JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 59/78

BEFORE: THE HON. MR. JUSTICE ZACCA, J.A.
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WHITE, J.A.

BETWEEN: - LT. COLONEL LESLIE H. LLOYD - PLAINTIFF/APPELLANT

AND: - THE JAMAICA DEFENCE BOARD

AND

EASTON DOUGLAS

AND

THE ATTORNEY GENERAL - DEFENDANTS/RESPONDENTS

Dr. Lloyd Barnett for the appellant.

Mr. R. Langrin for the respondents.

April 9, June 19, 1981.

ZACCA, J.A.:

This is an appeal against an order of Rowe, J. (as he then was) striking out the appellant's statement of claim as disclosing no cause of action on the ground that the acts complained of by the appellant occurred more than twelve months before the issue of the writ. Rowe, J. held that the action was statute barred by the provisions of Section 2 of the Public Authorities Protection Act.

The appellant was a Lieutenant Colonel in the Jamaica Defence Force. By letter dated April 27, 1977, signed by the Secretary of the Defence Board, the appellant was called on to retire under Regulation 10 of the Defence (Officers) Regulations 1962. On receipt of this letter the appellant tendered his resignation from his commission by letter dated April 28, 1977.

On November 20, 1978, the appellant filed a writ against all three respondents claiming a declaration that his commission had not been lawfully terminated or retired. The appellant's statement of claim which was filed on the same day alleged:

"(1) The Plaintiff has been a member of the Jamaica Defence Force for over 21 years.

(2) On April 27, 1977 and at all material times he was of the rank of Lieutenant Colonel, holding a commission granted him for an indefinite period.

.....

(6) On April 27, 1977 the Plaintiff was instructed to attend the office of the Honourable Keble Munn, M.P. then Minister responsible for Defence and on attending there, he was summoned before a group consisting of the following persons:

Hon. Keble Munn, Minister of National Security.

Hon. Carl Rattray, Attorney-General and Minister of Justice.

General Rudolph Green, Chief of Staff of the Jamaica Defence Board.

Mr. Roy McGann, Parliamentary Secretary, National Security and Justice.

Mr. Douglas Collins, then Permanent Secretary in the Ministry of National Security.

Professor M.G. Smith, and a female whose name is unknown.

(7) The Plaintiff was then interrogated by members on a variety of matters.

(8) Later that day the Plaintiff received a letter under the hand of the Secretary of the Defence Board dated April 27, 1977 which called on him to retire under Regulation 10 of the Defence (Officers) Regulations 1962 which deals with compulsory retirement.

(9) The Plaintiff contends that in acting as aforesaid the Defence Board and/or its Secretary in issuing the said letter of April 27, 1977 acted contrary to the provisions of the Defence Act and in breach of the rules of natural justice, and that accordingly the Plaintiff's commission has not been lawfully terminated or retired."

It was clear from the allegations and particulars set out in the statement of claim that the plaintiff was seeking to establish that the Defence Board was not properly constituted and also it acted contrary to the rules of natural justice.

The defendants then entered a conditional appearance and took out a summons to strike out the plaintiff's claim. It is being contended by the respondents that the act complained of by the plaintiff occurred on April 27, 1977. The plaintiff was called upon to retire under Regulation 10 of the Defence (Officers) Regulations and therefore the first defendant was doing an act in pursuance, or execution, or intended execution of a public duty conferred upon the Defence Board by the Defence Act and Regulations made thereunder. It is further contended that the writ was filed more than one year after the act complained of and therefore the defendants were entitled to rely on Section 2 (1) of the Public Authorities Protection Act. The learned judge held that the defendants could rely on the Public Authorities Protection Act and struck out the plaintiff's claim.

On the hearing of the appeal Dr. Barnett for the appellant submitted that it is being alleged in the statement of claim that the defendants acted contrary to the rules of natural justice. Since a breach of the rules of natural justice would result in the action of the Defence Board being declared a nullity, the defendants could not seek the protection of the Act. This is so, he argued, because a breach of the rules of natural justice is analogous to fraud or malice in that an allegation of fraud or malice would result in a nullity and a public official, acting in the exercise of a statutory or other authority, is not protected, if he acted maliciously or fraudulently. See Halsbury's Statutes of England, 2nd Edition, Vol. 18, page 752.

Dr. Barnett relied on the case of Anisminic Ltd. v. Foreign Compensation Commission 1969 2 A.C. 147 for the proposition that if an act done in bad faith results in a nullity and the protection of the act is not available, it follows that for a breach

of natural justice which would also result in a nullity, the protection of the Act does not avail.

Section 2 (1) of the Public Authorities Protection Act provides:

> "Where any action, prosecution, or other proceeding, is commenced against any person for any act done in pursuance, or execution, or intended execution, of any law or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such law, duty, or authority, the following provisions shall have effect -
>
> (a) the action, prosecution, or proceeding, shall not lie or be instituted unless it is commenced within one year next after the act, neglect or default complained of, in case of a continuance of injury or damage, within one year next after the ceasing thereof."

These provisions are similar to those contained in the corresponding U.K. Act of 1893.

The Jamaica Defence Board is established by Section 9 of the Defence Act. Section 16 of the Act provides for the making of Regulations with respect to the conditions and terms of service of Officers of the Defence Force. Under these sections regulations were promulgated on September 25, 1962 in the Defence (Officers) Regulations 1962, Regulation 10 provides:

> "10. (1) An officer shall not be called upon to retire his commission by the Defence Board.
>
> (2) An officer may at any time be called upon by the Defence Board to retire or resign his commission for misconduct or for reasons other than misconduct.
>
> (3) In the event of an officer failing to retire or resign when called upon to do so under this regulation, his commission shall be terminated."

In the Anisminic case (supra) at page 171, Lord Reid states:

> "It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the

> "term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some questions which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive."

The proposition that acts of public officials are not protected by the Act in any case where it can be shown that the trial would result in a nullity is untenable. Although the trial may result in a nullity for breaches of the rules of natural justice the act complained of must not have occurred more than one year before the action commences, unless it can be shown that the public official acted fraudulently or maliciously.

If, as in the instant case, it is being alleged that there was a breach of the rules of natural justice, then the action must have commenced within the year of the act complained of, this date being April 27, 1977. The writ being filed on November 29, 1978, the respondents are entitled to the protection of the Act. The defendants made it quite clear that if the action proceeded they would be relying on the protection of the Act. It is, therefore, open to the trial judge to strike out the statement of claim as disclosing no reasonable cause of action, Riches v. Director of Public Prosecutions 1973, 2 A.E.R. 935.

It is for these reasons that I concurred in the dismissal of this appeal on April 9, 1981 with costs of this appeal being awarded to the respondents.

CAREY J.A.

This is an appeal from a decision of Rowe J. in chambers delivered on 14th December 1978 whereby he ordered that the appellant's statement of claim be struck out on the ground that the claim was barred by Section 2 of the Public Authorities Protection Act. The complaint of the appellant was contained in paragraphs 6, 7, 8 and 9 of his statement of claim, and is reproduced below:

> "Para. 6. On April 27, 1977 the Plaintiff was instructed to attend the office of the Honourable Keble Munn, M.P. then Minister responsible for Defence and on attending there, he was summoned before a group consisting of the following persons:
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> Hon. Keble Munn, Minister of National Security. Hon. Karl Rattray, Attorney General and Minister of Justice. General Rudolph Green, Chief of Staff of the Jamaica Defence Board. Mr. Roy McGann, Parliamentary Secretary, National Security and Justice. Mr. Douglas Collins, then Permanent Secretary in the Ministry of National Security. Professor M.G. Smith, and a female whose name is unknown.
>
> 7. The Plaintiff was then interrogated by members of the group on a variety of matters.
>
> 8. Later that day the Plaintiff received a letter under the hand of the Secretary of the Defence Board dated April 27, 1977 which called on him to retire under Regulation 10 of the Defence (Officers) Regulations 1962 which deals with compulsory retirement.
>
> 9. The Plaintiff's contend that in acting as aforesaid the Defence Board and/or its Secretary in issuing the said letter of April 27, 1977 acted contrary to the provisions of the Defence Act and in breach of the rules of natural justice, and that accordingly the Plaintiff's commission has not been lawfully terminated or retired."

The question which arose for determination before us was whether breaches of the rules of natural justice prevented the operation of the protection provided by Section 2 of the Public

Authorities Protection Act. In resolving this question it is not, in my view, necessary to consider whether all the allegations particularised by the appellant in paragraph 9 of his statement of claim, constituted breaches of the rules of natural justice. It was enough from the appellant's point of view if one of the allegations amounted to a breach, to enable an argument to be founded. Indeed I did not understand learned counsel for the respondents to be saying that some of the allegations did not or could not constitute breaches of the rules of natural justice. He argued that considerations of this nature were irrelevant to the question of the operation of the Limitation Act and that the questions for the court were firstly, what was the act done or complained of and secondly, was that act done in pursuance or execution or intended execution of any Act of Parliament.

Mr. Barnett who put the appellant's case with admirable economy and relevance relied on Anisminic Ltd. v. Foreign Compensation Committee (1969) 2 A.C. 147. He said the decision of the Defence Board was a nullity by reason of the breaches of the rules of natural justice. Since it was a nullity it was not an act done in pursuance of any law or public duty and accordingly the respondents could not take the benefit of the Public Authorities Protection Act. In the exercise of statutory powers, there was a fundamental assumption or pre-condition, namely, that the rules of natural justice would be adhered to.

The particular words of the statute on which attention must now be focussed are "any/done in pursuance or execution or intended execution of any law or of any public duty or authority." The words have been the subject of judicial gloss to be found in a number of cases, some of respectable antiquity. Dennam C.J. in Lord Oakley v. The Kennsington Canal Co., (1835) 5 B & Ad. 138 said of these words (substituting "thing done" for (act'))-

> "The Limitation is a beneficial one, and should be adhered to. The words 'anything done or to be done in pursuance of the act or in execution of the powers and authorities' thereby given and granted must be taken to mean something done in prosecution of the works contemplated and not merely making the act a colour. The conduct of the company cannot be approved of, but the action is commenced too late."

Parker J. delivered himself to the same effect. It is important to emphasize that their lordships' views were expressed in a case where a company was held guilty of "mala fides." The authority must be intending to act in pursuance of the powers granted by the statute, and not for private purposes. In Gaby v. Wilts & Berks Canal Co., (1815) 3 M & S 580, a canal company acted in a manner prohibited by its statute, yet was held entitled to the benefit of the limitation act.

In Scammell & Nephew v. Hurley (1929) 1 K.B. 419 Scrutton L.J. is recorded in the headnote as saying at p. 420.

> "To entitle a public authority to the benefit of the Public Authorities Protection Act, 1893, the acts or omissions complained of must have been done in the bona fide intended execution of a statutory duty. If, therefore, illegal acts are done from some motive other than an honest desire to execute the statutory or other legal duty and an honest belief that they are justified by statutory or other legal authority, for example, if they are done from a desire to injure a person or to assist some person or cause, without any honest belief that they are covered by, or are necessary in the execution of, statutory authority, the Public Authorities Protection Act, 1893, is no defence."

Fraud, however, may remove the protection provided by the Public Authorities Act as the case of Pearson & Co., Ltd. v. Dublin Corporation (1907) A.C. 351 illustrates. No man should be allowed to benefit from his fraud. Fraud need only be briefly, mentioned seeing that the allegation in the instant case is confined to

breaches of the rules of natural justice and not fraud. These cases which I have cited show that where some improper motive can be shown, it may have the effect of rendering a decision of a tribunal not "acts done in intended execution of a statutory duty" but pretended execution thereof and remove the protection of the Act.

None of the cases to which I have referred demonstrate that in relation to the Public Authorities Protection Act, there is any assumption that the rules of natural justice will be followed and if breached, outs the protection of the Act. In my view Anisminic v. Foreign Compensation Commission (supra) is concerned with the jurisdiction of tribunals where their determination amounts to a nullity, and statutory provision exists which ousts intervention by judicial process. The effect of Anisminic in my judgment is that where a determination amounts to a nullity, an ouster clause is ineffective, and the court is entitled to order certiorari or grant some other prerogative remedy.

The question to be asked, except where fraud is alleged, is whether the act done is in direct discharge of a public duty or statutory authority. The act complained of in the appellant's statement of claim was that the Defence Board acted contrary to the provisions of the Defence Act and in breach of the rules of natural justice. The act occurred on 27th April, 1977 the writ was filed 20th November, 1978. More than 12 months had elapsed. The claim is thus barred by Section 2 of the Public Authorities Protection Act. As the learned judge correctly observed:

> "The uncontested fact in this case is that the plaintiff is alleging that the issuance of the letter of April 27, 1977 is the proximate act which led to his forced retirement from the Defence Force. The plaintiff for his own reasons neglected to file his claim until more than twelve months had elapsed from the time his cause of action (if any) arose."

The points which were debated in the court below were not canvassed before us. It is right to point out that counsel who appeared before us did not appear in the court below. Although ground 3 of the grounds of appeal which was in this form:

> "That the protection of the said statute did not extend to cases in which the public authority was merely exercising a power or did an act which was incidental to its statutory functions but only to cases where it was executing or intending to execute a positive duty imposed on it by the statute."

did challenge one of the points raised below, it formed no part of the appellant's case before us. The learned judge in disposing of this argument, had this to say:

> "The Defence Board is responsible for the command structure and the discipline of the Defence Force. The Defence Board is the only authority empowered by law to call upon an officer to resign or to retire his commission. If in a proper case the Board neglected to act under these regulations, the greatest harm could be done to the whole nation as conceivably, its security could be undermined and endangered. When the Defence Board acts or purports to act in pursuance of Section 10 of the Defence (Officers) Regulations 1962, the Board would, in my view, be indubitably exercising one of its primary functions, one which is a direct result of the public duty conferred upon it by the Defence Act and the Regulations made thereunder. The argument of the plaintiff that only the positive acts enumerated in the Defence Act, for example those contained in Section 173 of the Act, would be caught by the Public Authorities Protection Act is without merit. To hold otherwise would be to hold that the plentitude of powers given by Section 10 of the Defence Act would be but subsidiary functions of the Board, an argument which is palpably untenable."

In the event no criticism was made regarding the reasoning of Rowe J. which in my respectful view could not be faulted.

For these reasons I concurred with my Lords in holding that the appeal be dismissed with costs.

WHITE J.A.

Lt. Colonel Leslie Lloyd, the then plaintiff, has appealed from the order of Rowe J. (as he then was) striking out the statement of claim in an action against the then defendants, who are now the Respondents in this appeal. The appellant had sought a declaration that his commission in the Jamaica Defence Force, which was granted for an indefinite period, has not been lawfully terminated or retired. The appellant therefore sought to have declared invalid, a letter dated April 27, 1977, received by him on the same date and "which called on him to retire under Regulation of the Defence (Officers) Regulations 1962 which deals with compulsory retirement". According to paragraph 5 of the statement of claim that written request was "under the hand of the secretary of the Defence Board."

This letter was the sequel to the plaintiff being summoned, as he put it in his statement of claim,

> "Before a group consisting of the following persons:
>
> Honourable Keble Munn, Minister of National Security; Hon. Karl Rattray, Attorney General and Minister of Justice; General Rudolph Green, Chief of Staff of the Jamaica Defence Board (sic); Mr. Roy McGann, Parliamentary Secretary, National Security and Justice; Mr. Douglas Collins, then Permanent Secretary in the Ministry of National Security; Professor M.G. Smith, and a female whose name is unknown."

One of the grounds upon which the appellant based his action for a declaration is that "the Defence Board was dealing with the matter through the agency of a group of persons who did not properly comprise the Defence Board as established and constituted by the Defence Act." (Particulars (4) to paragraph 9 of Statement of Claim).

So much so that the Defence Board was:

> "(5) Acting on and/or considering the advice and/or observations and/or opinion and/or comments of persons who are not members of the Defence Board;
>
> (6) Failing to communicate or to notify

> the plaintiff of the nature of the advice and/or observations, and/or opinion and/or comments of the persons who were not members of the Jamaica Defence Board but who attended the said meeting of April 27, 1977 and remained with the members of the Board to discuss and/or to decide on the future of the Plaintiff's commission in the absence of the Plaintiff."

The Defence Board as established and Constituted by the Defence Act, Section 10, is comprised of:-

> (a) The Minister responsible for Defence who shall be chairman of the Board.
>
> (b) Such other Minister as shall be appointed by the Prime Minister under subsection (2).
>
> (c) The Chief of Staff.
>
> (d) The Permanent Secretary of the Ministry responsible for Defence.

This last functionary is designated by Section 11 the Secretary of the Defence Board. In the event of his being unable to perform those duties the chairman may nominate some other person to perform those duties of Secretary at any meeting of the Defence Board. Indeed, the fourth paragraph of the statement of claim identifies the second defendant as "the Permanent Secretary in the Ministry of National Security, the Minister assigned thereto being responsible for, Defence and as such is the present secretary of the said Board." In the same view, note must be made that the statement of claim averred that the meeting on April 27, 1977 was held at "the Office of the Honourable Keble Munn, M.P., then Minister responsible for Defence."

It will therefore be appreciated that in fact all the statutory members of the Board were present at the meeting mentioned. On the other hand, as regards the presence of the Attorney General and Professor M.G. Smith and the unnamed female, the only comment to be made in the present circumstances is to point out that in the performance of its functions the Defence Board is empowered by Section 12 (c) of the Defence Act to provide for "the consultation

by the Board with persons' other than members thereof."

The foregoing exposition was embarked on in as much as the lack of jurisdiction in "the group" was a ground of complaint, and particularly so when it is based on the averment that at the meeting "the plaintiff was then interrogated by members of the group on various matters" (paragraph 7 of the Statement of Claim). This terse complaint is devoid of any information as to who asked, and what were the questions asked. This information might have been of invaluable assistance in determining the question posed before this Court, as a result of the judgment and Order of Rowe J., that the statement of claim be struck out as disclosing no cause of action. This was so because the writ dated the 20th day of November, 1978 had been taken out after one year and seven months had elapsed from April 27, 1977.

Admittedly, the Defence Board, the first respondent, is a statutory board, which is responsible under the general authority of the Minister for command discipline and administration of, and all other matters relating to, the Jamaica Defence Force (Section 9 (1) of the Defence Act.). It cannot therefore be gainsaid that it is a public authority. It is coincident with this status that, prima facie, the provisions of the Public Authorities Protection Act, Section 2 apply:

> "When any action, prosecution, or other proceeding is commenced against any person for any act done in pursuance, or execution or intended execution of any law or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such law, duty, or authority, the following provisions shall have effect:-
>
> (a) The action, prosecution or proceeding, shall not lie or be instituted unless it is commenced within one year next after the act, neglect or default complained of, or in the case of a continuance of injury or damage, within one year next after the ceasing thereof."

Rowe J. neatly posed the relevant question in these words:

> "It is patent from paragraphs 8 and 10 of the Statement of Claim that the plaintiff is maintaining that the letter of the 27th April 1977 calling upon him to retire issued from the Defence Board. Was the issuance of this letter incontrovertibly done by a public authority in pursuance of, or execution, or intended execution of any law or public duty or authority? If so, the Public Authorities Protection Act applies (p. 16)"

The ultimate conclusion of the trial judge that as the writ was issued on the 20th day of November, 1978 over one year since the date on which the plaintiff had been required to resign his commission, the Public Authorities Protection Act, Section 2, applied to bar his cause of action and therefore the Plaintiff's Claim should be struck out.

In his submissions to this Court Dr. Barnett posited the following:

> "(a) The decision was not a decision of any relevant authority, because persons other than the relevant members participated in the making of it,
>
> (b) it was a nullity having been made in breach of the rules of natural justice observance of which is requisite for the exercise of statutory jurisdiction."

As regards (a) I have already dealt with the constitution of the Defence Board, and pointed out that there is not only no averment of the involvement and participation of each person present and more particularly in the interrogation. In this state of the matter it is not possible to say whether the complaint against the Defence Board is valid and sustainable, especially bearing in mind that the plaintiff must discharge the onus of proving that "the group" acted not in pursuance of statutory authority "but was using this pretended authority for some improper motive, such as spite, or a purpose entirely outside statutory justification. The plaintiff must prove

the existence of such dishonest motives and the absence of any honest desire to execute the statute and such existence and absence should only be found on strong and cogent evidence!" These remarks of Scrutton L.J. were made in G. Scammell & Nephew Ltd v. Hurky & Others (1929) 1 K.B. 419, and in the context of the Court of Appeal setting aside a judgment entered upon the findings of a jury that defendants were not acting in good faith and in honest belief that they were carrying out their statutory duties. The jury had also found that the defendants had been actuated by an indirect motive to injure the plaintiffs, and to further the interests of those interested in the strike in pursuance of which, it was alleged, the defendants failed to carry out their statutory duty. It seems to me that the observations of Scrutton L.J. at pages 427 - 429 on the efficacy of malice in this regard must be seen in the light of evidence given at a trial and cannot be usefully applied to a situation, as in the instant case, where the defendants have taken the point at the inception of the suit, after entering conditional appearance. This is not a situation in which a legitimate amendment could cure the defect thus questioned.

Dealing now with the submission that the purported action was a nullity, and therefore its effect was not affected by the Public Authorities Protection Act. The submission was elaborated in this way. Since Section 2 of that Act is designed to cover the exercise of Statutory power or authority, and not non-statutory action, in the particular case, the legislative authority carries with a fundamental assumption which requires that as a pre-condition of the statutory power the rules of natural justice should be observed. In the particular case also those rules were not observed, or at least an issue as to the observance of those rules was raised in the statement of claim, and that issue could only be determined on a joinder of the pleadings after hearing evidence on both sides.

We were referred to a passage in the judgment of Lord Reid in the case of Anisminic v. Foreign Compensation Commission [1969]

2 A.C. 147 at pp. 170 F - 171 I [1969] 2 W.L.R. p. 170 A. This is a catalogue of circumstances by which it could be judged whether a tribunal has failed to discharge its duties as to make its decision a nullity. My learned brethren have each quoted this passage in extenso, and I need not repeat it. Suffice it to say that that case dealt with an ouster clause in legislation. The decision of a statutory tribunal was not to "be called in question in any court of law." In proceedings for a declaration it was sought to declare the administrative action a nullity.

Lord Reid had earlier set out the respective arguments [1969] 2 A.C. at pp. 169 - 170 [1969] 2 W.L.R. p. 168 G - 169 A:

> "The respondent maintains that these are plain words (that is, the statutory ouster clause) capable of one meaning. Here is a determination which is apparently valid: there is nothing on the face of the document to cast any doubt on its validity. If it is a nullity, that could only be established by raising some kind of proceedings in court. But that would be calling the determination in question, and that is expressly prohibited by the statute. The appellants maintain that that is not the meaning of the words of this provision. They say that 'determination' means a real determination and does not include an apparent or purported determination, which in the eyes of the law has no existence because it is a nullity. Or putting it in another way, if you seek to show that a determination is a nullity you are not questioning the purported determination - you are maintaining that it does not exist as a determination. It is one thing to question a determination which does exist; it is quite another thing to say that there is nothing to be questioned."

With respect, this shows that the circumstances adverted to in the passage cited to us in argument are different from those of the instant case. There the court was exercising its supervisory jurisdiction over an inferior tribunal to determine whether it had committed an error going to jurisdiction. In the instant case the court is occupied with the effect of a statute barring the remedy because of the effluxion of time.

Nevertheless it has been shown time and time again that a failure to hear according to the rules of natural justice will make

the decision a nullity: see e.g. Cooper v. Wilson [1937] 2 All E.R. 726; Ridge v. Baldwin: [1964] A.C. 40, and this is so whether there is a failure to hear the other party, or there has been bias.

In the instant case the appellant asserted that the Defence Board acted contrary to the rules of natural justice by:

> "(1) Failing to give the Plaintiff any notice of the reason why he was being required at the meeting on April 27, 1927.
>
> (2) Failing to present him with any specific charges or allegations, against him or to give him any or any adequate notice of such charges or allegations.
>
> (3) Failing to afford him any or sufficient facilities including legal representation or time for consultation or preparation in order to meet or answer the allegations or charges which were being made against him.
>
> (4) Allowing the Chief of Staff who was previously involved in some of the issues raised to participate in the said meeting although this created a real likelihood of bias."

These being the allegations the appellant had the right to apply for an order for e.g. certiorari, to remove the proceedings of the Defence Board for the purpose of quashing the Board's determination. He did not avail himself of this procedure within the permitted time of not later than one month after the date of the proceedings, or such shorter period as may be prescribed by any enactment: Section 564 C of the Civil Procedure Code.

He sought instead to proceed by writ for a declaration which is not bound by the same limitation of time as the prerogative writs. At the same time, the action claiming a declaration is affected by the Public Authorities Protection Act. See Grand Junction Waterworks Co. v. Hampton Urban District Council (1899) 63 J.P. 503. Coventry v. Wilson [1939] 1 All E.R. 429 and Hogg v. Scott [1947] K.B. 759: [1947] 1 All E.R. 788 were actions by police officers claiming that the dismissal of each was a nullity. In the first, it was held by Tucker J. and affirmed by Scott L.J. in the Court of Appeal, that an action founded on an alleged wrongful act more than a year earlier was barred. In the later case, Cassels L.J. held that the plaintiff's

action for a declaration was barred by the Limitation Act 1939 Section 21, replacing section 1 of the Public Authorities Protection Act 1893; it being brought against a public authority charged with a public duty in respect of something done in the discharge of that public duty more than a year before the issue of the writ. I mention also the case of Markey and Another v. The Tolworth Joint Isolation Hospital District Board [1900] 2 Q.B. 454. Darling J., with whom Bigham J. agreed, in that case held that although the action was brought under the Fatal Accidents Act, 1846 and conformably thereto the writ was issued less than twelve months after the death of the deceased, yet as the writ was issued more than six months after the death of the deceased, the defendants, a statutory body, were entitled to the protection of the Public Authorities Protection Act, 1893, and the action was not maintainable. The argument before that learned judge was on a point of law arising on the pleadings. Darling J., explained:

> "Then the plaintiff's counsel contends that as, the Fatal Accidents Act gives a limit of twelve months for bringing an action, and the Public Authorities Protection Act gives one of six months we ought to hold that the later act, does not touch the earlier. I do not agree with this contention. It is true, as he says that the action must be brought under the Fatal Accidents Act within twelve months, and the Act of 1893 does not interfere with that limitation except as to actions against certain specified persons who must be sued within six months; the Act does not interfere with the Fatal Accidents Act except that as to certain classes a different time limit is imposed, a limit which affects not only an action under that Act, but also any action under any Act. The two Acts do not conflict in any way. This action should have been brought within six months calculated from the death of the deceased and our judgment must be for the defendant."

At this stage I revert to the argument above 'nullity' to which I earlier referred. What should not be overlooked is that when it is said that the action of an administrative body is a nullity it does not ipso facto assume that character. In other words, the consequences of the action have to be tested in Court to determine whether the alleged wrongful act is a nullity. Many dicta in numerous cases deal with this. I will quote first of all from the

case of Smith v. East Elloe Rural District Council [1956] A.C. 736. The House of Lords was there considering the issue of the validity of a compulsory purchase order which was being questioned on the allegation of bad faith. At page 769 Lord Radcliffe had this to say:

> "At one time the argument was shaped in the form of saying that an order made in bad faith was in law a nullity and that, consequently all references to compulsory purchase orders in paragraphs 15 and 16 must be treated as references to such orders only as had been made in bad faith. But this argument is in reality a play on the meaning of the word nullity. An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity on its head. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

Again in the judgment of Lord Morris as reported in Ridge v. Baldwin [1964] A.C. 40, at page 125, the following passage appears:

> "It was submitted that the decision of the watch committee was voidable but not void. But this involves the inquiry as to the sense in which the word 'voidable', a word deriving from the law of contract, is in this connection used. If the appellant had bowed to the decision of the watch committee and had not asserted that it was void, then no occasion to use either word would have arisen. When the appellant in fact at once repudiated and challenged the decision, so claiming that it was invalid, and when in fact the watch committee adherred to their decision, so claiming that it was valid, only the court could decide who was right. If in that situation it was said that the decision was voidable, that was only to say that the decision of the Court was awaited. But if and when the Court decides that the appellant was right, the Court is deciding that the decision of the watch committee was invalid and of no effect and null and void. The word 'voidable' is therefore apposite in the sense that it became necessary for the appellant to take his stand; he was obliged to take action, for unless he did, the view of the watch committee who were in authority, would prevail. In that sense the decision of

> the watch committee could be said to be voidable. The appellant could, I think, have applied for an order of certiorari; he was not saying that those who purported to dismiss him were not the watch committee: he was recognizing that they had a power and jurisdiction to dismiss, but he was saying that whether the regulations applied or whether they did not, the committee could only exercise their power and jurisdiction after hearing his reply to what said against him. In these circumstances he could, I think, have applied for an order of certiorari (though considerations of convenience would probably have pointed against pursuing such a course) or he could have asked for a declaration. In either proceeding the question of acquiesence by him might be raised, or the question whether by some binding election he had barred himself from taking proceedings in Court, or whether in some way he was estopped."

Even Lord Evershed in his dissenting judgment at p. 86 recognized that:

> "In the vast majority of circumstances, it does not in the end matter whether the decision challenged is void or only voidable; for if the court does decide to quash a decision or otherwise set it aside, then the effect is in general the same whether such decision be considered as void or only voidable."

So that I am reinforced in my view that merely to describe the decision of the Defence Board as a nullity is not solving the problem as it is. Just as it was pointed out in Newell v. Starkie [1920] 89 L.J.P.C. 1 H.L. that a plaintiff cannot deprive a defendant of the protection of the Act merely by pleading that the acts complained of were done maliciously in the absence of evidence to support the plea. Indeed Lord Burkenhead L.C. at page 6 commented:

> "Then it is contended first that the action under consideration here does not fall within the section because the acts are alleged to have been done maliciously. It is, I think sufficient commentary upon this contention to point out that, if that circumstance were a valid answer to a defence based upon the Public Authorities Protection Act 1893, that Act would be reduced to a complete nullity by all

> plaintiffs who adopted the simple course of alleging malice in their statements of claim. It is evident that this cannot have been the intention of the Legislature."

A view which is supported by Lord Lindley on page 6 of the same report.

It therefore follows that since the appellant is contending that a wrong was done to him on April 27, 1977 he should have issued his writ within the period of twelve months therefrom. Not having done so he cannot now maintain his action and I accordingly agreed that this appeal be dismissed with costs to the respondents.