CHAPTER III

CERTIORARI IN ENGLAND

1. History

Certiorari, as an order to furnish information, dates from the 13th century, and was used for general purposes of government. In the same century it was used to remove cases from local courts to Westminster, even at the instance of private litigants. Beginning in the latter half of the 17th century a large number of statutory offences punishable summarily were created, and an increasing number of new administrative duties were imposed on justices of the peace. When the question of supervision arose, the obvious answer, now that the Star Chamber had gone, was that it should be exercised by the Court of King's Bench, and, where an inferior statutory tribunal had exceeded its jurisdiction or made an order bad on its face, *certiorari* was used to quash the order. By the end of the first quarter of the 19th century the scope of local government had expanded to such an extent that it could no longer be entrusted to the justices, many of whose powers passed to elected local government boards and statutory authorities; auditors were given statutory powers to disallow illegal payments out of public funds; some statutes [1] provided for challenge of the acts of these new statutory authorities by certiorari. The courts, by analogy, in the absence of statutory authority allowed the writ against public authorities exercising similar functions. It was but a brief step to holding that central government departments were also amenable to *certiorari*. In 1882 it was said that:

> "wherever the legislature entrusts to any body of persons other than to the superior courts the power of imposing an obligation upon individuals, the courts ought to exercise as widely as they can the power of controlling those bodies"[2]

By this time the important question was not the character of the body against whom redress was sought, but the nature of the act impugned. It was available to correct "judicial acts", not in the ordinary sense of the phrase, but in contrast to ministerial acts; they were acts which involved the exercise of a right or duty to decide a question affecting individual rights.[3]

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1. E.g. The Poor Law Amendment Acts, 1834 (4 & 5 Will. IVC. 76) and 1844, (7 & 8 Viet. C. 101) and the Municipal Corporations Act, 1837. (7 Will. IV and 1 Vict C. 78.)
2. *R.* v. *Local Government Board*, (1882) 10 Q.B.D. 309.
3. *R.* v. *Woodhouse*, (1906) 2 K.B. 501.

Certiorari had been used from the 13th century to correct errors in local courts. In the 17th century it was used to quash convictions for error apparent on the face of the record, the Court of King's Bench requiring justices of the peace, when they recorded summary convictions, to make elaborate "speaking orders" *i.e.* orders which spoke for themselves. Parliament, in which justices of the peace were well represented, retaliated by forbidding recourse to *certiorari* when legislation to create new summary offences, and eventually, in the Summary Jurisdiction Act, 1848, prescribed a record from which the evidence and reasons for the finding were omitted. The result was that it became virtually impossible to obtain *certiorari* for error apparent on the face of the record, and the existence of this power was forgotten until it was resuscitated in the *Northumberland* case [4] and extended to administrative bodies. At that time very few tribunals were under an obligation to make "speaking orders", and the others often declined Lord Goddard's invitation to do so voluntarily. But the Tribunals and Inquiries Act, 1958, requires a large number of statutory tribunals to give reasons for their decisions if so requested. Ministers must do the same in regard to decisions which were or could have been the subject of a statutory enquiry. Any statement of reasons, written or oral, of a minister or tribunal is deemed to be part of the record.

2. Judicial and quasi-judicial proceedings

Certiorari and prohibition only issue to bodies under a duty to act "judicially". The acts of organs of government are usually categorised as ministerial, administrative, legislative, or judicial. A ministerial act is the discharge of a duty which involves no exercise of discretion or where the statute prescribes the circumstances in which the duty is to be performed with such particularity, that only a minimal exercise of discretion is possible. The main distinction between a legislative and an administrative act is that the former lays down a general rule of conduct, while an administrative act is the making of a specific direction or the application of a general rule to a particular case, as policy requires.

In determining whether a body exercises judicial functions for the purpose of jurisdiction in *certiorari*, English courts have applied four tests. The first is whether the body in question can give a definitive order, conclusive and binding, without confirmation by any other authority. *Certiorari* has been refused, for instance, to quash a report of hospital visitors to the Board of Control that a person ought to be

4. *R.* v. *Northumberland Compensation Appeal Tribunal, ex. p. Shaw,* [1952] 1 K.B. 338 on appeal from [1951] 1 K.B. 711.

kept in detention as a mental defective,[5] but the Privy Council has said that:

> "a proceeding is none the less a judicial proceeding subject to prohibition or *certiorari* because it is subject to confirmation or approval by some other authority"[6]

and in a number of cases involving the probability of action prejudicial to the rights of individuals, *certiorari*, and more frequently prohibition, has issued to prevent action being taken on the report of bodies, incapable of making definitive orders.[7]

The second test is whether the body in question sufficiently closely resembles a court. Is it called a tribunal? Must it sit in public? Can it compel the attendance of witnesses? More important than these is the question whether it determines issues between the Crown and a subject or between subject and subject, but a tribunal performing such functions must be distinguished from an authority which has to determine whether a subject shall be granted a privilege, like a license to keep a public house, and another subject may be heard in opposition. Though it might seem that that tribunal were deciding an issue between the petitioner and the objector, it is in fact deciding whether it is in the general public interest to grant the license. Nevertheless the exercise by licensing justices of their powers to grant or refuse licenses is a judicial act, susceptible of correction by *certiorari*.[8]

The third test is whether the body in question applies a pre-existing rule or objective standard to the case before it, but judges often make new law and in exercising discretionary powers there is often no precedent. Where discretionary powers affect the interests of individuals and the policy element is small, an authority may be held to act judicially. The fourth test is whether the body after enquiry performs an act or makes a final decision imposing obligations on or affecting the rights of individuals.[9]

The Committee on Minister's powers in England has enumerated four requisites of a judicial decision.[9a] The Committee's definition

5. *R.* v. *St. Lawrence's Hospital*, [1953] 1 W.L.R. 1158.
6. *Estate and Trust Agencies (1927) Ltd.* v. *Singapore Improvement Trust*, [1937] A.C. 898 at 917.
7. See de Smith, *op. cit.*, p. 277.
8. *R.* v. *Justices of Sunderland*, [1901] 2 K. B. 357; *R.* v. *Woodhouse*, (1906) 2 K. B. 501.
9. *R.* v. *Electricity Commissioners*, [1924] 1 K.B. 171 at 205.
9a. cmd. 4060 (1932) 73-74. The report says "A true judicial decision presupposed an existing dispute between two or more parties and then involves four requisites:
   (1) the presentation (not necessarily orally) of their case by the parties to the dispute;

was based partly on procedure and partly on the character of final decision. In *Cooper* v. *Wilson*,[9b] Scot, L. J., approved of the four requisites but it has to be mentioned that Scot, L. J., was himself a member of the Committee. The principle of the rules have not however had general recognition in English courts. There is an assumption by the Committee that the function of the courts is "mechanical, uncreative and never discretionary".[9c] Courts are required to determine the meaning of judicial in varying contexts.[9d]

The Privy Council has said that *certiorari* may be granted where an authority follows a judicial process or a process analogous to judicial.[10] Though this test seems to be generally applied when action of an authority is impugned as violating the rules of natural justice, when error in jurisdiction is pleaded, the English courts are disposed to expand the area of "judicial"-activity as, for instance, when a doctor certified that a child was an ineducable imbecile.[11] An executive authority may be under a duty to act judicially at a certain stage. For instance a firm of builders in 1944 acquired land to erect houses in accordance with a Town Planning Scheme, and were at all relevant times willing to erect them, having incurred preliminary expenses for that purpose. Then the local authority, without notice, made a compulsory purchase order of most of the firm's land under the Housing Act, 1936, and informed the firm of the order in August, 1945. The firm objected and asked for a public enquiry. In November, 1945, there was an informal meeting at which the minister, the local authority and the firm were represented. The firm asked for evidence that it was necessary for the local authority to build on the land, but none was produced.

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(2) If the dispute between them is a question of fact, the ascertainment of the fact by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence;

(3) If the dispute between them is a question of law, the submission of arguments by the parties;

(4) A decision which disposes of the whole matter by a finding upon the fact in dispute and application of the law of the land to the fact so found, including where required by a ruling upon any disputed questions of law".

When a judge does the above function it is called judicial. If it is done by an administrator it is called 'quasi-judicial'.

9b. [1937] 2 K.B. 309 at 340-341. See comment on the case in "*Justice & Administrative Law*" by W.A. Robson, p. 498 (1951 Edn.).

9c. Griffith & Street, '*Principles of Administrative Law*', p. 14 (1959 Edn.).

9d. *Ibid.*, p. 143.

10. *Nakkuda Ali* v. *Jayaratne*, [1951] A.C. 66 at 78.

11. *R.* v. *Boycott, ex. p. Keasley*, [1939] 2 K.B. 651.

In February, 1946, the minister informed the firm that he had confirmed the order. This was quashed by *certiorari* on the ground that he had not acted judicially in that he failed to put forward the local authority's representations. The Court of Appeal reversed the order. Though the minister's functions were administrative, at the stage of considering objections a quasi-judicial character was super-imposed, but the administrative character reappeared at the final decision, which was determined by the public interest, not the rights of parties. The obligation of a minister to act fairly implied that he must act honestly and to the best of his ability in the public interest, whereas the obligation of an official acting in a quasi-judicial capacity was to conform to rules. No minister could be compelled to disclose evidence collected in an administrative capacity.[12] In another case the local authority prepared a scheme, which was the subject of a local enquiry. In breach of statutory provisions, no plans were prepared and exhibited at the enquiry and no plans were sent with the scheme to the minister for confirmation. The scheme submitted was not a valid improvement scheme in that it empowered the local authority to dispose of any land not used for working class dwellings as it pleased, but the minister modified the scheme before confirming it. The owner of two houses sought to be compulsorily acquired got a *rule nisi* on the ground that the scheme was not an improvement scheme, but the Divisional Court discharged the rule, holding that by reason of the minister's modifications the scheme, as confirmed, was an improvement scheme. The Court of Appeal reversed this on the ground that, at the enquiry stage and at the stage of submission for confirmation, there had been a failure to comply with the procedure laid down in the statute.[13] The House of Lords restored the order of the Divisional Court, holding that these defects had been cured by the order of the minister.[14] It would seem to follow that, when an administrative authority has to reach a decision, and the procedure involves judicial action at some stage, if at that stage there is any defect such as would justify quashing an order of a judicial authority, the whole transaction is liable to be quashed if the error at the judicial stage has caused the authority to exceed its powers. The question of control of licensing authorities by *certiorari* raises difficulties. In a case before the Privy Council, the Controller of Textiles in Ceylon cancelled the appellant's textile license in exercise of a power to do so

12. *B. Johnson & Co. (Builders) Ltd.* v. *Minister of Health*, [1947] W.N. 251: [1947] 2 All. E.R. 395 see 399-400, 403.

13. *R.* v. *Minister of Health ex. p. Yaffe*, [1930] 2 K.B. 98.

14. *Minister of Health* v. *R.* [1931] A.C. 494.

in the Defence Regulations "where the Controller has reasonable grounds to believe the licensee unfit to be allowed to continue as a dealer". The judicial Committee said he was not acting judicially but taking executive action to withdraw a privilege because he believed on reasonable grounds that the holder was unfit to retain it. The words in the statute were not sufficient to oblige him to act judicially nor was there anything in the context or conditions of the jurisdiction suggesting that he must act as though governed by judicial rules.[15] In another case [15a] the Commissioner of Police, being satisfied on the report of two constables that a cab-driver was unfit to retain his license, assented to the assistant commissioner's proposal that the cab-driver should be brought before the licensing committee and that the license should be revoked unless anything transpired to induce him to reconsider. After the meeting of the Licensing Committee the license was revoked. The cab-driver in an application for *certiorari* complained that he had not been allowed to call evidence. All three judges agreed that the commissioner was acting in a disciplinary capacity and his order could not be quashed; it had been conceded that it could not have been quashed if, on the report of the constables, the license had been cancelled without reference to the committee, but two of the judges thought that, had the commissioner appointed a committee to enquire whether there was sufficient cause for withdrawing the license and report, the committee would have been obliged to follow the rules of natural justice.[15a] Where, however, a fireman was cautioned after an enquiry of a judicial character as prescribed by statute, it was held not to be a judicial act.[16]

As has been said, when justices of the peace were called upon to perform new duties of an administrative nature from the 17th century onwards, the remedy of *certiorari*, originally used to correct their judicial acts, was naturally used to control them in the exercise of their new powers, for instance to quash an order fixing rates for repair of bridges.[17] Licensing justices originally deemed to be acting judicially, were in 1894 held to act administratively,[18] but since 1906 they have been regarded as acting judicially.[19] Entertainment and cinema licensing authorities and other authorities required to grant a hearing to applicants and objectors will probably be regarded as acting judicially,

15. *Nakkuda Ali* v. *Jayaratne*, [1951] A.C. 66.

15a. *R.* v. *Metropolitan Police Commissioner, Ex parte Parker*, [1953] 1 W.L.R. 1150.

16. *Ex. p. Fry*, [1954] 1 W.L.R. 730.

17. *The Cardiff Bridge* case, (1700) 1 Lord Raym, 580.

18. *R.* v. *L.C.C.*, (1894) 71 L.T. 638.

19. *R.* v. *Woodhouse*, [1906] 2 K.B. 501.

whereas an authority which issues licenses like those for holding an automobile or for a driving it would be held to act administratively.

3. Parties

Though a court is unlikely to allow an application for *certiorari* not made by a person aggrieved, it seems probable that the position is that, assuming recognized grounds to exist, the court retains its discretion to quash even when made by an individual other than a person aggrieved.[20] In this context " person aggrieved " has been defined as one who has a peculiar grievance of his own beyond that suffered in common with the rest of the public, but ratepayers aggrieved by an order of a minister remitting a surcharge imposed on borough councillors for unlawful expenditure [21] and an order of an auditor allowing unlawful expenditure [22] who successfully applied for *certiorari* could hardly maintain that they were more heavily burdened than other ratepayers. They would, however, come within the category of persons with a special grievance by virtue of membership of a local community. The position may probably be stated with reasonable accuracy by saying that, assuming adequate grounds for *certiorari*, it will not be refused unless the applicant's interest is too slight or too remote.

Certiorari will issue to inferior courts, administrative tribunals, local authorities, other statutory bodies, individual officers, departments of state and individual ministers. It will not issue to a body exercising judicial powers by virtue of a contract or consent of its members, nor against a body which exercises such powers without colour of right, as, for example, when a self-constituted committee proceeds to exercise powers of a local government body over a group of squatters. It will only issue to a body exercising statutory powers, but it is not essential that the body should be created by statute.[23]

4. Orders subject to control by certiorari

The rules of the Supreme Court do not permit an order to be questioned by *certiorari* unless a copy is filed or failure to do so is accounted for to the satisfaction of the court. There must therefore normally be a written order, such as a record of the minutes of a local authority or a letter communicating the authority's decision, but there is a discretion to permit the inferior tribunal to reduce its order to writing before the application is heard.[24]

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20. See e.g. *R.* v. *Brighton Borough Justices,* [1954] : 1 W.L.R. 203 at 207 ; *R.* v. *Thames Magistrates Court, ex. p. Greenbaum,* [1957] 55 L.G.R. 129.
21. *R.* v. *Minister of Health, ex. p. Dore* [1927] 1 K.B. 765.
22. *R. (Bridgeman)* v. *Drury,* (1894) 2 I. R. 489.
23. de Smith, *op. cit.*, pp. 274-276.
24. *R.* v. *Newington Licensing Justices, ex. p. Conrad,* [1948] 1 K.B. 681.

It must be an order affecting the rights of subjects,[25] but in this context, "rights" is used in a very broad sense, and covers an indefinable variety of legally recognized interests, including those licensees.

5. Grounds for issue of certiorari

(a) Errors in jurisdiction

Refusal to exercise jurisdiction is normally corrected by mandamus. *Certiorari* is available to a person complaining of want of jurisdiction or abuse of jurisdiction or excess of jurisdiction, but the burden of proof is on him. It is generally assumed that a tribunal has jurisdiction to decide wrongly as well as rightly, but, when an authority acts on irrelevant considerations or without regard to relevant considerations, its proceedings are liable to be quashed for defect in jurisdiction, if the error can be related to the provisions in the statute defining its jurisdiction. In 1947 an application was made to quash a decision of a rent tribunal which had complied with the statutory conditions governing jurisdiction and the order was good on the face of it; it was an application to quash on a latent error of law not going to the jurisdiction, *viz.*, failure to take into account certain matters which should have been considered in assessing a fair rent; certiorari was not admissible,[26] but since then in one case the statute provided that a Land Tribunal should withhold consent to a notice to quit served by an agricultural landlord on his tenant unless satisfied that the carrying out of the purpose of the notice was in the interest of good farming. The Tribunal gave their decision on the assumption that they were entitled to take into consideration the effect on a farm worked by the landlord, and their order was quashed on the ground that only the effect on the land occupied by the tenant was relevant.[27] In a later case under the same statute in the Court of Appeal, where a similar misinterpretation of the statute had been made, the Court of Appeal affirmed an order of the Divisional Bench quashing the Tribunal's order.[28] In these and other cases decided since 1947, the error of law has been regarded as a jurisdictional error.

In the United States the distinction in the instant context between jurisdictional and non-jurisdictional questions, between collateral

25. *R.* v. *Electricity Commissioners*, [1924] 1 K.B. 171.
26. *R.* v. *Paddington & St. Marylebone Rent Tribunal, ex. p. Kendal Hotels Ltd.*, [1947] 1 All E.R. 448.
27. *R.* v. *Agricultural Land Tribunal for Wales and Monmouth Area, ex. p. Davies*, [1953] 1 W.L.R. 722.
28. *R.* v. *Agricultural Land Tribunal for Eastern Province of England ex. p. Grant*, [1956] 1 W.L.R. 1240.

matters and the main question which an authority has to deal with has been largely abandoned,[29] but it is still important in England and India, and the chief categories of jurisdictional questions have been recently summarised as arising from:

(a) decisions on procedural matters before hearing, such as whether parties have received notice, and whether an application is within time,

(b) decision on territorial and pecuniary competence of the authority, and

(c) exercise of powers prohibited by the statute *e. g.* when the power given is to take material from land other than a park.

Where a statute sets up a tribunal to deal with applications to enforce newly created rights, like a right to reinstatement after resignation to join the armed forces during the war, the court is disposed to take a very wide view of the tribunal's powers, but where there are discretionary powers to grant privileges or modify existing rights, the court treats a wide variety of questions as jurisdictional. In the former situation, for instance, whether the applicant was employed, how long he had been employed, whether he resigned or was dismissed have been treated as outside the scope of judicial review, but when licensing justices exercised their power to extend the hours during which public houses may sell liquor on "special occasions", the courts have held that this does not cover a weekly market day.[30]

Lack of jurisdiction is clear if the tribunal is improperly constituted, if essential principles have been disregarded, and if it has no jurisdiction over any of the parties.

(b) Failure of natural justice

Though it is, no doubt, susceptible of extension, the concept of natural justice in England includes the right to a hearing before an unbiased and disinterested tribunal, and the right to adequate notice and opportunity to be heard.

Different standards of impartiality appear to be required of different kinds of tribunals. Where a tribunal approximates to a court, the rigid standard required of a judge will be demanded. Any operative prejudice, whether he is conscious of it or not, in relation to a party or an issue, and any real likelihood of such prejudice will disqualify. But when a minister who had made, before the enquiry, a public

29. *B.* Schwartz, *Introduction to American Administrative Law*, pp. 202-206.
30. de Smith, *op. cit.*, pp. 70, 71.

speech expressing his intention to do so, confirmed a draft order designating the site of a new town, rejecting the objections of local residents at the enquiry and this was impugned, on the ground that the minister was biassed, the House of Lords held that the concept of impartiality relevant to a quasi-judicial authority was irrelevant. The object of the inquiry was only to ensure that the minister was properly informed of the objections, and the minister who was acting administratively in confirming the order, could not be accused of bias unless he had not considered the objections or had approached them in a state of mind precluding any genuine consideration of them.[31] When an authority is one which the court holds is under a duty to act quasi-judicially, the concept must come somewhere between these two extremes, according to the nature of its functions.

Likelihood of bias is to be judged as a reasonable man would judge of a matter in the conduct of his own business. Though a high degree of detachment will be expected from a disciplinary tribunal like the British Medical Association, personal hostility will be pleaded in vain when a member of a trade union, expelled on account of his opposition to the policy of the union, complains that the disciplinary committee was unlikely to be impartial; he will have to show that they did not fairly consider his case and determined on his expulsion before the hearing.[32] A teetotaller is not debarred by his principles from sitting as a licensing justice.[33]

But a licensing justice may be a member of a local government board, which has adopted a town planning policy effecting the future location of public houses, and has statutory powers to object to renewal of licenses. In one case it was held, wrongly it is submitted, that a licensing justice who had originated an objection to the renewal of a license, which has been referred by him and others to the compensation authority was not disqualified by reason of interest from sitting and adjudicating as a member of that authority upon the matter of the license,[34] but where licensing justices instructed a solicitor to appear before the compensation authority and yet sat as members of the compensation authority, it was held that these steps gave rise to a real likelihood of their inability to hear the application in a judicial spirit.[35]

31. *Franklin* v. *Minister of Town and Country Planning*, (The Stevenage case) [1948] A.C. 87.
32. *White* v. *Kuzych*, [1951] A.C. 585.
33. *R.* v. *Nailsworth Licensing Justices, ex. p. Bird*, [1953] 1 W.L.R. 1046.
34. *R.* v. *Leicester Justices, ex. p. Allbrighton*, [1927] 1 K.B. 557.
35. *Frome United Breweries* v. *Bath Justices*, [1926] A.C. 586.

If departmental bias is alleged, it would seem probable that the standard required is that laid down in the *Stevenage* case;[36] the objection can only succeed if the authority approached the matter in a state of mind precluding genuine consideration of objections to the order made, for it has been held that a minister who is ultimately obliged to confirm a compulsory purchase order made by a local government board, may, before the owners of the property affected have filed their objections, express tentative approval of the order.[37]

In England, when a decision is made by a minister or government department, natural justice is not deemed to include a right to be heard before an officer conducting an enquiry. But where the statute or the nature of the tribunal requires notice, failure to give it to a party affected will invalidate the proceedings, unless he has suffered no substantial detriment,[38] or has obstructed or evaded notice.[39] The court claims jurisdiction to determine the adequacy of the notice. When there are statutory rules, it will distinguish between mandatory and directory rules. Action prejudicial to a person's rights in disregard of statutory requirements will be avoided if he has been deprived of opportunity to file objections.[40]

In disciplinary proceedings a statement of the allegations must be furnished and sufficient time given to allow for the defence to be prepared, unless the individual in jeopardy is aware of the allegations,[41] or they are not in dispute.[42]

Though the rules stated above, in the case of a person against whom prejudicial action is contemplated, impose a duty on the competent authority, it is impossible to say to whom this duty is owed. If it is owed to an applicant for a license and a person whose license it is intended to revoke, is it owed to a person who wishes to oppose the application or support the proposal to revoke? Except where the point is covered by statute, there seems to be no rule.[43] This is probably due to the willingness of the court in *certiorari*, to give audience to persons who wish to be heard.

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36. *Franklin* v. *Minister of Town and Country Planning*, [1948] A.C. 87.
37. *Re Manchester (Ringway Airport) Compulsory Purchase Order*, (1935) 153 L.T. 219.
38. *Howell* v. *Falmouth Boat Construction Co.*, [1951] A.C. 837.
39. *De Verteuil* v. *Knaggs*, [1918] A.C. 557.
40. *Brown* v. *Minister of Housing*, (1953) 1 W.L.R. 1370.
41. *Byrne* v. *Kinematograph Renters Society Ltd.*, [1958] 1 W.L.R. 762.
42. *Davis* v. *Carew-Pole*, [1956] 1 W.L.R. 833.
43. de Smith, *op. cit.*, p. 110.

Though the person entitled to notice is entitled to an opportunity of being heard, he is not entitled to an oral hearing unless the statute so prescribes or he would otherwise be prevented from adequately presenting his case. Representation by counsel before many administrative tribunals is prohibited by statute or left to the discretion of the tribunal. The right to cross-examine is expressly granted in some statutes. It seems doubtful whether, in cases regarding which there is no statutory provision, denial of the right to cross-examine or the right to be represented by counsel would be regarded as a denial of natural justice, unless it could be shown that the consequence was a denial of a fair hearing.[44]

Acceptance of evidence, or inspection of premises in the absence of a party violates the rule of natural justice.[45] A rent tribunal and presumably any tribunal not required by statute to take evidence may act on its own impression or knowledge, and if it makes such a reduction as to cause loss to a landlord, he has no remedy.[46] A tribunal of experts, such as a medical appeal tribunal acting under the National Insurance (Industrial Injuries) Act, being an expert investigating body can use its own expertise in medical questions referred to it,[47] but when an appeal tribunal dealing with claims arising out of war injuries relied on the opinion of its medical member as to whether a claimant's disability was due to war service, the court held that evidence, whether oral or documentary, must be communicated to both parties, and the medical member's statement should not have been taken into account.[48] A rating authority is not restricted to the evidence brought before it; it can act on its own expert knowledge; it can call for a report from a competent person, but in dealing with an objection it must disclose the report to the objector.[49] Regarding decision of government department, it has been said :

> "Comparatively recent statutes have extended.....the practice of imposing upon departments or officers of State the duty of..... determining questions of various kinds.....In such cases.....they must act in good faith and fairly listen to both sides.....But I do not think they are bound to treat such a question as though it were a trial..... *They can obtain information in any way they think best,*

44. *R.* v. *Brighton & Area Rent Tribunal, ex. p. Marine Parade Estates,* [1950] 2 K.B. 410.
45. *Errington* v. *Minister of Health,* [1935] 1 K.B. 249.
46. *R.* v. *Brighton & Area Rent Tribunal,* [1950] 2 K.B. 410.
47. *R.* v. *Medical Appeals Tribunal, ex. p. Hubble,* [1958] 2 Q.B. 228 at 240.
48. *Moxon* v. *Minister of Pensions,* (1945) K.B. 490.
49. *R.* v. *City of Westminster Assessment Committee,* [1941] 1 K.B 53

always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view." [50]

The rules of natural justice do not apply to appointment, promotion and dismissal from the civil and military forces. As yet no student has succeeded in getting an order of court to a university or other examining authority to observe the rules of natural justice when disqualifying examination candidates.

The rules of natural justice may be excluded by statutory provisions permitting something to be done "without notice or other formality", or enabling an enquiry to be held "if necessary". Statute gave a local authority power to prohibit building, subject to an appeal, and the rules under the Act empowered the appeal tribunal to dispense with a hearing, and dispose of the appeal summarily, after considering the notice of appeal, the reply of the local authority and any further representation of either side; a decision was quashed when the appeal tribunal dismissed an appeal without giving the appellant the opportunity of controverting the statements of the local authority.[51]

The rules of natural justice may also be excluded when an authority is entrusted with a wide discretion in the exercise of a power, as in the case of the Home Secretary's power to deport aliens if he "deems it to be conducive to the public good".[52] The position in the United States is different. In 1950 an alien ordered to be deported successfully pleaded failure to observe the provisions of the Administrative Procedure Act, 1946, in particular in that the officer holding the enquiry performed investigating and prosecuting functions.[53] Congress subsequently excluded the provisions of the Administrative Procedure Act from application to deportation proceedings, the procedure under which was governed by the Immigration and Nationality Act, 1952, so that in 1955 an alien failed in an attempt to impugn a deportation order on the ground that the officer conducting the hearing was a member of the investigating staff. He could however insist on a fair hearing in accordance with the due process clause in the Fifth Amendment; that, however, had not been denied in the instant case.[54]

50. *Board of Education* v. *Rice*, [1911] A.C. 179 at 182.
51. *R.* v. *Housing Appeal Tribunal*, [1920] 3 K.B. 334.
52. *Ex. p. Venicoff*, [1920] 3 K.B. 72.
53. *Wong Yang Sung* v. *McGrath*, (1950) 339 U.S. 33.
54. *Marcello* v. *Bonds*, 349 U.S. 302 (1955).

(c) Fraud and collusion

If a landlord in collusion with another applied to a Rent Tribunal to fix a high rent, this would be a fraud upon the tribunal and certiorari would issue if the tribunal had been misled,[55] but the fraud must be clear and manifest. In affiliation proceedings the alleged putative father called a witness whom he believed to have associated with the mother. The witness denied this; in appeal he refused to answer material questions and was subsequently convicted of perjury. The father then sought to quash the affiliation order by certiorari, but it was held that the fraud, if any, was not clear and manifest, because it was not clear that, if the mother had been tried for perjury, the case against her could have been proved. *Certiorari* would not issue unless the facts constituting the fraud had resulted in the criminal conviction of the person against whom the fraud was alleged, or that person had confessed to it.[56] This was, perhaps, a hard case but, in the circumstances, a case of perjury against the woman could not have been proved.

(d) Errors of law and fact

A decision of a competent authority cannot be impugned for error of law or fact, unless the error goes to the jurisdiction, or is an error apparent on the face of the record, or is sufficiently flagrant to support the view that the authority has misused or misconceived its powers.[57] Before the power to quash for error apparent on the face of the record fell into disuse, justices' summary convictions were set aside not only for errors of substantive law but also for lack of evidence on material points and for trivial formal defects.[58] The Judicial Committee, dealing with a case arising out of a conviction for a criminal offence in Canada said in 1922:

> "Whether the verdict was one which twelve reasonable men could have found, whether the evidence was such that twelve reasonable men could safely convict on it, and whether it was such that a Court of Criminal Appeal should refuse to interfere with the conviction are questions which.....have no relation to the functions of a superior court on certiorari.....the question can at most be whether any evidence at all was given ".[59]

55. *R.* v. *Julham, Hammersmith and Kensington Rent Tribunal, ex parte Gormley,* [1951] 2 All. E.R. 1030 at 1034.
56. *R.* v. *Ashford Justices, ex p. Richley,* [1956] 1 Q. B. 167.
57. *Healey* v. *Minister of Health,* [1955] 1 Q. B. 221.
58. de Smith, *op. cit.,* p. 295.
59. *R.* v. *Natt Bell Liquors Ltd.,* [1922] 2 A.C 128. at 143, 144.

Absence of evidence on a material point is error of law apparent on the face of the record. The former managing director of two road haulage companies was entitled to compensation on nationalisation, and the Tribunal was empowered to take into account "expectation under existing customary practice to payment of compensation in the event of discharge". The Tribunal seems to have assumed that, on account of the reputation for generosity which the companies enjoyed, they would probably have paid him a sum of money on discharge, but there was no evidence of any such *custom* as that referred to in the rule. Its proceedings were quashed for error of law.[60]

A modern instance of quashing for misinterpretation of a statutory rule may be cited. A workman, who had injured a finger of the right hand subsequently injured two fingers of the left hand in the course of his employment. He was insured against this under the National Insurance (Industrial Injuries) Act, 1946. The medical board, ignoring the injury to the right hand, assessed the permanent disablement at 3%. He then moved the appeals tribunal contending that he was entitled to the benefit of the "paired organs" rule, *i.e.*, an injury to one of a pair of similar organs with complementary or interchangeable functions is to be assessed at a higher rate. The appeals tribunal held that though hands were organs, fingers were not, and if they were, their functions were not interchangeable. The court said that fingers were part of the hands, which were organs with complementary and interchangeable functions, and the "paired organs" rule should have been applied.[61]

There do not appear to be any English cases in which error of law on the face of the record is distinguished from any other kind of error of law other than an error going to the jurisdiction; it is clearly not an error so glaring as to require no argument to make it clear. It would seem to apply to any error calculated to affect the decision of the tribunal, and it is immaterial that the statute imposed finality on the tribunal's order.[62]

It is however necessary that the error should be disclosed on the record; the Tribunals and Inquiries Act, 1958, has imposed on many statutory authorities the duty to make "speaking orders", but previous to this the court, when necessary, gave a broad interpretation to "record". It includes the document initiating the proceedings, the

60. *R.* v. *Birmingham Compensation Appeal Tribunal, ex. p. Road Haulage Executive*, [1952] 2 All. E.R. 100.
61. *R.* v. *Medical Appeals Tribunal, London, ex. p. Burpitt*, [1957] 2 Q.B. 584.
62. *R.* v. *Medical Appeals Tribunal, ex. p. Gilmore*, [1957] 1 Q.B. 574.

pleadings and the adjudication. Under the Act of 1958, reasons for the decision form part of the record; they are recorded in writing and attached to the decision.[63] The evidence is not part of the record. A document, such as a medical report, which has been referred to in the award is part of the record.[64] The court can compel the tribunal to complete its record. Latent error of law cannot be brought to the court's notice by affidavit, unless the parties agree.[65]

What is the record ?

What exactly is the 'record' has not yet received a final judicial definition. In *Regina* v. *Patents Appeal Tribunal*,[65a] the majority view was that the Superintending Examiner's report in a patent matter which was set aside by the Patents Appeal Tribunal was not part of the record in *certiorari* proceedings before the Queen's Bench against the Appellate Tribunal's order. In the further appeal to the House of Lords[65b] Lord Tucker observed that the decision in the case could not be quoted as an authority as to the meaning of the word 'record' in that context or as to whether the court could or would look beyond the actual order or decision in the case of 'speaking order' to discover whether error in law existed or not, or what documents constituted the record if the court ordered the record to be brought before it. His Lordship pointed out that those questions might require a decision at some future date.[65b] Lord Denning on the other hand recognised not only the order of the superior tribunal but also as the ancient writ said 'all things touching the same'[65c] as part of the record. He considered the decision of the Superintending Examiner also to be part of the record as it was a document 'touching the same'. Viewed in that light, the omission of the Patents Appeal Tribunal to consider alternative 'D' (in the rival specifications) which was the basis of the Superintending Examiner's decision, was an error of law apparent on the face of the record. However, Lord Denning agreed with the other Lords in dismissing the appeal on the ground that there was an adequate legal remedy by suit.

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63. *R.* v. *Paddington North and St. Marylebone Rent Tribunal, ex. p. Perry*, [1956] 1 Q.B. 229.

64. *R.* v. *Medical Appeals Tribunal, ex. p. Gilmore*, [1957] 1 Q.B. 574.

65. *R.* v. *Northumberland Compensation Appeals Tribunal, ex. p. Shaw*, [1952] 1 K.B. 338.

65a. [1959] 1 Q.B. 105.

65b. *Baldwin and Francis Ltd.* v. *Patents Appeal Tribunal*, [1959] A.C. 663 at 686.

65c. *Ibid.*, 687 to 697.

6. Procedure

Applications for *certiorari* are heard by a Divisional Court in the Queen's Bench Division. A single judge has no jurisdiction except during vacation. Leave to apply for the order must first be made with a full statement of the grounds and affidavits verifying the facts must also accompany the application. If leave is granted, it operates as a stay of the impugned proceedings. If leave is refused by a judge in chambers, there is an appeal to a Divisional Court, whose decision is final; if leave is refused by a Divisional Court as court of first instance, there is an appeal to the Court of Appeal except in a criminal matter. If leave is granted, notice or summons must be served on all persons affected, and the court may order any other interested person to be served. The court may also allow any person who appears to be a proper party but who has not been served, to be heard. Exceptionally deponents of affidavits may be cross-examined. Parties may appear in person or by counsel. An application for *certiorari* except by the Crown, must be brought within six months of the making of the impugned order unless the court, in its discretion and after notice to the respondent, grants an extension.[66] If the Divisional Court rejects the application after leave granted and hearing, an appeal lies to the Court of Appeal.

Between 1950 and 1957, both years included, there were 271 applications for leave to move of which 75 were refused. Of the remaining 196, 96 were ultimately dismissed.[67]

7. Circumstances adverse to the grant of certiorari

Leave will be refused if there has been misrepresentation or concealment of material facts.[68] Where jurisdiction is impugned, *certiorari* may be refused if the applicant has waived his right to object. Acquiescence, or implied waiver by participation in proceedings, knowing of the facts on which objection might be taken, may also result in an application being dismissed. Apart from the six months' period of limitation prescribed, unreasonable delay in instituting proceedings may defeat an application. The exceedingly foolish and unreasonable conduct of the applicant has been given as a ground for refusing *certiorari*.[69]

Several statutes which empower local authorities to make orders for compulsory acquisition of land and other orders necessary in town

66. R. S. C. O. 59, r. 4(2).
67. de Smith, *op. cit.*, p. 320.
68. *R.* v. *Kensington I.T.C.*, [1917] 1 K.B. 486.
69. *Ex. p. Fry*, [1954] 1 W.L.R. 730.

and country planning permit such orders to be challenged in the High Court within a prescribed period, and prohibit recourse to the court after the expiry of that period. Whether there is a specific reference to *certiorari* or not, the intention is to enact a complete code for judicial review and the right to *certiorari* is barred. The Acquisition of Land (Authorisation Procedure) Act, 1946, provided (a) that a person aggrieved by an acquisition order on the ground that it was *ultra vires* the statute might, within six months of having notice of the order, apply to the court, (b) subject thereto the order should not be questioned in any court. The appellant brought an action outside the statutory period against a local authority, its clerk and the government department which confirmed the order, for damages, for injunction against trespass, for a declaration that the order was wrong and that the clerk acted *mala fide*. The Law Lords decided unanimously that the action for damages against the clerk might proceed, by 3-2 that the action against the Council and the Government Department by (b) above could not, and by 4-1 that (a) excluded the right to question the order as *mala fide*.[70]

Where there is no such statutory exclusion of *certiorari*, the existence of an alternative remedy will not affect the court's jurisdiction to quash, but, if it is equally convenient, it may influence the court to exercise its discretion against the applicant. Though in the United States, with exceptions administrative remedies must be exhausted before judicial relief is sought,[71] this is not the rule in England.[72] The Rules of the Supreme Court provide that, when an order is subject to appeal within a stated period, an application for *certiorari* may be adjourned until the appeal has been determined or the period of limitation has passed.

70. *Smith* v. *East Elloe R.D.C.*, [1956] A.C. 736.
71. *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U.S. 41.
72. *R.* v. *Postmaster-General, ex. p. Carmichael*, [1928] 1 K.B. 291.