

**IZADEEN
V.
DIRECTOR - GENERAL OF CIVIL AVIATION**

SUPREME COURT.

G.P.S.DE SILVA C.J.

KULATUNGA, J.AND

WIJETUNGA, J.

S.C. APPEAL 119/94.

C.A. NO.466/93.

12 MAY, 16 JUNE, 11 & 21 JULY AND 15 SEPTEMBER 1995.

Certiorari - Suspension of pilot's licence and instructor rating-Rules of natural justice - Principle of audi alteram partem.

The Petitioner was a professionally qualified commercial pilot. He held a commercial pilot's licence issued by the Director General of Civil Aviation under the provisions of the Air Navigation Act. He was an airplanes single and multi-engine instrument pilot and an instructor. He was employed as a Training/Co-ordinator/Flight instructor by the Asian Aviation Centre (Pvt.) Ltd. The Director General of Civil Aviation by his letter dated 14.06.93 suspended the Petitioner's pilot's licence for one year from 1st June 1993 in terms of the Air Navigation Regulations (ANR) 259(3) (later corrected to 259(1) as he had "violated relevant ANR in the presence of a student on board the flight". The ANR (1) confers on the Respondent a discretion in regard to the cancellation or suspension of a licence or certificate issued under the Regulation. This action of the Director-General was the sequel to an inquiry into an alleged incident of dropping teargas from a helicopter or aircraft over the Kanatte cemetery on 28.04.93 during the fugal procession of the late Mr. Lalith Athulathmudali. The Petitioner and the student pilot had been questioned during the inquiry and their statements were recorded on 1.5.93. The inquiry team reported the following findings against the Petitioner:-

(i) Contravention of Air Navigation Regulation (ANR) 137, that is, flying over a public gathering below safe altitude without proper authority;

(ii) Contravention of (ANR) 138, that is, flying over populous areas below safe altitude without proper authority,

(iii) Non-compliance with air traffic control instructions whilst operating in a controlled zone (ANR 139, 114). On receipt of the report the Director-General by letter dated 14.05.93 asked the Petitioner to show cause as to why his

commercial pilot's licence and the flight instructor ratings should not be suspended or cancelled as there is "*prima facie* evidence" to show that the aircraft piloted by him on 28.04.93 had contravened (i) ANR 137, (ii) ANR 138, (iii) ANR 114, 139. The Petitioner by his letter dated 24.05.1993 denied every allegation.

Held:

(1) The use of the expression "*prima facie* evidence" shows it is not conclusive evidence which could not be rebutted.

(2) Despite the categorical denial the Director-General failed to hold any inquiry. Once the Petitioner denied the charges, justice plainly required a proper inquiry at which he could have given evidence and called witnesses to support his position. It was essential that a fair opportunity should have been afforded to the Petitioner to be heard in his defence. There has been a failure of a fundamental principle of justice, namely, that a man's defence must always be fairly heard. Procedural fairness and regularity are of the indispensable essence of liberty.

Per Kulatunga, J.

An irreducible minimum of the requirements of natural justice are :

- (1) the right to be heard by an unbiassed tribunal.
- (2) the right to have notice of charges of misconduct, and
- (3) the right to be heard in answer to those charges.

Cases referred to:

1. *Shaughnessy v. United States* (1953) 345 US 206.
2. *Ridge v. Baldwin* (1964) AC 40, 132
3. *Fontaine v. Chesterton* (unreported - cited in case No. 4)
4. *John v. Rees* (1969) 2 WLR 1294, 1332
5. *Jayatilleke v. Kaleel* (1994) 1 Sri LR 319, 394
6. *Stevenson v. United Road Transport Union* (1976) 3 All ER 29, 41
7. *Labouchere v. Earl of Wharncliffe* (1879) 13 Ch. D. 346, 351
8. *Fisher v. Keane* (1878) X1 Ch. D 353, 360.

APPEAL from judgment of Court of Appeal.

*N. Sinnathamby with R. Balasubramaniam for Petitioner-Appellant.
Mohan Peiris S.S.C. for Respondent -Respondent.*

Cur.adv.vult.

22 September, 1995.
G.P.S. DE SILVA, C.J.

The Petitioner is a professionally qualified commercial pilot. He holds a commercial pilot's licence issued by the Director General of Civil Aviation (the Respondent) under the provisions of the Air Navigation Act. He is an airplanes single and multi-engine instrument pilot and an instructor. He was employed as a training/co-ordinator/flight instructor by the Asian Aviation Centre (Pvt) Ltd., whose training centre is based at the Colombo Airport, Ratmalana.

The Director General of Civil Aviation by his letter dated 14.06.93 (exhibit D) suspended the Petitioner's pilots licence for one year from 1st June 1993 in terms of the Air Navigation Regulations (ANR) 259(3); his instructor rating was also suspended for one year from 1st June 1993 as he had "violated relevant ANR in the presence of a student on board the flight". It is right to add that the Respondent in an affidavit filed in the Court of Appeal has stated that the reference to ANR 259(3) was a mistake and the correct reference is to ANR 259 (1). It is to be observed that ANR 259(1) confers on the Respondent a **discretion** in regard to the cancellation or suspension of a licence or certificate issued under the Regulations.

The Petitioner moved the Court of Appeal by way of a writ of certiorari to quash the decision of the Respondent contained in the aforesaid letter dated 14.06.93 (exhibit D). His application was unsuccessful and hence the present appeal to this court. The Court of Appeal granted leave to appeal to this Court on four questions of law but at the hearing before us we invited Counsel to address us on the following question of law which was one of the matters upon which the Court of Appeal had granted leave to appeal to this court; "Did the respondent fail to comply with rules of natural justice, in particular the principle of audi alteram partem?"

The facts which gave rise to the Petitioner's complaint may be briefly stated thus :- The Secretary to the Minister of State for Defence by his letter dated 30.04.93 directed the Respondent to inquire into an alleged incident of dropping tear gas from a helicopter or aircraft over the Kanatte cemetery on 28.04.93 during the funeral procession of the late Mr. Lalith Athulathmudali. An "inquiry team" was accordingly appointed to ascertain, inter alia, whether the flight contravened any flight regulations and whether tear gas was dropped by the aircraft.

The "inquiry team" questioned the Petitioner and the "student pilot" and recorded their statements on 01.05.93. The "inquiry team" submitted its report to the Respondent on 04.05.93. The "inquiry team" reached, inter alia, the following findings against the Petitioner: (i) contravention of Air Navigation Regulation (ANR) 137, that is, flying over a public gathering below safe altitude without proper authority; (ii) contravention of ANR 138, that is, flying over populous areas below safe altitude without proper authority; (iii) non-compliance with air traffic control instructions whilst operating in a controlled zone (ANR 139, 114).

Upon receipt of the report, the Respondent by letter dated 14.05.93 (exhibit B) asked the Petitioner to show cause as to why his commercial pilot's licence and the flight instructor ratings should not be suspended or cancelled as there is "*prima facie* evidence" to show that the aircraft piloted by him on 28.04.93 had contravened (i) ANR 137; (ii) ANR 138; (iii) ANR 114, 139. It is a matter of significance that the Respondent in his "show cause letter" to the Petitioner uses the expression "*prima facie* evidence". In other words, it is not conclusive evidence but evidence which could be rebutted by other evidence to the contrary.

To the "show cause letter" sent by the respondent, the petitioner replied by his letter dated 24th May 1993 (exhibit C). The Petitioner's reply is of critical importance to the issue arising for decision in this appeal and is set out below, almost in its entirety :-

"With regard to the alleged contravention of the Air Navigation Regulations 137, 138, 114, 139 as set out in your letter, I would most sincerely state that I did not contravene any of the above regulations nor did I ever intend to contravene them. Upto date I

have had no allegations whatsoever from my superiors, that I have committed any wrong in the course of performing my professional functions.

With regard to alleged violation of regulation 137, I did maintain an Air Traffic Control cleared altitude of 1000 feet during my said flight and as such I am confident that I did not violate the said Regulation. My aircraft arrived over Katunayake VOR at approximately, 0950 hrs, U.T.C. for the purpose of training my student, M. Chandrasiri, and after the completion of the training sortie, on my return to Ratmalana Airport in the normal course of navigation to arrive at Ratmalana, clearance was given by Ratmalana Tower to maintain an altitude of 1000 feet, and call Airfield in sight, with which I complied. In these circumstances I earnestly state that I did not intend to violate the said Regulation, and did not in fact violate the same.

As to Regulation 138, I wish to state that in view of stress of weather, extremely unfavourable weather conditions had settled over the coastal region of the city, which rendered a flight through such area unsafe. In any event, I did not fly below safe altitude since I was maintaining an Air Traffic Control cleared altitude of 1000 feet, as mentioned above, which is a safe altitude for the Cessna 152, that is capable of gliding away from such area in case of propulsion failure. (Attached please find copy of METAR issued for Ratmalana).

With regard to allegation of non compliance with Air Traffic Control clearance, I would sincerely state that the said allegation is factually incorrect for the following reasons:

Colombo Tower Cleared me to Ratmalana at 1000 feet, and follow a coastal route, which I did, on arrival of 10 Nautical Miles south of Katunayake, I was requested to contact Ratmalana which I also did. Upon contact, Ratmalana Tower cleared me to Ratmalana at 1000 feet, but did not inform me of any restrictions such as to maintain a coastal route. Therefore, I chose a direct route from that point onwards at my discretion which has been the normal procedure adopted by all the pilots, which the Air Traffic Controllers are aware of, unless otherwise advised by them.

I have always acted with utmost responsibility without any intention to commit any violation of any regulation in the course of the performance of my duties, in all the above circumstances I kindly request you to consider the above matter most sympathetically and exonerate me from all the allegations made, which would otherwise adversely affect my career, which I love so much."

It is very clear that the Petitioner has specifically denied the allegations of the Respondent relating to the contravention of Air Navigation Regulations. Notwithstanding the categorical denial of the charges by the Petitioner, the respondent failed to hold an inquiry; instead, the Respondent by his letter dated 14.06.93 (exhibit D) addressed to the Petitioner proceeded to suspend his pilot's licence for one year and also suspended his instructor rating for one year. The Petitioner's employer, Asian Aviation Centre (Pvt.) Ltd., has informed the Petitioner that his services have been suspended in view of the allegations made against him by the Respondent.

Once the Petitioner denied the charges, justice plainly required the Respondent to hold a proper inquiry at which the Petitioner could have given evidence and called witnesses in support of his position which he had indicated in his reply to the "show cause" letter. In my view, it was essential that a fair opportunity should have been afforded to the Petitioner to be heard in his defence, inasmuch as he had in no uncertain terms denied all the charges made against him. There were many important disputed questions of fact upon which the Respondent had to satisfy himself before he could properly exercise the discretion vested in him and suspend the petitioner's licence; it is the licence upon which the petitioner's livelihood rested. The question whether the Petitioner had complied with Air Traffic Control Instructions and whether he had deviated from the prescribed route loomed large in the area of controversy. Mr. Sinnatamby for the petitioner submitted that it was not possible to reach a correct finding on this issue without perusing a transcript of the A.T.C. tapes recorded at the Ratmalana Tower. With this submission, I entirely agree. It is relevant to note that the petitioner's position is that on arrival at 10 nautical miles south of Katunayake, he was directed by Katunayake to contact Ratmalana and this he did. According to the Petitioner, Ratmalana "did not inform him of any

restrictions such as to maintain a coastal route". Even the "inquiry team" does not appear to have had before it the transcript of the A.T.C tapes recorded at the Ratmalana Tower.

Having regard to the matters that were in dispute between the parties, it was very necessary for the Respondent to have held an inquiry and to have had the evidence of at least two essential witnesses, namely the Air Traffic Controllers at Katunayake and Ratmalana recorded. The position taken up by the Petitioner could only have been properly considered and evaluated in the light of the evidence of these two witnesses. The fact that ANR 259(1) vests a 'discretion' in the Respondent coupled with the fact that the "show cause letter" speaks of "*prima facie*" evidence makes the need for a formal inquiry all the greater. An equally important fact is that the matters in dispute were of a technical nature. Admittedly, no inquiry was held after the Petitioner denied the charges preferred against him.

Mr. Mohan Peiris for the Respondent strenuously contended before us that there was no need whatsoever for a formal inquiry. The "inquiry team" had probed all aspects that need to be considered and had questioned the Respondent and the student pilot on all relevant matters. With these submissions, I find myself unable to agree. The inquiry conducted by the "inquiry team" was at best an inquiry of a preliminary nature. In my view, the Respondent cannot possibly rely on the statement of the Petitioner and his student pilot recorded on 1st May 1993 as constituting compliance with the rules of natural justice. There is no material on record to show that the Petitioner was informed at that stage of the precise nature of the allegations against him. He had no opportunity whatever of calling evidence in support of his position. As far as the Petitioner was concerned, the inquiry concluded in a matter of a few hours on the 1st of May itself. It was not even the finding of the Court of Appeal that a formal inquiry was unnecessary in the facts and circumstances of this case.

On the other hand; the Court of Appeal ultimately arrived at the following finding in favour of the Respondent:-

"Upon a consideration of the respective claims of the Petitioner and the Respondent in regard to the violation of the rules in regard

to compliance with air traffic control instructions; I am of the view that the Director took an honest and reasonable decision upon the material before him and he has not misdirected himself either on the facts or on the law."

In reaching this finding the Court of Appeal was in error, for it has overlooked the fact that no inquiry was held despite the Petitioner's denial of the charges preferred against him. This crucial fact vitiates the decision of the Respondent and the Court of Appeal appears to have proceeded on the assumption that an inquiry was held.

On a consideration of the matters set out above, I am satisfied that there has been a failure of a fundamental principle of justice, namely, that "a man's defence must always be fairly heard." (Administrative Law by Wade 6th Edn. at page 472). As stated by Jackson, J. in *Shaughnessy v. United States*⁽¹⁾, "Procedural fairness and regularity are of the indispensable essence of liberty." I accordingly hold that the decision of the Respondent which was communicated to the Petitioner by letter dated 14.06.93 (exhibit D) is void..

For these reasons, the appeal is allowed, the judgment of the Court of Appeal is set aside, and I direct that an order in the nature of a Writ of Certiorari do issue to quash the decision made by the Respondent and communicated to the Petitioner by letter dated 14.06.93 (exhibit D). The Petitioner is entitled to costs of appeal fixed at a sum of Rs.2500/

WIJETUNGA, J. – I agree.

KULATUNGA, J. – I agree with the judgment of my Lord The Chief Justice.

I do not agree with the submission of learned Counsel for the Respondent that there was no need whatever for a formal inquiry. None of the decisions cited in support of that submission has application to this case. In *Ridge v. Baldwin*⁽²⁾ Lord Hodson summed up thus:

"No one, I think, disputes that three features of natural justice stand out - (1) the right to be heard by an unbiassed tribunal (2) the right to have notice of charges of misconduct; and (3) the right to be heard in answer to those charges".

In *Fontaine v. Chesterton*⁽³⁾ cited in *John v. Rees* ⁽⁴⁾ Megarry, J. referring to the above dicta of Lord Hodson said :-

I do not think I shall go far wrong if I regard these three features as constituting in all ordinary circumstances an irreducible minimum of the requirements of natural justice".

In *Jayatillake v. Kaleel* ⁽⁵⁾ this Court observed:

" there are certain procedural safeguards which are recognised for ensuring fair hearings *e.g.* the accused should be supplied with a fair statement of the charges. *Stevenson v. United Road Transport Union*⁽⁶⁾ he should be informed of the exact nature of the charge *Labouchere v. Earl of Wharncliffe* ⁽⁷⁾, he should be given an opportunity of defending or palliating his conduct *Fisher v. Keane*⁽⁸⁾. The opportunity should be fair, adequate and sufficient. Thus, the right to be heard will be illusory unless there is time and opportunity for the case to be met - Paul Jackson 'Natural Justice' p.63".

In the instant case, there has been a clear breach of the rules of natural justice. Hence the Appellant is entitled to the relief sought.

Appeal allowed.

Certiorari issued.