NOTES & COMMENTS

BIAS AND ADMINISTRATIVE POWER

A. K. Kraipak v. *Union of India*

A. K. Kraipak v. *Union of India*,[1] is the most remarkable recent pronouncement of the Supreme Court on the question of quasi-judicial versus administrative functions.[2] The facts were that for selection to the Indian Forest Service from amongst the employees of the Forest Department of the State of Jammu and Kashmir, the government appointed a Selection Board consisting, among others, of the Acting Chief Conservator of Forests of the State, who himself was a candidate for the selection post. The Board selected a number of persons from amongst the State employees including the Acting Chief Conservator of Forests himself who had participated in the deliberations of the Selection Board. On the basis of these selections, the Union Public Service Commission prepared a final list. Several candidates not selected by the Selection Board challenged the list prepared by the U.P.S.C. on the basis that the Board's recommendations were vitiated on the ground of bias insofar as a person personally interested in the matter sat on the Selection Committee itself The Supreme Court recognised the fact that the list prepared by the Selection Board was not the last word in the matter of the selections in question. Nevertheless, it emphasized that the recommendations must have carried considerable weight with the U.P.S.C. in making the final selections and, therefore, if the initial selection was vitiated, the final recommendations made by the U.P.S.C. must also be held to have been vitiated.

The question was whether the concept of 'bias' usually applicable to quasi-judicial proceedings would apply to the Selection Board. It was argued that the selection process being administrative, the concept of 'bias' would not apply. On the question whether the function of selection performed by the Board was quasi-judicial or administraive, the Court speaking through Justice Hegde observed:

> "The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. . . . The concept of the rule of law would lose its validity if the instrumentalities of the State are not

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1. A.I.R. 1970 S.C. 150.

2. For a detailed discussion of this topic reference may be made to Jain & Jain, *Principles of Administrative Law*, 118-207 (1971).

> charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and fair decision. In recent years the concept of quasi-judicial power has been undergoing a radical change. What was considered as an administrtive power some years back is now being considered as a quasi-judicial power....[3]

The Court laid stress on the fact that with the increase in the power of the administrative bodies, it has become necessary to provide guidelines for the just exercise of their power and to see that it does not become a new despotism.[4] Courts are gradually evolving the principles to be observed while exercising such powers. In such matters, public good is not advanced by a rigid adherence to precedents. New problems call for new solutions. It is neither possible nor desirable to fix the limits of a quasi-judicial power. For the sake of argument, however, the Court assumed the function involved in the instant case to be administrative. Nevertheless, the Court held that the proceedings of the Selection Board were vitiated because of 'bias'. It was improper to have the Acting Conservator of Forests as a member of the Selection Board when he himself was to be considered for selection. There was, thus, a reasonable ground for believing that he was likely to have been biased as he would be interested in safeguarding his own position while preparing a list of selected candidates. The Court held further that the principles of natural justice could be applied even to 'administrative' proceedings similar to the one involved in the instant case. The Court refused to be guided by the precedents which held that natural justice was not applicable to 'administrative' proceedings, and said that it was not necessary to examine those decisions as there was a great deal of fresh thinking on the subject. "The horizon of natural justice is constantly expanding."[5]

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3. *Supra*, note 1, at 154.

4. *Id.* at 155.

5. To support this view, the Court referred to the following English cases: *Reg.* v. *Criminal Injuries Compensation Board, ex parte Lain*, (1967) 2 Q.B. 864, 881, in which it has been held that *certiorari* would lie to a body set up under prerogative and even if its determination gave rise to no legally enforceable rights. But two recent cases on the other side of the line, not mentioned by the Supreme Court, may also be noted. In *Schmidt* v. *Secretary of State* (1969) 1 All. E.R. 904, the Court of Appeal

The rules of natural justice aim at securing justice, or to put it negatively, to prevent miscarriage of justice. If that is the purpose, one fails to see why those rules should be made inapplicable to administrative enquiries. The Court pointed out that often it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries and that enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. The aim of both quasi-judicial as well as administrative enquiries is to arrive at a just decision. An unjust decision in an administrative enquiry may have a more far reaching effect on the individual concerned than a decision in a quasi-judicial enquiry. Accordingly, the selections were quashed as the Board's decision could not be said to have been taken "fairly or justly" insofar as one of the members of the Board was a judge in his own case, a circumstance which is abhorrent to our concept of justice.

The Supreme Court's pronouncement in the *Kraipak* case is marked by a freshness of approach; it breaks new ground and may be regarded as epoch-making in the development and growth of Indian administrative law. Hitherto, the concept of quasi-judicial had to be invoked if it was thought that in discharging a function, the authority concerned should have followed the principles of natural justice. It has been found that in the modern complex administrative age, it is not easy to characterise a body as 'quasi-judicial' or 'administrative'. Many a time the distinction between the two becomes artificial and thin. In many cases, the one and the same body may be regarded as quasi-judicial for certain purposes, and administrative for certain other purposes. In such a context, it appears to be anomalous to seek to characterise a function discharged by the administration as quasi-judicial or administrative. The significance of drawing this distinction, it may be remembered, lies, by and large, only in deciding whether natural justice should or should not be applied. The *Kraipak* case seeks to dilute the distinction between 'quasi-judicial' and 'administrative' for the purpose of hearing and seeks to emphasize that some principles of natural justice should be applied to all proceedings irrespective of whether these

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repudiated the suggestion that in exercising his powers under the Aliens Order, the Minister should have followed natural justice while refusing to extend the stay of alien students in England. Aliens "have no right to be here except by the licence of the Crown", *ibid.* 909. For a comment on the case see 43 A.L.J. 235 (1969). Another case where natural justice has been denied is *Wiseman* v. *Borneman* (1969) 3 W.L.R. 706. Here it was held not necessary to decide whether there was a *prima facie* case or not for proceeding in the matter. For a comment see, 86 L.Q.R. 7 (1970).

proceedings be characterised as administrative or quasi-judicial, on the ground that the administration is obligated in all situations to act justly and fairly. This appears to be a rational approach.

In the process of evolution of judicial thinking on the subject of quasi-judicial proceedings and the right of hearing, the first deep impact was made on the Indian courts by *Ridge* v. *Baldwin*.[6] And now, in the *Kraipak* case, the Supreme Court has taken another leap forward towards making the application of principles of natural justice more broad-based and universal than has been the case hitherto. The *Ridge* case prompted the courts to characterise more and more functions as quasi-judicial so as to win for the affected party a right of hearing. Now, the *Kraipak* case has given a further stimulus to such an approach. Several lines of development are now possible in the judicial thinking in India. One, the courts may be tempted more and more to characterise functions as quasi-judicial and, thus, ensure a broader right of hearing for persons injured by acts of the administration. Two, it is possible that even while characterising a proceeding as administrative, the courts may yet insist on some sort of a hearing on the basis of justice and fairplay, although in such situations the hearing requirement may be somewhat narrower than what is usually insisted upon in a quasi-judicial proceeding. Three, the courts may get over their long ingrained habit of characterising a function as quasi-judicial or administrative and irrespective of the nature of the function, concede a right of hearing to the affected person. There seems to be no doubt that the *Kraipak* case is bound to have a deep impact on judicial thinking and affected persons will now be able to claim a right of hearing in many more types of administrative proceedings than was possible, till now, but this result, it appears, will be achieved by the courts following the first and second alternatives mentioned above. It appears to be still far away for the third alternative to become the operative norm. It appears to be somewhat premature to think, as one commentator seems to assume,[7] that the *Kraipak* case leads to a 'total obliteration' of the distinction between 'administrative' and 'quasi-judicial'. There does not appear to be any immediate possibility of such a distinction being obliterated in the near future. For one thing, it will take time for the impact of the *Kraipak* case to filter down the judicial

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6. (1963) 2 W.L.R. 935. comments see, Jain & Jain, *op. cit.* 101, 112 and 116.

7. Nambyar in 86 *L.Q.R.* 6.

ladder. Two. the old habit dies hard. The courts being oriented for long to thinking in terms of the quasi-judicial and administrative dichotomy, cannot possibly shed their habit all at once. It would. of course. be a most welcome development in the Indian administrative law if hearing becomes the normal rule in administrative proceedings and if the courts can persuade themselves to get over the obsession of calling a function as quasi-judicial when they feel that hearing should be given, and if the courts concentrate merely on the question whether in the given situation the party affected should or should not have a right of hearing. Such an approach will rid the present-day Indian administrative law of much of its artificial conceptualism, e.g., trying to find a 'judicial' duty in the statute when nothing of the kind is specifically mentioned therein. The rule should come to prevail that whenever the administration seeks to affect the person, property or a right of an individual, hearing should be the rule and non-hearing an exception. e.g., when some matter of high policy may be involved. Adoption of such a rule will greatly simplify the administrative law, for the courts will then be spared the trouble of first trying to characterise a function as 'quasi-judicial' or 'administrative' to decide whether principles of natural justice are applicable or not to the given situation. The principle of 'bias' should also become a universal norm irrespective of the nature of the proceeding. for it is not only a negation of the 'rule of law' but also of good administration that a person directly interested in the result of a decision should participate in the decision-making process. If such things happen too frequently, then the public confidence in the fairness of the administration would be shaken completely which will not be conducive to good and efficient administration. But the eventuality of such an approach being generally adopted lies, if at all, in the womb of the distant future.[8] For the time being the greater possibility is that the quasi-judicial v. administrative dichotomy will remain valid and relevant, and will retain its vitality, in Indian administrative

8. Similar views have been propounded by the judges in England, especially by Lord Denning. In the *Schmidt* case, note 5, *supra*, Lord Denning stated that the distinction between 'administrative' and 'judicial' acts was no longer valid for "an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say." Hearing was, however, denied in the instant case. But despite such statements the terms 'quasi-judicial' or 'duty to act judicially' frequently occur in English case-law, see, e.g., the House of Lords case *Wiseman* v. *Boreman*, *supra*, note 5.

law, although under the impact of the *Kraipak* case the courts would lean more and more towards holding functions as quasi-judicial and, thus, concede a right of hearing on a more liberal basis.

A few cases picked up from the recent reports may be noted here to denote the trends which have already been initiated in judicial thinking under the impact of the *Kraipak* pronouncement. Under S. 17(3) of the Arms Act, the licensing authority may revoke a license for arms if it deems it necessary for the security of the public peace or for public safety after recording its reasons for revocation of the license. An appeal lies to an appellate authority from this order. Some High Courts have taken the view that no opportunity of hearing need be given to the licensee at the time of cancellation of the licence as there is no such provision in the Act.[9] However, the Orissa High Court, following the *Kraipak* case, has held in *Sisir Kumar* v. *State*,[10] that principles of natural justice should be followed, otherwise the right of appeal would become wholly illusory if the licensee has had no right of hearing before the revoking authority. However, in *K. N. Naik* v. *The Addl. Dist. Mag.*,[11] the Kerala High Court, without referring to the *Kraipak* case has reached the same result and has held that the function of cancelling an arms licence is quasi-judicial and that the licensee is entitled to be heard. The impact of the *Kraipak* case in this area may be that the High Courts which have been hitherto holding the function as administrative may now come round to treating it as quasi-judicial. Another case is *A.S. Society* v. *Union of India*.[12] Under the Sugarcane (Control) Order, 1966, a minimum price is to be payable by a sugar factory for the sugarcane purchased by it. Over and above this, the order provides for payment of an additional price for sugarcane purchased during 1958-62, according to a formula contained in the order. The Government has been given power to exempt any sugar mill from payment of the additional price if the government is satisfied that during the year a factory has made no profit or has made an inadequate profit. The authority concerned quantified the additional price payable by the mill in question for sugarcane purchased in 1961 and 1962, but, on being moved by the mill, the Central Government granted exemption to it from payment of the additional price. The

9. *Hassan Ali* v. *Commissioner*, A.I.R. 1969 Ass. 50. For a large number of cases on this point, refer to *Naik's* case, cited *infra*, note 11.

10. A.I.R. 1970 Ori. 110.

11. A.I.R. 1971 Ker. 162.

12. A.I.R. 1970 Mys. 243.

High Court ruled that the suppliers of the cane should have been given an opportunity of being heard as they had an accrued right to get additional price under the statute, and the question whether exemption should be given therefrom, accordingly, assumes a quasi-judicial character and principles of natural justice require that the sugarcane growers should have been heard. After holding the function as quasi-judicial, the court proceeded to state, as an obiter, that according to the *Kraipak* case, whether the government's decision to exempt be regarded as quasi-judicial or administrative, the sugarcane suppliers should in any case have been given a right of hearing or allowed an opportunity to make representation. In *C.B. Boarding and Lodging* v. *State of Mysore*,[13] the Supreme Court has ruled that it was not necessary to go into the question whether the power to fix the minimum wages conferred on the government by S. 5(1) of the Minimum Wages Act was 'quasi-judicial' or 'administrative', as the government should observe natural justice in any case. The Court referred to the *Kraipak* case to state that the dividing line between an 'administrative' and 'quasi-judicial' power "is quite thin and is being gradually obliterated," and that the "principles of natural justice apply to the exercise of the administrative power as well." However, the procedure prescribed in the Act for fixing minimum wages was held to be sufficient and adequate for the purpose This again was the judgment of Justice Hegde who had given the *Kraipak* judgment earlier. The next case worth noticing is the *R.D. Chemical Co.* v. *Company Law Board*.[14] Under S. 326(2) of the Companies Act, the Central Government is not to accord its approval for the appointment of a managing agent by a company unless, *inter-alia, in its opinion* the person proposed is a fit and proper person to be appointed as such. In the instant case, the Supreme Court has held that the words 'in its opinion' in S. 326(2) do not mean that the "subjective satisfaction" of the government "is determinative of the question whether the proposed person is fit and proper to be appointed managing agent" and that the decision reached is immune from judicial review. The investment of the power, emphasized the court, carries with it a duty to act judicially, *i.e.*, to hold an inquiry in a manner consistent with natural justice, to consider all relevant matters to ignore irrelevant matters and to reach a conclusion without bias and prejudice. The court has thus insisted on giving a hearing in a discretionary matter. It has reached the result without any

13. A.I.R. 1970 S.C. 2042
14. A.I.R. 1970 S.C. 1789.

reference to the *Kraipak* case. On the other hand, one can find quite a large number of cases in which hearing has been denied by characterising the function as 'administrative'. As for example, in *Western India Watch Co.* v. *Its Workers*,[15] the power conferred on the government by S. 10(2) of the Industrial Disputes Act has been held to be 'administrative.'[16] an order of requisitioning property made under S. 29(1) of the Defence of India Act has been held to be 'administrative'[17] and the power of the R.T.A. under S. 47(3) of the Motor Vehicles Act to increase or decrease the number of stage carriages running on a route can be exercised without giving any notice to the existing operators.[18] There is no need to multiply such examples.

Thus, from the course of judicial decisions since the *Kraipak* case, it appears that the distinction between quasi-judicial and administrative is still maintained and has not yet been obliterated although Hegde, J., has again advocated the view in the *C. B. Boarding* case that natural justice should apply to all proceedings irrespective of their nature. It is also true that the courts have recognised that the *Kraipak* case widens the vista of the concept of natural justice, and thus hearing has come to be conceded on a broader scale. It may also be noted that the *Kraipak* case itself is the culmination of a trend which had already commenced in judicial thinking much earlier. Nevertheless, it seems to be too early to say whether the approach as propounded in the *C.B. Boarding* case will be accentuated and courts would give hearing without characterising the function, whether they will persist in the old tendency of characterising the function. There would, however, always remain some segment of administrative proceedings where no hearing may be conceded even in a limited or a restricted sense.

It also needs to be pointed out that if the approach of the *C.B. Board* case catches on then the concept of hearing, or the irreducible minimum of natural justice, may become somewhat more complicated than it is today, for how formal the hearing should be in a particular case would depend on the type of function involved, the provisions of the Act, the objectives behind it, the purposes to be achieved and the authority on whom the power is conferred. It may then be time to think whether or not India should opt for an administrative procedure Act on the American model to lay down the irreducible minimum of hearing in all proceedings undertaken by the administration.

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15. A.I.R. 1970 S.C. 1205.

16. This has been the view earlier also: *State of Madras* v. *C. P. Sarathy*, *A.I.R.* 1953 S.C. 53.

17. *Chowgupe R.E. & C. Co.* v. *Govt. of Goa* A.I.R 1970 Goa 80.

18. *B.D. Tandon* v. *State*, A.I.R. 1970 All. 215.

Reference may also be made to another aspect of the *Kraipak* case which also has its own importance in Indian administrative law, *viz.* the concept of bias. Talking of the participation of the Addl. Conservator of Forests in the selection process, the Court stated:

> "The real question is not whether he was biased. It is difficult to prove the state of mind of a person. Therefore, what we have to see is whether there is reasonable ground for believing that he was likely to have been biased. We agree with the learned Attorney-General that a mere suspicion of bias is not sufficient. There must be a reasonable likelihood of bias. In deciding the question of bias we have to take into consideration human probabilities and ordinary course of human conduct..."[19]

Each member of the Selection Board filed affidavits in the Supreme Court swearing that the Addl. Conservator of Forests in no manner influenced their decision in making the selection. But, the Court's view was that the "bias" of a member of a group is likely to operate in a subtle manner.

Till recently, the test of 'bias' in England used to be whether there was a 'real likelihood' of bias and it was the task of the courts to decide whether such a likelihood existed. Recently, in *Metropolitan Properties Co.* v. *Lannon*,[20] the test has been formulated somewhat broadly insofar as it has now been suggested that, whether there was a 'real likelihood' of bias or not should be ascertained with reference to right minded persons: whether they consider that there was a 'real likelihood' of bias. In India, from the very beginning, the broader test has been adopted[21] and the *Kraipak* case reiterates the same position without referring to the *Lannon* case.

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19. A.I.R. 1970 S.C. at 155.
20. (1968) 3 W.L.R. 694. Also see, 43 *A.L.J.* 71 (1969).
21. Jain and Jain, note 2, *supra*, 167.

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