DEPORTATION OF ALIENS: POTENTIAL FOR CONFLICT

By

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The decisions in the trilogy of cases: Premdas v Independent State of PNG,[1] Re Rooney (No.1)[2] and Re Rooney (No.2)[3] pose very important and interesting legal and political issues for third world countries. For those who are not familiar with the cases a statement of the composite facts would help to elucidate the issues which they raised. This statement is the subject of section 1 of this article.

Section 2 discusses the question of the application of rules of 'natural justice' in the processes of the revocation of an alien's permit of entry into the host country, including his deportation therefrom. It draws a comparison of the approaches to this problem by the Supreme Court of Papua New Guinea in the Premdas case, and the Court of Appeal of the Republic of Guyana in the Rolf Brandt case.[4] Both Courts are the final appellate and Constitutional courts of their respective jurisdictions. These jurisdictions are classifiable as 'common law' jurisdictions within the legal traditions as are generally agreed upon by comparative lawyers. A comparison of the approaches to similar problems by courts in jurisdictions of the same genre is not without significance generally, and more so when the courts share common historical and political characteristics.

Specifically both countries have recognised plural systems of law and their legal sources are identical.[5] They have adopted as part of their 'national common law', English common law and principles of equity, subject to limitations of 'appropriateness' and 'consistency' with local circumstances and their Constitutions. They proclaimed Constitutions which guarantee "civil and political" and "social and economic" rights; and espouse commitments to the development of autochthonous legal systems by methodologies which include references to cases and approaches of jurisdictions with similar background. It is now a matter of historical fact, as Peter Bayne reminded in a recent article on the Constitutional aspect of the Papua New Guinea cases,[6] that the Constitutional Planning Committee in its recommendations for

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the Independence Constitution (including the political structures) of Papua New Guinea, drew inspiration from the experiences of the new nations in the Commonwealth. These included, in particular, those in Africa and the Caribbean. It needs no apologies, therefore, to evaluate and compare their solutions to identical issues.

Section 3 reflects on political and legal ironies of the Papua New Guinean cases, including a lingering suspicion that justice might not have been done in the Premdas case. This suspicion is harboured not only by this writer but shared by one of the judges who sat on the bench of five justices in the Supreme Court which rejected Premdas's application to set aside the Minister's order revoking his entry permit. At this juncture one needs only quote a passage from Mr. Justice Saldanha's judgment in the committal proceedings brought against Minister Nahau Rooney, who attempted to intimidate the judges in their adjudication of Premdas's application. This application was for the Court to declare the Minister's order revoking his entry permit into Papua New Guinea as being null and void. The learned judge stated:

> "That the Minister's letter would tend to cause embarrassment and prejudice the fair trial of the proceedings in the Premdas case can be readily shown. The reference by Pritchard J. has been duly dealt with by the Supreme Court which decided that the revocation of the entry permit by the Minister and the decision of the Committee of Review could not be challenged in the courts unless there had been breaches of rights guaranteed by the Constitution ...
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> Following that decision Dr Premdas was forced to leave the country. It was part of his case all along that he had been victimized by the Government. It is one of the cardinal principles of our law that justice must not only be done but must be seen to be done. Who can say for certain that Dr Premdas has not left the country with the impression that the decision of the Supreme Court was not influenced by the Minister's letter? And who can say for certain that there is not in the minds of some people a lurking suspicion that the judges of the Supreme Court may have been influenced by the Minister?"[7]

These comments become the more depressing when juxtaposed with those of Chancellor Luckhoo in the Brandt case on minimum standards expected from a judicial system in resolving rights generally and those of aliens residing within its jurisdiction in particular.[8]

1. STATEMENT OF FACTS AND ISSUES

Dr. Premdas, an American citizen of Indo-Guyanese origin was employed as a lecturer in politics at the University of Papua New Guinea. He was the holder of an entry permit which was valid for the duration of his contract of employment, ie until sometime in 1982. Sometime in 1979 at the request of the Minister of Primary Industry, who was deputy leader of the United Party (the junior partner in a coalition government headed by Mr. Somare, the Prime Minister and leader of the Pangu Pati), he rendered unpaid and part-time service to the Minister, helping him in the organisation and administration of his ministry. In that role he had access to confidential documents without having taken an oath of secrecy under the Ministerial Personal Staff Act, 1972.

Following complaints of the Secretary of the Department of Primary Industry concerning his attendance and inteference in the running of the Department, the Prime Minister on two occasions by letters addressed to the Minister of Primary Industry requested that Premdas should desist from involvement in the activities of the Department. However, Premdas continued to render help on the continued request of the Minister. The Minister in the words of Mr. Justice Saldanha, "was delighted with the work done by Dr. Premdas". He continued:

> "The [latter] had organised his office and arranged a timetable for him to adhere to.... Papers were now being presented with explanatory notes attached in ample time for him to read them and digest their contents. At last Mr. Evara felt that he was on top of his job and in real control of his Department."[9]

The Prime Minister did not view these facts with such equanimity, and the Minister for Foreign Affairs and Trade, no doubt on his behest, made an order under the Migration Act revoking Premdas's residence permit. The latter applied to have the revocation order reviewed by a Committee of Review of three Ministers appointed by the Prime Minister under the Act.

The Committee confirmed the revocation order without giving Premdas the opportunity of appearing before it, as he requested, in order to present his case and respond to the allegations made against him. Premdas was then ordered to be deported. He immediately applied to the Court for a declaration that the principles of natural justice had been violated in the processes of revoking his permit and the issuing of the order of deportation. He sought an interlocutory injunc-

tion restraining the Minister for Foreign Affairs and Trade from effecting his imminent deportation, pending the hearing of his application. On July 4 of 1979, Pritchard J who heard the application for an injunction found that there was a genuine argument involving the interpretation and application of the Constitution. He, therefore, resolved that the matter should be referred to the Supreme Court for determination. He granted an interim injunction restraining the Minister of Foreign Affairs and Trade from effecting the deportation before August 3 1979, being the last day of the Supreme Court sittings, which were to commence on July 30 1979.

On the July 11 1979, subsequent to the order but before the actual reference to the Supreme Court was settled, the Minister for Justice wrote to the Chief Justice of the Supreme Court a letter which she copied to forty three other persons. In her letter she referred to 'the recent case the State v Dr R Premdas' and suggested, inter alia, limits on the power of the courts, composed of 'expatriate judges', to review executive actions of 'Papua New Guinean leaders' which were taken against 'foreigners'. The text of the letter read as follows:

"OFFICE OF MINISTER FOR JUSTICE

11 July, 1979

The Hon Sir William Prentice
Chief Justice of Papua New Guinea
P O Box 7018
Boroko

My Dear Chief Justice,

In writing this letter, I acknowledge section 157 of the constitution which refers to the Independence of the National Judicial system.

However I am writing in my capacity as an elected member, a leader of this country and the Minister responsible for National Justice Administration. I see it absolutely necessary to bring to your attention the feelings of the nation. I now refer to the recent case the State v Dr R Premdas.

The recent decision by the National Court to suspend the deportation order for Dr. Premdas can be clearly seen as a case where a narrow and literal interpretation of the written law was used.

In saying this I believe the court had a responsibility to take into account the reasons that Papua New Guinea or any other country makes provisions for deportation in the Migration Act.

The decision to deport Dr. Premdas was made by the Minister for Foreign Relations and Trade and later endorsed by a properly constituted committee of review of three senior Ministers of the Government.

The Ministers made their decision in the belief that the actions of Dr. Premdas may have been detrimental to the sovereignty of the Nation.

It is obvious that no one has deprived Dr. Premdas of his basic human rights or freedom.

The important principle at stake is not simply whether Dr. Premdas has done any wrong to warrant deportation nor whether the procedures employed are correct but whether the Government of Papua New Guinea has the right and power to decide which non-citizens are welcome here and which non-citizens are not welcome.

It is up to the elected Government and no one else to decide what criteria are used to deport foreigners.

Neither I nor my Ministerial colleagues understand the meaning of 'injunction' 'prerogative writ', 'unconstitutionality of the decision of the review committee' or any of the other legalistic arguments that are now proceeding. What we do understand is the concept of a Papua New Guinea identity and we believe that it is our right and prerogative to decide which foreigners we want in our country.

The matter of deportation is not a matter of justice or injustice because the deportee is not being penalized by imprisonment or being fined in any way. He is merely being told to return to his home country and that he is no longer a welcome visitor to our country.

I believe the principle of being a Papua New Guinean is basic and transcends any semantic or legalistic argument.

In failing to recognize this principle the court has jeopardized its independence and neutrality by intervening in a matter which is obviously the sole prerogative of the Government.

However I ask all members of the Judiciary to make a greater effort to use their discretion effectively to develop the National legal system in the context of a proud and growing National consciousness. (sic)

I remain,

Yours respectfully,

NAHAU ROONEY, (MP)
MINISTER FOR JUSTICE"

The Chief Justice responded two days later with a letter to the Minister, which stated, inter alia :

"I feel I must say in the strongest terms that I consider it was grossly wrong of you to write as you did. My brothers and I are affronted by what you have written, which could well be held to have constituted a serious contempt of court. I can assure you my dear Minister that judges of the National and Supreme Courts will not accept directions from or pressure by the Minister for Justice or anyone else ... If you reflected, I am sure you would realise that were they to do so, the whole reputation and standing of the judiciary would be destroyed ... You are sadly mistaken in confronting the Court in this way that you have done, and in all frankness we will not tolerate it. We find ourselves very embarrassed by your action. I assure you that we will not be deterred from carrying out to the best of our abilities the role given us by the Constitution... [I]t is my Constitutional duty, I believe, to make representation to the Prime Minister against what I believe to be your unconstitutional attempt to interfere with the Judiciary in its duty. Believe me."

The Minister then replied on July 17 by a letter which stated, inter alia:

"I am very sorry that my letter to you of July 11, has upset you so much. It is obvious that this whole misunderstanding has come about because both of us have a deep appreciation of our responsibilities to this Nation. When I wrote that letter to

> you I sincerely believed I was raising some grey areas in which there is a potential area of conflict between the executive and the judiciary for us all to talk about as a matter of principle or subject of discussion, and nothing else ... I sincerely had no intention to direct or interfere in any decision of the National or Supreme Court. It is unfortunate that you have read and taken my letter to imply that I do not respect the Independence of the Court. If that was the case, I would not have made this reference."

The Chief Justice acknowledged the Minister's letter of the 17th but noted that "you have given it very limited distribution unlike that of yours of 11th July". The Chief Justice also acknowledged Mrs. Rooney's phone request to sit down and discuss the matter, but concluded that 'the circumstances (referring to the legal situation) were such that I might not accept your invitation'.

On July 20 of the Chief Justice called a special sitting of the Supreme Court, and with the full bench seated behind him revealed the existence of the correspondence in open court. The correspondence then appeared in the national newspaper, the Post Courier, July 23 and 24. On the evening of July 20, in response to the special sitting, Mrs. Rooney appeared on the National News radio programme and held a lengthy interview with a Post Courier reporter, during which time she said "If the Chief Justice can use the court as a forum to publicize these matters then I want to make a reply to the statement". On the radio Mrs Rooney was quoted as saying that she had "no confidence in the Chief Justice and the other Judges ... it appears that the foreign judges on the bench are only interested in administration of foreign laws, and not the feelings and aspirations of the Nation's political leaders"; in the press she was quoted as saying that she "would not retract what she had said, because the judiciary is no longer doing justice".

The Chief Justice demanded the withdrawal of Mrs. Rooney's letter, and a formal apology, and urged the Cabinet promptly to dissociate itself from Mrs Rooney's actions. Instead, Prime Minister Somare, speaking for the Cabinet, supported Mrs Rooney's letter and described it as being part of the normal consultation between the Executive and Judicial branches of Government, and fully in keeping with the traditional Melanesian concepts of mooting a dispute through until consensus is reached.

Proceedings were thereafter instituted against the Minister for contempt (sub judice) of the Supreme Court on grounds that she attempted to interfere with the due course of

justice. She was also charged on two other counts of contempt for scandalising the court. These were as a result of the derogatory statements about the judges which she made to the media representatives.

The Supreme Court in Re Rooney (No.1) held that there was a case to be answered on the contempt charges, and eventually on a finding of contempt in Re Rooney (No.2), committed her to imprisonment with light labour for a period of eight months.

The Minister served only one day of her sentence in prison. The Prime Minister assumed the Justice portfolio and used his new authority to release her on licence under the procedures set out in section 627 of the Criminal Code. The public reacted violently to this partiality shown to the Minister. Prisoners rioted and university students and others demonstrated and symbolically burnt a copy of the Constitution.

The Minister's release from jail prompted the resignation of the Chief Justice, the deputy Chief Justice, and three other judges of the Supreme Court. They were all expatriate judges. The remaining justices who were also expatriates numbered three. On May 11 1980, the Prime Minister and his coalition government were defeated on a vote of no confidence. Many thought that the defeat of the government was partly due to the Prime Minister's handling of the 'Rooney Affair'.[10]

The most important legal issue raised in the Premdas case concerned the application of principles of 'natural justice' in the processes of revoking an alien's entry permit and his subsequent deportation. These are the subject of discussion in section 2 of this article. Those arising from the Rooney cases viz: the committals for contempt sub judice and for scandalising the Surpeme Court, and that of the severity of the punishment, have been discussed in a very interesting article in the Legal Services Bulletin by David Weisbrot.[11] There he correctly characterised the offence of contempt for scandalising the court as a legacy of colonialism. He asserted that while conviction of the Minister on the sub judice charge was no surprise, the sentence was, however, too harsh. Mitigating circumstances which should have gone to justify a lighter sentence, he argued, were (1) that it was the first time in history that a Justice Minister of a Commonwealth nation had been imprisoned for contempt, and (2) the Minister was ignorant of the concept of 'division of powers'. Yet in the same article he let slip the facts that Mrs. Rooney is an Arts/Social work graduate of the University of Papua New Guinea and she worked as a teacher, a research officer in the Prime Minister's Department and se-

nior public servant before entering Parliament in 1977.[12] If I might add, she was at one time a registered Law student at the University of Papua New Guinea.

Bayne discussed the interesting preliminary issue raised in Re Rooney (No.1) with reference to the sub judice charge. That is, whether the reference to the Supreme Court was pending on July 11, the day when the Minister wrote and published her contemptuous letter, bearing in mind that Pritchard J., had decided on July 4 that Premdas had an arguable case, but the reference was not actually drawn up until July 20. There seems, however, to be agreement supported by persuasive authorities for the view that the judge having decided that an arguable constitutional point was raised for the Supreme Court to determine, it was inevitable that the Supreme Court would be involved. This being the case the Court can be said to be seised of the matter. The preparation of the questions and the signing of the reference were purely procedural matters.

The question of the propriety of the Prime Minister's action in releasing his colleague from prison has been the subject of extensive critical debates.[13] The seriousness of the question is compounded by the fact that just prior to the Premdas affair, the Minister of Justice (Mrs. Rooney) wrote to the Public Prosecutor, an independent constitutional officer, on another matter in which she questioned the need for the continuation of criminal proceedings against her colleague, the Minister of National Planning and Development. The latter was charged with disobeying an order of the court following his failure to obey a National Court order which required him to lodge, inter alia financial statements pursuant to the Companies Act, in respect of a company of which he was Director and Secretary.[14] The justice portfolio would, therefore, in the eyes of an independent observer, appear to be misused on occasions.

The political issues are more fundamental and far reaching than the legal ones. They underline the concepts of 'separation of powers' and the 'independence of the judiciary'. In a recent publication it was noted that the trilogy of cases could be likened to the great Proclamation case. They could have long term benefits for the people of Papua New Guinea in the same way as Coke's judgment, in the latter, had for the people of England.[15] For whilst these cases go to establish the supremacy of the law, the Proclamation case sets limits to the law making powers of the Monarchy, and the Rooney cases, to the powers of the Executive. It is trite learning that it is essential to the doctrine of 'separation of powers' that the Executive should not travel

'out of bounds' or 'assert to itself powers of the other component parts', and this is particularly so with reference to the powers of the judiciary.

Unlike David Weisbrot who advocates tolerance, to the issuing of directives by the Executive to the Bench,[16] the writer's experience of the politics of third world countries would suggest that there is need for rigid adherence to the 'separation of powers' doctrine. This is the only 'legal' safeguard to the increasing tendencies towards totalitarianism, a development which threatens all countries irrespective of ideology, but in particular the third world countries.[17]

It is conceded, however, that the issue is not foreclosed. The arguments are bound up with the more complex problem of the 'ethics of development' in third world countries. It is only recently that the Chancellor of Guyana's judiciary argued that a judge under a 'co-operative socialist-type', constitution, 'must need work in conjunction with, and not unseparably from the Executive'. He continued:[18]

> "There is no rigid sphere of constitutionally assigned jurisdiction with regard to the judiciary. There is no longer any theory, as there is in England, about a judge in a cooperatve socialist state 'standing between the State and the citizen' because, under socialism, it cannot be envisaged that the State and the citizen can ever be in conflict..."

These assumptions were made with reference to the socialist-type constitution which nevertheless guarantees basic 'civil and political rights' of the type found in the Papua New Guinean 'Melanesian-type Constitution', secures the judges' independence and espouses the 'rule of law'. The ramifications of the issue are too far-reaching to be debated en passant, and for purposes of this article we need do no more than note the difference.

The significance of the public's reaction to the Prime Minister's release of his colleague from jail on licence is hailed as proof of Jaffe's theory[19] that judges are in a position to give leadership in the body politic. This could only be so if they are prepared to be impartial and bold in administering justice and in protecting the Constitution. Again this phenomenon is of particular importance in third world countries where the bench had in the colonial period been composed exclusively of non nationals and only in comparatively recent times tends towards localisation. In these circumstances, despite all the 'trappings' to ensure independence by clear constitutional provisions, the judges are

constantly subjected to political directives backed by threats of incurring the wrath of the politicians and its consequences. In the absence of an established tradition of 'independence', the application of 'impartiality' in the judicial process becomes increasingly volatile in the face of such pressures. The expression of confidence in the judges' work by the public, goes a long way to offset the impact of these external importunities in a democracy.

Finally on this section, the significance of the Premdas saga, in the realisation of a localisation process of the bench in Papua New Guinea must be mentioned. As Weisbrot conjectured, the case is 'the silver lining in the dark clouds'. The bench at that time was composed of eight members all of whom were expatriates: seven were nationals of Australia, the erstwhile colonial power. On the resignation of five expatriate judges, steps were taken towards reconstituting the bench by the immediate appointment of the first national judge, Mr. Mari Kapi. Shortly thereafter Mr. Buri Kidu, the Secretary for Justice, was appointed Chief Justice, thus becoming the first national Chief Justice and the second national member of the bench. Thereafter Mr. B. Narokobi, Chairman of the Law Reform Commission, accepted an acting appointment and he was followed on the Bench by Messrs. W. Kaputin and A. Amet.

An indigenous bench is the surest guarantee of the reorientation of the courts from being merely arms of the administration, a colonial concept, into institutions adapted to the demands for the development and realisation of autochthony.

2. APPLICATION OF PRINCIPLES OF NATURAL JUSTICE

(a) The Premdas Case

Volumes have been written on the application of the principles of natural justice in the administrative processes in general and with particular reference to deportation orders. It is not the intention in this article to discuss in any detail or depth the common law on this subject[20] but to note certain historical features. As the Rolf Brandt case shows, a consideration of the common law is only tangentially relevant in interpreting legislation such as the 'Migration Act' of Papua New Guinea, and the 'Expulsion of Undesirables' Act of Guyana, the relevant legislations in issue.[21] Moreover, the common law developments have been copiously treated in all but one of the five judgments handed down in the Premdas case.

The historical division between administrative and quasi-judicial functions was mentioned by the judges as the key to answering the question, 'When are the principles of natural justice applicable?' The authorities expressed the view that they did not apply to administrative decisions. In the opinions of Prentice, CJ, Saldanha and Andrew, JJ, the power of the Minister to revoke an entry permit was administrative rather than judicial or quasi-judicial. Support for this view was forthcoming from a series of English and Australian cases decided before the landmark case of Ridge v Baldwin.[22] In that case the House of Lords resoundingly rejected the administrative/judicial dichotomy as a basis for determining the applicability of principles of natural justice.

Saldanha and Wilson JJ, dealt extensively with common law developments on the subject: the blurring of the administrative/judicial dichotomy; and the substitution of the concept of deprivation of 'liberty and/or property', and the further extension of this concept to include a notion of 'legitimate expectation'. A formulation of these developments as propositions would read as follows: (i) a person whose 'liberty or property' is apt to be affected adversely by an administrative decision must be given the opportunity to consider the allegations made against him and to make representations in his defence; (ii) these safeguards should be accorded to a person whose 'legitimate expectation' is apt to be affected by an adverse decision.

The recognition of the concept of 'legitimate expectation' in deportation cases owes its origin to Lord Denning in Schmidt v Secretary of State for Home Affairs[23] and Birdi v Secretary of State for Home Affairs.[24] In the latter it received the support of Geoffrey Lane, L. However, Saldanha J., concluded that the statements on 'legitimate expectations' in both cases were only obiter dicta and could not overrule the authority of earlier cases which denied the alien any right to be heard before being deported.

It follows, that if obiter dicta are not binding they cannot override the authority of decided cases.[25]

Wilson, J, in a dissenting judgment was the only member of the court to hold that the principles of natural justice do apply to proceedings before the Committee of Review under the Migration Act. He was prepared to accept the 'legitimate expectation' doctrine as part of the common law of Papua New Guinea. He stated the issue as follows:

> "[The] question is whether or not a foreign alien (sic) who is the holder of an entry permit but who has his entry permit revoked before the time limit thereof has expired, is being deprived of a 'right or interest or legitimate expectation'."[26]

His Honour searched for an answer by analysing the Birdi case, which he stated affirmed the principle established in the Schmidt case, that an administrative body may be bound to give a person an opportunity to be heard in a case where the person had a 'right or interest' or 'legitimate expectation' of which it would be unfair to deprive him without giving him an opportunity of making representations. Based on the authority of Birdi's case, Premdas had a right or interest or legitimate expectation of being allowed to stay in Papua New Guinea until his entry permit expired, and therefore, he had a right to the application of the principles of natural justice in the proceedings before the Committee of Review.

His Honour responded to Mr. Justice Saldanha's argument that Lord Denning's comments on legitimate expectation were obiter dicta by stating that the comments were a "considered enunciation of His Lordship's opinion of law on that point", and they "formed an integral part of the train of reasoning directed to the real question that was decided". He also relied on two cases of the High Court of Australia and a recently decided English Court of Appeal's decision, which, he was of the opinion, approved Lord Denning's doctrine of legitimate expectation.[27]

(b) Rolf Brandt's Case

In any consideration of the natural justice issue in developing countries the case of Brandt v A.G. of Guyana and Austin[28] stands out in importance, particularly as the courts are confronted with interpreting statutes in many ways in pari materia. The decision in Brandt case was given in 1971. The facts of the case were that the President of the Cooperative Republic of Guyana made an expulsion order against the applicant, an alien national of the Federal Republic of Germany, who was at all relevant times lawfully residing in Guyana. No reasons were given for making the order, and the appellant refused to comply with it. Instead, he made written representations through his lawyer to the Minister for Home Affairs seeking a review of the revocation order and/or its suspension. He further asked that he be allowed to make further oral representations in his defence; be permitted to know the grounds upon which the expulsion order was made; and that he and his legal adviser be granted audience before the determination of his application.

The grounds for expulsion were communicated to the applicant's legal adviser, after which a letter was sent to the applicant advising him that his representations were considered by the President who had decided that the order should stand. The applicant was not afforded the opportunity of being heard before or at the review of his case and he therefore sought a declaration from the Court that the expulsion order was illegal, unconstitutional and void, because he was denied a fair hearing.

The Court of Appeal comprising the Chancellor, Chief Justice and three other Justices of Appeal, all Guyanese, unanimously held that an alien had no right to be heard before an expulsion order is made - the Court holding that rules of natural justice were of no avail to him in this regard and therefore the order was validly made. In arriving at its decision the court followed the established English decisions.

However, the Court went on to hold by a majority of three to two that in the light of the reviewing process granted by the relevant statute, it was incumbent on the President to supply the applicant with the reasons for his expulsion, and to give him an adequate opportunity of making representation in writing; therefore, there was a duty on the governor to enquire into the expulsion and come to a decision in accordance with the established principles of natural justice.

A comparison of the decision with that of the Supreme Court in the Premdas case would suggest agreement on the basic principle that the right to revoke an entry permit of or expel an alien is a logical and necessary consequence of the sovereignty and independence of a state. It is an administrative act not reviewable by the courts. But that right must be exercised in conformity with the laws of that state. Therefore, it is the subject's right to seek redress in the courts if there has not been due conformity with the laws of the country, eg the Constitution.[29] Secondly, in so far as legislation defines the powers of the state and does not provide for the application of the rules of natural justice it is not within the power of the courts to supply the omission. In the words of Chancellor Luckhoo:

> "But great as the anxiety of the common law might be in fit cases to come to the aid of one condemned without a hearing, its "justice" will not supply the omission of the legislature in cases arising under statute if it be not in consonance with the end and purpose of the specific and relevant statu-

> tory provisions, or has the tendency of frustrating the legislature's will as expressed under those statutory provisions."[30]

His Lordship then went on to dwell on the hackneyed supposition of 'state security' which justifies 'expeditious actions' and 'secrecy' in expulsion cases. This is a familiar concept which pops its ugly head at all turns in an attempt to cloak arbitrary actions of politicians. There was no dearth of English authorities to justify this statement of the law.[31] These authorities, we have stated, formed the basis of similar holdings in the Premdas case.

But this was not the end of the matter, and here is where the Brandt and Premdas cases parted company. Luckhoo C, with characteristic thoroughness, was prepared to look again at the reviewing provisions of the relevant statutes. After vesting in the President the power to issue an expulsion order against an 'undesirable alien', section 6 of the 'Expulsion of Undesirables' Act provided as follows:

> "(1) Where any such alien ... alleges any excuse for not complying with such order or any reason why the same should not be enforced or why further time should be allowed to him, he may submit the same to the President, and where such alien is in custody under any warrant of the President under this Ordinance, the person having the custody of such alien, on it being signified to him that any such excuse or reason is alleged by such alien, shall forthwith make known the same to the President.
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> (2) Where the President is informed that any such excuse or reason is alleged by any such alien, the President shall suspend the execution of the warrant until the matter can be enquired and determined by the President."

Chancellor Luckhoo after referring to these provisions posed the question, "what is the end and purpose of a review?". He suggested that a review might be merely a means of providing an opportunity for the exercise of compassionate discretion; or it may be the means of securing for the alien the justice which his case might merit, by inducing the President to revoke the order.

On his interpretation of the provisions, and the interpretation of the majority of members of the bench, the reviewing procedure was itself of an obligatory rather than a casual nature ie there was an obvious implication of a review requiring some form of an inquiry. That is, in essence what

was purely an executive action became quasijudicial at the reviewing stage and therefore necessitated compliance with the rules of 'natural justice'.

His Lordship characterised the reviewing mechanism as being 'fair' with an 'admirable intent'.[32] He proceeded:

> "Certainly, the way of its formulation illustrates its anxiety to gather from the alien why, if at all, he might wish to excuse himself for not obeying the order; for what reason, if at all, he might wish to attack its enforceability, and why, if he wanted furtner time before deportation, it was necessary to ask for such extension."

In comparison, the relevant provisions of the Papua New Guinean Migration Act,[33] provides as follows:

> (3) A person on whom a notice... has been served may, within seven days after receiving the notice, apply to the Minister in writing to have the notice reviewed by a Committee of Review.
>
> (4) As soon as practicable after receiving an application for a review... the Minister shall appoint three Ministers to be a Committee of Review, and shall submit the application to the Committee for its decision."

The salient questions are: "what is a review?" and "what is its purpose"? The facts that the reviewing procedure can be invoked only on the revocation of a residence permit and the reviewing body comprise three Ministers appointed under the Migration Act raise a stronger argument of a quasi-judicial function than is the case with the Guyana legislation where the review is by the President from his own order. Yet the court found an intention in the latter enactment to place the President in a quasi-judicial role, and did not so find in the former.

Guidance may be sought from judicial statements in the interpretation of the expression 'review' as used in Papua New Guinean legislation. We may refer to section 155 of the Constitution which provides for the Supreme Court to 'review' decisions of the National Court, and for the latter to 'review' any exercise of judicial authority.

This jurisdiction has been interpreted as being tantamount to an appeal applicable in circumstances where appeal procedures otherwise provided for, cannot be invoked. In Aihi v The State (No.2)[34] where this jurisdiction was invoked, the 'review' took the form of an 'appeal' which by definition afforded the accused a right of hearing. As Kidu

CJ stated in Aihi v The State (No.1),[35] there is no distinction between a right of review and a right of appeal; and Kearney, J., in the same case agreed that the process of 'review' is equivalent to the process of 'appeal'.[36]

It is clear that any review of the revocation of an alien's permit would involve settling a 'contest' once an excuse or reason for challenging it, or for its non compliance is tendered. Every contest implies an inquiry and its determination by the reviewing authority.

3. SOME CONCLUDING REMARKS

The analysis in Part 2 of this article leaves one with the awkward question of whether justice was done in the Premdas case ie whether the decision is supportable in law. To construe review procedures as an act of grace, at the pleasure of the Executive by the Executive as was done, is to preclude any challenge to the validity of an order on factual basis.[37] It is submitted that this could not have been the intent in the Migration Act. If, as is argued, the reviewing process implies the application of the rules of 'natural justice' then the violation of these rules would affect the validity of the order in the same way as the violation of a constitutional enjoinment affected the deportation order in Seeto v Minister for Foreign Affairs and Trade.[38]

The more perplexing question is, however, to what extent did the Executive's interference in the due process of law form a contributing factor in the final decision to deny Premdas a hearing in the process of reviewing his application to challenge the revocation order. Referring to the Minister's letter, the Deputy Chief Justice in Re Rooney (No.2) stated that "it was couched in arrogant and aggressive terms, terms that were assertive; the executive, through the Minister of Justice, was said to be the ultimate repository of power..." The judiciary was plainly told to 'toe the line', and this was done in really 'inexcusable terms'. He continued:

> "The words: 'it is up to the elected Government and no one else to decide what criteria are used to deport foreigners' were clearly intimidatory."[39]

One's fears cannot be entirely allayed by a statement of one member of the Bench that, "I am not easily intimidated". In any case these self confessions of temerity were made in the contempt action which was subsequent to the rejection of Premdas's application to set aside the deportation order. The decision in the Premdas case was also made at a time when

the judges did not contemplate resigning their appointments. Reference has already been made to statements of Saldanha J,[40] who to my mind voiced the realities in a puncheant manner and much more startlingly than did the other members of the Bench.

The Premdas-Rooney affairs are replete with ironies: without a doubt Premdas was the scapegoat in a political squabble and, being a foreigner, he was an easy prey. The obvious alternative presented to the Prime Minister was to discipline his Minister of Primary Industry, but that Minister was an important member of the United Party which had formed the coalition government with the Prime Minister's Pangu Pati though we have seen from the composite facts that the Government was eventually brought down by a no confidence vote of which the Prime Minister's mishandling of the Rooney affair might have been a contributory factor.[41]

Secondly, Brandt's case which championed a different path to ascertaining the appropriate rules on the issues raised in the Premdas case and supported Premdas's contention that he was entitled to the protection of the principles of natural justice was never brought to the attention of the court. It is the view of this writer that that case overwhelmingly established the correct interpretation of the law and the scheme of the review process; it is the duty of the Supreme Court when the opportunity avails to redirect the common law of Papua New Guinea on its right course.[42]

Finally on a sociological note - it is a much repeated proposition that law is a reflection of the inner feelings of a people and must be examined in their political, historical and social context. Even a casual reading of Brandt's case would inform the reader of a deep seated resentment of some Caribbean judges to the notion of arbitrary deportation ie that which denies the applicant the opportunity of having his say. In reading Chancellor Luckhoo's judgment one is apt to find explanations in the historico-economic conditions of Caribbean societies. He made much weather of de Verteuil v Knaggs [43] which arose out of the plantation economy where immigrant indentured labourers whose descendants in the Guyanese society now form nearly 50 per cent of population, were apt to be removed (deported) ad lib from one plantation to another at the behest of the colonial governors.

Other explanations from a review of Boller's CJ judgment, may be found in 'Christian morality'. Boller's reminded that:

> "Even God himself did not pass sentence upon Adam before he was called upon to make his defence."[44]

Yet still one can cull from some of the judgments, resentment arising out of the prejudices of the colonial administration which in legislating for the expulsion of undesirable aliens made a distinction between a 'British subject' who was by legislation entitled to a hearing, and other foreigners, who were given no such safeguards.

A modern explanation may be the ever present tendencies on the part of the Executive to assert dictatorial powers.[45] Related practices being 'dismissals at pleasure' justified by that 'Trojan horse' of 'state security' or, more nebulously, 'public interest'.[46] Claims of the Executive to deport without minimum concessions to the deportee and to dismiss at their pleasure are common and timeless. The latter aberration has only been recently put to rest in the Caribbean in the case of Thomas v A.G. of Trinidad and Tobago,[47] though one might note that it was still-born in Papua New Guinea.[48]

The question becomes one of whether a people through its legal system are prepared to confront these arbitrary practices. It might be asserted that these are political issues beyond the judicial functions of a judge. However they are the inarticulate major premises founded on historical experiences which are central to the decision-making processes.

ENDNOTES

1. [1979] PNGLR 329

2. Ibid, 403

3. Ibid, 448

4. Brandt (Rolf) v AG of Guyana and Austin (1971) WIR 448

5. These are the internal agencies of law-making (the Constitution, legislation, precedents and custom) and the external ones (ie the common law o(England and doctrines of equity).

6. Judicial Method and the Interpretation of PNG Constitution (1980) v11 FLR 121.

7. [1979] PNGLR at p475

8. Post, p.13

9. Premdas v Independent State of PNG, at p351.

10. See for example Bayne, P, Judicial Method and the Interpretation of Papua New Guinea's Constitution (1980) 11 FLR 121; and references set out in Weisbrot, D, Papua New Guinea: Judges and Politicians, Legal Services Bulletin, v5(5), p217, fn5.

11. Papua New Guinea: Judges and Politicians, Legal Services Bulletin, v4(6) 240-245, v5(5) 214-7.

12. Mr. Narakobi has stated that the Secretary for Justice had advised the Minister against writing the letter, see Narakobi, B, How Independent Are the Courts in Papua New Guinea? The Somare/Rooney Affair, Pacific Perspective, v9, no2 (1980) at p15.

13. Ibid, pp12-23.

14. See Narakobi, B, op cit 15; Weisbrot, D, op cit 240-1.

15. James, R and Lutchman, H, Law And The Political Environment in Guyana, (Institute of Development Studies, University of Guyana, 1984), pp203 etseq.

16. Judges and Politicians op cit 244. In contrast, Narakobi, op cit p12, draws attention to the Constitution which states that "in principle the respective powers and functions of the three arms [of government] shall be

kept separate from each other" (s99 of the Constitution). However s99(4) states clearly that the provisions on separation of powers are "descriptive only and, non justiciable". It is difficult, therefore, to support Narakobi's contention that if the separation of powers' provisions are infringed the National Court may, under s23 of the Constitution, impose a sentence of imprisonment against the defaulter for a maximum period of 10 years or a fine not exceeding K10,000, and that this jurisdiction is in addition to its powers to commit for contempt.

17. Dr. Tsamenyi ascribes these tendencies in Ghana to the 'general legitimacy crisis' of successive governments heightened by economic difficulties, see Regime Failure and the Political Legitimacy of Governments in Ghana: The Case of the Acheampong Regime, 1972-1979 (1983, Unpublished Ph.D thesis: ANU) pp33, etseq. In Guyana which in contrast to Ghana boasts 'political stability', the movement towards totalitarianism has largely been caused by economic mismanagement: James, R and Lutchman, H, Law and the Political Environment in Guyana, ppl50, 162-3 and ch9.

18. "The Function of the Courts in Contemporary Guyana" by Crane, Hon.V, Chancellor of the Judiciary (being the second lecture of the Guyana Bar Association's Lecture Series 1981: forthcoming in Issue No4 of the Guyana Law Journal). It is a matter of historical fact that Crane, J, (as he then was) gave a dissenting judgment in the Rolf Brandt case (see post p.). For a reformulation of the justification for an independent judiciary see: Guy Green, Sir C, The Rational and Some Aspects of Judicial Independence((1985) v59 ALJ 135.

19. Jaffe, L, The English and American Judges as Law Makers, (1969).

20. This has been adequately accomplished with particular reference to the Premdas case by Bayne, "Judicial Method and the Interpretation of Papua New Guinea's Constitution (1980) 11 FLRev 121; Wesibrot, D, "Papua New Guinea: Judges and Politicians" Legal Services Bulletin, v4 (6) 240-5 and 5(5) 214-7; Mitchell, B, "Development of the Principles of Natural Justice: The Constitutional Mandate and the Judicial Response" (mimeographed nd). This latter article contains a cryptic analysis of the judgments in Premdas case on this issue, and has formed the basis of this section of my comments.

21. The appropriate provisions are set out post, pp. 15-16

22. [1964] AC 40

23. [1969] 2 ch149. For developments in the law of this notion see Mackie, K, Expectations and Natural Justice (1985) 59 ALJ 33.

24. (1975) 119 Sol, J, 322

25. Premdas case, p368.

26. Ibid, p376

27. Salemi v Minister For Immigration and Ethnic Affairs (No2) (1977) 14 ALR 1; R v Minister for Immigration and Ethnic Affairs, Ex parte Ratu, (1977) 14 ALR 317; R v Secretary of State for the Home Department ex parte Hosenball [1977] 3 All ER 452.

28. (1971) WIR 448.

29. In Seeto v Minister for Foreign Affairs & Trade (Unreported, unnumbered NCJudg March 4 1985) an application was made to the National Court of PNG for judicial review of a deportation order made against the applicant by the Minister. The ground for review was the failure of the appropriate authority to exercise its discretion and perform the duties required under the Constitution upon the plaintiff's application for citizenship. The Court held that despite section 19 of the Migration Act which purported to exclude the court's jurisdiction in absolute terms, the court can intervene if "the deportee's basic constitutional rights ... are being violated".

30. At p457.

31. The King v Inspector of Leman Street Police Station, Ex p. Venicoff [1920] 3 KB 72; R v Gov of Brixton Prison Ex p. Soblen [1963] 2 QB 243.

32. Op cit p464

33. See capl6, section 3, Laws of PNG.

34. [1982], PNGLR 44

35. [1981], PNGLR 81

36. At pp89, 92; see also Constitutional Ref No2 of 1978 [1978] PNGLR 404; 409. Review is defined in Black's Law Dictionary: "Review. To re-examine judicially... consideration for purposes of correction...." "Review im-

plies a further consideration of all the relevant facts after full enquiry": De Verteuil v Knaggs [1918] AC at p563.

37. For example, in the Nigerian case of Shugaba Darman v The Min. of Internal Affairs, The New Nigerian, July 26 1980, where attempts were made to prevent the re-entry into Nigeria of a popular Nigerian politician under the mistaken belief that he was a Chadian citizen. It was subsequently established that he was a citizen of Nigeria by descent. Or as in the "Kerevat High School Affair", where there were moves to deport three expatriate teachers whose contracts were not renewed on the ground that they were 'trouble makers'. They were critical of the Inspector for National High Schools who they accused, inter alia, of having homosexual relations with a student at the school, and for being privy to and condoning such relation between the student and a former teacher of the school. The Obudsman Commission investigated the matter, exculpated the teachers, recommended the renewal of their contracts and the dismissal of the Inspector - see "Ombudsman Commission of Papua New Guinea, Final Report on Kerevat National High School Enquiry" (1981).

38. See fn29, supra.

39. Op cit 467-8.

40. Ante, p2.

41. It is an interesting fact that this has been the only successful no confidence vote in Mr. Somare's government. His 'Pangu Pati' was returned to power in the general elections held 18 months later. Since then Mr. Somare has led various coalition governments and has successfully defeated, by one compromise after another, seven other no-confidence motions in his governments. The most recent of such motions was moved on March 25 of 1985. The Prime Minister defeated that motion with a crushing 68-19 victory by manoeuvering the realignment of parties in the opposition to his side. The 'Pangu Pati' now governs in coalition with two other parties.

42. The Supreme and National Courts have in two subsequent cases cited the Premdas case as authority for the view that the exercise of the Minister's power under the Migration Act is administrative: Perryman v Minister for Foreign Affairs & Trade [1982] PNGLR 339, and Seeto v Min. for Foreign Affairs & Trade (unreported, unnumbered National Court Judg March 4, 1985). Those decisions do

not affect the arguments preferred here on the implications of the statutory review process. In neither case was that issue raised.

43. [1918] AC 557

44. Cummings, J, in a dissenting judgment made reference to Deuteronomy 1, 16-17:

> "And I charge your judges at that time, saying Hear the causes between your brethern, and judge righteously between every man and his brother, and the stranger that is with him."

45. See Eversley, C, Are Public Servants still Dismissable at Pleasure in Guyana? (1983) WILJ 123. James, R, A Right to Work (1983) Bar Assoc Rev v5, p40.

46. See Art 232(7) of the Guyana Constitution (1980) which now vests in the Executive President the power to dismiss any public officer "in the public interest". It is reassuring to read that the Appellate Court in Argentina, when interpreting a comparable provision, rejected the argument of the state that it sanctions "dismissal at pleasure", see Argentine: Administrative Tribunal Requires Evidence to support Alleged Security Reasons for Dismissal of a Teacher (1981), ICJ Review (no26) p69.

47. [1982] AC 113.

48. See Gerald Fallscheer v Iambakey Okuk and Independent State of PNG [1980] PNGLR 101; [1980] PNGLR 274 (SC).