IN THE SUPREME COURT OF NAURU CIVIL ACTION NO. 2 OF 1985

IN THE MATTER of an application by the Chief Secretary of Nauru for leave to apply for orders of certiorari and Mandamus

and

IN THE MATTER of a decision of the Public Service Appeals Board dated 18th. July, 1983 and numbered No. 2 of 1983

Date of Hearing: 29.5.85
Date of Judgment: 29.5.85(?)

Chowdhury for Applicant:
Macsporran for Mr. Clodumar

Judgment of Donne, Chief Justice

This is an application for an order of certiorari to remove into this Court and quash a decision of the Public Service Appeals Board (hereinafter called "the Board") delivered on the 18th. July, 1983 in respect of an appeal by Mr. Kinza Clodumar (hereinafter called "the appellant") against a decision of the Chief Secretary dismissing him from the Public Service.

The facts leading up to the decision of the Board were detailed therein and read:

> "The Appellant was formerly a First Division Officer. As a result of disciplinary proceedings he was reduced in rank to Director of Civil Aviation. The Appellant appealed against the decision. The office of Director of Civil Aviation is that of a Second Division Officer and his Head of Department is the Secretary for Island Development and Industry. As Director of Civil Aviation, the Appellant took part in an official visit to London and Paris from 12th. to 17th. December, 1982. It was alleged that in the course of that visit and on his return journey, the Appellant committed disciplinary offences within the terms of the Public Service Act 1961-1979 ("the Act").
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> On 19th. January, 1983, charges were laid against him under the Act.
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> On 20th. January, 1983 (sic), the Public Service Appeals Board determined that the Appellant should be reinstated as Secretary for Island Development

"and Industry as from that day. On the same day, the Appellant was suspended from duty. The preliminary point is, has there been compliance with the provisions of law such as to enable this Board to say that subsequent proceedings against the Appellant should be allowed to stand?

The Legal provisions for disciplinary control over officers in the public service are contained in the Constitution in the first instance. Article 68(1) of the Constitution provides so far as is relevant:-

> 'Except as otherwise provided by law under Article 68(1) there is vested in the Chief Secretary the power -
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> (b) to exercise disciplinary control over persons holding or acting in such offices; and
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> (c) to remove such persons from office.'

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Disciplinary offences by Second Division Officers are also referred to in Division 2 of Part VI of the Act. Section 73 of that Act provides:-

'(1) Where the Head of Department has reason to believe that an officer in his Department has committed a disciplinary offence, the Head of the Department may charge the officer with the offence.

(2) The Head of the Department shall, as soon as practicable after the charge has been made against the officer, cause a copy of the charge to be served on the officer together with a notification requiring the officer to reply, within a time specified in the notification, to the charge and to give any explanation that the officer may wish to give in relation to the charge.

(3) If the officer does not reply to the charge within the time specified in the notification, the officer shall be deemed to have denied the allegations contained in the charge.

Section 74 enables the Head of Department to suspend from duty and sections 75 and 76 empower the Chief Secretary to determine the charges and to impose a penalty if he finds the officer guilty.

The case for the Appellant is a simple case. It being conceded, he says, that he was at the time of the alleged offences and the time when the charges were laid a Second Division Officer, then the charges against him should have been initiated under section 73 by the Head of the Department. As it is

"not disputed that no part was played by the Head of the Department in the laying of the charges, then those charges, he submits, were not properly laid and this Board should declare the charges and subsequent proceedings to be void and of no effect.

The Secretary for Justice, however, argues that this is not only a technical point without merit but unmeritorious as a technical point. The Constitution he submits, provides the Chief Secretary with unfettered powers in his disciplinary control of public officers and therefore any purported restrictions on those powers in the Act is of no effect."

The Board considered that the Chief Secretary did not have an unfettered power under Article 68(1)(b) and (c) of the Constitution and that while he had both the power to determine the charge against the appellant, a Second Division Officer of the Public Service, after considering the reports of the alleged disciplinary offence committed by the latter and the reply and explanation by him obtained under section 73 of the Act, and also the power to punish after a finding of guilt, the charges against the appellant must be initiated by the appellant's Head of Department under Section 73 of the Act. As this was not done, the Board concluded the charges were void ab initio and that consequently the decision thereon was void. The Board therefore declined jurisdiction.

Counsel for the appellant submitted that the Court had no power to entertain this application. He based his argument on Article 70(8) which reads:-

"Except as provided by law, no appeal lies from a decision of the Public Service Appeals Board."

While he concedes that applications for certiorari and prohibition are not appeals, he argues that the Constitution provides in a detailed way when appeals lie and when they shall not lie and that Article 70(8) indicates clearly that the legislature intended that all decisions of the Board shall be final. He contends that view is supported by the deliberations on the Article when it was considered at the Constitutional Convention of 1967-8 and that on the authoritiy of Degabe Jeremiah v. Nauru Local Government Council (1971) Misc. Cause 2 reported in Part A of the Nauru Law Reportsat page 11, the deliberations are admissable to show, where it does so, the basic principles accepted by the Convention as the foundation of the Constitution. These deliberations show that the Article concerned was discussed and ultimately agreed to after the Convention was satisfied that

there would be no appeal against the Board's decisions and that all decisions would be final. But the process here seeks the Court's order to quash the Board's decision because there is an error of law on the face of it. It does not seek an appeal against the decision on the merits which undoubtedly there could not be. That is what I consider the effect of the "no appeal" provision of the Article. This Court's jurisdiction is conferred on it by the Constitution (Article 48) and the Courts Act 1972, section 17(2) of which states:

> "(2) The Supreme Court shall, subject to any limitation expressly imposed by any written law, have and exercise within Nauru all the jurisdiction, powers and authorities which were vested in, or capable of being exercised by, the High Court of Justice in England on the thirty-first day of January, 1968."

In R. v. Medical Appeal Tribunal; ex parte Gilmore (1957) 1 Q.B. 574 (C.A.), the Court was concerned with a decision of a Medical Appeal Authority in which an order for certiorari was sought on the ground that there was an error of law on the face of the record. The enactment constituting the Tribunal provided that "any decision (of the Tribunal on a claim to it) shall be final". The Divisional Court refused leave to the applicant for the order to apply and he appealed to the Court of Appeal. Denning L.J. at page 583 said:

> "....on looking again into the old books, I find it very well settled that the remedy by certiorari is never to be taken away by any statute except by the most clear and explicit words. The word "final" is not enough. That only means "without appeal". It does not mean "without recourse to certiorari". It makes the decision final on the facts, but not final on the law. Notwithstanding that the decision is by a statute made "final", certiorari can still issue for excess of jurisdiction or for error of law on the face of the record."

And at page 585:

> "It was no doubt that train of authority which Lord Summer had in mind when he said in Rex v. Nat Bell Liquors Ltd. (1922) 2 A.C. 128, 159-160; 38 T.L.R. 541. 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 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.
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> I venture therefore to use in this case the words I used in the recent case of Taylor (formerly Kraupt) v. National Assistance Board (1957) P. 101;

"(1957) 1 All E.R. 183 (about declarations), with suitable variations for certiorari: 'The remedy is not excluded by the fact that the determination of the board is by statute made 'final'. Parliament only gives the impress of finality to the decisions of the tribunal on the condition that they are reached in accordance with the law.'

In my opinion, therefore, notwithstanding the fact that the statute says that the decision of the medical appeal tribunal is to be final, it is open to this court to issue a certiorari to quash it for error of law on the face of the record."

Parker L.J. at pp. 588-9 said:

"One thing is clear beyond doubt. The ordinary remedy by way of certiorari for lack of jurisdiction is not ousted by a statutory provision that the decision sought to be quashed is final. Indeed, that must be so, since a decision arrived at without jurisdiction is in effect a nullity. This, however, is not so where the remedy is invoked for error of law on the face of the decision. In such a case, it cannot be said that the decision is a nullity. The error, 'however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not': see per Lord Summer in Rex v. Nat Bell Liquors Ltd.(1922) 2 A.C. 128, 151-152; 1 Q.B. 1957. But is the statement that the decision shall be final sufficient to oust the remedy? There are many instances where a statute provides that a decision shall be 'final'. Sometimes, as here, the statute provides that subject to a specific right of appeal the decision shall be final. In such a case it may be said that the expression 'shall be final' is merely a pointer to the fact that there is no further appeal, and the remedy by way of certiorari is not by way of appeal. Since, however, appeal is the creature of statute the expression is strictly unnecessary. In other cases, the expression is used in the statutes when no rights of appeal are provided. In such a case, it could be said that the expression was of no effect unless it was intended to oust the remedy by way of certiorari. Be that as it may, I am satisfied that such an expression is not sufficient to oust this important and well-established jurisdiction of the courts."

This case is directly in point and I am satisfied that the provisions of Article 70(8) do not prevent review by this Court from issuing certiorari to quash a decision which shows on the face of it an error of law. Nor does it oust certiorari in cases of lack or excess of jurisdiction or disregard of the requirements of natural justice for in such cases the decision is a nullity.

Turning now to the substantive matter, whether certiorari should lie, the applicant's case is based substantially upon his submission that the powers given to him under Article 68(2) and (3) of the Constitution are unfettered. He submits that in Nauru, power to exercise disciplinary control over a public officer resides both in the Departmental Head and the Chief Secretary and that the Public Service Act is directed only to the regulation of the powers of the former. The powers of the Chief Secretary, he contends, remain untouched by the Act. He relies on the wording of the commencement of the Article 68 - " Except as otherwise provided by law under Article 69, there is vested in the Chief Secretary the power -". The operative word there is "vested". Article 69 provides for the "vesting" of the powers and functions of the Chief Secretary in either a Public Service Board or in the officer in charge of the Nauru Police Force, i.e. it provides for vesting otherwise than that laid down in Article 68 and in the case of such vesting, the Chief Secretary is divested of his powers to that extent.

In my view, the Board correctly states the position of the Chief Secretary, the disciplinary control exercised by him and the role of the Head of Department in relation to the charge in respect of which the disciplinary control is exercised. It states (page 7 of its decision):

> "The Head of Department merely initiates proceedings; the Chief Secretary acts as Judge of the merits and decides the punishment, if any. In other words, he exercises disciplinary control after the matter has been properly raised."

Section 73 of the Act gives a public servant important rights in relation to charges laid against him. He must be notified of the change, of his rights to reply to it within a specific time and of his right to give an explanation to it. By-passing section 73 deprives the public servant of those rights. The Chief Secretary contends he can do that and lay the charge in pursuance of his unfettered power of disciplinary control. It was the Board's view that the laying of a charge is not an act of disciplinary control. It considered the function of disciplinary control is not brought into play until after the charge is laid. That view, I consider, is correct. However, even if we are wrong, I am satisfied the definition of the power of the Chief Secretary to exercise disciplinary control under Article 68(2) is not unfettered. In Keke and Anor v The Chief Secretary (1985) Misc. Cause No. 3, a decision

delivered contemporaneously with this decision, the Court said at page 10-11:

> "This examination of the relevant legislation satisfies me that it is inconsistent with a term that the State may put an end to employment of public servants at pleasure; and I do not think there is room for a view that a residue of the common law right still remains with the State in its relationship to them. In my opinion, the effect of the Public Service Act 1961-1979 is to provide a code reulating the employment of public servants to whom it applies. I conclude therefore that the Chief Secretary in the exercise of the power given to him in Article 68(1)(c) of the Constitution must exercise the power within the framework of the Public Service Act 1961-1979 and that no direction by Cabinet to the contrary can lawfully be given. The Chief Secretary's power under the said Article is therefore not unqualified and unfettered. I have considered the decision of Daly C.J. in Kinza Clodumar v. Chief Secretary (1983) Civil Action No. 1. The learned power under Article 68(1)(b) in relation to disciplinary offences is unfettered. With respect, I am unable, for the reasons given in this case, to agree with that conclusion."

I consider, therefore, that the Board was correct in concluding that the Chief Secretary had no power to initiate proceedings. Section 73 should have been complied with.

Furthermore, the deprival of the appellant of his rights under section 73, in my view, rendered the proceedings by the Chief Secretary, void. The appellant was not heard, nor was he asked for an explanation nor allowed to give an answer to the charge. Natural justice would require these rights to be available to the appellant - see Keke's case (supra) pp. 13-18.

In the circumstances, I conclude certiorari cannot lie and the application is dismissed with an order for costs $250 in favour of the appellant Mr. Clodumar against the applicant.

CHIEF JUSTICE

Solicitor for Applicant - Counsel for the Republic, Nauru.
Solicitor for Appellant - Peter H. Macsporran, Melbourne.