SCSL-2004-16-T
(14678 – 14706)

SPECIAL COURT FOR SIERRA LEONE

THE APPEALS CHAMBER

Before: Justice A. Raja N. Fernando, Presiding
Justice Emmanuel Ayoola
Justice George Gelaga King
Justice Geoffrey Robertson, QC
Justice Renate Winter

Registrar: Robin Vincent

Date filed:

THE PROSECUTOR **Against** **ALEX TAMBA BRIMA**
BRIMA BAZZY KAMARA
SANTIGNE BORBOR KANU

CASE NO. SCSL-2004-16-T

1ST RESPONDENT'S RESPONSE TO THE INTERLOCUTORY APPEAL OF ALEX TAMBA BRIMA AND BRIMA BAZZY KAMARA

First Respondent

The Registrar

Second Respondent

The Principal Defender

Defence Counsel for Brima

Kojo Graham
Glenna Thompson

Defence Counsel for Kamara

Andrew Daniels
Mohammed Pa-Momo Fofanah

FIRST RESPONDENT'S RESPONSE TO GROUNDS OF APPEAL

1. First Ground of Appeal

Error of law and or / fact due to the Trial Chamber's erroneous interpretation of the statutory rights of the accused persons as provided under Article 17 (4) (c) and (d) of the Statute of the Special Court. The Defence submits that the appealed decision wrongfully denied the rights of the Accused persons to have Counsel of their own choosing as provided in Article 17 (4) (d) of the Special Court Statute.

2. The First Respondent opposes the appeal. There is no absolute right to Counsel of choice under Article 17 (4) (d) of the Special Court Statute. The Trial Chamber correctly stated the law on this point.

3. Second Ground of Appeal

Error in law and / or fact due to the appealed decision's denial of the Defence request for an order to the acting Principal Defender to enter into a legal services contract with Messrs. Metzger and Harris on the grounds the Trial Chamber has no power to interfere with the law relating to privity of contract.

4. The ground of appeal is opposed. The Trial Chamber does not have power to force parties to enter into a contract. The Trial Chamber only has power to order parties to enter negotiations to enter into a contract and that the Principal Defender conducts those negotiations within the powers granted to him under legislation.

5. Third Ground of Appeal

Error in law and / or fact due to the ruling of the Trial Chamber that the Defence request for an open and public hearing is an application for further relief in a

Reply and that there has been no submission to support or explain this application for a public hearing.

5. This ground of appeal is opposed. The right to a hearing in an open Court is not absolute and reasons must be presented to the Trial Chamber as to why there should be an open Court hearing and the appellants failed to do so. Further the request for a public hearing was incorrectly pleaded and the Trial Chamber therefore did not have the power to consider the application.

6. Fourth Ground of Appeal

Error in law and / or fact due to the Trial Chamber's erroneous legal interpretation of Rule 45 (E) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone to prohibit re-appointment of former Lead Counsel. The ruling in this respect is entirely misplaced because the Original Motion was not a Rule 45 (E) application.

7. This ground of appeal is opposed. The majority decision of the Trial Chamber correctly stated that the application was confusing and at no time was it argued by the Appellants why the Trial Chamber should make an order under Rule 54 and instead it argued the application of Rule 45.

8. Fifth Ground of Appeal

Error in law and / or fact due to the Trial Chamber's treatment of the Original Motion as an application for review of its earlier decision on Motion for withdrawal by Messrs. Metzger and Harris.
The Defence is of the opinion that the Trial Chamber erred in law by not considering the Original Motion as separate and distinct from the Motion of Withdrawal of Counsel.

9. This ground of appeal is opposed. The majority decision of the Trial Chamber correctly stated that the Motion was a "backdoor" attempt to review the original order of the Trial Chamber in allowing Counsel to withdraw. It never was a separate application from the Original Motion of Withdrawal of Counsel

10. Sixth Ground of Appeal

Error in law and / or fact due to the Trial Chamber's decision that Counsel are not eligible to be re-appointed since they are no longer on the list of qualified Counsel required to be kept under Rule 45 (C).

11. This ground of appeal is opposed. The majority decision of the Trial Chamber correctly stated the fact that counsel were no longer on the list of qualified Counsel and therefore could not order that they be re-appointed as Counsel.

12. Seventh Ground of Appeal

The Trial Chamber erred in law and / or fact due to its ruling that since there was no determination of the issue of re-appointment of Counsel there are no grounds for submitting that any Judge recuse him/herself.

13. This ground of appeal is opposed. The Justices of the majority decision acted within their authority and there are no grounds upon which to seek that they recuse themselves.

FIRST RESPONDENT'S SUBMISSIONS IN SUPPORT OF OPPOSING THE GROUNDS OF APPEAL OF THE APPELLANTS

14. The First Respondent opposes the first ground of appeal. There is no absolute right to Counsel of choice under Article 17 (4) (d) of the Special Court Statute. The Trial Chamber correctly stated the law on this point.

15. The First Respondent agrees with the decision of the majority of the Trial Chamber on the Motion for the Re appointment of Counsel and, in particular, paragraphs 41 to 47 as a correct statement of the law that there is no absolute right to Counsel of their own choosing.[1]

16. It should also be pointed out that the Accused in their Original Motion[2] at paragraph 21 stated "The Defence submits that even though it recognizes that Article 17 (4) (d) cannot be construed as vesting in accused persons an absolute right to be assigned counsel of their own choice ...".

17. The Principal Defender must take into account Rule 45(C) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (The Rules) which requires the Principal Defender to provide qualified Counsel who will provide an *effective defence*[3] before deciding whether to accept a request by an accused for Counsel.

18. The majority decision of the Trial Chamber, at paragraph 47 of the Decision on the Re-Appointment of Counsel, restated the finding of the majority decision of

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[1] Decision on the Extremely Urgent Confidential Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara and Decision on Cross Motion by Deputy Principal Defender to Trial Chamber 11 for Clarification of its Oral Order of 12 May 2005.

[2] Extremely Urgent Confidential Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara Pursuant to Articles 17(4) (C) and 17(4) (D) of the Statute of the Special Court for Sierra Leone and Rule 54 of the Rules of Procedure and Evidence and the Inherent Jurisdiction of the Court.

[3] Rule 45 (C) "The Principal Defender shall, in providing an effective defence, maintain a list ..."

the Trial Chamber of 12 May[4] on the application for withdrawal of Counsel that "Lead Counsel with their present difficulties would not be capable of acting in the best interests of their clients". This is clearly a matter that would need to be taken into consideration in the assignment of Counsel in the trial by the Principal Defender, and that finding should be considered in deciding on the request of the accused for Counsel of their choice.

19. In this case Counsel, Mr. Harris and Mr. Metzger, had both applied to withdraw from the trial on the basis that they were not receiving full instructions from the accused and that they had received unspecified threats. Based upon this information the majority of the Trial Chamber allowed Counsel to withdraw from the trial stating that Counsel were not able to represent their clients to the best of their ability.[5]

20. In these circumstances the Principal Defender acted reasonably within his powers under Rule 45 (C) of The Rules in refusing the request for the re-appointment of Counsel by the accused, particularly where there were no new circumstances which would override the observations of the Trial Chamber as to the ability of Counsel to effectively defend the accused.

21. The comments apparently made by the accused, that they were now willing to give full instructions, is not a matter that the Principal Defender could reasonably accept as the accused had withdrawn instructions before and may do so again as they wish. This is a matter which is out of the control of the Principal Defender and as such these statements cannot be treated as reliable.

22. The accused have a remedy under Article 12 of the Directive on the Assignment of Counsel if they were not happy with the decision of the Principal Defender.

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[4] Decision on the Confidential Joint Defence Application for Withdrawal by Counsel for Brima and Kamara and on the Request for Further representation by Counsel for Kanu.
[5] Paragraph 60 of the Decision on the Motion for Withdrawal by Counsel "We doubt that they would be able to represent their clients to the best of their ability ..."

This by implication recognizes that choice of Counsel by the accused may be refused by the Principal Defender.

23. The second ground of appeal is opposed. The Trial Chamber does not have power to force parties to enter into a contract. The Trial Chamber only has power to order parties to enter negotiations to enter into a contract and that the Principal Defender conducts those negotiations within the powers granted to him under legislation.

24. It is submitted by the First Respondent that the Trial Chamber will have power to review an administrative decision of the Registrar and, in this case, the Principal Defender, as it affects the right to fair trial of the accused under Article 17 (4) (d) of the Statute of the Special Court. The right must affect a real issue of the right to a fair trial, such as in this case, the assignment of Counsel who can provide an effective defence and not some issue vaguely connected to the right of fair trial.

25. However, that right of review is not absolute but founded in restrictive terms as stated by Lord Brightman in Chief Constable of the North Wales Police v. Evans [1982] 3 All ER 141 at154 (paragraph d) HL,

> "Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be guilty of usurping power".

In other words the Trial Chamber cannot simply overrule the decision of the Principal Defender because it disagrees with it.

26. The right of review must also give full authority to the Principal Defender's powers under the legislation and not be used as a means of overruling a decision with which the parties or even the Trial Chamber disagree. As long as the

Principal Defender acted reasonably within his powers, the Trial Chamber cannot not interfere with the decision.

27. The Trial Chamber therefore can only direct the Principal Defender on the decision making process and not direct the Principal Defender to enter into a contract. The Trial Chamber cannot ignore or override all the matters the parties must consider upon entering a contract, such as availability of counsel and agreement on payment and all the other requirements under the Directive on the Assignment of Counsel and the Contract Specifications document. To do so would in effect be making the decision for the Principal Defender.

28. The Trial Chamber may direct the Principal Defender to enter negotiations for a contract if it decides that the Principal Defender has acted outside his powers in refusing to enter contractual negotiations with Counsel, but it cannot simply order the Principal Defender to enter a contract.

29. The Appellants seek to rely on the case of *Prosecutor v. Alex Tamba Brima, Case No. SCSL-04-16-PT* of 6 May 2004 as authority for the proposition that the Trial Chamber can order the Principal Defender to enter into a contract. However that was a case where a provisional agreement had been reached with Counsel to represent an accused, but where the Principal Defender withdrew Counsel's appointment to represent the accused and required him to undergo a medical review. The purpose of the medical review was to assess Counsel's continuing ability to represent the accused effectively. The Trial Chamber found that the Principal Defender did not have power to order Counsel to undergo a medical review and thus ordered that the Legal Services Contract be entered.

30. However, all the other considerations for the contract had been agreed to prior to this dispute and the only issue left was the request for a medical review. Once the Trial Chamber had found that the Principal Defender did not have that power to request the medical review it in effect completed the contractual negotiations.

31. If this factual analysis is compared to the factual situation in this current appeal where there had been no contractual negotiations, the *Brima case* cannot be considered as authority for a Trial Chamber to be able to order the Principal Defender (or the Registrar) to enter a contract with those Counsel who were seeking to be re-appointed.

32. It is also respectfully submitted that the Trial Chamber in the *Brima case* was decided incorrectly, in that it did not recognize the discretion of the Principal Defender provided for under Rule 45 (C) of The Rules, which states that,

> "The Principal Defender shall, in providing an effective defence, maintain a list of highly qualified criminal defence counsel, whom *he believes are appropriate* (emphasis added) to act as duty counsel or to lead the defence of an accused".

33. The Rule then sets out conditions that must be met, and as in addition, some additional conditions are set out in Article 13 under the Directive on the Assignment of Counsel. But it is submitted that they are not exclusive conditions and that Rule 45 (C) allows, within the lawful exercise of discretion by the Principal Defender, other conditions to be applied. Conditions such as the state health of Counsel must surely be considered by the Principal Defender even though not stated specifically in The Rules and the Directive on the Assignment of Counsel.

34. It is the First Respondent's submission that the law in relation to the exercising of a discretion is as stated in Halsbury Laws of England 4th ed. Vol.1(1) under Administrative Law. Paragraph 76 states;

> "In some statutes, some or all of the relevant considerations may be express, where the statute is silent or the express considerations are not exhaustive the

courts will determine whether any particular consideration is relevant or irrelevant to the exercise of the discretion by reference to the implied objects of the statute".

It is the First Respondent's submission that the objective of The Rules and the Directive on the Assignment of Counsel is to ensure that the accused receives an "effective defence" as stated in the first line of Rule 45 (C)[6].

35. By reference to the objective of the Rule, such matters as the reputation for competence and integrity of Counsel, the state of health of Counsel, such that Counsel can effectively defend the accused as was unfortunately evidenced with the subsequent death of the Counsel who had refused the request for a medical examination in the *Brima Case,* which resulted in disruption to the trial and to the effective defence of the accused may be considered. Also to be considered is whether Counsel have a security problem which would not enable Counsel to effectively defend the accused and also might present a security problem for the court and its personnel. All these matters are highly relevant considerations for the Principal Defender in the exercise of his discretion of under Rule 45 (C), even though not specifically mentioned in The Rules or the Directive on the Assignment of Counsel.

36. It is respectfully submitted that the Trial Chamber in the *Brima Case,* did not recognize the discretion the Principal Defender has under Rule 45 (C) and also failed to consider the objective of Rule 45 (C) and the Directive on the Assignment of Counsel in considering how the discretion of the Principal Defender under the Rule should be applied (see paragraphs 84 to 99 of the decision in the *Brima Case*). It is submitted therefore that The Trial Chamber misapplied the law and made an error in determining that the Principal Defender could not request a medical examination. As a result it exceeded its authority to

[6] Rule 45 (C) "The Principal Defender shall in providing an *effective defence,* maintain ..."

intervene in an administrative decision (see Evans Case) made by the Principal Defender in directing the Principal Defender to enter a contract with Counsel.

37. In summary, it is the First Respondent's submission that the Trial Chamber in the B*rima Case* in deciding not to recognize the discretion of the Principal Defender under Rule 45 (C) under which authority the Principal Defender lawfully acted, incorrectly applied the law and therefore the decision should not stand as good authority on the legal basis upon which a Trial Chamber can to intervene in an administrative decision made by the Principal Defender on the assignment of Counsel.

38. The third ground of appeal is opposed. The right to a hearing in an open Court is not absolute and reasons must be presented to the Trial Chamber as to why there should be an open Court hearing and the appellants failed to do so. Further the request for a public hearing was incorrectly pleaded and the Trial Chamber therefore did not have the power to consider the application.

39. The first point to be made is that the application to have the proceedings in open Court was made in the Reply to the Response of the First Respondent and as such gave no opportunity to the Respondent to reply. The decision of the majority of Trial Chamber rightly took this point.[7]

40. It therefore follows that there was not a proper application for a hearing under Rule 73 of The Rules for a hearing in open court.

[7] Paragraph 25 of the Majority Decision on the Application for Re-Assignment of Counsel, "We again note that Counsel have made an application for further relief in a Reply. We repeat what was stated by this Trial Chamber in the Decision on the Joint Defence Motion on Disclosure of all Witness Statements, interview Notes and Investigators' Notes Pursuant to Rule 66 and / or 68 (4 May 2005); "This is a practice that must be discouraged. A Reply is meant to answer matters raised by the other party in its Response, not to claim additional relief to that sought in the Motion. Obviously the other party, having already filed a Response to the Motion, has no way under the Rules to answer the new prayer, except to apply to the Trial Chamber for leave to do so. In future, the Trail Chamber will not hear claims for additional relief contained in a Reply".

41. It was also pointed out in the majority decision of the Trial Chamber that there were no arguments put forward to persuade the Trial Chamber to hold the hearing in open Court and as such there was nothing before the Trial Chamber to consider.

42. The Trial Chamber could have decided for itself to have a hearing in open Court but chose not to in the exercise of its discretion. There are no arguments submitted by the Appellants to suggest that the majority decision of the Trial Chamber inappropriately exercised this discretion.

43. The fourth ground of appeal is opposed. The majority decision of the Trial Chamber correctly stated that the application was confusing and at no time was it argued by the Appellants why the Trial Chamber should make an order under Rule 54 and instead it argued the application of Rule 45.

44. The Original Motion for Re-Assignment of Counsel itself was headed as an application under Rule 54 but at no point in the Motion did the Appellants argue the basis of the application under Rule 54 and how it should be applied. Instead the Motion argued primarily the rights of the choosing of Counsel under Article 17 (4) (d) and assignment of Counsel under Article 45 of The Rules.

45. The majority decision of the Trial Chamber on the Motion for the Re-Assignment of Counsel was therefore well within its rights to make the comment at paragraph 49 of the majority decision that "... it is unclear on what legal grounds this application is made".

46. If there was confusion, it was caused by the unclear pleading of the Appellants and they cannot now complain that the Trial Chamber did not consider the basis of their argument under Rule 54 of the Rules. The Trial Chamber cannot be asked to "second guess" what the Appellants applications were in its Motion on the Re-Assignment of Counsel.

47. The fifth ground of appeal is opposed. The majority decision of the Trial Chamber correctly stated that the Motion was a "backdoor" attempt to review the original order of the Trial Chamber in allowing Counsel to withdraw. It never was a separate application from the Original Motion of Withdrawal of Counsel

48. It is the submission of the First Respondent that the majority decision of the Trial Chamber on the Motion for the Re-Assignment of Counsel at paragraph 50 correctly states;

> "It appears that this application in reality is simply an application to reverse a majority decision by the Trial Chamber on 12 May 2005 because in that decisional relief prayed for was granted to Counsel. A decision upholding the submissions made and granting the relief prayed for could hardly be appealed."

49. The Appellants argued in their Motion for Re-Assignment of Counsel that the conditions upon which the order of 12 May by the Trial Chamber allowing Counsel to withdraw had now changed. It was stated that Counsel were now (not less than a few days after their application) not so concerned about those security issues which they had raised in their application to the Trial Chamber for withdrawal. However, they provided no evidence to support that alleged change in circumstances They also indicated that the accused were now prepared to give full instructions.

50. It can reasonably be concluded from the presentation of these arguments that this application was focused entirely on the original application by Counsel to be allowed to withdraw and a "back door" attempt to reverse the subsequent Order. The Motion for the Re-Assignment of Counsel had nothing to do with any separate application on the assignment of Counsel.

51. It is the First Respondent's submission that the Motion was simply an attempt to reverse the order of the Trial Chamber of 12 May by means other than an appeal against the majority decision of the Trial Chamber and that the Trial Chamber correctly identified it as such.

52. The sixth ground of appeal is opposed. The majority decision of the Trial Chamber correctly stated the fact that Counsel were no longer on the list of qualified counsel and therefore could not order that they be re-appointed as counsel.

53. The Trial Chamber by a majority decision made an order allowing Counsel, Mr. Metzger and Mr. Harris, to withdraw from the trial. At that moment Counsel were no longer contracted to represent the accused.

54. Counsel however remained on the List of Qualified Counsel and a decision was taken subsequently by the Acting Registrar to remove both Counsel on the basis of unresolved security concerns that had been raised by Counsel in their application to withdraw. No attempt had been made by Counsel to seek the assistance of the Registrar to deal with these security issues and, in fact, they had indicated to the Trial Chamber that they did not wish to disclose the sources of the threats.[8]

55. The Appellants filed a Motion for the Re-Assignment of Counsel but this was neither an application to vary the Order of 12 May or to have it rescinded, nor was it an appeal against the Order of 12 May. In those circumstances the Order of 12 May stands as a valid order upon which the Registrar can act.

[8] See paragraph 6 of Decision on the Confidential Joint Defence Application for Withdrawal by Counsel for Brima and Kamara and on the Request for Further Representation by Counsel for Kanu. "Lead Counsel say that these threats were communicated to both Counsel from different sources and that 'due to the nature of these threats Counsel do not wish to reveal the said sources'."

56. The Registrar is entitled to act immediately upon his authority and discretion to seek the removal of Counsel from the List of Qualified Counsel if their appointment would raise concerns for the security of the court and the personnel within it, particularly where those Counsel have refused to disclose the source of threats which may affect the personal safety of all other court users.

57. The seventh ground of appeal is opposed. The Justices of the majority decision acted within their authority and there are no grounds upon which to seek that they recuse themselves.

58. The Registrar pursuant to his powers under Rule 33(B) of The Rules is entitled to;

> "...make oral or written representations to Chambers on any issue arising in the context of a specific case which affects or may affect the discharge of such functions, including that of implementing judicial decisions ...".

The Rule by implication suggests that Chambers can make comments on the matters raised by the Registrar with Chambers pursuant to this Rule.

59. The Registrar's representations to Chambers in the case of the withdrawal of Counsel, was to clarify and inform himself of the views of the Trial Chamber on the order it made on 12 May and was pursuant to his powers under Rule 33(B). He was not seeking to be directed by the Trial Chamber. The Trial Chamber is entitled to express the view that Counsel who have withdrawn from the case should not to be re-assigned, in compliance with an order to that effect made by the Trial Chamber.

60. It is also submitted that courts have the power to intervene in matters affecting the fair trial of the accused by virtue of Article 17 (4) (d) of the Statute of the Special Court. The Trial Chamber in this matter was therefore well within its rights and, indeed exercising its responsibilities, when it expressed its view on the attempt to

have Counsel re-assigned in contravention of the order allowing the withdrawal of Counsel. The Trial Chamber had already found that the Counsel who had been allowed to withdraw were not in a position to properly defend the accused. It would therefore be in the interests of the right to a fair trial for the accused that the Trial Chamber indicated to the Registrar, following his representations pursuant to Rule 33(B), that it would not accept a re-assignment of these Counsel as specific findings had already been made on the ability of these Counsel to properly defend the accused.

61. The Trial Chamber did not express a view on who, specifically, should be appointed as Lead Counsel. The actions of the Trial Chamber in expressing its view that the Counsel who withdrew should not be reappointed was in defence of the right of fair trial of the accused which is within its inherent power and in defence of the order it had made allowing Counsel to withdraw and, as such, no perceived bias, or interference with the rights of the accused is evidenced.

62. The Registrar must make his own decision and at no stage did the Trial Chamber direct that the Registrar should not re-assign Counsel. However, the Registrar correctly observed that in the end the Trial Chamber must have a say if not the final say, that is, in any proceedings brought in this matter, which did in fact occur. The Registrar was entitled to take the comments of the Trial Chamber into account when he made his decision to direct the Principal Defender not to re-appoint Counsel, but that was his decision, not the Trial Chamber's decision.

63. The Trial Chamber and the Registrar have acted within their statutory and inherent powers and in these circumstances there can be no legal issues of ultra vires, perceived judicial impropriety, potential bias and conflict of interest and the potential compromise of fair and impartial conduct of the trial.

64. The appellants seek to rely on the minority opinion of Justice Sebutinde. The First Respondent submits that it is inappropriate to rely on the decision of Justice

Sebutinde. It is clear from the Decision on the Application for Leave to Appeal filed on 5 August; specifically the attached comments of Justice Doherty, that there is a considerable dispute as to the facts of what occurred in Chambers between the Justices of the Trial Chamber that are relied upon in the minority opinion of Justice Sebutinde. The situation faced by the litigants is that the factual basis of Justice Sebutinde's opinion are disputed by another Justice of the Trial Chamber and those factual issues would need to be resolved before any assessment of bias and the other matters raised by Justice Sebutinde could be relied upon.

65. It is the submission of the First Respondent that in these circumstances it is not possible for the Appellants, the Respondents or the Appeal Chamber to seek to rely on the minority opinion of Justice Sebutinde.

CONCLUSION

67. That the Appeals be dismissed and that Reliefs (ii) to (vi) be refused by the Appeal Chamber.

Filed this 12th day of September 2005.

In Freetown

Robin Vincent
First Respondent and Registrar

LIST OF AUTHORITIES

Chief Constable of the North Wales Police v. Evans [1982] 3 All ER 141, 153-154 HL per Lord Brighton,

Prosecutor v. Alex Tamba Brima, Case No. SCSL-04-16-PT Brima – Decision On Applicant's Motion Against Denial By The Acting Principal Defender To Enter A Legal Service Contract For The Assignment Of Counsel of 6 May 2004

Halsbury Laws of England 4th ed. Vol.1(1) under Administrative Law. Paragraph 76.

Fox LJ said:

> 'Nevertheless, it does not seem to me that a case of prejudice has been disclosed. It is perfectly true that Mr and Mrs Langdale have spent money on costs in pursuing the order they obtained for specific performance. That is a matter which, it seems to me, goes only to costs and not to substance, and I think the matter can be dealt with by considering the question of costs separately.'

My Lords, with all respect, I cannot agree with any of the reasons suggested for holding that the conduct of Mr Danby's case before Oliver J and in particular the admission that no impropriety was attributed to Mr Langdale did not estop Mr Danby from alleging, nearly two years later, that the judgment of Oliver J could be reversed on grounds which were not taken before Oliver J and which directly accused Mr Langdale of improper conduct as a solicitor. In this context, I confess I simply do not understand the distinctions sought to be drawn by Dunn LJ between the conduct of the case before Oliver J and Mr Danby's subsequent delaying tactics or between the grant of leave to appeal out of time and the decision of the appeal itself, or that drawn by Fox LJ between matter going to costs and matter going to substance.

As I see it the direct result of the conduct of Mr Danby's case before Oliver J was to permit the Langdales to obtain summary judgment. They then spent nearly two years in time and a great deal of money in costs in the course of enforcing that judgment. True it is that part, but part only, of the costs so incurred could be and were set off against the balance of the purchase price of the cottage due to Mr Danby, probably Mr Danby's only significant resource. But now, if the Court of Appeal judgment were to stand, the Langdales would face a full scale trial against a legally-aided defendant in which, though they succeeded, they would have little prospect of recovering any of their costs. Looking at this history in a commonsense way, it seems to me beyond argument that the Langdales will have acted to their detriment, on the faith of the conduct of Mr Danby's case which enabled them to obtain summary judgment, by spending large sums to enforce that judgment, if they are now denied the benefit of it by allowing Mr Danby to set up a case which conflicts radically with the case presented on his behalf before Oliver J. Independently of any other ground I would, therefore, hold Mr Danby estopped from arguing the case on which he succeeded in the Court of Appeal.

My Lords, for all these reasons I would allow the appeal, set aside the order of the Court of Appeal and restore the judgment of Oliver J. Bearing fully in mind the recent observations of your Lordships' House, in *Din v Wandsworth London Borough Council (No 2)* [1982] 1 All ER 1022, [1982] 1 WLR 418, this seems to me, subject to any submissions advanced on behalf of the Law Society for which the usual opportunity should be provided, pre-eminently a case where it would be just and equitable to order the costs of the Langdales in the Court of Appeal and this House to be paid out of the legal aid fund pursuant to s 13 of the Legal Aid Act 1974.

LORD BRIGHTMAN. My Lords, I also agree with the speech of my noble and learned friend Lord Bridge and would allow this appeal.

Appeal allowed.

Solicitors: *Warren, Murton & Co*, agents for *Stamp, Jackson & Procter*, Hull (for Mr and Mrs Langdale); *Lake, Parry & Treadwell*, agents for *John Bosomworth & Co*, Leeds (for Mr Danby).

Mary Rose Plummer Barrister.

Chief Constable of the North Wales Police v Evans

HOUSE OF LORDS

LORD HAILSHAM OF ST MARYLEBONE LC, LORD FRASER OF TULLYBELTON, LORD ROSKILL, LORD BRIDGE OF HARWICH AND LORD BRIGHTMAN

21, 22 JUNE, 22 JULY 1982

Police – Dismissal – Constable – Probationer constable – Chief constable deciding to dispense with services of constable on basis of certain allegations and rumours – Constable informed that if he did not resign he would be dismissed – Constable not given opportunity to refute allegations and rumours – Whether chief constable having absolute discretion to discharge constable – Whether chief constable required to observe rules of natural justice before exercising discretion – Police Regulations 1971, reg 16(1).

Judicial review – Availability of remedy – Mandamus – Wrongful dismissal of police constable – Rules of natural justice not observed in dismissal procedure – Impractical to order reinstatement – Whether mandamus should be issued requiring constable to be reinstated – Whether constable merely entitled to declaration that he was entitled to rights and remedies not including reinstatement.

The respondent was a probationer constable undergoing training with a police force. He received good reports on his progress from his instructors who stated that there was no reason to doubt his becoming a reliable and competent constable. However, during his probationary period, certain rumours started concerning his private life. Those rumours were largely unfounded but, following inquiries made by the respondent's superiors, the chief constable believed them to be true and decided to dispense with the services of the respondent under reg 16(1)[a] of the Police Regulations 1971, which provided for the discharge of a probationer constable if the chief constable considered 'that he [was] not fitted . . . to perform the duties of his office or that he [was] not likely to become an efficient or well conducted constable'. The chief constable did not put to the respondent the allegations and rumours on which he based his decision nor did he offer the respondent an opportunity to offer any explanation, but he informed him that if he did not resign he would be discharged. The respondent resigned and began proceedings against the chief constable seeking (i) an order of certiorari to quash the chief constable's decision that the respondent should resign or be discharged, (ii) an order of mandamus requiring the chief constable to reinstate the respondent to the office of police constable, and (iii) a declaration that the chief constable's decision requiring the respondent to resign or be discharged was illegal, ultra vires and void. In an affidavit sworn in the proceedings, the chief constable asserted that reg 16(1) gave him an absolute discretion to dispense with a probationer constable's services. The judge held that the decision of the chief constable did not accord with the standards of fairness that should have been observed, but that no relief should be granted except in regard to costs. The respondent appealed in order to obtain substantive relief. The chief constable cross-appealed. The Court of Appeal confirmed the conclusion of the judge but added a declaration that the decision of the chief constable requiring the respondent to resign or be dismissed was void. The chief constable appealed.

Held – (1) It was plain from the wording of reg 16(1) of the 1971 regulations that the

a Regulation 16(1), so far as material, provides: '. . . during his period of probation in the force the services of a constable may be dispensed with at any time if the chief officer of police considers that he is not fitted, physically or mentally, to perform the duties of his office, or that he is not likely to become an efficient or well conducted constable.'

power of a chief constable to dispense with the services of a probationer constable was not an absolute discretion, but was to be exercised only after due consideration and determination of whether the constable was fitted to perform the duties of his office or was likely to become an efficient and well conducted constable. The chief constable's decision to force the resignation of the respondent was vitiated by his erroneous assumption that he had an absolute discretion and by his total failure to observe the rules of natural justice in not giving the respondent the opportunity to refute the allegations on which the chief constable relied (see p 144 *b* to *j*, p 145 *e f*, p 146 *h j*, p 147 *a* to *e* and p 154 *a b* and *g* to p 155 *b*, post); dictum of Lord Reid in *Ridge v Baldwin* [1963] 2 All ER at 72 followed.

(2) On the question of the appropriate remedy, the respondent was entitled at least to a declaration that the chief constable had acted unlawfully and in breach of his duty under reg 16 of the 1971 regulations. However, although an order of mandamus to reinstate the respondent was the only satisfactory remedy in consequence of that breach of duty, to make such an order would be impractical and might border on a usurpation of the powers of the chief constable by the court and therefore the court would restrict itself to issuing a further declaration affirming that, by reason of his unlawfully induced resignation, the respondent thereby became entitled to the same rights and remedies, not including reinstatement, as he would have had if the chief constable had unlawfully dispensed with his services under reg 16 (see p 146 *g h*, p 147 *a b* and *h* to p 148 *d*, p 155 *h j* and p 156 *a d e* and *g*, post).

Per curiam. Judicial review is not an appeal from a decision but a review of the manner in which the decision was made, and therefore the court is not entitled on an application for judicial review to consider whether the decision itself was fair and reasonable (see p 143 *h*, p 144 *a*, p 146 *h*, p 147 *a b*, p 154 *c* and p 155 *c d*, post).

Per Lord Hailsham LC and Lord Bridge. A chief officer of police who is contemplating dispensing with the services of a probationer constable under reg 16 may delegate the investigation of a specific complaint to a suitable subordinate but (per Lord Bridge) (i) the delegate should make clear to the constable the precise nature of the complaint and that he, the delegate, is acting on behalf of the chief officer of police to hear whatever the constable wishes to say about it, (ii) the delegate should make a full report of what the constable has said, and (iii) the chief officer himself should show the report to the constable and invite any comment on it before reaching any decision under reg 16 (see p 144 *e* to *g* and p 147 *e f*, post).

Notes

For breach of natural justice, see 1 Halsbury's Laws (4th edn) 64, and for cases on the subject, see 1(1) Digest (Reissue) 200–201, 1772–1176.

For the Police Regulations 1971, reg 16, see 17 Halsbury's Statutory Instruments (3rd reissue) 278.

Cases referred to in opinions

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA, 45 Digest (Repl) 215, 189.

Ridge v Baldwin [1963] 2 All ER 66, [1964] AC 40, [1963] 2 WLR 935, HL, 37 Digest (Repl) 195, 32.

Appeal

Philip Meyers, Chief Constable of the North Wales Police, appealed with leave of the House of Lords granted on 13 January 1982 against the order of the Court of Appeal (Lord Denning, MR, Shaw and Ackner LJJ) dated 21 December 1981 in so far as the Court of Appeal (i) allowed an appeal by the respondent, Michael John Evans, against the decision of Woolf J hearing the Divisional Court list on 23 March 1981 whereby he refused to make an order save as to costs on the respondent's application for judicial review by way of orders for certiorari and mandamus and a declaration in respect of the applicant's decision of 7 November 1978 requiring the respondent to resign or be dismissed from the North Wales Police Force, (ii) dismissed the appellant's cross-appeal, and (iii) declared that the appellant's decision of 7 November 1978 was void. The facts are set out in the opinion of Lord Brightman.

Martin Thomas QC and *Alexander Carlile* for the chief constable.
Roger Gray QC and *Michael Jefferis* for the respondent.

Their Lordships took time for consideration.

22 July. The following opinions were delivered.

LORD HAILSHAM OF ST MARYLEBONE LC. My Lords, the analysis of the facts and argument contained in the speech of my noble and learned friend Lord Brightman, which I have read in draft, relieve me of much of the labour in this case, and enable me to reduce the few observations I wish to make to reasonably concise proportions. I desire, however, to say at the outset that I agree with every word which is about to fall from my noble and learned friend as to the treatment to which this young respondent has been subjected by the chief constable. Like my noble and learned friend, I do not doubt the chief constable's good faith, but in the result, partly as the result of muddle, partly as the result of a false view of the law, and partly as the result of a disregard of the elementary principles of natural justice, I regard the treatment meted out to this young man as little short of outrageous.

Briefly, the proceedings originated in an application by the respondent for judicial review under RSC Ord 53 of a decision by the appellant (then Chief Constable of the Police Force of North Wales) whereby in November 1978 he had given the respondent, at that time a probationary constable, the option of resignation from office or dismissal on a month's notice under reg 16 of the relevant regulations. In the event, the respondent had chosen resignation, but had sought relief under RSC Ord 53 on the basis that he had been treated unfairly and in a manner contrary to natural justice.

The first observation I wish to make is by way of criticism of some remarks of Lord Denning MR which seem to me capable of an erroneous construction of the purpose of the remedy by way of judicial review under RSC Ord 53. This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practised at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner.

Since the range of authorities, and the circumstances of the use of their power, are almost infinitely various, it is of course unwise to lay down rules for the application of the remedy which appear to be of universal validity in every type of case. But it is important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law. There are passages in the judgment of Lord Denning MR (and perhaps in the other judgments of the Court of Appeal) in the instant case and quoted by my noble and learned friend which might be read as giving the courts carte blanche to review the decision of the authority on the basis of what the courts themselves consider fair and reasonable on the merits. I am not sure whether Lord Denning MR really intended his remarks to be construed in such a way as to permit the court to examine, as for instance in the present case, the reasoning of the subordinate authority with a view to substituting its own

opinion. If so, I do not think this is a correct statement of principle. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised or enjoined by law to decide for itself a conclusion which is correct in the eyes of the court.

In the instant case I have no doubt that the respondent was not treated fairly by the chief constable. In the first place by his own affidavit the chief constable establishes that he asked himself the wrong question, and, once this has been established, for the purposes of judicial review, that by itself is surely enough to vitiate an impugned decision which is not otherwise self-evidently justified. The relevant regulation enjoined the chief constable to consider whether the respondent was 'fitted physically or mentally to perform the duties of his office' or was likely to 'become an efficient or well-conducted constable' before dispensing with his services. In his affidavit the chief constable claimed that this regulation 'gives me an absolute discretion to dispense with a probationer's services'. In my opinion the discretion, although wide, is not absolute. The chief constable should have directed his mind to the criteria laid down in the regulation in accordance with the appropriate principles of natural justice. He did not do so, and I think it only too likely that it was precisely the belief that his discretion was absolute which led to the cavalier treatment to which, in the event, the respondent was subjected.

To this treatment I now come. Once it is established as was conceded here, that the office held by the chief constable was of the third class enumerated by Lord Reid in *Ridge v Baldwin* [1963] 2 All ER 66 at 72, [1964] AC 40 at 66, it becomes clear, quoting Lord Reid, that there is 'an unbroken line of authority to the effect that an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation'. I regard this rule as fundamental in cases of this kind when deprivation of office is in question. I agree with the chief constable's affidavit that 'a formal hearing' may well be unnecessary if by that is meant an oral hearing in every case held before the chief constable himself. But this does not dispense a chief constable from observing the rule laid down by Lord Reid. It may well be also that part or all of the inquiry on the facts may be delegated to a subordinate official, as was done here by the chief constable to the deputy chief constable, though, where this is done, the ultimate decision must not be delegated, and in my view, common prudence should dictate that the report by the delegated officer, in this case the deputy chief constable, or at least its susbstance, should be shown to the officer the subject of review and an opportunity afforded him to comment on it before the final decision is taken by the chief constable himself. This was not done here. Moreover, where there has been delegation, the delegated inquiry itself must be conducted in accordance with Lord Reid's rule, and, where it is not, the ultimate decision, even if not delegated, will almost certainly be vitiated.

Apart from his self misdirection on the scope of his discretion, in the present case the chief constable clearly admitted in his affidavit that he had taken into account matters concerning the domestic life of the respondent, some of which, if properly put to the respondent, might perhaps, after his explanation had been given and heard, have influenced the decision as to whether the respondent was likely to become an efficient or well-conducted constable. But some of the allegations were plainly erroneous and none, whether erroneous or otherwise, was ever put to the respondent at all in connection with the relevant inquiry, whether at the delegated hearing or otherwise. Moreover, it was conceded by counsel for the chief constable that, at the time of the extremely brief interview at which the decision was made by the chief constable, the chief constable had already made up his mind to dispense with the respondent's services on the basis of the report made to him by the deputy chief constable, and the respondent was given no chance to say anything by way of denial of the facts alleged in the report or in mitigation of them.

As an example of the extreme danger of proceeding in this way, it must be observed, that, as one of the two clinching matters which seem to have influenced him, the chief constable says in his affidavit:

> 'Further, it became known (sic) to Senior Officers that the Applicant and his wife had lived a "hippy" type lifestyle at Tyddyn Mynyddig Farm, Bangor.'

This had never been put to the respondent at all, and had the chief constable or his deputy to whom he delegated the inquiry taken the trouble to ask the respondent about it, he would have discovered at once that this allegedly clinching allegation was palpably untrue, and simply the result of a mistaken address. It was, in short, an utterly incorrect statement relied on precisely owing to the failure of natural justice of which complaint is made.

There is room for greater controversy regarding the other matter supposedly clinching. There was a finding by the deputy who conducted the inquiry that the respondent had 'deliberately flouted' the conditions of tenancy at his council house by keeping dogs in excess of the number permitted by the council and that this exhibited an attitude to authority improper in a member of the police force. This matter had indeed been put to the respondent in some form, but there is a conflict of evidence relating to the interview, of which only the respondent's version is on oath. Without seeking to resolve this conflict, I am of the opinion that natural justice required that it should have been put precisely to the respondent that exact compliance with the conditions of tenancy within the extended time permitted by the council, which at the time of the interview had not yet expired, would probably be a condition of his continuance in office as a probationary constable. It is clear that this was not done and it is fair to the respondent to say that he deposed on oath that, had it been put in this way, 'I would have disposed of the dogs'. Without going into this conclusively, I must express doubt whether, on a fair view of the evidence, the chief constable, had he applied his mind at all to the correct criteria, or to the evidence available to him in his file, or had he given the respondent a chance to speak, could possibly have come to the conclusion that the facts relating to this aspect of the matter betrayed an attitude to authority inconsistent with the view that he could at the conclusion of his probationary period become an efficient or well-conducted constable, or that the respondent was in any sense deliberately flouting authority. However this may be, the decision of the chief constable was, it seems to me, vitiated beyond repair partly by the fact that the chief constable does not appear to have directed his mind to the correct criteria laid down in the regulations, and partly by the fact that he certainly took into account matters which were never put to the respondent in connection with the relevant inquiry, one of which, and not the least important, had it been put, would have been immediately exposed as nonsense.

Like my noble and learned friend, I find much more difficulty in deciding the order which it is appropriate for the House to make in a case such as the present. In *Ridge v Baldwin* [1963] 2 All ER 66, [1964] AC 40, a majority of the House, in not dissimilar circumstances, granted a declaration that the decision of the watch committee was 'void'. This was the language adopted by the Court of Appeal in the instant case. Personally, I find difficulty in applying the language of 'void' and 'voidable' (appropriate enough in situations of contract or of alleged nullity of marriage) to administrative decisions which give rise to practical and legal consequences which cannot be reversed. Under pressure, which I have considered to be inappropriate and unfair, the respondent, nearly four years ago, was compelled to resign as an alternative to dismissal from office. That was in November 1978. He was then a probationary constable with ten months of service to run. I am inclined to think that his decision, though made under duress, to pursue the option of resignation did put an end to the tenure of his office as a constable. If so, a declaration simply to declare void the decision of the chief constable to offer the respondent a Hobson's choice between resignation and dismissal is a mere brutum fulmen without practical consequences. This may be illustrated by asking a number of quasi rhetorical questions. If the decision was 'void', has the respondent been a constable in the police force in North Wales in the intervening four years and what has happened to the ten months of uncompleted probationary service? Since the only decision removing him from office was the decision now impugned has he now become an established constable? Has he acquired pension rights? Is he entitled to back pay? The

respondent has moved house. We are told that he has found other, though less rewarding, employment in the Civil Service. Can we simply put the clock back as if nothing has taken place? Presumably the respondent has lost much of his training and experience. If he returned, and if he is still a probationary constable, he would still be subject to reg 16 and the possibility, after a fair inquiry, of dismissal on a month's notice. It might well be thought that after what has happened it might be considered by the new chief constable that the respondent could not become an efficient constable or at least not without further training. His counsel said that, if reinstated, he would apply for a transfer to another force. But what possible guarantee have we that another force would now have him, or that the transfer would be in the public interest if it did? These would be matters for the relevant authority. The respondent has not sought damages, which, in my view, might well have proved substantial, and, though the chief constable stated to us that he would be prepared to pay compensation if the appeal went against him on the merits, even in the face of this, the respondent through his counsel, firmly stated that he was not interested in money and simply wanted 'reinstatement' whatever that might mean. This problem did not arise in *Ridge v Baldwin* where the chief constable did not seek reinstatement, and was content with a declaration and his pension rights.

Are we then to leave the respondent wholly without remedy without spelling out the consequences? In that case, the order of the Court of Appeal stands and the decision of the chief constable is declared 'void' without spelling out what this means. It would be possible, of course, simply to quash the decision of the appellant as in the old writ of certiorari. But this, too, would leave the parties without a clue as to their present position or any direction as to their future conduct. But what the respondent wishes is reinstatement. There is no cross appeal, but it must be within the power of your Lordships' House to vary the order of the Court of Appeal. My own belief is that this would have been pre-eminently a case which would have been dealt with most effectively either by re-engagement perhaps on a fresh term, which the chief constable does not offer, or by substantial monetary compensation for which the respondent does not ask. Your Lordships' House is therefore put in a position in which it is compelled to make an order within the limits of the powers given the court by RSC Ord 53 which must in any circumstances be less than satisfactory. I must confess to surprise, and, even to some degree of indignation, that, despite the offer of compensation should the tide of argument go against him, the chief constable gave no instructions to counsel to tender to the respondent the smallest expression of regret at the really extraordinary treatment meted out to him or even the most qualified offer of re-engagement in the face of the respondent's persistent desire to rejoin the force (described in much greater detail and with great restraint by my noble and learned friend). As it is, the order of the Court of Appeal cannot stand unaltered, and the best that your Lordships' House can properly do for the respondent is the course proposed by my noble and learned friend with which I now concur. Happily, the Appeal Committee, as a condition of giving leave to appeal, directed that the chief constable bear the respondent's costs of the appeal in any event.

LORD FRASER OF TULLYBELTON. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Brightman, and I agree with it.

I wish to emphasise that the only matter which I am deciding is that the process by which the chief constable reached his decision in this case was unfair in respect that the respondent was never told the reasons why his dismissal was being considered, and that he was given no opportunity of making an explanation about the matters of complaint against him. I am far from saying that, if the procedure had been fair, the chief constable would not have been entitled to reach the decision that he did. Whether the decision itself was fair and reasonable is not a matter that can be raised in the present proceedings, but, having regard to the criticisms of the chief constable's decision made by the Court of Appeal, I think it is only right to say that if he had decided, after hearing the respondent's explanations, that the respondent's conduct in marrying a woman who had been living in the same house as him on the footing that she was his aunt showed that he

was not likely to become a well conducted constable, I very much doubt whether the decision could have been said to be unreasonable.

I agree that the two declarations proposed by Lord Brightman should be made.

LORD ROSKILL. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Brightman, with which I agree and I too would dismiss the appeal.

LORD BRIDGE OF HARWICH. My Lords, the facts of this most unhappy case are fully set out in the speech of my noble and learned friend Lord Brightman. There are only certain aspects of the case on which I wish to comment.

The chief constable's decision to force the resignation of the respondent was vitiated both by his erroneous assumption that he had an absolute discretion and by his total failure to observe the rules of natural justice. The matters considered fell into two categories, first the respondent's private life and domestic circumstances, second his keeping four dogs in the council house rented for his occupation by the police authority. In the first category, because the chief constable gave the respondent no opportunity to refute the allegations against him, he acted on false information. If the truth had been established, the only matters for consideration under this head would have been that the respondent was married to a lady some fourteen years older than himself whom he had previously treated as an aunt, because she had for some years lived as man and wife, although not married, with the respondent's uncle by whom she had four children. For my part, I should regard these matters as irrelevant to the question whether the respondent was likely to become an efficient or well-conducted constable.

With regard to the dogs, I do not dissent from the view that a chief officer of police who is contemplating dispensing with the services of a probationer constable under reg 16 of the Police Regulations 1971, SI 1971/156, may delegate to a suitable subordinate the investigation of a specific complaint with a view to giving the constable a fair opportunity to meet the allegations made against him. But in the case of such delegation certain conditions should be observed. First the delegate should make clear to the constable the precise nature of the complaint and that he, the delegate, is acting on behalf of the chief officer of police to hear whatever the constable wishes to say about it. Second, the delegate should make a full report to the chief officer of what the constable has said. Third, the chief officer should himself show the report to the constable and invite any comment on it before reaching any decision under reg 16.

The evidence as to what happened with regard to the respondent's dogs is the least satisfactory part of this case. The memorandum of 6 November 1978 of the deputy chief constable exhibited to the affidavit of the chief constable contains matter which has never been verified by an affidavit of the deputy chief constable, although much of it is flatly contradicted by the affidavit of the respondent. Of the three conditions I have referred to above as necessary to the investigation of a complaint by a delegate of the chief officer of police, it is doubtful if the first two were observed. It is certain that the third was not. On the probabilities, it is hard to believe that the respondent, whose dedicated enthusiasm for a police career has never been doubted, if faced with the stark alternatives of removing three of his dogs from his council house or being dismissed from the force, would have chosen the latter.

My Lords, I agree with my noble and learned friends, the Lord Chancellor and Lord Brightman, that the most difficult problem posed by this appeal is to decide what remedy is appropriate and further that the form of declaration made by the Court of Appeal is unsatisfactory in that its practical consequences are uncertain. So far as it lies within our power, we should, above all, make clear to the parties what their respective rights and obligations are in consequence of any order to be pronounced. There is no doubt in my mind that the respondent has suffered a grievous wrong. It should not be beyond the power of the courts to provide a suitable remedy. The respondent has throughout disclaimed any interest in monetary compensation. What he seeks is reinstatement. This could only be secured by an order of mandamus requiring the present Chief Constable

of the North Wales Police to reinstate him as a probationer constable who has already completed fourteen months of his probationer service. I have no doubt your Lordships have power to make such an order and was at one time strongly inclined to think that it should be made. I know now that none of your Lordships favour such an order and it would therefore be an empty gesture for me to express a formal dissent on the point. But, that apart, I appreciate the weight of the objections to it. Great practical problems would arise in relation to his training and perhaps other matters from the fact that his service has been interrupted for nearly four years. Moreover, human nature being what it is, if the North Wales Police Force had the respondent forced on them by order of your Lordships' House as the culmination of this lengthy litigation, there would be an obvious danger that an undercurrent of ill-feeling would affect his future relations with his superiors in the force.

I am reluctantly driven to the conclusion that the best service we can render to the respondent, and indeed this is the least we should do, is to make clear to the North Wales Police Force or indeed to any other police force he may now seek to join that he emerges from this litigation with his reputation wholly untarnished, that nothing has ever been proved against him to show that he is unlikely to become an efficient and well-conducted constable, but that, on the contrary, all the formal reports on his work and training during the period of his service in 1977 and 1978 were highly favourable to him.

As regards the formal disposal of the appeal I concur in the order proposed by my noble and learned friend, Lord Brightman.

LORD BRIGHTMAN. My Lords, the issue in this case is whether the Chief Constable of the North Wales Police acted lawfully when he forced a probationer constable to resign his office; and, if not, what remedies can properly be granted to the aggrieved constable.

The matter first came before a Divisional Court of the Queen's Bench Division. It was heard by Woolf J. He came to the conclusion that the decision reached by the chief constable did not accord with the standards of fairness that should have been observed, but held that no relief should be granted except in regard to costs. The constable appealed in order to obtain substantive relief. The chief constable cross-appealed. The Court of Appeal confirmed the conclusion of the Divisional Court but added a declaration that the chief constable's decision to require the constable to resign or be dismissed was void. The chief constable now appeals to your Lordships' House.

My Lords, I will narrate the story as briefly as I can, but some detail is inevitable. In the summer of 1977 the respondent, Mr Michael John Evans, applied to join the North Wales Police. He had an unfortunate upbringing. His father, who had been in the Royal Navy, died when he was five years old. His mother suffered from ill health and was unable to look after him. In consequence, he was brought up in an orphanage until he was 16. In May 1971, when he was about 19, he had a serious motor cycle accident. He received a considerable sum of money as compensation. He was in hospital for almost a year. While there, he was visited and befriended by Miss Margaret Farey. She was a lady who had been living with his uncle for a number of years. There were four children of the liaison. The respondent believed that his uncle and Miss Farey were married. She called herself Mrs Evans and he referred to her as his aunt. At about this time, Miss Farey and the respondent's uncle parted company. After the respondent left hospital he stayed for a while with his grandmother, and later with Miss Farey. He came to know that she was unmarried but he continued to refer to her as his aunt.

The respondent went out to work. He was first first employed as a chauffeur. He then spent a year as an operating theatre technician in a hospital. This was followed by a spell of unemployment. In the autumn of 1976 he accepted an offer of a place at the University College of North Wales, Bangor, beginning in the autumn of 1976. He first lived in lodgings, but later secured the tenancy of a house on a farm near Bangor, where Miss Farey and her two younger children joined him.

The respondent's first year at the university was not a success. He did not achieve the requisite academic standard and he left. He applied to join the North Wales Police. He

was interviewed in July 1977 by Police Sergeant Morris. The police sergeant recorded the following in his suitability report:

> 'The address where the applicant resides is a house on Tyddyn Mynyddig Farm some two miles from Bangor, which his aunt rents from the owner of the farm. It is a comfortable home, clean and well cared for . . . For the past twelve months he has resided with his aunt, Mrs Margaret Evans at the farm, and it appears that she has been the one person in his life who has cared for him, and encouraged him in his studies.'

A fortnight later he was interviewed by Superintendent Ellis. Finally he had a brief interview with the chief constable, the appellant, and was accepted into the force. He was duly sworn into the office of constable on 31 August and became a probationary member of the police force for a period of two years pursuant to reg 15(2) of the Police Regulations 1971. He was then just under 25 years of age.

On 5 September he began his initial course of training at the police training centre at Cwmbran. It lasted for two months. He obtained a good report. The commandant of the centre described him as 'a very good prospect with all the attributes to develop into a reliable and competent police officer'. He then spent a month on the beat at Holyhead attached to a tutor constable. He was given a satisfactory report. During this period he gave formal notice to his divisional chief superintendent of his intention to be married to 'Miss Margaret Farey of Tyddyn Mynddig Farm' and requested police accommodation. Within a week the deputy chief constable allocated accommodation to him at Llangefni, and changed his station from Holyhead to Llangefni. The accommodation provided was a house belonging to the local council. On 26 January the respondent gave the divisional chief superintendent formal notification of his marriage. This showed that his wife was 14 years older than he.

On 31 January 1978 Police Sergeant Roberts, of the Llangefni Police Station made a report to the divisional chief superintendent. He said that as a result of various observations and various rumours spread about the police station, he had decided to make some discreet inquiries about the respondent and his wife. It is a long report. It is sufficient to pick out these items: (1) A year previously a police officer visiting the Evans' household about the absence from school of one of the children, had been introduced to the respondent as the stepson of Mrs Evans. (2) Police Sergeant Morris, who had made the suitability report, had been led to believe that Mrs Evans was the respondent's aunt. (3) The respondent's council house was untidy, poorly carpeted and furnished. (4) Despite the poor state of the house, the respondent had just bought a large car and he also owned an almost new Honda motor cycle; and there were four or five dogs in the house. (5) It was also within the police sergeant's knowledge that the respondent's referees (in the plural) described him as plausible and possibly dishonest. Inspector Yates added a footnote to the report: (6) Prior to their marriage, the respondent and Mrs Evans resided at a hippy commune at Tyddyn Mynyddig; it was believed that Mrs Evans was the sister of the respondent's mother (and therefore within the prohibited degree of relationship); and there was no proof that Mrs Evans was divorced from her previous husband (thus also indicating bigamy).

On 3 February this report was forwarded by the divisional chief superintendent to the deputy chief constable. On 8 February the divisional chief superintendent added fuel to the fire. Current information, he said, suggested that in the past the respondent had had several (query severe) financial difficulties; he was said to be plausible; and he had a medical history of chronic leg injuries.

On 9 February the deputy chief constable asked the divisional chief superintendent to interview the respondent with a view to resolving the various issues which had recently come to notice. The respondent was summoned to an interview. Superintendent Ellis attended with the divisional chief superintendent. The divisional chief superintendent gave the respondent to believe that the interview was concerned only with a discrepancy in the number of children in the family, in order to ensure that the family would obtain the full benefit of the pension arrangements.

According to the evidence, none of the various items, I am tempted to call them smears, appeared to have been brought out into the open so as to enable the respondent to put the record straight. The rumour that Mrs Evans was still the wife of the respondent's uncle, and the alternative rumour that Mrs Evans was the sister of the respondent's mother, were ultimately laid to rest by an investigation conducted by New Scotland Yard at the request of the divisional chief superintendent. A report of this investigation was made on 19 July. As to the rest of the items: (1) as regards the untidy and poorly equipped house, the respondent and his wife had only just moved in and there is uncontradicted evidence that they had not had time to get their furniture out of store and carpets fitted; (2) there is uncontradicted evidence that the respondent had suffered from no financial difficulties; (3) it was somewhat misleading to record that the respondent's referees (in the plural) had described him as plausible and possibly dishonest. The truth was that one referee, the Dean of the Faculty of Science at Bangor University had concluded his letter as follows:

> 'I believe Evans to be reasonably intelligent and, on first acquaintance, has an outgoing and fairly attractive personality. However, I should say that I doubt somewhat his plausibility. In some ways it is perhaps a minor matter but he tendered a number of excuses about his academic performance which I saw no reason to disbelieve. Quite by accident, as a result of an enquiry from his Local Education Authority, I came to discover that much of what he had said was in fact untrue. When subsequently tackled about this matter he still wished me to believe most of what he had previously told me. He therefore is either dishonest with himself and/or is willing himself to believe a situation exists when it clearly does not. I am sorry to have to report on Evans in this way because I firmly believe he has had a difficult home environment in his earlier days and I think he is deserving of some help.'

(4) The reference to the hippy commune was a most damaging error. Inspector Yates had confused the farm where the respondent lived with another locality where he had never been; (5) the respondent's leg injury had been fully disclosed in his medical report and he had completely recovered from it.

In the meantime the respondent undertook phase 1 of the headquarters training course, a traffic course, an administration course and a CID course. All reports from those instructing him were good.

To go back in time for a moment: in January 1978 when the respondent's house had been allocated to him, the respondent had called at the council's housing department to discover the council's attitude towards the keeping of domestic pets. He had four dogs. He was told that as a rule pets were not allowed, but that the council took no notice unless there were complaints. At a routine meeting with the divisional chief superintendent a little later, the respondent told him about the dogs. The divisional chief superintendent informed him that there was no problem as long as the dogs were kept under control. In the autumn of 1978, acting on information that the respondent had four dogs, a health inspector called at the house. He said that as a rule only one dog was allowed, but it appeared that no actual complaint had been made by anyone. The health inspector agreed that the dogs were well cared for and said that the health department could have no complaint. However, two days later a council official called and told the respondent that he would have to get rid of the dogs.

On 19 October Superintendent Jones of Caernarvon interviewed the respondent as a result of what he had heard about the dogs. On the next day the respondent made a written report to the divisional chief superintendent explaining his predicament. He referred to the interview with Superintendent Jones and added that at this interview he had indicated that he would try to find alternative accommodation, but the possibility of success seemed remote. The respondent handed his memorandum to Superintendent Jones who forwarded it to the divisional chief superintendent with his own covering letter. In his covering letter Superintendent Jones wrongly informed the divisional chief superintendent that prior to being moved to Llangefni the respondent and his family were living in a hippy commune at Bangor, and added that his wife continued to dress in the hippy fashion; and that all the dogs were strays. The respondent denies that his wife dressed in hippy clothes, and there is undisputed evidence that none of the dogs was a stray. Superintendent Jones added that he had told the respondent that he had the alternative of getting rid of three of the dogs or finding alternative accommodation.

On 20 October a routine assessment report was made on the respondent. This followed the pattern of earlier reports; his appearance and bearing were of high standard; in the performance of his duties he got through a great deal of work; he accepted responsibility; was considerate and firm in his attitude to the public; showed a great deal of interest; and was well liked and respected by his colleagues. Sergeant Evans, who signed the assessment, considered that he would do well in his career. Inspector Yates, who endorsed the assessment, said the respondent showed a great deal of interest and enthusiasm, and intended to establish a career for himself within the police force. It was Inspector Yates who started the damaging canard about the hippy commune. He did not repeat it. But unfortunately it had already been repeated by Superintendent Jones.

On 23 October the respondent visited the senior management officer of the local council to discuss the question of the dogs. In a letter of the same day the senior management officer wrote to the respondent requesting him to find other accommodation for the animals within the next four weeks, ie by the third week in November.

On 25 October the respondent reported to his divisional chief superintendent. He said that he had been given four weeks to leave the council house. That was not an accurate account of the council's letter, although it would come to the same thing if he adhered to his expressed intention of not parting with the dogs. The respondent said that he could see no prospect of finding suitable alternative accommodation.

On 30 October the divisional chief superintendent forwarded the memoranda of 19, 20 and 25 October to the deputy chief constable.

On 6 November the deputy chief constable interviewed the respondent. He was told that there were only two alternatives, that he 'should comply with the conditions of tenancy or that we should take other action by, eg, terminating his employment'. The deputy chief constable added in his memorandum of the interview, which he forwarded to the chief constable, that 'it was very doubtful in my view whether people who deliberately flouted conditions of tenancy were suitable to be in the police service'. Your Lordships may feel that an accusation of deliberately flouting the terms of the tenancy is an extravagant description of the respondent's conduct in the light of the clear evidence that he began with a revocable permission to keep the dogs and, though the permission was then revoked, he still had another fortnight within which to comply with the council's requirements.

On 8 November the respondent was summoned to an interview with the chief constable. He was told by the chief constable that he 'had made a mistake in accepting him and gave him the opportunity to resign as an alternative to formally dispensing with his services'. He was given no indication of the reasons for his enforced resignation. The respondent in his affidavit says this about the interview, and his account is not disputed:

> 'I asked if I could have a reason for this action but he refused outright. I was not informed of what was alleged against me nor afforded any opportunity to be heard by way of defence or explanation. I asked for time to consider and he said that I must let him know by 10 a.m. the following morning. I was not given any document recording this decision.'

As a result of the chief constable's threat, the respondent signed on 9 November a formal letter of resignation.

At the time of his enforced resignation it should be observed that the respondent still had a fortnight within which to comply with the council's requirements: that all the routine reports on his suitability as a police constable had been highly satisfactory, and likely, viewed in isolation, to lead to his being confirmed in office; and that he was due in only three weeks' time to attend a routine interview with his divisional chief superintendent pursuant to the ordinary probationary procedure.

Within a week of his enforced resignation, the respondent applied to join the Metropolitan Police. The Metropolitan Police, naturally enough, communicated with the North Wales Police. The deputy chief constable replied by letter in fairly innocuous terms. The Chief Constable of the North Wales Police also spoke personally to an assistant commissioner of the Metropolitan Police. Not surprisingly his application was rejected. It has no particular importance except to demonstrate the respondent's dedication to police work, and the then practical impossibility of his regaining acceptance into a police force.

My Lords, before I conclude this unhappy story, I must turn to the statutory provision. Regulation 16 of the Police Regulations 1971, which I need not quote verbatim, provides that during his period of probation in the force, the services of a constable may be dispensed with at any time if the chief officer of police considers: (1) that he is not fitted, physically or mentally, to perform the duties of his office; or (2) that he is not likely to become an efficient constable; or (3) that he is not likely to become a well conducted constable.

It is plain from the wording of the regulation that the power of a chief officer of police to dispense with the services of a person accepted as a probationer constable is to be exercised, and exercised only, after due consideration and determination of the specified questions. It is not a discretion that may be exercised arbitrally and without accountability.

A year went by. The respondent tried unsuccessfully to pursue a remedy before an industrial tribunal. He consulted solicitors and applied for legal aid which took some time to arrange. On 23 October 1979 his solicitors wrote to the chief constable. They indicated that he would be seeking judicial review of the decision to dispense with his services. They asked the chief constable to reconsider his decision. They also requested disclosure of various reports about him which the respondent knew, or suspected, were in existence. This request was peremptorily refused in a letter despatched by the chief constable two days later.

In early January 1980 the respondent filed the requisite statement and swore the requisite affidavit in support of his application for leave to apply for judicial review. At this time he was still unaware of the facts or supposed facts which had led the chief constable to force his resignation. So far as he was aware, there was only one matter over which any problem arose, namely, his ownership of the dogs, of which the North Wales Police were aware shortly after he took up accommodation at Llangefni. Leave was given by a Divisional Court on 29 January. On the following day the respondent issued a notice of motion seeking (1) an order of certiorari to quash the chief constable's decision of 8 November 1978, (2) an order of mandamus directed to the chief constable requiring his reinstatement, and (3) a declaration that the decision of the chief constable was illegal, ultra vires and void. On 8 May 1980 the respondent obtained a consent order for the discovery of the documents which he had requested six months earlier.

On 12 June 1980 the chief constable swore an affidavit in answer to the respondent's filed statement and affidavit. There are two important matters revealed in the affidavit. First, the chief constable asserted that reg 16(1) gave him an absolute discretion to dispense with a probationer's services. Second, in deciding as he did, the chief constable was principally concerned with three adverse factors: (1) The respondent had married a woman much older than himself; she was the former mistress of his uncle; such a marriage might give rise to some scandal, which would not be in the interests of the force. (2) The respondent and his wife were keeping four or five dogs in a police/council house, when there was a permitted limit of one dog. (3) The respondent and his wife had lived a 'hippy' life style at the Bangor farm.

The second of these adverse factors was inaccurate, because the dogs were initially kept in the house with the council's permission; and that permission was still extant at the date of the chief constable's decision. The third adverse factor was the result of a complete misunderstanding and was devoid of all substance.

The respondent swore an affidavit in reply on 15 January 1981. He furnished his answers to all the criticisms of which he had by now become aware and he convincingly

disposed of the damaging statement about the previous life style of himself and his wife. Furthermore, he deposed that if he had realised that he had to choose between keeping his career and keeping the dogs, the dogs would have gone. It is difficult to suppose otherwise.

The chief constable has never challenged the truth of the respondent's second affidavit.

The motion came before Woolf J on 23 March 1981. The judge found in favour of the respondent to the extent that he held that the proper approach to this type of case was that the chief constable was bound to act fairly in the course of exercising his statutory discretion under reg 16; and that the decision which was reached did not accord with the standards of fairness because the respondent was not given an opportunity to answer the accusations which led the chief constable to the conclusion which he reached. However, the judge declined to grant any relief except in costs. His reasoning was this. The court could give no remedy now which would enable the respondent to serve the period which would have remained if his engagement had not been terminated, because the two year probationary period had long since expired. Even if that period had not ended, the court would not in the normal way make an order of mandamus requiring a chief constable to re-engage a constable. The only order which could be made would be one which would have required the chief constable to reconsider his decision of 8 November. There was no purpose to be served by such an order now that the probationary period had expired. To put the matter shortly, an order of mandamus would be contrary to all precedent and an order of certiorari would be academic. He could not make a declaratory order that the respondent was still a probationary constable, nor could he make a declaration that the chief constable's decision was wrong. All that could be declared would be that the decision had been reached irregularly, and such a declaration would serve no purpose.

My Lords, I must address myself later to the question of remedy. All that I would say at this moment is that it would, to my mind, be regrettable if a litigant who establishes that he has been legally wronged and particularly in so important a matter as the pursuit of his chosen profession, has to be sent away from a court of justice empty handed save for an order for the recoupment of the expense to which he has been put in establishing a barren victory.

The respondent appealed. By his notice of appeal, he sought an order of certiorari, an order of mandamus and a declaration in the terms set out in his application for leave to apply for judicial review. The chief constable cross-appealed. He attacked the findings of the judge. He claimed not only that the decision was fairly reached, but also that the respondent's office was held during pleasure so that, on established principles, he had no right to be heard before dismissal.

Before I turn to the judgments in the Court of Appeal, I would make certain observations on the law as I understand it. I turn first to the decision of this House in *Ridge v Baldwin* [1963] 2 All ER 66, [1964] AC 40 where I find useful guidance on the proper approach to this type of case. As was pointed out by Lord Reid, the application of principles of natural justice to a variety of different situations is likely to lead to varying definitions of those principles (see [1963] 2 All ER 66 at 71–72, [1964] AC 40 at 64–66). For example, 'what a minister ought to do in considering objections to a scheme may be very different from what a watch committee ought to do in considering whether to dismiss a chief constable'. So cases of dismissal need to be considered on their own. Lord Reid divided these into three categories. First, dismissal of a servant by his master. Here no relevant question arises whether the master has heard the servant in his defence unless, presumably, the principle of audi alteram partem has been made a term of the contract. The question is whether the facts emerging at the trial prove a breach of contract. If so, damages are payable for the breach. Second, dismissal from an office held during pleasure

> 'It has always been held, I think rightly, that such an officer has no right to be heard before he is dismissed, and the reason is clear. As the person having the power of dismissal need not have anything against the officer, he need not give any reason.'

(See [1963] 2 All ER 66 at 71, [1964] AC 40 at 65 per Lord Reid.) Third, dismissal from an office where there must be something against the office holder to warrant his dismissal:

> 'There I find an unbroken line of authority to the effect that an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation.'

(See [1963] 2 All ER 66 at 72, [1964] AC 40 at 66 per Lord Reid.)

I turn secondly to the proper purpose of the remedy of judicial review, what it is and what it is not. In my opinion the law was correctly stated in the speech of Lord Evershed ([1963] 2 All ER 66 at 91, [1964] AC 40 at 96). His was a dissenting judgment but the dissent was not concerned with this point. Lord Evershed referred to—

> 'a danger of usurpation of power on the part of the courts . . . under the pretext of having regard to the principles of natural justice . . . I do observe again that it is not the decision as such which is liable to review; it is only the circumstances in which the decision was reached, and particularly in such a case as the present the need for giving to the party dismissed an opportunity for putting his case.'

Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.

I leave these preliminary observations in order to consider the judgments in the Court of Appeal. It was accepted by each member of the court that the case fell within the third of Lord Reid's categories; that the respondent was entitled to a fair hearing; and that he had not had one. However, Lord Denning MR added this:

> 'I go further. Not only must he be given a fair hearing, but the decision itself must be fair and reasonable. That is the protection afforded to every servant who is employed under a contract of service. He is protected against unfair dismissal. No less protection should be afforded to a probationer constable . . . It is my opinion that the chief constable was not justified in dispensing with the services of Constable Evans or in requiring him to resign.'

Shaw and Ackner LJJ concurred.

In his submissions to this House, counsel for the appellant submitted that the chief constable took into account all the matters which appeared on the respondent's file; that he was entitled to rely on the accuracy of the reports of his officers; and that he was not bound to put every adverse point to the respondent.

My Lords, for my part I emphatically reject the approach of the chief constable to his duties under reg 16. He made the fundamental mistake, as appears from his affidavit, of assuming that he had an absolute discretion to discharge the respondent under reg 16, a right to dismiss him at pleasure. That was not his right. His mistake coloured and indeed tainted the decision-making process. His discretion to discharge was a qualified one, exercisable only if he considered that the respondent was not fitted to perform the duties of the office or was not likely to become an efficient constable or a well conducted constable. It is implicit in reg 16 that there must be a fair consideration of the constable's fitness to perform his duties and a fair consideration of the likelihood of his becoming an efficient and well conducted constable. The legality of the choice given to the respondent to resign or be discharged must be judged by the same criteria as would be applied to the legality of discharge without the alternative of resignation; for clearly the chief constable could not use an invalid threat of discharge to compel resignation, as that would be an abuse of power.

As I have indicated, the chief constable forced the respondent's discharge on account of three adverse factors which he believed to exist: the allegedly undesirable marital circumstances, the alleged hippy life style and the alleged flouting of authority. It was the duty of the chief constable to deal fairly with the respondent in relation to the adverse factors on which he was proposing to act. The chief constable failed in his performance of that duty because these supposedly adverse factors were never put to the respondent. He was given no opportunity to offer one word of explanation. Your Lordships will not doubt the honesty of the chief constable and that he reached a decision which he truly believed was in the interests of the North Wales Police on the information that had been laid before him. But the inescapable fact is that he misunderstood the extent of his discretion and the nature of his duty under reg 16. The decision-making process was therefore defective.

There is however a wider point than the injustice of the decision-making process of the chief constable. With profound respect to the Court of Appeal, I dissent from the view that 'Not only must [the probationer constable] be given a fair hearing, but the decision itself must be fair and reasonable'. If that statement of the law passed into authority without comment, it would in my opinion transform, and wrongly transform, the remedy of judicial review. Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made. The statement of law which I have quoted implies that the court sits in judgment not only on the correctness of the decision-making process but also on the correctness of the decision itself. In his printed case counsel for the appellant made this submission:

> 'Where Parliament has entrusted to an administrative authority the duty of making a decision which affects the rights of an individual, the court's supervisory function on a judicial review of that decision is limited. The court cannot be expected to possess knowledge of the reasons of policy which lie behind the administrative decision nor is it desirable that evidence should be called before the court of the implications of such policy. It follows that the court ought not to attempt to weigh the merits of the particular decision but should confine its function to a consideration of the manner in which the decision was reached.'

When the sole issue raised on an application for judicial review is whether the rules of natural justice have been observed, these propositions are unexceptionable. Other considerations arise when an administrative decision is attacked on the ground that it is vitiated by self-misdirection, by taking account of irrelevant factors or neglecting to take account of relevant factors, or is so manifestly unreasonable that no reasonable authority, entrusted with the power in question, could reasonably have made such a decision: see the well known judgment of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223.

I agree entirely with the Court of Appeal, and indeed with the Divisional Court, that the respondent did not have the fair hearing to which he was entitled. I differ only from the Court of Appeal on the extent of the court's supervisory jurisdiction.

I turn now to the question of remedies. The Court of Appeal granted the respondent a declaration that the decision requiring the respondent to resign or be dismissed was void. I feel some misgivings about a declaration in that form, because it is not clear to me what consequences flow from it. Whatever remedy may be granted by the court in this case, I think it is highly desirable that the North Wales Police and the respondent should be in no doubt how, under the order, they will stand in relation to each other.

The conclusion reached by the Divisional Court, the Court of Appeal and by this House, if your Lordships are in agreement with me, is that the chief constable acted unlawfully and in breach of his duty under reg 16 in threatening to dispense with the respondent's services unless he resigned from the North Wales Police and in thus causing him to resign. That having been established, the respondent is, in my view, entitled at least to a declaration to that effect. But the matter cannot be satisfactorily left there. One must know what are the consequences that flow from the breach of duty.

One possibility would be to add to that declaration an order of mandamus. The respondent has one desire and one desire only, namely, to be reinstated in the police force. This would be secured if an order of mandamus were to issue, directed to the chief constable now in office, requiring him, for example, to restore the respondent to the office of probationer constable as held by him on 8 November 1978.

An alternative to an order of mandamus would be a declaration affirming that, by reason of such unlawfully induced resignation, the respondent thereby became entitled to the same rights and remedies, not including re-instatement, as he would have had if the appellant had unlawfully dispensed with his services under reg 16(1). Such a declaration would clarify the status of the respondent vis-à-vis the North Wales Police, and would leave him free to pursue such remedies, short of re-instatement, as may be open to him. I have in mind that under Ord 53, r 7 an applicant for judicial review may claim damages if they are sought in the filed statement and if damages could have been awarded in an action brought for the purpose. I have not, however, addressed my mind to the question whether it is still open to the respondent to apply to amend his filed statement by adding a claim for damages.

It is possible that the respondent would not wish, nor indeed would have any incentive, to pursue a claim for damages. Counsel for the appellant, acting on instructions, told your Lordships that if the decision of your Lordships' House went in favour of the respondent it would be the intention of the North Wales Police to offer him monetary compensation. I trust that the compensation which the chief constable has in mind to offer would be on a generous scale, and amply reflect the fact that the respondent has been unlawfully deprived of his profession as a consequence of the wrongful procedures of the chief constable's predecessor in office.

I feel that the choice of remedy is a difficult one. It is a matter of discretion. From the point of view of the respondent who has been wronged in a matter so vital to his life, an order of mandamus is the only satisfactory remedy. I have been much tempted to suggest to your Lordships that it would in the circumstances be a remedy proper to be granted. But it is unusual, in a case such as the present, for the court to make an order of mandamus, and I think that in practice it might border on usurpation of the powers of the chief constable, which is to be avoided. With some reluctance and hesitation, I feel that the respondent will have to content himself with the less satisfactory declaration that I have outlined.

So far as I am aware, it would be open to the respondent to apply in the ordinary way to re-join the North Wales Police as a new entrant. If the respondent does make such an application, I for my part express the hope that the North Wales Police will give very serious consideration to it. If an objective assessment of his accomplishments and character were made, the North Wales Police might come to the conclusion that a person so dedicated to the profession is police material which ought not lightly to be discarded. They might feel that his re-acceptance would go some way towards remedying the wrong which he has suffered as well as benefiting the force itself. This would be a happy solution, if it could properly be brought about; it would give the respondent the chance which he merits; and the way that I have expressed myself avoids any usurpation of the power of the chief constable, because a decision to accept or reject must lie with him.

My Lords, I would dismiss the appeal but vary the order of the Court of Appeal by substituting the declarations which I have outlined for that which is contained in the order of the Court of Appeal.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co*, agents for *M H Phillips*, Mold (for the chief constable); *Peter Badham & Co* (for the respondent).

Mary Rose Plummer Barrister.

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689, DC; *Pepys v London Transport Executive* [1975] 1 All ER 748, [1975] 1 WLR 234, CA; *Crake v Supplementary Benefits Commission* [1982] 1 All ER 498.

24 See para 203 post; and TORT. But a civil action based entirely on the invalidity of an order may be barred by the operation of a statutory time limit for calling in question its validity in a court: see *Smith v East Elloe RDC* [1956] AC 736, [1956] 1 All ER 855, HL; *Tutin v Northallerton RDC* [1947] WN 189; *R v Secretary of State for the Environment, ex p Ostler* [1977] QB 122, [1976] 3 All ER 90, CA; and para 21 note 15 ante.

75. Failure to act fairly. The exercise of a statutory power in circumstances which would have amounted to breach of contract or representation by the decision-maker had he not acted as a public authority will be quashed as an abuse of power, even where no improper purpose is pursued[1]. Discretion must be exercised fairly, not capriciously[2].

1 See *Re Preston* [1985] AC 835, [1985] 2 All ER 327, HL; and see *HTV Ltd v Price Commission* [1976] ICR 170 at 185, 192, 195, CA; *Laker Airways Ltd v Department of Trade* [1977] QB 643 at 707, [1977] 2 All ER 182 at 194, CA, per Lord Denning MR (authority misuses its powers if it exercises them in circumstances which work injustice or unfairness to the individual without any countervailing benefit for the public); *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 650, [1981] 2 All ER 93 at 111, HL, per Lord Scarman (cf 637, 101–102 per Lord Diplock); *R v Secretary of State for the Home Department, ex p Khan* [1985] 1 All ER 40 at 52, [1984] 1 WLR 1337 at 1352, CA, per Dunn LJ (an unfair action can seldom be a reasonable one); *Wheeler v Leicester City Council* [1985] AC 1054 at 1078, [1985] 2 All ER 1106 at 1111, HL, per Lord Roskill; and see para 76 note 4 post. Unfairness to third parties may amount to misuse of a power where fairness to such third parties is a relevant consideration in the exercise of that power: *R v Port Talbot Borough Council, ex p Jones* [1988] 2 All ER 207 at 214 per Nolan J. See further paras 81, 84, 188 post.

2 See *Rooke's Case* (1598) 5 Co Rep 99b at 100 per Coke CJ; *R v Askew* (1768) 4 Burr 2186 at 2189; *R v Wilkes* (1770) 4 Burr 2527 at 2539, HL, per Lord Mansfield CJ; *Re Durham, ex p Merchant Banking Co of London* (1881) 16 ChD 623, CA, per Sir George Jessel MR; *Gardner v Jay* (1885) 29 ChD 50 at 58, CA, per Bowen LJ; *Sharp v Wakefield* [1891] AC 173 at 179, HL, per Lord Halsbury LC. These dicta are primarily concerned with the standards governing the exercise of judicial discretion by tribunals, but are not exclusively confined to such a context. References in modern judgments to an implied duty to 'act fairly' are primarily concerned with procedural fairness (see para 85 post); but they must also be understood to mean that a person or body vested with powers of decision affecting others must not discriminate improperly or be animated by personal bias: see *Breen v Amalgamated Engineering Union* [1971] 2 QB 175, [1971] 1 All ER 1148, CA; also see para 32 note 12 ante and para 76 note 21 post.

76. Relevant and irrelevant considerations. A discretionary power must be exercised for proper purposes which are consistent with the conferring statute[1]. The exercise of such a power will be quashed where, on a proper construction of the relevant statute, the decision-maker has failed to take account of relevant considerations or has taken into account irrelevant considerations[2]. In some statutes, some or all of the relevant considerations may be express[3]; where the statute is silent or the express considerations are not exhaustive, the courts will determine whether any particular consideration is relevant or irrelevant to the exercise of the discretion by reference to the implied objects of the statute[4].

In practice the scope of judicial review will vary according to the context. If a very wide range of considerations needs to be taken into account by a minister determining whether to take certain discretionary action on grounds of national policy, the courts will seldom interfere at the instance of a person claiming to be aggrieved by the action taken unless the act has been vitiated by excess of power in the narrow sense, or non-compliance with procedural requirements, bad faith, or the bona fide pursuit of an unauthorised purpose where the ambit of the power is