Re Mottley, Elliott

Jurisdiction:	Bahamas
Judge:	Georges, C.J.
Judgment Date:	16 December 1987
Reported In:	BS 1987 SC 116
Court:	Supreme Court (Bahamas)
Docket Number:	No. 1174 of 1987
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Supreme Court

Georges, C.J.

No. 1174 of 1987

Re: Mottley, Elliott

Appearances:

Dr. L. Barnett, H. Longley and L. MacDonald with him for the applicants.

M. Barnett, B. Moree and Miss D. Esafakis with him for the respondents.

Attorney-at-law - Application by member of Barbados Bar for special admission to practice in the Bahamas — Bahamas Bar Council refused application and then reconsidered but reached the same conclusion — Question of availability of expertise locally considered by court as one of the factors which the Bar Council would have considered — Council did not indicate reason for its decision — Procedural requirements of natural justice therefore not met — Order for certiorari to quash decision of Bar Council.

Georges, C.J.

By letters dated 13 October, 1987, addressed to the Chairman of the Bahamas Bar Council, Mrs. Rubie Nottage of Nottage, Miller, Johnson & Co., applied on behalf of Elliot D. Mottley Esq. Q.C. for his special admission to The Bahamas Bar, pursuant to sections 10 and 11 of *The Bahamas Bar Act* (the Act) for the purpose of conducting and assisting the firm in the several election cases with which it was concerned. She noted that Mr. Mottley was a member of the Barbados Bar and had been in practice since 1961. He had been involved in cases in constitutional law throughout the Caribbean. She was not aware of anything, which would have disqualified Mr. Mottley under section 10(2) of the Act. On 14 October 1987 the Chairman of the Bar Council spoke to Mrs. Nottage pointing out that she had not specified the particular proceedings in respect of which special admission was being sought nor had the appropriate certificates required under the Act been enclosed.

On that very day Mrs. Nottage despatched a letter listing 28 election petitions, in which it was intended to retain Mr. Mottley for the successful candidates who had been named as respondents. He would also be retained for the unsuccessful candidate in one constituency who had filed a petition. She also included a copy of a certificate evidencing Mr. Mottley's call to the Bar.

By letter dated 19 October, 1987 the Chairman informed Mrs. Nottage that the Council had considered the application and had not approved it. Mrs. Nottage learnt from Mr. Lobosky who represented the 28 unsuccessful candidates who had filed the listed petitions in her letter that his application for special admission of foreign attorneys had also been refused. She asked Mr. Lobosky to join with her in asking for a reconsideration of the decision. Identical letters dated 20 October 1987, addressed to the Chairman were dispatched by Mrs. Nottage and Mr. Lobosky to the Council.

In her letter Mrs. Nottage complained that the decision was not in accord with the tenor of *The Bahamas Bar Act*. No reasons had been given and the decision was a departure from previous practice, which she stated was one of approval as a matter of course. She stated–

> "The instant cases are of immense political and constitutional importance. The issues raised herein are novel. Never before in Bahamian or Caribbean history has a challenge of this magnitude been presented to an Election Court. We feel that the important issues to be decided in those cases may not be appropriately canvassed without bringing to bear the best legal minds available.
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> In the words of section 11 of the *Bahamas Bar Act*, the interests of justice require the employment of the eminent counsel we have chosen and we trust that Bar Council will, on reflection share that view."

The letter ended with a request for reconsideration of the application and should the Council be still minded to refuse, an opportunity to show cause whether by representation in writing, or orally should the applicant wish to do so, why the determination should be made. On 21 October 1987, the Chairman received a telephone call from Mr. Wallace-Whitfield. The affidavits do not so state but Mr. Wallace-Whitfield is the leader of the Opposition in the Commonwealth and the leader of the party to which belong the 28 unsuccessful candidates who are the petitioners in the election petitions in which it was hoped Mr. Mottley would appear. He told the Chairman that he was speaking in the presence of Mr. Kendal Nottage, a senior partner of Nottage, Miller, Johnson & Co. and husband of Mrs. Rubie Nottage. He spoke for persons whom he described as "our people" and requested the Council to reconsider its determination. The Chairman informed Mr. Wallace-Whitfield that the Council was prepared to consider any representations, which might be made and to review its decision at an early meeting it proposed to call. He promised to advise Mr. Wallace-Whitfield of the date and time of such a meeting. Mr. Kendal Nottage came on the telephone and confirmed that he concurred with the statements, which Mr. Wallace-Whitfield had made in his presence.

That afternoon the Chairman received the letter from Mrs. Nottage asking for reconsideration of the application.

The meeting of the Council was convened for 22 October 1987, at noon. Mr. Wallace-Whitfield was given oral notice of this meeting on 21 October 1987, and he agreed to tell Mr. Kendal Nottage. The Council did meet and the Chairman deposes that by 12:45 p.m. neither Mr. Wallace-Whitfield nor Mr. Nottage had turned up and he was unable to contact either of them by telephone.

He rang Mrs. Nottage and informed her that the Council had convened since noon and that no one had appeared on behalf of the applicants. His affidavit continues–

> "Mrs. Nottage stated that she did not know how I formed the impression that anyone intended to attend the Council meeting to make oral representation on behalf of the applicants, *inter alia*. She then inquired whether the Council had received her letters, which I confirmed and she said the Council should proceed to reconsider its earlier determination on the basis of the letters."

The Council proceeded thereupon to reconsider its determination and again decided not to grant the applications. The Chairman so advised Mrs. Nottage by telephone on 23 October 1987. On 26 October 1987, an application was filed for leave to apply for an order of certiorari to remove into the Supreme Court for quashing–

> "a Determination of the Bar Council that an application of Elliot Mottley, Q.C. for a determination that he is qualified to be admitted to practice and for an Order of Mandamus directed to the said Bar Council requiring it forthwith to give notice to the Chief Justice that the said Elliot Mottley, Q.C. is qualified to be specially admitted to practice."

Leave was granted on 26 October, 1987, and the Originating Notice of Motion filed on that day, supported by the affidavit of Mrs. Rubie Nottage. An affidavit in reply was filed by the Chairman of the Council acting on the authority of the Council. From these have been drawn the narrative of events set out above. Named as applicants in the originating notice of motion were Mr. Mottley and the respondents in all of the petitions for whom he was to be retained to appear.

Attorneys for the applicants were anxious to discover the reasons for the Bar Council's decision and by letter to its attorneys dated 25 November 1987, requested copies of the minutes of the Bar Council held on 16 October 1987 and 22 October 1987. This appeared to produce no response and was followed up with a second letter dated 3 December 1987. Finally a notice was filed stating an intention on the part of the applicants to apply at the hearing of the originating motion for production of the minutes of the meetings of the Bar Council referred to in the affidavit of the Chairman. A *subpoena duces tecum* was also served on the Secretary of the Bahamas Bar Association who is also a member of the Bar Council to produce these minutes. A summons was filed on behalf of the Secretary asking that the writ of subpoena be set aside on the ground that its issue was "oppressive, vexatious and an abuse of the process of the court." This summons was heard immediately before the notice of motion itself.

Essentially it raised the issue of the entitlement to discovery in proceedings under Order 53 of *The Bahamas Supreme Court Rules*. It was common ground that general discovery was not available. Order 53, r.3 made this clear. The position in the Commonwealth is identical with the position as it was in England before the amendments of 1977. Nonetheless Dr. Barnett argued that where the remedy sought was an order of certiorari, discovery was permissible to make available to the court the record on which was based the decision in respect of which the order was being sought. In the grounds for the application it had been alleged that the Council had taken irrelevant and extraneous matter into consideration in arriving at its decision. The Chairman's affidavit had made reference to meetings of the Council and purported to give conclusions as to the effect of those proceedings. He relied on Order 24, r.10, 11, 12 and 13 of the Bahamas Supreme Court, which entitled a party to call for the production for inspection of any document mentioned by the other party in any affidavit.

Order 24, r.10, 11, 12 and 13 of The Bahamas Supreme Court are an exact reproduction of orders of the very same number in the *English Supreme Court Rules* of 1976, but there is no reason to think that it was possible under Order 24 to obtain discovery of documents mentioned in affidavits in applications for judicial review. In this case it should be noted that the affidavit makes no reference to minutes. It refers to a meeting. Doubtless some minutes of that meeting would have been prepared though the Secretary in her affidavit in support of her summons to set aside the writ of subpoena deposes that no minutes are yet available because the Council has not met with a quorum since 24 October 1987, to confirm the minutes. The affidavit does not, therefore, in terms of Order 24, refer to a document as such.

In *O'Reilly v. Mackman* [1983] 2 A.C. 237 at p.280 Lord Diplock stated–

> "Although the availability of the remedy of orders to quash a decision by certiorari had in theory been extended by these developments, the procedural disadvantages under which applicants for this remedy laboured remained substantially unchanged until the alteration of Order 53 in 1977. Foremost among those was the absence of any procedure for discovery. In the case of a decision that did not state the reasons for it, it was not possible to challenge its validity for error of law in the reasoning by which the decision had been reached. If it had been an application for certiorari those who were the plaintiffs in the *Anisminic* case would have failed, it was only because by pursuing an action by writ for declaration of nullity that the plaintiffs were entitled to the discovery by which the minute of the commission's reasons which showed that they had asked themselves the wrong question was obtained."

Dr. Barnett pointed out that in *Municipal Council of Sydney v. Campbell et al* [1925] A.C. 348 the court of first instance clearly had access to the minutes of the municipality. In that case, however, the remedy sought was an injunction and not an order of certiorari.

In *Queen v. Medical Appeal Tribunal* [1957] 1 Q.B. 574 Lord Denning did state that the court had power to order the tribunal to complete the record by finding the material facts, for the tribunal could not defeat an application for certiorari by failing to find such facts. In that case, however, there were regulations, which prescribed the matter to be contained in the record of the Tribunal. The relevant regulation set out at p.582 of the report required that the tribunal should in each case record their decision in writing and should include in such record a statement of the reasons for their decision including their findings on all questions of fact material to the decision. Lord Denning's dictum must be seen against this duty imposed on the tribunal.

The Act in this case imposes no obligation to keep any record so that there would be no basis on which the court could order that the record be completed by the production of the minutes.

Having held that there was no power to order production of the minutes it followed that the writ of *subpoena duces tecum* directed to the Secretary of the Bar Association to produce the minutes would be oppressive. Accordingly, I ordered that it should be struck out.

Before turning to the substantive issues to be determined three submissions, which can be treated as preliminary matters, must be addressed.

It was contended but not strenuously that an application for an order of certiorari and for an order of mandamus should not be made in the same originating motion. Mr. Moree referred to Volume 14 of Atkin's Encyclopedia of Court Forms in Civil Proceedings, Form 20 at p.69. The Form is headed - "Statement on application for leave to apply for *order of certiorari and mandamus* to professional body."

The footnote to the heading states–

> "Whilst a combined statement and supporting affidavit may be used, a separate notice of motion or originating summons will subsequently be required. The motion or summons for an order of certiorari will be heard before the motion or summons for an order of mandamus. Separate orders will be made and drawn up in respect of each type of relief sought."

It is not at all unusual in the Commonwealth of The Bahamas to include a prayer for both orders in the same originating motion. I can see no reason in principle, which prevents this nor has any been advanced. Clearly the issue of an order of mandamus in such cases will not arise unless a decision to grant an order of certiorari is made. Clearly also the law in relation to orders of mandamus will have to be separately considered and it should not be assumed that the order of mandamus will automatically follow upon the grant of the order of certiorari

In *Regina v. Chief Immigration Officer--Lympne Airport Ex parte Amrick Singh* [1969] 1 Q.B. 333 the application originally had been for an order of certiorari to have brought up and quashed a determination of the Immigration Officer refusing to admit the applicant into the United Kingdom subject to a condition as to duration of stay. In the course of the hearing the court gave leave to move for an order of mandamus directing the Immigration Officer to determine the matter afresh according to law in the light of the opinion of the court. Clearly convenience can dictate the determination of the entitlement to both orders in one proceeding.

In *Red v. Russell ex parte Beaverbrook Newspapers Ltd.* [1969] 1 Q.B. 342 it would appear that a single motion was filed for an order of mandamus directing a magistrate to make a certain order and for an order of certiorari to bring up and quash part of an order which he had purportedly made.

In my view the joinder of the prayers for the two orders of certiorari and mandamus is in no way a technical irregularity.

A more substantial objection was based on the obligation of persons applying for orders of certiorari and mandamus to make full disclosure when seeking leave to make the applications. The principle that the utmost good faith must be shown is indisputable. This requires the party asking for leave to bring to the notice of the court all facts, material to the determination of the granting of such leave. The test is objective in the sense that it is no excuse to say that the applicant was unaware of the materiality of the fact not revealed if indeed the court determines that it was a material fact.

In her affidavit Mrs. Nottage made no reference to the conversation, which the Chairman of the Council reports as having taken place between himself and Mr. Wallace-Whitfield and himself and Mr. Kendal Nottage. Nor does she make mention of the conversation between herself and the Chairman on the early afternoon of 22 October, 1987 when the Council had convened expecting some representative to appear and none did.

Mr. Moree contends that Mrs. Nottage must have been aware of the telephone call of 21 October 1987. There is nothing on the record to make that inference probable. The initiative in that conversation was clearly being taken by Mr. Wallace-Whitfield who was speaking for his side. Mr. Nottage was present, heard what Mr. Wallace-Whitfield said and supported the approach for a reconsideration by the Bar Council. The Chairman does not state in his affidavit that he told Mrs. Nottage of the conversation. Her reply to the Chairman as reported in his affidavit does not, in my view, convey any knowledge of it. The passage has already been quoted and need not be repeated. It is not stated that the Chairman on her response indicated why he had formed the impression that there would have been oral representations. In the absence of any probable indication that Mrs. Nottage was aware of the conversation of 21 October 1987, she cannot be said to have suppressed it or to have failed to disclose it.

I am also unable to conclude on the record that the attorneys acting for the applicant should have been aware of it. The record discloses that Mrs. Nottage was in touch with Mr. Lobosky whose assistance she sought in pressing for reconsideration. There is no reason to think or infer that she was in touch with Mr. Wallace-Whitfield I am asked to infer from the fact that Mr. Nottage is a senior partner of Nottage, Miller, Johnson & Co. and the husband of Mrs. Rubie Nottage that she must have known of the conversation. I see no reason to draw this inference, having particular regard to her reaction when informed by the Chairman that he had expected that oral representations would have been made.

Mrs. Nottage did not mention in her affidavit that she had had the conversation with the Chairman, which the Chairman reports. This does not appear to me to be in any way material. The Chairman had told her that the Council had been expecting oral representations. She had replied that she had no idea how he had formed that impression and had then asked whether the letters which she had dispatched had been received. Having heard that they had been, she had asked that the applications be considered on the basis of the letters. There had, it would appear, been no inquiry as to how the Chairman had formed the impression, which he had formed. I am satisfied that disclosure of that conversation could in no way have affected a determination as to whether or not leave should have been granted. That is so because it was not a material fact. The final preliminary issue related to the form in which the application was placed before the Bar Council.

Section 12(1) of the Act states–

> "Any person desiring to be admitted to practice or to be specially admitted shall make application to the Bar Council in such form as the Council may require, attaching to his application the appropriate certificate or certificates in accordance with the Second Schedule and an affidavit declaring–
>
> (a) that any certificate produced by him in support of his application is a true certificate and relates to him;

> (b) that he is not suspended or disqualified for practice in the courts of any place outside the Bahama Islands and that he has not done any act or been guilty of any omission which would render him liable to be so suspended or disqualified; …"

The application as originally made did not include certificates establishing that Mr. Mottley was qualified for admission under Schedule A or B. The Chairman drew Mrs. Nottage's attention to this omission and the certificates were forwarded. There was no affidavit verifying the matters set out in section 12(1) of the Act. The Chairman did not draw this to Mrs. Nottage's attention and the Council considered the application despite the omission. Clearly its rejection did not nest on that basis.

Indeed the Chairman in the final paragraph of his affidavit stated:- "That with regard to the matters mentioned in paragraphs 13, 14 and 15 of Mrs. Nottage's affidavit the Council at no time disputed that Mr. Mottley's professional qualifications were in accordance with the provisions of the First Schedule to the Act."

Mr. Moree contended that an order of certiorari could only issue if there was a determination by the Council on a proper application placed before it conforming to all the statutory requirements. In the absence of such an application there could be no determination. The Council could not waive the requirements prescribed in section 12(1) of the Act because they had been prescribed in the public interest for the protection of the public.

He cited the case of *Edward Ramia Ltd. v. African Woods Ltd* [1960] 1 W.L.R. 86. The appellant, Edward Ramia Ltd had been granted a timber concession by the appropriate Ashanti chief. When it filed this concession the respondent entered opposition to the grant of a certificate of validity on the ground that much of the area granted had been already granted to the respondent and that the provisions of the Concession ordinance had not been complied with. In particular, section 12 of the ordinance provided that notice had to be given to the Chief Regional Officer of Ashanti of such application, that on receipt of the notice the Chief Regional Officer was to summon the chief or the chiefs concerned to appear before him or a designated officer to ascertain whether the chief or chiefs were willing to grant the concession and to conduct such inquiries as he thought proper. The agreement reached between the applicant and the chief or chiefs was to be embodied in an agreement containing prescribed particulars and was to be executed in the presence of the Chief Regional Officer or the designated officer. No notice of the application had been given to the Chief Regional Officer, nor had any inquiry been conducted.

The trial judge held that the intention of the legislature had been purely to protect the grantors of concessions and where the grantors raised no objections it would be inequitable to hold the concession void. He was reversed by the West African Court of Appeal whose judgment was upheld in the Privy Council. In its judgment the Board quoted with approval the judgment of the President in the court below. It stated at p.91–

> "To render the purpose of section 12 unmistakable, subsection (4) provides that the terms of the agreement can only be embodied in a concession after they have agreed upon before the official named. The policy of the law clearly insists upon strict observance of the steps already alluded to before there can be a concession. Sections 12 and 12 (11) are so clearly designed to protect the grantor in the public interest that in my opinion the learned judge erred in holding that a waiver is possible of any of the conditions of section 12 and that the grantors have waived them. To accede to this proposition would be entirely to ignore the intention of the legislature for the public good and to defeat one of the main purposes of the *Concessions Ordinance*."

In much the same way Mr. Moree contended that the requirement of the affidavit was intended to ensure that persons who were in fact not qualified to be admitted to The Bahamas Bar did not manage to gain admission by the submission of documents which did not relate to them. Even if such persons may have at some time been qualified for admission they may at the time of the application been disqualified by reason of suspension. I do not think the principle enunciated in *Edward Ramia Ltd. v. African Woods Ltd.* is applicable in this case. The mechanism there set up of notice to a prescribed officer and an inquiry was plainly devised to bring to the notice of a wider audience the fact that a concession was being sought. Indeed it transpired in that case that a large part of the land comprised in the concession to Edward Ramia Ltd had been covered by the concession to African Woods Ltd.

In this case the issue is one of proof of qualifications. The Council may well be satisfied without need of an affidavit of the matters which the Act prescribes should be stated in the affidavit. The application as not being made personally by the applicant. It was being made on his behalf by an attorney of longstanding whose word the Council may well have thought did not need the sanction of an oath to make it reliable. They may have been well aware of the applicant, Mr. Mottley, by repute. The provision appears to me to be there to be invoked by the Council in circumstances in which it deems that safeguard necessary to establish the facts on which the application is based. Where it is satisfied without invoking the safeguard it could waive it. The request for the certificate in the case of Mr. Mottley unaccompanied by a request for an affidavit is, in my view, clear evidence of waiver, which I find was possible.

On the substantive issue there was no serious difference on the principles of law applicable in this case. The divergence arose on the views expressed as to the result of the application of the principles to the facts of the case.

Section 11 of the Act states–

> "Notwithstanding anything to the contrary in this Act, The Bar Council upon being satisfied that the interests of justice so require, may determine that any person qualified in accordance with the provisions of in the First Schedule shall be specially admitted to practice for the purpose of conducting particular proceedings specified in such determination and shall forthwith give notice of its determination to the Chief Justice."

The controversial issue was whether or not it was in the interests of justice that the applicant in this case should be specially admitted. Once that term was defined, if it appeared on the record that the Council took into consideration matters falling outside the ambit of that phrase then the determination could be successfully challenged.

Dr. Barnett stressed that the words of the Act were, "interests of justice" and not "public interest." The latter phrase could embrace considerations, which clearly would not fall under the former. Broadly his submission was that where a foreign attorney is qualified for special admission and a litigant desired to be represented by such foreign attorney, unless there were circumstances relevant to the particular case, which operated against the application, it was in the interests of justice that the litigant should be permitted to appear by the attorney of his choice. On any reasonable assessment of the nature of the election petitions and the statements made in respect of them in the applications to the Council, the interest of justice required the admission of foreign attorneys to represent the various petitioners and respondents.

He contended that the Chairman's affidavit clearly showed that the Council had taken extraneous matters into consideration – matters, which might have been appropriate if the public interest was to be considered rather than the interests of justice. Since in this country a work permit had to be granted before a non-citizen could be employed, the authorities charged with the administration of the *Immigration Act* could be depended upon to weigh public interest factors when deciding on work permits.

He submitted that an analysis of the Chairman's affidavit disclosed two factors which the Council had taken into account which did not fit under the phrase "interests of justice" - the fact that Bahamian counsel had appeared in constitutional and election cases (mentioned in paragraph 12 of the Chairman's affidavit) and the need to develop "a strong and independent local bar" (mentioned in paragraph 11).

Mr. Moree pointed out that in paragraph 11 the Chairman was specifically replying to a statement in paragraph 3 of Mrs. Nottage' affidavit that "such applications [for special admission] have been approved as a matter of course on all previous occasions." He asserted that this was erroneous and went on to state the serious view the Council took of its statutory responsibilities and of the need in the public interest to develop a strong and independent local Bar. The paragraph ended by stating having regard to these matters - "the Council considers and determines each application for special admission on its merits and in accordance with the requirement of section 11 of the Act that an affirmative decision is mandated by the interests of justice alone."

This final statement seems unequivocal, and though a measure of ambiguity could be said to lurk in the earlier reference to the need for the development of a strong local Bar, I do not think that this is sufficient to base an interpretation that that factor had been taken into account in determining the application. Section 5 of the Act does place on the Council the responsibility for - "the maintenance of the honour and independence of the Bar and the defence of the Bar in its relations with the executive and the judiciary."

It is a responsibility of which the Council is, no doubt, always conscious.

In my view, Dr. Barnett's formulation of the content of "interests of justice" places undue weight on the factor of the litigant's right to an attorney of his choice. In criminal charges it is a right, which is guaranteed by Article 20 paragraph 8 of the Constitution of the Commonwealth of The Bahamas. It does not achieve that level of protection in civil proceedings in the determination of civil matters in the Courts of the Commonwealth but it certainly exists and shall be jealously guarded.

I accept, however, as accurate the statement of Sir Alan Huggins then the acting Chief Justice of Hong Kong *In the Matter of A.R. Tyrrell Q.C. Barrister of the Honourable Society of Grays Inn England* Misc. Proceedings 1984 no. 2516 at p.2 - "I have said before on more than one occasion that the right to counsel of the litigant's choice means the right to choose counsel who are available and

entitled to practice; it does not entitle a litigant to demand that somebody be admitted for the special purpose of representing him."

Bearing this in mind it is in my view in the "interests of justice" that a litigant in the courts of the Commonwealth should be competently represented. In arriving at an assessment of that interest it appears to me relevant to consider whether in the area under consideration there are attorneys at the local bar who have appeared in similar cases and could be thought to have developed expertise at such a level as to assure for the litigant competent representation should they be retained. Accordingly, I would hold that an evaluation of the complexity of the case and of the level of expertise locally available to ensure competent presentation before the courts are both necessary in the performance by the Council of its duties under section 11 of the Act.

The availability factor may be complicated. Attorneys of indisputable expertise may be available in the sense that they are engaged in private practice in The Bahamas but peculiar local circumstances may make it plain that it would be unfair to ask that the litigant retain any of those attorneys. There may be ties of kinship, of friendship, of business or of politics, which would make impossible the existence of that trust which a litigant must have in his attorney.

There may also be cases in which there is available local expertise but the volume of work to be done is massive and the special admission of foreign counsel may be considered to be in the interests of justice, to supplement what is available.

Mr. Moree has examined in some detail the material in the letters sent on behalf of the applicant to the Council and I agree that they say little. Mrs. Nottage clearly believed her statement that the Council had in the past routinely granted such applications. It would have been perhaps clear to her, as she thought it would have been to the Council from matters which were of public knowledge, that questions of major political importance hung on the outcome of the petitions. Much as the Council were satisfied without formal affidavit of Mr. Mottley's qualifications under the Schedule, so it seemed they would be satisfied that the other condition for his special admission was patent. As the record now stands it is not in my view clear that once the Bar Council had properly directed itself on the content of the "interests of justice" it would follow inexorably that special admission would have been granted. The decision is not plainly unreasonable on the face of it, nor does it appear that the Council took extraneous matters into consideration in arriving at it.

Finally there remain Dr. Barnett's submissions relating to the method by which the decision was reached. The Act is not silent on the procedure to be followed. Section 12(2) provides–

> "Where upon receipt of an application made under subsection (1) the Bar Council is satisfied that the applicant is qualified to be admitted to practice or to be specially admitted, as the case may be the Council shall so determine and shall forthwith give notice of its determination to the Chief Justice, but in every case where the Council is minded to refuse to make such a determination the Council shall afford to the applicant an opportunity to show cause, whether by representation in writing or, if the applicant so desires, orally before the Council, why such a determination should be made."

Mr. Moree conceded that the Council may not have complied literally with the requirements of section 12(2) the Act but contended that transgressions did not deprive the applicant of any opportunity to present his case, which he would otherwise have enjoyed. The integrity of the process had been preserved. The non-compliance had not been material and had not been prejudicial to the applicant.

The sequence as the affidavits show began with the original application, supplemented as a result of the Chairman's telephone call. This was considered and special admission was refused. Then there was the telephone conversation between Mr. Wallace-Whitfield supported by Mr. Kendal Nottage and the Chairman, from which the Chairman not unreasonably, formed the impression that the applicant would be making oral representations. No one turned up when the Council convened. There was the telephone call to Mrs. Nottage, her puzzlement as to the source of the impression, which the Chairman had formed and her request that the application be considered on the basis of her letters which the Chairman received that afternoon. On reconsideration the Council did not alter its position.

The last paragraph of Mrs. Nottage's letter is of some importance. It read–

> "We hereby request, therefore, that you urgently reconsider the subject application and if Bar Council is still minded to refuse, then in accordance with section 12(2) Bar Council shall afford us the opportunity to show cause, whether by representation in writing or, if the application so desires, orally before the Council, why such a determination should be made."'

Central to Mr. Moree's submissions was the proposition that the Council did not have to give reasons for its decision – a proposition which was the basis of the earlier successful challenge to the *subpoena duces tecum* served on the Secretary. Dr. Barnett submitted that even accepting this, the Council could not afford a realistic opportunity to show cause unless the Council indicated to the applicant its area of concern so that the applicant could direct his evidence and argument to clear the 'misgivings. The argument is certainly attractive. Mr. Moree pointed out that it had been rejected in *Payne v. Lord Harris of Greenwich and another* [1981] 2 All E.R. 842.

In that case the plaintiff had been convicted of murder and had been sentenced to life imprisonment. As a life-sentence prisoner he could be considered for release on licence by the Secretary of State acting under section 61 of the *Criminal Justice Act* 1967. The Secretary of State acted on the recommendations of The Parole Board which itself made recommendations after studying a report made by the Local Review Committee. The plaintiff had been a model prisoner and had been placed in the lowest category of security. A number of his applications for release on licence had been refused. Eventually he filed a writ against the Local Review Committee and the Secretary of State claiming a declaration that he was entitled to know the reasons for the refusals. The action failed. It was held that the provisions of the Act laid down a comprehensive code of procedure to be followed in determining whether a prisoner should or should not be released on licence and did not provide that the prisoner should be given reasons. Against that background it could not be said to be unfair of the Parole Board or the Local Review Committee to refuse to give reasons.

All the judges who delivered judgments in that case stressed the need for flexibility in formulating what the principles of natural justice required. Necessarily this would vary from case to case, and in that case all were of the view that they did not require disclosure of reasons to the prisoner. The process of review in that case included a compulsory interview with the prisoner by a member of the Local Review Committee. Rule 3(2) provided - "When a prisoner is interviewed he shall be given a reasonable opportunity to make representations which he wishes to be considered by the Committee."

It was urged that such an interview would be of little use if the interviewing member did not indicate the reasons for previous refusals so that the prisoner could direct his representations to those aspects of his case. This argument was rejected. Brightman L.J. held that there was no necessity for drawing any such implication and on the language of the rule this seems indisputable.

This case does not, however, appear to me to fall close to the category of the *Payne* case. Mr. Moree asserted that special admission for an applicant was a privilege much indeed as release on license is to a prisoner. Though it may be a privilege to the attorney being specially admitted, it is, in my view, an entitlement, to the litigant who seeks to retain his services once the conditions specified in the Act have been fulfilled. The interests of justice which the Council is asked to consider are the interests of justice in the case of a litigant who may be a citizen of this country or a resident at the very least a person who by choice or compulsion has to subject himself to the processes of justice of this Commonwealth and is entitled to all the rights appurtenant thereto. There is, therefore, a situation of entitlement vastly different from the pure privilege, which can be said to be the situation in the case of a prisoner seeking release on licence.

Additionally the words "show cause" which appear in section 12(2) of the Act are far stronger than any words, which appear in Rule 3(2) of the Rules governing the Local Review Committee. The situation in which a litigant is called upon to show cause is well known. A case in which the litigant is concerned has been completed and a preliminary ruling has been made. All the facts have been investigated and are fully known to the parties. One party is then afforded the right to show cause why the preliminary rule should not be made absolute. The legislation here appears to require an analogous process.

Mr. Moree also placed considerable reliance on *McInnes v. Onslow Fane and another* [1978] 3 All E.R. 211. It was held that in that case that the British Boxing Board of Control was under no obligation to give reasons for its refusal to grant the plaintiff a manager's licence. Megary, V.C. gave a detailed review of the authorities.

He divides the cases into three categories – forfeiture cases where the decision may take away an existing right; application cases where the decision merely refuses to grant the applicant some position or licence which he seeks and an intermediate group, which falls into neither of those two. Into that group fall the legitimate expectation cases in which the applicant seeks the renewal of some licence or position which he already holds and the situation is such that there is no obvious indication that he is any less eligible at the date of the application for renewal than he was when it was first granted. In the application cases into which fell *McInnes v. Onslow Fane* (Supra) a more structured hearing would not usually be required. Reasons for decisions need not be given nor need the applicant be told of the thinking of the deciding body so that he may tailor his case to meet possible objections. He concluded his judgment at p.223 thus–

> "Looking at the case as a whole, in my judgment there is no obligation on the board to give the plaintiff even the gist of the reasons why they refused his application or proposed to do so. This is not a case in which there has been any suggestion of the board considering any alleged dishonesty or morally culpable conduct of the plaintiff. A man free from moral blemish may nonetheless be wholly unsuitable for a particular type of work. The refusal of the plaintiff's application by no means necessarily puts a slur on his character, nor does it deprive him of any statutory right. There is

> no mere narrow issue as to his character, but the wide and general issue whether it is right to grant this licence to this applicant. In such circumstances, in the absence of anything to suggest that the board have been affected by dishonesty, bias or caprice, or that there is any other impropriety, I think that the board is fully entitled to give no reasons for their decision, and to decide the application without any preliminary indication to the plaintiff of those reasons. The board is the best judges of the desirability of granting the licence, and in the absence of any impropriety the court ought not to interfere.
>
> There is a more general consideration. I think the courts ought to be slow to allow any implied obligation to be fair used as a means of bringing before the courts for review honest decisions of bodies exercising jurisdiction over sporting and other activities which these bodies are far better fitted to judge than the courts."

Clearly the circumstances of this case are vastly different. Here the decision is closely concerned with the representation of litigants before the courts, a factor, which is quite inseparable from the proper administration of justice. The language of showing cause establishes an intention that the Council should indicate to the applicant its thinking if it is minded to make a determination against special admission. There is as well the broader consideration that where the legislature has vested such an important function in a body of lawyers it certainly behoves that body to set a standard of rational and open decision making as a pattern for other decision making authorities in areas of public administration of matters affecting personal rights in the community.

Further the Bar Council failed to follow the procedure laid down in section 12(2) in that it notified the applicant on the first occasion that the application had been refused. True enough there was a reconsideration. There is, however, in my view, a significant difference between reversing a decision already arrived at and forming a tentative opinion open to review on reconsideration. In the one case a decision reached has to be upset, a reversal which the authority may well find unpalatable. In the other a preliminary view is altered on reconsideration - a far less drastic change of stance.

For these reasons I am satisfied that the procedural requirements of natural justice were not adequately met in this case and the decision must be quashed. Accordingly the order of certiorari will issue.

I see no need to issue an order of mandamus in this case. The original application was clearly faulty. I have no doubt that the Bar Council is ready and willing to entertain any fresh application which may be filed and it is only necessary to clear the way by quashing the decision under review. An application can now be submitted properly documented and the procedure envisaged by section 12(2) of the Act set in train.

The issue of costs is reserved for submissions.