainty on what ground the Minister refused the appellant's application. But, whatever the reason was, it could only lawfully have been one which fell within the scope of paras (a) - (e) of the proviso to s.7 of the BNA; and, although no one has stated that the appellant's application was refused for any particular reason, I do not think it is correct to say that no reasons have been given. In my view, the First Secretary in the Ministry has given what might reasonably be said to be two reasons. Firstly, he states that the Ministry had no evidence that the appellant had never been convicted in Canada or any other country, and, secondly he states that, from what appears in the notes of the appellant's interview, the appellant "gave answers to the matters with which (the Under-Secretary) was concerned,as he should have been in order to comply with" the BNA and the Constitution. That obviously refers to the proviso to s.7 of the BNA; and, although nothing is to be gained by speculating, what is being alleged is that one or more of the answers given by the appellant and recorded by the Under-Secretary, satisfied

the Minister of one or other of the matters referred to in paras (a) - (e) of the proviso.

As to the first of these two reasons, the appellant was not under any duty to satisfy the Minister that he had not been convicted in any part of the world; and if the Minister's decision turned on the fact that the appellant had failed to produce evidence that he had not been so convicted, the Minister erred in law; and his decision would be a nullity.

As to the second reason, no tribunal could reasonably have concluded from any of the appellant's answers given at the interview that he fell within any of the categories mentioned in paras (a) - (e) of the proviso; and if the appellant's application was refused by applying the concluding words of the proviso to any answer given by him, the decision would again be bad in law and therefore a nullity. If the concluding words of the proviso are disregarded and this Court is correct in concluding that no tribunal could reasonably have concluded from any of the appellant's answers given at the interview that he fell within any of the categories mentioned in paras (a) - (e) of the proviso, the Minister's decision not to register the appellant must have been founded on information other than what is disclosed on the record of the interview, - that is to say on information which, against the background of paras (a) - (e) of the proviso militated against his being registered as a citizen. The appellant should have been given an opportunity of answering, correcting, or contradicting any such information. He was not given such an opportunity. There was, therefore, a breach of the rules of natural justice; and, accordingly, on that ground, the Minister's decision is a nullity.

The respondent relies on s.16 of the BNA which reads (in part) :-

> "the decision of the Minister on any such application or order shall not be subject to appeal or review in any court."

In Anisminic, Lord Reid, when referring to an ouster clause framed thus:-

> "The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law,"

said (p.213) :-

> "Undoubtedly such a provision protects every determination which is not a nullity. But I do not think that it is necessary or even reasonable to construe the word 'determination' as including everything which purports to be a determination but which is in fact no determination at all."

In my view, the Court's jurisdiction to make the declaration sought by the appellant in this case is not ousted by s.16 of the BNA.

Finally, the respondent submitted that this action is barred by s.2 of the Public Authorities Protection Act Cap.86, the material part of which reads :-

> "Where.....any action, prosecution or other proceeding is commenced against any person for any act done in pursuance, or execution or intended execution of any Act or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such Act, duty or authority,.....(a) the action prosecution or proceeding shall not lie or be instituted unless it is commenced within six months next after the act neglect or default complained of, or, in the case of a continuance of injury or damage, within six months next after the ceasing thereof."

Counsel for the respondent submitted that even if the Minister refused the appellant's application on some ground not authorised by s.7 of the BNA, he would be "protected" by this provision because, in refusing the application,

he acted in intended execution of his public duty under the BNA.

If this Court is correct in ruling that the decision of the Minister is nullity, that is simply another way of saying that there was no decision, no act, from the date of which time began to run. But, in any event, I do not think that s.2 of the Public Authorities Protection Act has any relevance to a proceeding of this nature. The appellant is seeking a declaration that he is entitled to be registered as a citizen in accordance with the provisions of the Constitution, because the Minister decided that he was not so entitled. The action does not involve any "act, neglect, or default" on the part of the Minister. The Minister did not 'neglect' to register the appellant. He did not in fact register the appellant because he apparently decided that, under the relevant legislation, the appellant was not entitled to be registered.

The Chief Justice was of the opinion that the Court did not have jurisdiction to make the declaration sought; that the Minister, not the Court, has been given a discretion; that the Court cannot exercise it for him, the Court's jurisdiction being supervisory in the sense that it will review a purported decision where there is a jurisdictional defect. The Chief Justice was therefore disposed to "remit the matter to the Minister for a determination of the (appellant's) application according to law".

Mr. Justice Graham considered that the Court should make the following declaration :-

> "That the (appellant) is entitled to be registered as a citizen of the Commonwealth of the Bahamas subject to his compliance with the requirements of Article 5(3) of the Constitution."

As the two judges differed, the appellant's application was dismissed pursuant to r.4 of the Supreme Court (Special Jurisdiction) Rules 1976.

As I have said earlier in this judgment, the facts have been dealt with in affidavits filed in support of the Minister's decision and reasons for his decision have been put forward in those affidavits. With respect, I do not think that they are good reasons; but, in my view, this Court is entitled to assume that his decision was reached on those facts and for the reasons which he has given. The appellant has asserted positively that he does not fall within any of the exceptions specified in the proviso to s.7 of the BNA., and, as the learned President has said, the time for controverting the appellant's assertions is past.

I agree that this Court should declare that the appellant was entitled, at the inception of these proceedings, to registration as a citizen of the Bahamas, upon his complying with Art. 5(3) of the Constitution. I also agree that this Court should declare that

(a) the Minister failed to observe the requirements of natural justice when he rejected the appellant's application for registration; and that, consequently, the rejection was a nullity; and

(b) the words

"or if for any other sufficient reason of public policy he is satisfied that it is not conducive to the public good that the applicant should become a citizen of the Bahamas"

which appear at the end of the proviso to s.7 of the Bahamas Nationality Act 1973 are ultra vires.

I agree that the appeal should be allowed with costs to the appellant here and in the court below.

Alastair Blair-Kerr J.A.

In the Court of Appeal

No.16
Order
dated 16th
March 1977

No. 16

ORDER

COMMONWEALTH OF THE BAHAMAS 1976

IN THE COURT OF APPEAL No.8

Civil Side

IN THE MATTER of the Constitution of the Commonwealth of the Bahamas

AND

IN THE MATTER of the entitlement of Thomas D'Arcy Ryan to be registered as a citizen of the Commonwealth of the Bahamas

B E T W E E N

THOMAS D'ARCY RYAN Plaintiff

AND

THE ATTORNEY-GENERAL Defendant

O R D E R

UPON MOTION by way of Appeal from the Final Judgment dated the 23rd day of June, A.D. 1976 made unto this Court by Counsel for the Plaintiff/Appellant and upon Notice by way of Cross-Appeal by Counsel for the Defendant/Respondent

AND UPON HEARING Counsel for the Plaintiff/Appellant and Counsel for the Defendant/Respondent

AND UPON READING the said Final Judgment and the Judgments of the Chief Justice, Sir Leonard J.Knowles C.B.E. and Justice Samuel H.Graham dated the 23rd day of June, A.D. 1976

THIS COURT DOTH ORDER that this Appeal be allowed and the Defendant/Respondents Notice/Cross-Appeal be dismissed

AND IT IS ORDERED that at the inception of these proceedings on the 7th day of April A.D. 1976 the Plaintiff/Appellant was entitled to be registered as a Citizen of the Commonwealth of the Bahamas subject to his compliance with paragraph 3 of Article 5 of the Constitution of the said Commonwealth of the Bahamas

AND IT IS ORDERED that the Defendant/Respondent
10 do pay to the Plaintiff/Appellant his costs occasioned by the said Appeal and costs in the court below.

DATED this 16th day of March, A.D. 1977

BY ORDER OF THE COURT
(Sgd) Illegible
REGISTRAR

In the Court of Appeal

No.17
Order granting Final Leave to Appeal to Her Majesty in Council dated 14th September 1977

No. 17

ORDER GRANTING LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

COMMONWEALTH OF THE BAHAMAS 1976

IN THE COURT OF APPEAL No.8

Civil Side

IN THE MATTER of the Constitution of the Commonwealth of The Bahamas

AND

IN THE MATTER of the entitlement of Thomas D'Arcy Ryan to be registered as a Citizen of the Commonwealth of The Bahamas

B E T W E E N

THOMAS D'ARCY RYAN Appellant

AND

THE ATTORNEY-GENERAL Respondent

O R D E R

UPON MOTION made on the 14th day of September 1977 by Counsel for the Respondent.

AND UPON HEARING Counsel for the Appellant.

IT IS ORDERED that the Respondent in this action be granted an Order granting him final leave to appeal to the Judicial Committee of Her Majesty's Privy Council.

DATED the 14th day of September 1977

BY ORDER OF THE COURT

(Sgd) Illegible
REGISTRAR

IN THE PRIVY COUNCIL No.29 of 1977

O N A P P E A L

FROM THE COURT OF APPEAL OF THE COMMONWEALTH OF THE BAHAMAS

B E T W E E N

THE ATTORNEY-GENERAL — Appellant

- and -

THOMAS D'ARCY RYAN — Respondent

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