R v. Chairman of the Parole Board
Ex Parte Patterson

Full Court of the Supreme Court of the Northern Territory of Australia

Nader, Maurice and Asche JJ.

28 July and 20 October 1986 at Darwin.

Administrative law - natural justice - certiorari - revocation of parole - duty of parole board to accord procedural fairness to parolee - reasonable expectation of parolee to fair treatment by parole board - failure to notify parolee of allegation by third party and to provide opportunity for parolee to respond - criminal law - prisons.

Certiorari - administrative law - natural justice - revocation of parole - duty of parole board to accord procedural fairness to parolee - reasonable expectation of parolee to fair treatment by parole board - failure to notify parolee of allegation by third party and to provide opportunity for parolee to respond - criminal law - prisons.

Criminal law - administrative law - natural justice - certiorari - revocation of parole - duty of parole board to accord procedural fairness to parolee - reasonable expectation of parolee to fair treatment by parole board - failure to notify parolee of allegation by third party and to provide opportunity for parolee to respond - prisons.

Natural justice - administrative law - certiorari - revocation of parole - duty of parole board to accord procedural fairness to parolee - reasonable expectation of parolee to fair treatment by parole board - failure to notify parolee of allegation by third party and to provide opportunity for parolee to respond - criminal law - prisons.

Prisons - administrative law - natural justice - certiorari - revocation of parole - duty of parole board to accord procedural fairness to parolee - reasonable expectation of parolee to fair treatment by parole board - failure to notify parolee of allegation by third party and to provide opportunity for parolee to respond - criminal law - prisons.

Cases applied:

Kioa and Others v. Minister for Immigration and Ethnic Affairs and Another (1985) 62 ALR 321.

Cases referred to:

Christie v. Leachinsky (1947) AC 573
Commissioner of Police v. Tanos (1958) 98 CLR 383
Durayappah v. Fernando (1967) 2 ALL ER 152
Power v. The Queen (1974) 131 CLR 623
R v. Brenton Prison (Governor) ex parte Soblen (1962) 3 ALL ER 641
R v. Edwards (1974) 2 ALL ER 1085
Re Nicholson & Haldimand Norfolk Regional Board of Commissioners of Police (1978) 88 D.L.R. (3d) 671
Russell v. Duke of Norfolk (1949) 1 ALL ER 109
The Queen v. Mackellar ex parte Ratu (1977) 137 CLR 461
Salemi v. Mackellar (1977) 137 CLR 396
Seaman v. Burley (1896) 2 QB 344
Smith v. Correctional Services Commission of New South Wales (1980) 147 CLR 134
Twist v. Randwick Municipal Council (1976) 136 CLR 106
Ridge v. Baldwin (1963) 2 ALL ER 66

Parole of Prisoners Act (1971) N.T. ss.3A,3B,3C,4,5,6,7, 9,10,11,14
Parole of Prisoners (Amendment) Act (1982) N.T. s.4
Police Administration Act (1979) N.T. s.127
Supreme Court Act (1979) N.T. ss.21,78

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IN THE FULL COURT
OF THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 525 of 1986

BETWEEN:

THE QUEEN

AND:

THE CHAIRMAN OF THE PAROLE BOARD OF THE NORTHERN TERRITORY

Ex Parte:

DARRELL ROSS PATTERSON

CORAM: NADER, MAURICE and ASCHE JJ

REASONS FOR JUDGMENT

(delivered 20 October 1986)

On 17 July 1986 Maurice J, by Order Nisi, called upon the Chairman of the Parole Board of the Northern Territory (the Chairman) to show cause why a Writ of Certiorari should not issue to quash an order made by him on 27 June 1986 revoking the parole of Darrell Ross Patterson, the prosecutor.

The Chairman of the Parole Board appeared by counsel to acknoweldge receipt of the relevant documents and to indicate his readiness to abide by the decision of the court. The Chairman took no further part in the proceedings.

On 24 July 1986 Asche J, pursuant to s.21 of the Supreme Court Act (NT) referred the return of the Order Nisi to the Full Court.

On 28 July 1986 the matter was heard and, on the same day, we ordered that the Order Nisi be made absolute, that a Writ of Certiorari issue and that the order of the Chairman of 27 June 1986 revoking the prosecutor's parole be quashed.

I now publish my reasons.

On 8 May 1984 the Parole Board made a parole order directing that the prosecutor be released from prison on parole on 16 May 1984. The parole order recited certain facts: that the prosecutor had been sentenced in the Supreme Court, Darwin, on 17 November 1981 to an aggregate sentence of 5 years imprisonment for 'Break, Enter - Steal, Larceny as a Servant' and that a non-parole period of 2 years 6 months was specified. The parole order was to

remain in force for the period commencing on 16 May 1984 and terminating on 16 November 1986, provided that it was not revoked or cancelled before the latter date. The parole order was expressed to be subject to the following conditions during the parole period:

'1. the parolee shall be of good behaviour and shall not violate the law;

2. the parolee shall be subject to supervision on parole of a parole officer, appointed in accordance with this parole order, and shall obey all reasonable directions of the parole officer appointed;

3. the parolee shall report to the parole officer, or other person nominated by the parole officer, in the manner and at the places and times directed by the officer and shall be available for interview at such times and places as a parole officer or his nominee may from time to time direct;

4. the parolee shall not leave the Northern Territory without the written permission of his supervising parole officer;

5. the parolee shall enter into employment arranged or agreed upon by the parole officer and shall notify the parole officer of any intention to change his employment before such change occurs or, if this is impracticable, then within such period after the change as may have been directed by the parole officer;

6. the parolee shall reside at an address arranged or agreed upon by the parole officer and shall notify the parole officer of any intention to change his address before such change occurs or, if this is impracticable, then within such period after the change as may have been directed by the parole officer;

7. the parolee shall not associate with any person specified in a direction by the parole officer to the parolee;

8. the parolee shall not frequent or visit any place or district specified in a direction by the parole officer to the parolee.'

The parole order was endorsed with various notations as follows:

'SUMMARY OF SECTIONS 5, 12, AND 13 OF THE PAROLE OF PRISONERS ACT

The Parole Board has the power to vary the conditions of this Parole Order.

The Parole Board has the power to revoke this parole order for any breach of any conditions during the period of the order.

This parole order is automatically revoked should the parolee be sentenced to a term of imprisonment for an offence committed during the parole period, whereupon the court may order the parolee to undergo the balance of the term or terms of imprisonment.

The Parole Board may make further parole orders should the parolee be returned to prison as a consequence of the revocation of this parole order.'

The parole order bears an endorsement signed by the prosecutor and dated 16 May 1984 by which he declared that he fully understood the conditions upon which he was released on parole and by which he undertook to comply with those conditions and with any directions given to him by his Parole Officer.

On 27 June 1986, the Chairman of the Parole Board, pursuant to s.5(6)(b) of the Parole of Prisoners Act ordered that the parole order of 8 May 1984 be revoked.

The prosecutor had served half of the sentence of five years imprisonment before becoming eligible for parole. As at the date of revocation, 27 June 1986, he had been out of prison on parole for a little over 2 years.

It was common ground that no notice was given to the prosecutor of the allegation of any matter which might place him in jeopardy of being returned to prison. He was given no opportunity to respond to any such allegation. He was not made aware of the existence of any movement towards the revocation of his parole until after his parole had been revoked: presumably by the process by which he was returned to prison. As far as the Chairman knew, revocation of parole would come to the prosecutor as a complete surprise.

He submits that the power of the Chairman to revoke his parole was subject to a duty to be fair to him in the exercise of that power. He submits that the procedure adopted by the Chairman showed no regard to such a duty and was unfair to him.

Whether the exercise of a statutory power is conditioned by a duty to accord procedural fairness and, consequently, reviewable by a superior court for failure to accord such fairness depends on a proper construction of the statute conferring the power. 'At base, the jurisdiction of a court judicially to review a decision made in the exercise

of a statutory power on the ground that the decision-maker has not observed the principles of natural justice depends upon the legislature's intention that observance of the principles of natural justice is a condition of the valid exercise of the power. That is clear enough when the condition is expressed; it is seen more dimly when the condition is implied, for then the condition is attributed by judicial construction of the statute. In either case, the statute determines whether the exercise of the power is conditioned on the observance of the principles of natural justice. The statute is construed, as all statutes are construed, against a background of common law notions of justice and fairness and, when the statute does not expressly require that the principles of natural justice be observed, the court construes the statute on the footing that "the justice of the common law will supply the omission of the legislature" (Cooper v. Wandsworth Board of Works (1863) 14 CB (NS) 180 at 194; 143 ER 414 at 420). The true intention of the legislature is thus ascertained. When the legislature creates certain powers, the courts presume that the legislature intends the principles of natural justice to be observed in the absence of a clear contrary intention': Kioa and Others v. Minister for Immigration and Ethnic Affairs and Another (1985) 62 ALR 321 Brennan J at 365-6.

It is necessary, therefore, to have regard to the terms of the Parole of Prisoners Act (the Act). There is a

Parole Board including a Chairman of the Parole Board: ss. 3A, 3B, 3C.

Where, at a meeting of the Parole Board, a matter relating to a prisoner is to be discussed, the Chairman may, if he considers it necessary or desirable, require the prisoner to be brought before the Board: s.3G.

Section 4 of the Act requires a court, where it sentences an offender to a term of imprisonment of 12 months or longer, to specify a lesser term of imprisonment during which the offender is not eligible to be released on parole: the non-parole period.

I set forth s.5 of the Act in full:

'5. RELEASE OF OFFENDERS ON PAROLE

(1) [Omitted]

(2) Subject to this section the Board may, in its discretion, by order in writing direct that a person, being a person who is serving a term of imprisonment for an offence in respect of which a minimum term of imprisonment has been fixed in pursuance of this Act, be released from prison on parole at a time specified in the order, being a time that is after the expiration of that minimum term of imprisonment.

(3) An order under sub-section (2) in relation to a person is sufficient authority for the release of the person from prison.

(4) [Omitted]

(5) A parole order -

(a) shall be expressed to be subject to the condition that the person to whom it relates shall, during the parole period, be subject to supervision on parole under a person, for the time being, appointed in accordance with the order and shall obey all reasonable directions of the person so appointed; and

(b) is subject to such other conditions, if any, as are specified in the order.

(6) The Chairman may, at any time before the expiration of the parole period, by order in writing -

(a) amend a parole order by varying or revoking a condition of the order, other than the condition referred to in sub-section (5)(a), or by imposing additional conditions; or

(b) revoke the parole order.

(6A) The Board may give directions to the Chairman for his guidance for the purposes of sub-section (6).

(7) An amendment of a parole order under sub-section (6) does not have effect until notice of the amendment is given to the person to whom the parole order relates, being notice given before the expiration of the parole period.

(8) Subject to sub-sections (8A) and (8B), where a person to whom a parole order relates is sentenced to a term of imprisonment in respect of an offence committed during the parole period (including an offence against a Commonwealth Act, regulations under a Commonwealth Act or a law of a State or another Territory), the parole order shall thereupon be deemed to have been revoked or, if the parole period has already expired, to have been revoked as from the time immediately before the expiration of the parole period.

(8A) Subject to sub-section (8B), a parole order shall not be deemed to be revoked where a person to whom it relates is sentenced to a term of imprisonment but is released forthwith in pursuance of a direction given under section 5(1)(b) of the Criminal Law (Conditional Release of Offenders) Act.

(8B) Where a person is subsequently committed

to prison under section 6 of the Criminal Law (Conditional Release of Offenders) Act, the parole order shall be deemed to be revoked when the person is so committed.

(9) Where -

(a) a parole order in relation to a person is revoked; or

(b) the person to whom a parole order relates has, during the parole period, failed to comply with a condition of the parole order or there are reasonable grounds for suspecting that he has, during that period, failed to comply with a condition of that order,

a constable may,

(c) where the person is in the Territory - without warrant, arrest that person; or

(d) where the person is, or where there are reasonable grounds for suspecting that that person is, in a State or another Territory - with a warrant referred to in sub-section (9A), arrest that person.

(9A) For the purposes of sub-section (9)(d), a court may, upon application being made to it by the Crown Solicitor, issue a warrant authorizing the constable named in the warrant to arrest a person referred to in that sub-section.

(10) Where a constable arrests a person in pursuance of sub-section (9), the constable shall, as soon as practicable, take the person before a court of summary jurisdiction.'

Section 6 provides for cancellation of parole by a Court of Summary Jurisdiction. If a constable arrests a parolee in the circumstances specified in s.5(9)(b), the court before which he is taken may, if it is satisfied that the parolee has failed, without reasonable excuse, to comply with a condition of the parole order, cancel the parole

order. It is worth noting that a discretion has been conferred on a magistrate acting under s.6 by the Parole of Prisoners Amendment Act 1982, s.4, which, inter alia, substituted the word 'may' for the word 'shall' which had formerly appeared in the section.

Section 7 provides for the issue of a warrant for the commitment of a person, whose parole has been revoked or cancelled, to prison to serve the part of the term of imprisonment to which the parole order relates that he has not served. Section 7 must be read in conjunction with s.14.

Section 10 provides for an appeal by way of rehearing to the Supreme Court:

> '10. APPEAL FROM DECISION TO CANCEL PAROLE ORDER
>
> (1) Where a court of summary jurisdiction, in pursuance of section 6, cancels a parole order, the person to whom the order relates may appeal to the Supreme Court against the cancellation and the Supreme Court shall -
>
> (a) if it is satisfied that the ground on which the parole order was cancelled has been established - confirm the cancellation; or
>
> (b) if it is not so satisfied - order that the cancellation and any warrant issued as a result of the cancellation cease to have effect.
>
> (2) An appeal under sub-section (1) shall be by way of rehearing, but the Supreme Court may have regard to any evidence given before the court of summary jurisdiction.

Section 14 states the effect of a parole order. The parolee is deemed to be still under sentence and not to have served the part of the term that remained to be served at the commencement of the parole period, until the parole period expires without the parole order having been revoked or cancelled or until he is otherwise discharged from imprisonment. If the parole period expires without the parole order being revoked or cancelled, the parolee is deemed to have served the part of the term that remained to be served at the commencement of the parole period, and to have been discharged from that imprisonment.

Considerable formality accompanies the release of a prisoner on parole. The sentencing court, as part of the very process of sentencing, specifies a non-parole period. If the Parole Board decides to make a parole order, it must do so in writing. The parole order is required to express the conditions to which it is subject. It appears to be the practice to require the prisoner to sign the parole order in the presence of a witness declaring his full understanding of the conditions specified in the order and undertaking to comply with them and with any directions given him by his parole officer.

A parole order may be either amended, revoked or cancelled.

The procedures relating to deemed revocations and cancellations are formal in the sense that they involve a hearing in a court culminating in the parolee being sentenced to a term of imprisonment. Revocation is deemed to occur when, during the parole period, the parolee is sentenced to a term of imprisonment in respect of an offence committed during the parole period: s.5(8).

The procedures relating to cancellation of parole are quite elaborate. The parolee may be arrested and taken before a magistrate. If the magistrate is satisfied of a breach of a condition of the parole order he may cancel the order. There is an appeal by rehearing to the Supreme Court against the magistrate's decision.

The effect of the revocation or cancellation of a parole order upon a parolee is loss of freedom. A further effect is to postpone the date when the parolee's freedom would otherwise have become unconditional. The revocation (or cancellation) of parole does not merely cause the person affected to cease to enjoy liberty; but, by virtue of s.14 (supra) it puts back the day when the person will become unconditionally entitled to liberty. In this very case, the prosecutor, if his parole had not been revoked or cancelled, would have become entitled to unconditional freedom on 16 November 1986. The effect of the purported revocation would

have been that he would not have become entitled to unconditional freedom (subject to any remissions) until 27 December 1988: a postponement of more than two years. It can be seen that the longer a parolee has been at liberty on parole the more adversely he is affected by revocation or cancellation of parole by reference to the date on which his freedom will become unconditional. Of course, loss of freedom itself can have harsh consequences for a parolee. He may, for example, be renting a house and supporting a family. There are many ways in which one can imagine the loss of freedom imposing hardships in addition to and consequential upon the loss of freedom itself.

In brief review, then, the general scheme of the relevant provisions of the Act is that a prisoner may be released on parole before the completion of his sentence. If he remains on parole without committing a breach of a parole condition until his parole period has expired, his sentence is deemed to have been served. If he commits a breach of a parole condition before his parole period has expired, he is in jeopardy of having his parole terminated by one method or another and of having to return to prison to serve the part of his sentence that remained to be served when he was released on parole.

For an appropriate and sufficient exposition of the relevant law, I have found it unnecessary to go beyond Kioa. The judgments in that case are not only very much to the point in respect of the case at bar, but they discuss the landmark antecedent cases. 'In the absence of a clear contrary legislative intent, a person who is entrusted with statutory power to make an administrative decision which directly affects the rights, interests, status or legitimate expectations of another in his individual capacity (as distinct from as a member of the general public or of a class of the general public) is bound to observe the requirements of natural justice or procedural fairness.': Deane J 383. 'It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it . . . ': Mason J at 345. 'The reference to "right or interest" in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests.': ibid. The interest claimed by the prosecutor here concerns his personal liberty. '. . . "legitimate expectation" extends to expectations which go beyond enforceable legal rights provided that they are reasonably based.': ibid. 'The

expectation may be based on some statement or undertaking on the part of the authority that makes the relevant decision.': ibid. Natural justice and procedural fairness are to be equated in respect of administrative decision making: see Mason J at 346. 'The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary intention.': ibid. 'When the doctrine of natural justice or the duty to act fairly in its application to administrative decision-making is so understood, the need for a strong manifestation of contrary statutory intention in order for it to be excluded becomes apparent. The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case?': Mason J at 347.

'What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject matter, and the rules under which the decision-maker is acting': Mason J 346-347. '. . . the expression "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate

and adapted to the circumstances of the particular case.': Mason J at 347.

'Having decided that the statute makes the exercise of the power contingent on the observance of natural justice, the courts then decide what is required in the particular circumstances to satisfy the statute so construed.': Brennan J at 366.

Whether a particular statutory power is conditioned on the observance of the principles of natural justice is a question of construction of the statute and the answer therefore has universal application. But, what is required in a particular instance of the exercise of the power will depend upon the facts of the case. The requirement for natural justice will be universal, but the procedures called for by that requirement may differ from case to case: Brennan J 367-370.

The only procedure having the effect of terminating a parole order before its expiry by the passage of time, not expressly providing for some formality ensuring the prisoner a right to be heard, is revocation by the Chairman. The question arises whether the absence of expressed procedural formality in such a case evinces an intention by the legislature to exclude the procedural protection inherent in the other two methods of terminating parole during the

currency of the parole order. If such were the case, the elaborate provisions relating to cancellation could be sidestepped in every case by the expedient of revocation.

The first question, then, is whether upon a proper construction of the Parole of Prisoners Act the power of the Chairman of the Parole Board to revoke parole is qualified by a duty to observe the principles of natural justice, which, for present purposes, is tantamount to a duty to accord procedural fairness to a parolee. I have couched this question in general terms because, as Brennan J observed, the existence or otherwise of the duty is universal arising from a true construction of the statute.

A second question might be whether, leaving aside the requirements of the Act, the conduct of the Parole Board in the particular case gave rise to a reasonable expectation in the prosecutor that he would be fairly treated in the matter of revocation of parole, giving rise to a duty on the part of the Chairman to accord to him such fair treatment.

Finally, it must be asked whether, if such a duty exists, in the circumstances of the present case the procedure adopted by the Chairman sufficiently recognized the duty.

The statutory provisions governing the release of persons on parole, in particular, the requirement that the parole order be in writing and subject to conditions expressed therein (s.5(2)(5)), to my mind carries a clear inference that compliance with those conditions will ensure the continuation of parole: parole may be cancelled for breach of a condition; it will not be cancelled except for a breach of a condition.

The practice of requiring the parolee to sign the endorsement relating to his understanding of the parole conditions and undertaking to comply with them can only reinforce the statutory inference to which I referred and produce in the parolee the reasonable expectation that, so long as he keeps his undertaking, his parole will continue. It will have been noticed that one of the endorsements on the parole order is as follows:

> 'The Parole Board has the power to revoke this parole order for <u>any breach of any conditions</u> during the period of the order.' (emphasis mine)

As far as I can see, this can only be intended as a reference to the power of the Chairman to revoke the parole order. However, to formally inform the parolee that the Parole Board has power to revoke parole for any breach of any condition would inevitably lead him to expect that the Parole Board has no such power except in cases of a breach

of a condition. I make no point of the fact that the Parole Board is referred to instead of the Chairman. The important point about the endorsement is that it refers specifically and formally to a power to revoke for breach of condition.

There is no clear manifestation of an intention that the duty to act fairly is excluded in the sense referred to by Mason J, supra, in respect of revocation by the Chairman.

It would be legitimate indeed, and eminently reasonable, in the legal and factual circumstances I have referred to, for a parolee to expect that he would continue at liberty on parole except for a breach of a parole condition. It would be reasonable for him to expect that the time when unconditional freedom will arrive would not be postponed except for such a breach. A prisoner released on parole would have every reason to expect that, for so long as he commits no breach of a parole condition, he would remain on parole until his parole order expires.

It is not without considerable significance that the Chairman holds judicial office. He would be expected by the Parliament to be well aware of the applicability of principles of natural justice. It might have been thought almost a statutory insult to lay down rules to ensure fair procedural treatment by such a Chairman. In fact, however,

the Chairman was doing no more than following the well established practice of his predecessors who had failed to recognize the implications of the Act in respect of natural justice. It has required the occurrence of these proceedings to focus attention on the requirements of the legislation.

It is to be noted that s.3G refers to situations where it may be 'necessary' or 'desirable' that the Chairman require the prisoner to be brought before the Board. Does this section recognize that justice may from time to time require such a course? I think it must. The word 'prisoner' is not appropriate to describe a parolee, but the fact that such a power is conferred on the Chairman in respect of prisoners points to the fact that the Parliament expected the Board and the Chairman to adopt fair procedures. It is difficult to imagine a situation where it would be 'necessary' for the Chairman to require the attendance of a prisoner except by reference to considerations of justice. Statutory authority is required to bring a prisoner from a prison to the place where the Parole Board is meeting. Such authority is conferred by s.3G. Perhaps no such specific power was inserted with respect to a parolee because no special power is needed. No special power is needed to authorize the Chairman or the Board to invite a person on parole to attend before the Chairman or the Board.

I am satisfied that the power of the Chairman to revoke parole is qualified by a duty to act fairly towards a parolee. The valid exercise of the power is conditioned upon the carrying out of that duty. I am satisfied too that the factual circumstances referred to were apt to create in the prosecutor a reasonable expectation of fair treatment with a consequent obligation to accord him such treatment. A fortiori, therefore, in this case the duty to accord natural justice existed.

A parolee would expect, with good reason, that before his parole were revoked by the Chairman upon an assertion by a third person of a breach, the Chairman would inform him of the allegation and invite him to respond to it if he should wish to. Fairness to the prosecutor concerning revocation of his parole required some such step. I would not care to say precisely what the procedure should have been, nor do I think it necessary or desirable to do so. A letter might have been sufficient. A personal visit from an officer of the Department might have been sufficient. The important thing is that some mechanism should have been put into operation adequately to bring to the knowledge of the prosecutor the particulars of the allegation made, and informing him that an opportunity existed for him to respond. He may not have wished to respond; he may not have wanted to respond personally; but he ought to have been given the opportunity to do so.

Nothing at all was done in this case to put the prosecutor on notice of the proceedings to revoke his parole or of the allegation made against him, nor was he given an opportunity to put his case to the Chairman.

I concluded, therefore, that the purported revocation of the prosecutor's parole was not a valid exercise of the Chairman's power.

The Attorney-General intervened through counsel pursuant to s.78(1) of the Supreme Court Act. That section provides that the Attorney-General may intervene in proceedings before the court involving the interpretation of a law of the Territory where he is of the opinion that it is in the public interest to do so. Counsel for the Attorney-General presented a lengthy argument why the court should discharge the Order Nisi. He submitted that it was unambiguously clear that the legislature intended to exclude the operation of the audi alteram partem rule as a prerequisite to the exercise of the Chairman's discretion to revoke a parole order. He relied on a number of cases in the High Court and elsewhere decided before Kioa. There has been a gradual evolution of the law relating to the applicability of the principles of natural justice which have, in Australia, culminated in Kioa. Some of the cases upon which counsel for the Attorney-General relied were

decided at a time when the rules were applied with slightly more arbitrariness than has come to be the position in Kioa. I regard it as a fruitless exercise, except for academic purposes, to analyse those cases to compare them with the statements made in Kioa.

Counsel for the Attorney-General relied on a passage from Smith v. Correctional Services Commission of New South Wales (1980) 147 CLR 134 at 138 where the court said, 'The Parole Board appears to have a power to revoke parole which is not conditioned by any specific criteria (Parole of Prisoners Act s.6(2B)).' That was a premise upon which that case proceeded in the High Court. There is no indication in the judgment that the question was ever in issue. I think it is unlikely that the High Court would expect the passing statement made in that case, which was concerned with remissions under regulation 110 of the Prisons Regulations (N.S.W.), to be treated as authority for the proposition that the Chairman exercising his power of revocation under s.5 of the Parole of Prisoners Act (NT) need not accord natural justice to a parolee.

I would reserve the question of costs.

MAURICE J: I had prepared separate reasons for the orders we made immediately following the hearing of this matter, but having read the judgment of Nader J. I can say that so closely does my reasoning parallel his and so thoroughly do I concur in the reasons he has just given that there is no point in publishing my own.

ASCHE J.: On 17th November 1981 before Gallop J. in the Supreme Court of the Northern Territory the applicant Darrell Ross Patterson pleaded guilty to one charge of breaking entering and stealing and one charge of larceny as a servant. For these offences he was sentenced to 2 years imprisonment on the first charge and 3 years imprisonment on the second, the sentences being cumulative. His Honour specified a period of 2 years and 6 months during which he was not to be eligible for parole.

On 16 May 1984 at the expiration of the 2½ year period specified by His Honour the applicant was released on parole. The Parole Order, which is exhibited to the affidavit of Douglas Kelvin Owston sworn 24 July 1986, recites that it is to remain in force until 16 November 1986 and during that period the applicant was to be subject to a number of conditions of which the following are relevant for the purpose of these proceedings:-

1. The parolee shall be of good behaviour and shall not violate the law.

2. The parolee shall be subject to supervision on parole of a parole officer, appointed in accordance with this parole order, and shall obey all reasonable directions of the parole office appointed.

3. The parolee shall report to the parole officer, or other person nominated by the parole officer, in the manner and at the places and times directed by the officer and shall be available for interview at such times and places as a parole officer or his nominee shall from time to time direct (then follow conditions as to residence and employment which are subject to notification to the parole officer and his permission; and conditions giving the parole officer power to direct the parolee not to associate with persons specified by the officer and not to frequent or visit places specified by the officer).

With the permission of his parole officer the applicant, on release on parole, first went to Queensland where he remained for about one year, then to New South Wales for about nine months, then back to Queensland. While in New South Wales he married. He returned to the Northern Territory in about March 1986. His wife came with him.

During all this time the applicant alleges that he complied with the conditions of his parole; and nothing is alleged to the contrary for the purposes of the present application.

The applicant says that after his return to the Northern Territory and having first obtained the permission of the parole officer, he commenced work in Elliott. He was told

that there was a female parole officer visiting Elliott who would visit him. He raised an objection to this on the ground that he "did not get on with women parole officers" because he "had trouble communicating with them". However he seems to have accepted the necessity that the female parole officer would visit him but he made the point that he required her visits to be confidential since he believed that in a small town such as Elliott he would have trouble obtaining or maintaining employment if his past history became known. He then received a phone call and later a letter from this officer saying she would visit him. He did not reply to the letter.

Subsequently he received information which led him to believe that this officer had spoken to his employers telling them that he was on parole for larceny as a servant. He became very upset at this information; though that is not to say that he then acted wisely. He telephoned a parole officer in Darwin whom he knew and on his own admission made some threats concerning the woman parole officer. He says that he used words to the effect that if she was present in Elliott now he would "smack her in the teeth". A report made by the Regional Director of Correctional Services dated 23/6/86 states that several threats were made by the applicant about this officer. It is fair to the female parole officer concerned to say that the report of the Regional Direction makes it clear that the information, if

it was given, about the applicant being on parole did not come from her but from another source quite unconnected with any officer of the Department of Correctional Services. There was subsequently a telephone conversation between the applicant and the female parole officer in which he says he informed her that he had no confidence in her and asked for a transfer of his supervision to the Elliott police.

On 26 June there was a meeting of the Parole Board in which the report of the Regional Director of 23/6/86 was presented and both he and the Principal Probation & Parole Officer recommended that the applicant's parole be revoked. The Board so recommended to the Chairman who accepted the recommendation and revoked the parole and the applicant was taken into custody on 27 June.

The revocation of parole had serious consequences for the applicant because of the operation of S. 11 of the Parole of Prisoners Act. That section reads:-

> "11. SERVICE OF TERM OF IMPRISONMENT
>
> Where a parole order in relation to a person is revoked or cancelled and the person is taken into custody in pursuance of this Act, the person shall, during any period in which he is in custody in pursuance of this Act be deemed to be serving the part of the term of imprisonment that remained to be served at the commencement of the parole period."

It follows that the applicant, who had been released on parole on 16 May 1984, and who could, subject to proper compliance with the conditions of his parole, have expected his parole to expire on 16 November 1986, was now faced with serving the full term of 2½ years which remained to be served on 16 May 1984; although it is true that he could again be released on parole. See S. 13.

It is not disputed that the applicant upon being taken into custody was given no opportunity to be heard on his own behalf or to give his version of the circumstances which were alleged against him as justifying revocation of parole; nor were those circumstances put to him before he was taken into custody. It is the applicant's case that he was thereby denied natural justice. Application on his behalf was made for a Writ of Certiorari against the Chairman of the Parole Board. An Order Nisi calling upon the Chairman and Members of the Parole Board to show cause why a Writ of Certiorari should not issue quashing the revocation of the Parole Order was granted by Maurice J. on 17 July. On the return of that order before me on 24 July, and because of the importance of the issues involved I was invited by both counsel appearing for the applicant and counsel appearing for the Attorney-General to refer the matter to the Full Court pursuant to S. 21(1) of the Supreme Court Act; and being, I hope, properly persuaded that that was the appropriate course, I did so. The matter therefore came before the Full Court.

Under the Parole of Prisoners Act alternative procedures are available for revocation of parole.

S. 5(6)(b) simply provides that the Chairman may at any time before the expiration of the parole period, by order in writing revoke the parole. S. 5(6A) provides that:-

> "the Board may give directions to the Chairman for his guidance for the purposes of subsection 6".

The expression "for his guidance", however, makes it plain that the Chairman is not bound to follow the directions thus given, though the use of the word "directions" may imply that he is normally expected to do so. The Act is otherwise silent on any procedures to be followed by the Chairman in coming to his decision. Upon revocation of the parole by the Chairman the parolee can be arrested (S. 9) and taken before a court of summary jurisdiction. In those proceedings the court of summary jurisdiction has no power to inquire into the circumstances of the revocation but, upon being satisfied that the parole order has been revoked, "shall issue a warrant for the commitment of the person to prison to serve the part of the term of imprisonment to which the parole order relates that he has not served". (S. 7).

Hence on the face of it the Chairman may act arbitrarily, - and I do not use that expression in the pejorative sense but

rather to emphasise that the Act does not by its terms provide that the Chairman should apply the rules of natural justice before revoking the parole.

In the present case one may, I think, legitimately infer that the Chairman acted upon the positive recommendations of two senior officers of the Department of Correctional Services and on the subsequent recommendation of the Parole Board. But nothing in the Act suggests that he was bound to act on those recommendations; for the discretion to act remained exclusively his.

In contrast, the revocation of parole under S. 5(9)(b) is encompassed with safeguards which give the parolee an opportunity to know the case presented against him and to answer it.

S. 5(9)(b) provides that where the parolee has "failed to comply with a condition of the parole order or there are reasonable grounds for suspecting that he has, during that period, failed to comply with a condition of that order", a constable may without warrant if the parolee is in the Territory, or with warrant issued upon application by the Crown Solicitor if there are reasonable grounds for suspecting he is in a State or another Territory, arrest him. S. 5(10) provides that upon arrest the constable shall as soon as practicable take the parolee before a court of summary jurisdiction.

S. 6 then provides:-

> "If a constable arrests a person in the circumstances specified in S. 5(9)(b), the court before which he is taken may, if it is satisfied that the person has failed, without reasonable excuse, to comply with a condition of the parole order, cancel the parole order".

A right of appeal to the Supreme Court is given from any order cancelling parole.

Those requirements comply with the rules of natural justice. As a first step, the arresting constable must have reasonable grounds for suspecting that the parolee has failed to comply with a condition of his parole.

Then, upon arrest it would in my view normally be proper for the arresting constable to inform the parolee of the reasons for the arrest. I deduce this from general principles rather than a specific enactment since s. 127 of the Police Administration Act provides only that a member of the Police Force who arrests a person for an "offence" shall inform him as soon as practicable thereafter of the "offence" for which he is arrested. Breach of parole does not strictly seem to be an "offence" within the Parole of Prisoners Act. There, "offence" is defined as "an offence against a law ... in force in the Territory". No specific "offence" of being in breach of parole is created by the Act and no sanction is imposed. A court of summary jurisdiction, if it finds that

the parolee is in breach of parole, does not deal with him otherwise than by cancelling the parole order. But s. 127 of the Police Administration Act and the classical case of Christie v Leachinsky (1947) A.C. 573 are in my view based on a broader principle of fairness which plainly dictates that whenever and for whatever reason a person is arrested he should be told at least in general terms why he is being arrested, unless urgency or some other special circumstances make that impracticable.

After arrest the parolee must be taken before a court of summary jurisdiction as soon as practicable. Although not in express terms the necessary inference in the language of S. 6 of the Parole of Prisoners Act (previously set out) is that some form of charge should then be given to the parolee to make it clear how it is alleged that he has failed without reasonable excuse to comply with a condition of the parole order; and unless he then acknowledges that he has so failed, evidence must be led and the parolee given the usual opportunities to cross-examine witnesses and to lead evidence on his own behalf and make appropriate submissions. In such proceedings, since the result of an adverse finding against the parolee results in the cancellation of his parole and his return to prison the matter is in my view a criminal matter (c.f. Seaman v Burley (1896) 2 Q.B. 344) and the Court would need to be satisfied beyond reasonable doubt that the parolee had failed to comply with a condition of

the parole order. Any proof of "reasonable excuse" would however rest with the parolee on the balance of probabilities R v Edwards (1974) 2 All E.R. 1085.

Where safeguards such as this are provided for the protection of the parolee it may seem unusual that there should be a parallel procedure where that protection is not apparent. Yet the fact that separate procedures are provided must indicate that the legislature envisaged that both alternatives are available, and it follows that some explanation should be looked for which would justify the difference. The Act is silent on this but the answer clearly lies in the fact that to make a parole system effective there must be wide powers of control given to the parole authorities to enlarge or restrict liberties as circumstances dictate. Under the Territory legislation these powers are vested in the Chairman who may act even if there has not been a specific breach of parole such as could be examined by a court of summary jurisdiction under S. 5(9)(b). The Chairman and those advising him may take account more generally of behaviour and attitudes of the parolee such as to lead experienced officers to believe that he is not genuinely co-operating, or not yet showing the improvement or maturity of approach hoped for by the act of paroling him. Since parole is a privilege not a right, the legislature no doubt considered it necessary to leave these matters in the hands of those most experienced to deal with

them. There may often be sound reasons for revoking parole notwithstanding that no specific breach of the conditions of parole can be established. For instance a person imprisoned for crimes of violence may be released on parole but show manifestations of anger and lack of self-control sufficient to warrant a revocation of that parole for the safety of society.

The power of the Chairman to act in a wide variety of ways to ensure that a parole order is not being abused should therefore not lightly be interfered with by Court process. Nevertheless, if there remains a real possibility of injustice or appearance of injustice in what is done the Court may intervene. The problem of balancing competing principles such as these has given rise to much discussion as recent cases have shown.

In the present case the Board or the Chairman had every right to be concerned at what appeared to be disturbing and threatening conduct by the parolee. But what has been described as "procedural fairness" (see the cases discussed later) would rather demand that an explanation be first sought from him; for it may then have appeared that the conduct of the parolee was not as it was reported to have been, or that there were mitigating circumstances.

The rules of natural justice are encompassed in very broad terms in two principles "audi alteram partem" and "nemo judex causa sua". It has been suggested that there may be other principles involved such as the necessity to give reasons for a decision and the duty to act on evidence of probative value, but (per Halsbury - 4th Ed. Vol 1 p. 77) these have yet to gain general acceptance.

The present case is concerned with the audi alteram partem rule and one cannot do better than commence, as Mr McDonald who appeared for the applicant commenced, with the words of Barwick C.J. in Twist v Randwick Municipal Council (1976) 136 C.L.R. 106 at 109:-

> "The common law rule that a statutory authority having power to affect the rights of a person is bound to hear him before exercising the power is both fundamental and universal. See Cooper v Wordsworth Board of Works (1863) 14 C.B. (N.S.) 180; Ex parte London Electricity Joint Committee Co (1920) Ltd (1924) 1 K.B. 171 at 205".

See also Ridge v Baldwin (1963) 2 All E.R. 66: Durayappah v Fernando (1967) 2 All E.R. 152: Commissioner of Police v Tanos (1958) 98 C.L.R. 383 (per Dixon C.J. and Webb J. at 395).

It is, however, accepted that the legislature may displace that rule by providing otherwise. R v Brenton Prison (Governor), Ex parte Soblen (1962) 3 All E.R. 641: Salemi v Mackellar (1977) 137 C.L.R. 396: The Queen v

Mackellar, Ex parte Ratu (1977) 137 C.L.R. 461. In Salemi's case Barwick C.J. said at p. 401:-

> "Of course the parliament is not bound to provide that natural justice be accorded. It may enact a power which it intends should be exercised by its donee without regard to the demands of natural justice. In such a case the courts cannot override the intention of the Parliament."

But if the legislature intends to dispense with the requirements of natural justice in a particular enactment that intention must be clear and unambiguous. Twist v Randwick Municipal Council (supra) per Barwick C.J. at 110:

> "The rule (i.e. the rule as to the requirement of natural justice) is subject to a sufficient indication of an intention of the legislature to the contrary. Such an intention is not to be assumed nor is it spelled out from indirect references, uncertain inferences or equivocal considerations. The intention must satisfactorily appear from express words of plain intendment. The Commissioner of Police v Tanos (1958) 98 C.L.R. 383 at 396."

Now it may be put that, because the safeguards built into the procedure under ss. 5(9) and 6 of the Parole of Prisoners Act do not appear in the procedure under s. 5(6)(f), there is thereby a sufficient indication of the intention of the legislature that the rules of natural justice do not apply to the latter procedure. In my view that is not the case. The emphasis is on the greater discretion given to the Chairman; but that in itself need

not mean that the rules are excluded; though it may, as I mention later, have some effect on the extent of the application of those rules. For, as the cases indicate, it may not be difficult to determine whether those rules are imported into a particular Act. The more difficult matter is to determine the manner and extent to which those rules are to be imported.

In Kioa v Minister for Immigration & Ethnic Affairs (1985) 62 A.L.R. 321 the appellants were a husband and wife, who were citizens of Tonga, and their child who had been born in Australia. Mr and Mrs Kioa overstayed their temporary entry permits in Australia and were ordered to be deported. The delegate of the Minister for Immigration charged with making the decision to extend their entry permit or to deport took into account a departmental submission recommending deportation which contained prejudicial statements against the husband appellant and ordered deportation of the husband and wife. Neither were given an opportunity to answer these statements. The judge at first instance refused to disturb the deportation order and an appeal to the Full Court of the Federal Court was unsuccessful. The High Court, however, allowed the appeal and ordered that the deportation order be set aside and the appellants application to review the original decision to deport be referred back to the Minister to be considered according to law. By a majority, their Honours held that, because of certain legislative

amendments, the rules of natural justice now applied to the making of deportation orders; and, further, that there had been a breach of those rules by failing to give the appellants an opportunity to respond to the material prejudicial to them in the departmental submission.

Brennan J. at p. 367-368 said:

> "Two distinct but closely related questions can be perceived in the cases relating to the exercise of a statutory power: the first, or threshold, question is whether the exercise of the power is conditioned upon observance of the principles of natural justice; the second question, arising when the exercise of the power is so conditioned, is what the principles of natural justice require in the particular circumstances. It is seldom possible to say that the legislature intends to exclude observance of the principles of natural justice in the exercise of a statutory power which is apt to affect individual interest, and the more difficult and more frequently addressed question is what the principles of natural justice require in the particular circumstances. In Salemi (No. 2) Jacobs J. said (CLR) at p 451; (ALR) at p 44:-
>
> > 'The legislature is assumed by the courts to be aware of the principles of natural justice which are a part of the common law. The application of those principles depends on the circumstances of the case. It is seldom possible to say in the case of the exercise of any particular statutory power 'All the principles which have ever been applied in ensuring natural justice will here apply' or on the other hand 'Natural justice was intended to be wholly excluded'. The questions which must be asked are - in particular circumstances such as exist in this case did the legislature intend that the principles of natural justice should be wholly excluded? If not, what particular principles should be applied? I recognize that the search for legislative intention can be described as somewhat artificial. What the courts do in the absence of express legislative intention is to ensure that power, whether it be judicial or quasi-judicial or executive, be exercise fairly, weighting the interest of the individual and the interest of society as a whole'.

I would adopt this view, though I should state my understanding of his Honour's question: 'What particular principles should be applied?' The content of the principles which the legislature intends to be applied in the circumstances of a particular case cannot be discovered by reference solely to the statute. Nevertheless, a legislative intention that the principles of natural justice apply is an intention that the principles appropriate to the circumstances of the particular case should apply.

The principles of natural justice have a flexible quality which, chameleon-like, evokes a different response from the repository of a statutory power according to the circumstances in which the repository is to exercise the power. The variable content of the principles of natural justice was articulated by Tucker LJ in an oft-cited passage in his judgment in Russell v Duke of Norfolk [1949] 1 All ER 109 at 118: 'The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case.

In the Privy Council that passage was cited with approval in University of Ceylon v Fernando (1960) 1 All E.R. 631 and again in Furnell v Whangarei High Schools Board (1973) A.C. 660 where Lord Morris of Borth-y-Gest said (at p. 679): 'Natural justice is but fairness writ large and juridically. It has been described as 'fair play in action''. The same view was adopted in the House of Lords: Wiseman v Borneman (1971) A.C. 297 at 308, 309, 311, 314-5. In this Court the flexibility of the principles of natural justice was recognised by Kitto J. in Mobil Oil Australia Pty Ltd v F.C. of T. (1963) 113 C.L.R. 475 at 504: 'What the law requires in the discharge of a quasi-judicial function is judicial fairness. That is not a label for any fixed body of rules. What is fair in a given situation depends upon the circumstances. And it is not a one-sided business'."

Mason J. at p. 346 said:-

"The law has now developed to a point where it may be accepted that there is a common law duty to act

> fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights interests and legitimate expectations, subject only to the clear manifestation of a contrary intention."

At p. 347 His Honour said:-

> "In this respect the expression 'procedural fairness' more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, that is, in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations (cf Salemi (No. 2) (C.L.R. at p. 451, per Jacobs J.)."

The expression "procedural fairness" is also employed by Wilson J. at p. 359 and by Deane J. at p. 383.

When one therefore examines how far the application of he rules of natural justice should be imported into those sections of the Parole of Prisoners Act which relate to the broad powers and discretion given to the Chairman regard should be had to the interests not only of the individual parolee but also the "interests and purposes which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations" (per Mason J. supra). In this respect it must be remembered that Parole is not a release but a conditional release (See

Power v The Queen (1974) 131 C.L.R. 623 at 628). The Act of paroling requires a delicate balance between the encouragement of reform in a prisoner who shows a potential for reform on the one hand and the risk to society that may ensue if the prisoner does not avail himself of the opportunity given. If a prisoner released on parole indulges in conduct or behaviour which gives experienced parole officers concern that he is still a potential risk to society it may not be appropriate to wait until he specifically breaches some express condition of his parole. If he cannot be accountable until then, other prisoners may suffer; because the authorities may be the more reluctant to recommend parole if subsequent control depends only on breach of a condition. The wide discretion vested in the Chairman is a recognition of these factors and that discretion should remain flexible

But it should not be an undue interference with the Chairman's discretion, and it is clear that the exercise of "procedural fairness" demands it, that the parolee should have the opportunity to answer the case against him. Since there is nothing in the Parole of Prisoners Act to suggest otherwise, the rules of natural justice must apply to this extent.

> "Whatever standard is adopted one essential is that the person concerned should have a reasonable opportunity of presenting his case" (Per Tucker L.J. in Russell v Duke of Norfolk (1949) 1 All E.R. 109 at 118).

In the circumstances of this case, therefore, the order nisi for certiorari should be made absolute.

I stress however, and for the reasons already given, that such a result should not be seen as over-restrictive of the power of the Chairman of the Parole Board, acting on the advice of the Board or information from parole officers to control parolees. This decision does not mean that the Chairman must now establish formal procedures before considering whether to revoke parole. It is noteworthy that where a Court determines that there has been a denial of natural justice such as to nullify the original decision it does not provide a blueprint for the procedure to be followed by the tribunal whose decision it sets aside. In Kioa's case, for instance, the application was referred back to the respondents "to be considered according to law". This approach involves a recognition of the diversity of administrative action and a reluctance to insist on too great an adherence to the stricter formalities of courts in this process. Mason J. in Kioa's case at p. 347 speaks of "a flexible obligation". At p. 346 he says:-

> "The effect of Atkin L.J.'s influential observations in R v Electricity Commissioners; Ex Parte London Electricity Joint Committee Company (1920) Ltd (1924) 1 K.B. 171 at 205 was to focus attention on those elements in the making of administrative decisions which are analogous to judicial determination as a means of determining whether the rules of natural justice apply in a particular case. The emphasis given in subsequent decisions to the presence and absence of these characteristics diverted attention from the need to

> insist on the adoption in the administrative process of fair and flexible procedures for decision-making procedures which do not necessarily take curial proceedings as their model: see Re Nicholson & Haldimand-Norfolk Regional Board of Commissioners of Police (1978) 88 D.L.R. (3d) 671 at 680-2."

It would be sufficient therefore that some proper opportunity be given to a parolee whose conduct was giving concern to explain that conduct or meet such allegations as are being made against him. How that would be done would be a matter for the circumstances of the particular case and is properly a matter to be left to the Chairman. Provided the parolee is given that opportunity, and provided his case is properly taken into account, I see nothing unjust in the fact that the Chairman is invested with wider powers under S. 5(6)(b) of the Act to revoke parole than is given to a court of summary jurisdiction under s. 6. Furthermore I see nothing otherwise to inhibit the Chairman's exercise of those powers in a broad and flexible way; particularly in those cases where there may be no breach of the specific conditions of parole but a real fear, based on rational assessment of experienced persons, that the parolee has become a potential risk to himself and society and privileges extended should be withdrawn. In the present case, however, and for the reasons given, the decree nisi should be made absolute.