1959 *Present :* Sinnetamby, J.

N. P. DON SAMUEL, Petitioner, *and* S. F. DE SILVA (Director of Education), Respondent

S. C. 154—Application for a Writ of Certiorari

Certiorari—Education Code—Regulation 32 (iii)—Effect of words "proves unsatisfactory"—Judicial nature of the power vested in the Director—Education Ordinance, s. 31—Would writ lie even against an administrative act ?

Regulation 32 (iii) of the Code of Regulations for Assisted Vernacular and Bilingual Schools reads as follows (omitting the irrelevant portions)—

"Where the manager proves unsatisfactory the Director of Education may assume the management or appoint a Manager *temporarily, etc.*"

Held, that a duty to act judicially is imposed upon the Director of Education by the Regulation. Accordingly, *certiorari* would lie if the Manager of a School is removed from office without being given an opportunity of making his defence to any charge made against him.

Held further, that even if the order of the Director involved an administrative process, writ would be allowed if the Director did not bring his mind at all to bear upon the question.

APPLICATION for a mandate in the nature of a writ of *certiorari* arising out of an order made by the Director of Education removing the petitioner from the office of Manager of the Matara Yatiyana Buddhist Mixed School.

H. V. Perera, Q.C., with *S. Sharvananda* and *S. Sivarajah,* for the petitioner.

M. Tiruchelvam, acting Solicitor-General, with *V. Tennekoon,* Senior Crown Counsel, and *R. S. Wanasundera,* Crown Counsel, for the respondent.

Cur. adv. vult.

May 14, 1959. SINNETAMBY, J.—

This is an application for a mandate in the nature of a writ of *certiorari* arising out of an order made by the Director of Education removing the petitioner from the office of Manager of the Matara Yatiyana Buddhist Mixed School.

The facts relevant for the purpose of this case are shortly as follows :—

The petitioner was the proprietor of the said school and from the year 1926 has also been its manager. It would appear from the affidavit of the respondent and the exhibits attached thereto that on or about 5th December, 1958, there was addressed to the Minister of Education a petition alleging that Communism was being taught in the school under the guise

of Civics and Geography. This was referred to the Education Officer of the Southern Province who caused an inquiry to be made and reported his findings to the Director of Education. These were in due course forwarded to the Permanent Secretary to the Ministry of Education and on the 4th March, 1959, the Director received an order from the Minister to the following effect :—

> " I order that the school be Director-managed with immediate effect as the Management is unsatisfactory."

The Director of Education himself did not bring his mind to bear on the question and in his affidavit states that on receipt of this communication he made the order contained in the document P1, the relevant portion of which is as follows :—

> " I have the honour to inform you that as your work as Manager of the above school has been found to be unsatisfactory, I have assumed the management of the school with effect from 9th March, 1959, under the provisions of clause 32 (iii) of the Code of Regulations for Assisted Vernacular & Bilingual Schools. I shall continue duties as Manager until such time as the proprietor of the school is able to appoint a suitable Manager. The Education Officer, Southern Province will administer the school on my behalf. It should be noted, therefore, that you have ceased to be the Manager of the school with effect from 9th March, 1959."

It is apparent from the Director's letter P1 that he purported to act under Regulation 32 (iii) of the rules made under the rule making powers contained in the Education Ordinance. The rules are in numbered sections and is called the " Education Code ". It was in existence even prior to the amending Ordinance of 1947 and were stated to have been in existence since July, 1929.

Document P1 gives the ground of removal, viz : that the Manager has been found to be unsatisfactory. It was conceded at the argument that the petitioner was not given an opportunity of making his defence to this or any other charge and that the official of the department conducted whatever inquiries he held in the absence and without the knowledge of the petitioner. Letter P1 came as a surprise to the petitioner. He promptly made representations but the Director refused to alter his decision. He, thereupon, filed these papers asking for a mandate in the nature of a writ of *certiorari* to quash the order of the Director of Education.

The only question that arises for decision is whether the Director in acting under regulation 32 (iii) of the Education Code acts administratively or in a quasi judicial capacity. It was agreed that if he was acting in the latter capacity, the order cannot stand. The argument in the case proceeded on the usual lines and several reported cases were cited in some of which it was held that the orders made were in an administrative capacity while in others that they were made in a judicial or quasi-judicial capacity. I do not consider it necessary to refer to all these cases.

The learned acting Solicitor General appeared on behalf of the Director of Education. In most of the cases cited by him in support of his contention that the order was an administrative one, the enabling provisions of the enactment under which the order was made used such words as "if in the opinion of the Minister", "If the Minister is satisfied", "If it appears to the Minister" or words to that effect. In these cases the view was taken that the Minister acted in an administrative capacity because on a consideration of the provisions of the enactment he was the sole judge as to the existence of a certain set of circumstances from which followed his power to make a particular order. The use of such phrases rendered it easier to make the submission that it was the subjective test which had to be applied. Regulation 32 (iii) of the Education Code contains no similar phrase. The words used omitting the irrelevant portions are—

> "Where the Manager proves unsatisfactory the Director may assume the Management or appoint a Manager temporarily, etc., etc."

The question that one has to decide is whether this provision casts upon the Director an administrative or a judicial function. The absence of such a phrase as "where it appears to the Director, etc." is of itself no absolute indication that the test to be applied is objective just as much as the presence of such an expression is also not conclusive that the test is subjective; for instance, in the case of *Subramaniam v. Minister of Local Government and Cultural Affairs* [1] where the expression used was "if the Minister is satisfied that there is sufficient proof of" the court held that it was a judicial function that the Minister was called upon to perform. It came to that conclusion on the ground that the use of the words "sufficient proof of" involved the hearing of evidence. Although it was the Minister who had to make the decision it involved the judicial process. In the recent case of *Sugathadasa v. Minister of Local Government and Cultural Affairs* [2] the expression used was :—

> "if at any time upon representations made or otherwise it appears to the Minister etc. etc."

the Court held that an administrative power was vested in the Minister.

It is clear that when a Court is called upon to decide a question of this kind, the duty cast upon it is to decide on a consideration of all the relevant provisions of the enabling Act whether the test to be applied is a subjective or an objective one. If it is subjective, then it is the administrative process that comes into operation but if it is objective, it is the judicial process. The expression used in Regulation 32 (iii) is "proves unsatisfactory". It rather suggests that the test to be applied is an objective one. It is only if the Manager is in point of fact unsatisfactory that the Director can act. The other instances enumerated in Section 32 of the Code also suggest the existence of circumstances which are objective in character; for instance, the question of whether a Manager refuses to act or absents himself from his duties or is unable owing to financial difficulties

[1] *(1957) 59 N. L. R. 254.* [2] *(1958) 59 N. L. R. 457.*

to continue his duties are questions which have to be decided upon the *de facto* existence of certain facts and not on whether the Director in his own mind honestly thinks that they exist.

Perhaps, it would be appropriate in dealing with this question to refer at this stage to the famous dictum of Lord Atkin in *Rex v. Electricity Commissioners* [1] which stipulates the existence of four conditions for a writ of *certiorari* to lie. These are that there must be :—

(1) a person or body of persons having legal authority to determine a question ;

(2) the question must effect the rights of subjects ;

(3) the person or body of persons must have a duty to act judicially, and

(4) they must act in excess of their legal authority.

Of these four the only question that arises for decision in this case is whether there is a duty to act judicially imposed upon the Director by the terms of Regulation 32 of the Education Code. The other conditions, it was conceded, exist.

In certain enactments it is clear from a consideration of all its provisions that their object is to enable an Official or a Minister to make orders affecting adversely the rights of subjects in order that the community as a whole may benefit. The enactment embodies the policy of the Government and when a Minister or other functionary makes orders in pursuance of powers given him by the enactment the Courts have held that it is the administrative process that is invoked and have refused to exercise any supervisory jurisdiction over such acts. Examples of this are to be seen in the orders made under the New Towns Act and the Housing and Town Improvement Act in England. Here questions of policy and expediency are involved and the rights of the individual are made subordinate to the interests of the community.

In the case of *Rex v. Manchester Legal Aid Committee* [2] the principle was enunciated that when a decision has to be made on the facts of any particular case and solely on the evidence apart from any extraneous considerations then it is the judicial process that is invoked. Applying that principle to the facts of the present case it is manifest that the questions of whether the Manager was unsatisfactory must depend solely on the facts of this case and upon the evidence available to support it. No extraneous considerations such as policy or expediency can come into play, but the learned acting Solicitor General contended that questions of policy were involved. He contended that it is the policy of the Government to discourage schools being utilised for political purposes. That may be the policy of the Government, but, apart from policy, if the Manager had infringed it, it may be a good ground for saying that he was unsatisfactory. It would be an item of evidence in support of the charge ; only he must be given an opportunity of refuting it. Can it, however, be said

[1] *(1924) 1 K. B. 171.* [2] *(1952) A. E. R. 480.*

that any such policy is either expressly or implicitly declared to be a factor to be taken into consideration in enforcing the enactment? It seems to me that it is only if, on a consideration of the provisions of the enactment or the purpose for which it was enacted, it is clear that a certain policy is involved that questions of policy can be taken into consideration when action is taken under its provisions. I do not agree that when the Director is called upon to act under the provisions of regulation 32 (iii) of the Code any question of policy or expediency is involved.

It has, at the same time, to be recognised that although extraneous considerations need not be involved Parliament may, nevertheless, confer administrative powers upon a Minister or functionary even when a decision has to be made solely on the facts of the case—*Sugathadasa v. Minister of Local Government and Cultural Affairs* [1]. Such an intention must, however, be manifest on a consideration of all the provisions of the enactment. The question is, therefore, whether in this present case such an intention can be attributed to the legislature when it approved the "Education Code". It is to be noted in this connection that a right of appeal to the Minister is granted by section 31 of the Education Ordinance to a Manager who is dissatisfied with an order of the Director. That is one of the matters which have to be taken into account in deciding this question. In the *Nakkuda Ali case* [2] the Privy Council in holding that certain provisions in the Defence Regulations relating to the control of textiles imposed upon the Controller administrative duties, took into consideration, *inter alia*, the fact that there was no right of appeal. A right of appeal ordinarily involves consideration of the sufficiency of grounds upon which an administrative body reaches a decision and carries with it the concept of conflicting claims and a duty cast on the appellate body to decide between them. This in turn involves the existence of what has been termed a "lis" or a "proposition and an opposition". In those cases where it has been held that the power exercised is administrative no right of appeal generally lies. The existence of a right of appeal favours the view that the power vested in the Director by this regulation is judicial in nature.

In the recent case of *Ross-Clunis v. Papadopoullos and others from Cyprus* [3] the Privy Council declared that even if the power which is granted by an enactment is an administrative power, if it could be shown that there was no ground on which the administrative body could have come to its conclusion the court might infer that it did not honestly form it or that in forming it it did not apply its mind to the relevant facts. In other words, even where it is the subjective test that has to be applied some qualification is placed on the power. Lord Morton in the course of his judgment made the following observations:—

"Counsel for the appellant submitted that the only duty cast on the appellant was to satisfy himself of those facts; that the test was a subjective one, and the statement in paragraph 12 of the appellant's affidavit of December 4, 1956, was a complete answer to the argument

[1] *(1958) 59 N. L. R. 457.* [2] *(1950) 51 N. L. R. 457.*
[3] *(1958) 2 A. E. R. 23.*

of the Counsel for the respondents, unless it could be shown that the statement in the affidavit was not made in good faith, and bad faith was not alleged. Their Lordships feel the force of this argument, but they think that if it could be shown that there were no grounds on which the appellant could be so satisfied, a court might infer either that he did not honestly form that view, or that in forming it, he could not have applied his mind to the relevant facts".

In such a case a writ would be allowed.

It would appear in the present case that even if the view is taken that the order involves an administrative process, as the Director did not according to his affidavit even bring his mind to bear upon the question, the principle enunciated in the Cyprus case would "*a fortiori*" apply.

I hold that the power vested in the Director of Education by regulation 32 (iii) of the Education Code is judicial in character. The petitioner was not given an opportunity of making his defence and the order made against him cannot stand. It is accordingly quashed. The petitioner will be entitled to the costs of this application.