R. v. ASTON UNIVERSITY SENATE, EX PARTE ROFFEY AND ANOTHER[1] GLYNN v. KEELE UNIVERSITY[2]

Relationship between student and university—natural justice—effect of breach of natural justice—judicial discretion.

University students are rapidly learning how many legal remedies are discretionary.[3]

In the *Aston University* case,[4] Roffey and Pantridge, two students, who failed their supplementary examinations, were excluded from the course by the examiners without being given an opportunity to explain their failure. The court, having held that the examiners acted unfairly in excluding them without a hearing, nevertheless would not give them any remedy.

In *Glynn's* case,[5] Glynn sunbathed nude on the campus and was excluded by the vice-chancellor from residence at the university for one year. Although the court held that the vice-chancellor acted unfairly in not giving Glynn a hearing before imposing the penalty, it likewise refused to give him any remedy.

In both cases, the courts, having decided that certain matters of university discipline were within their purview and having held that the university authorities had failed to accord natural justice to the students, declined for various reasons to give the students any remedy.

In the *Aston University* case[6] the two students Roffey and Pantridge were doing a Bachelor of Science degree with honours in behavioural sciences. At the end of their first year both passed the three major subjects in this course, but of the subsidiary, minor subjects Roffey failed two and Pantridge one. Both were given supplementary examinations which they failed. However, the rates of failure in these supplementary examinations had been very high: 10 out of 21 failing in one subject, and 8 out of 12 in the other. This caused 'grave disquiet amongst the academic staff as well as the students'.[7] The question then arose as to whether the students who had failed in these supplementary examinations should be allowed to resit the year or be excluded from the course. In consultation, the examiners (but not the full board of examiners) took into consideration not only the marks of the students but also any personal matters (such as, for example, family difficulties) which they happened to know of and which could have been relevant to the students' performance. They did not, however, give the students the opportunity of informing them of similar personal problems which might have been relevant and which the examiners did not know of. It was decided finally that five students be allowed to repeat first year, while six, including Roffey and Pantridge, be asked to leave. The six students now appealed, claiming *inter alia* that they had been informed by tutors that these supplementary examinations did not matter and failure in them would not prejudice their places in the course.

[1] [1969] 2 Q.B. 538. Queen's Bench Division; Lord Parker C.J., Blain and Donaldson JJ.
[2] [1971] 1 W.L.R. 487. Chancery Division; Pennycuick V-C.
[3] H.W.R.W., 'Nudism and Natural Justice' (1971) 87 *Law Quarterly Review* 320.
[4] [1969] 2 Q.B. 538.
[5] [1971] 1 W.L.R. 487.
[6] [1969] 2 Q.B. 538.
[7] *Ibid.* 545.

The whole affair now received considerable attention from senior administrative bodies in the university: the full board of examiners for behavioural science, the board of the faculty of social science, the senate and the university council.

Over a series of meetings in October, the full board of examiners confirmed the decision to exclude the six. The faculty board, however, on 12 October, after the professors had met five of the six students who had been excluded, decided that the six be permitted to repeat the year: a decision the full board of examiners seemed to regard as decisive.

On 1 November, the senate by a vote of 18 to 4 rather staggeringly confirmed the original decision of the examiners to exclude the students and held that no doubt had been shown to exist in the students' minds about the significance of the supplementary examinations.

Then on 7 December (over a month after their decision to exclude the six) the senate interviewed members of staff and the vice-chancellor satisfied himself that the staff members had not misled students about the significance of the supplementary examinations. On the next day, 8 December, the university council confirmed the senate's decision and that of the board of examiners, and to quote the vice-chancellor 'resolved to defend the University against any attack'.[8]

From the facts as outlined in some detail by Donaldson J. it seems difficult to avoid the impression of mismanagement by the staff which the university authorities finally determined to cover up, whether or not in the process justice was done to certain individuals.

Roffey and Pantridge some seven months later (July of the following year) applied to the court for *certiorari* and *mandamus*.

In their judgments, both Donaldson and Blain JJ. held that according to the statutes and regulations governing the administration of the university it was the examiners who made the final decision about the exclusion of students from the course.[9] It is worth noting that the board of examiners did not seem to know this, nor apparently did the faculty board, the senate or the university council—a state of unawareness, if not ignorance, one might want to call somewhat unsatisfactory.[10]

It is surprising that the issue of improper delegation was not pressed. Donaldson J. was inclined to think that the regulations conferred the power and discretion of exclusion of students on the full board of examiners; yet, 'the decision was in fact taken by a smaller body and no objection has been

[8] *Ibid.* 550.

[9] *Ibid.* 553 *(per* Donaldson J.: 'regulation 4(f) under which Mr Pantridge was sent down . . . provides that "Any student who fails to satisfy the examiners in not more than two subjects may at the discretion of the examiners be permitted to take a referred examination normally in these subjects. Students . . . who fail a referred [*i.e.* supplementary] examination may not normally proceed further on the course." '), 557 (Blain J.).

[10] In the light of this ignorance of the regulations by the university authorities, the determination of the board of examiners (16 October 1967) has its irony: 'students would be expected to keep themselves informed of syllabuses and regulations'. *Ibid.* 549.

taken on that account'.[11] Such an *ad hoc* delegation as happened rather than was made was not permitted by statute or regulation nor probably in the actual situation desirable.

The examiners used as criteria for exclusion not only examination marks but also 'a wide range of extraneous factors, . . . for example personal and family problems',[12] some of which might have been known only to the students. Hence, it was only fair that the students should be given an opportunity to be heard either orally or in writing. As this was not done, there was a breach of natural justice. Two basic strands can be separated out here. Firstly, the gravity of the consequences of exclusion for the student brought the decision by the university authorities within the rules of natural justice. Secondly, what amounts to the fair hearing required by natural justice varies according to the circumstances. Here, since the examiners in coming to their decision took into account personal matters as well as examination results, natural justice, or as Donaldson J. paraphrased it 'common fairness to the students'[13] demanded that they be given an opportunity to put any such personal matters which they felt could be relevant to their case. As this opportunity was not given, there was a breach of the rules of natural justice. If examination results had been the only criterion, the opportunity for the students to put their case would not have been required by natural justice.

However, such a breach of itself seems to give rise to no rights of prerogative redress. For prerogative redress to flow from a breach of natural justice, Blain J. outlined two further conditions: (a) there must have been a real injustice suffered; (b) the applicant must have shown diligence in seeking a remedy.[14]

Since Roffey had subsequently gained entrance to another tertiary institution, the Regent Street Polytechnic, it was held that he had suffered no real injustice in being unfairly 'sent down'.

Pantridge, however, had failed to gain entrance at any other university and so had a real need of relief. Donaldson J. could not determine whether the decision of the examiners to exclude Pantridge would have been different if he had been given a hearing. Hence, presumably, he could not be sure that any real injustice had been suffered. Blain J. would not like by judicial action to create 'perpetual students'.

Finally, however, Pantridge failed to gain his remedy because he delayed too long (over six months) before instituting proceedings. The court relied in the end on the well-established principle that 'one must not sleep on one's rights'. The judges, given their evident reluctance to exercise their discretion in favour of both Pantridge and Roffey, are very slow to use this time factor.

In *Glynn's* case[15] Glynn was one of a number of students who sunbathed nude in the university grounds: complaint being made, the vice-chancellor made investigations, received 'clear and reliable evidence',[16] and without per-

[11] *Ibid.* 553.
[12] *Ibid.* 554.
[13] *Ibid.*
[14] *Ibid.* 559.
[15] [1971] 1 W.L.R. 487.
[16] *Ibid.* 490.

sonally interviewing Glynn informed him in a letter dated 1 July 1970 that for his behaviour he was fined £10 and was excluded from residence at the university for the coming year. He also in the same letter informed Glynn of his right of appeal to the university council. Glynn wrote on 3 August giving notice of his appeal and then went on his long vacation. His appeal was heard on 2 September, but, apparently through his own carelessness, he was not present, returning home on 4 September, 'considerably after September 2'.[17] At his appeal, the decision of the vice-chancellor was confirmed. Glynn in December applied for an injunction restraining the university from excluding him from residence as he was seriously inconvenienced by their decision.

Regulation XXX of the university regulations dealing with discipline stated, *inter alia*:

> This regulation is subject to section 6 of the statutes under which the ultimate responsibility for disciplinary action lies with the vice-chancellor.[18]

And under section 6(4)[19] the vice-chancellor has powers which, as Pennycuick V-C. summed up, 'although they do not amount to expulsion, amount in terms to suspension, and also amount in substance to something very like expulsion.'[20]

Pennycuick V-C. held that since these powers were so fundamental to the students' position at the university, the vice-chancellor when exercising them was acting in a 'quasi-judicial' capacity, and so was bound to obey the rules of natural justice. Here natural justice required that the vice-chancellor hear Glynn before imposing the penalty. His failure to do so constituted a breach of natural justice.

However, Pennycuick V-C. then decided that the university council's decision to uphold the vice-chancellor's sentence must be treated 'as effective'.[21] It is difficult to determine what exactly was meant by 'effective'. Pennycuick V-C. seems to think that the council had not only fulfilled the requirements of natural justice (Glynn was not denied the opportunity of being heard by the appeal body, the council), but that its decision had validity despite the vice-chancellor's breach of natural justice. Such an interpretation would seem opposed to Megarry J.'s comment:

> As a general rule at all events, I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body.[22]

If, as Megarry J. says, the trial body's decision, if in breach of natural justice, is 'in law a mere nullity',[23] the university council's decision on appeal has been retrospectively rendered meaningless or been converted into an initial hearing which is not the council's business under section 19(24) of the statutes and hence is *ultra vires*.

To hold the council's decision 'effective' must mean that the vice-chancellor's decision had substantive validity—that the breach of natural justice by the vice-chancellor was *prima facie* a procedural defect only and did not vitiate of

[17] *Ibid.* 491, *per* Pennycuick V-C.
[18] *Ibid.* 492.
[19] *Ibid.* Section 6(4) of the statute reads as follows: 'The vice-chancellor may refuse to admit any person as a student . . . from any class or classes and may exclude any student from any part of the university or its precincts. He shall report any such suspension or exclusion to the council and the senate at their next meeting'.
[20] *Ibid.* 495.
[21] *Ibid.*
[22] *Leary v. National Union of Vehicle Builders* [1971] Ch. 34, 49.
[23] *Ibid.* 49.

itself the decision. This seems contrary to the authorities. Professor Wade[24] has pointed out that the decision in *Cooper v. Wandsworth Board of Works*[25] must be interpreted as implying that a breach of natural justice renders the decision void (or a nullity). There the plaintiff successfully sued the board for damages for trespass; if the board's decision taken in breach of natural justice had any substantive validity, there could not have been trespass until after the court had decided that a breach of natural justice had occurred. Despite some dissenting judicial pronouncements, the weight of modern judicial and academic opinion would hold that a breach of natural justice renders the decision void.[26] Thus Lord Reid in *Ridge v. Baldwin*:[27]

> Time and again in the cases I have cited it has been stated that a decision given without regard to the principles of natural justice is void, and that was expressly decided in *Wood v. Woad*.[28] I see no reason to doubt these authorities.

And de Smith writes:[29]

> The judgment of Lord Reid [in *Ridge v. Baldwin*] at 71-9 is the leading modern exposition of the rule. Whether breach of the rules of natural justice renders a decision void or merely voidable raises complex questions to which no short answer is possible and no uniform set of answers has yet been offered by the courts. The balance of recent authority indicates that for most purposes such a decision will be held to be void.[30]

On this view the university council's decision really does not matter. And certainly Pennycuick V-C. was mainly concerned in his judgment with the vice-chancellor's decision.

Pennycuick V-C. supported his right to refrain from issuing an injunction by relying on authority rather than examining the special problems concerning the exercise of judicial discretion where there has been a breach of natural justice. It is a long-established principle that the injunction is a discretionary remedy; it is surprising that Pennycuick V-C. went to such elaborate lengths in quoting and discussing authorities. What he appears to be searching for is authority and precedent for the use of judicial discretion in withholding remedies after there has been a breach of natural justice. The *dictum* of Plowman J.[31] was given in a case which did not involve natural justice, and Parker C.J.'s[32] recent *obiter dictum* was made in an as yet unreported decision, where it was actually held that there was no breach of natural justice. Such paucity of authority serves only to buttress Pennycuick V-C.'s own recognition that 'this particular discretion should be very sparingly used . . . where there has been some failure in natural justice'.[33]

[24] Wade, 'Unlawful Administrative Action: Void or Voidable' (Part II) (1968) 84 *Law Quarterly Review* 95, 102.

[25] (1863) 14 C.B. (N.S.) 180.

[26] See *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 A.C. 147; *Banks v. Transport Regulation Board* (1968) 119 C.L.R. 222.

[27] [1964] A.C. 40, 80.

[28] (1874) L.R. 9 Ex. 190.

[29] S.A. de Smith, *Constitutional and Administrative Law* (1971) 563, n. 56, speaking of *Ridge v. Baldwin* [1964] A.C. 40 and administrative action.

[30] See also the Privy Council's much discussed decision in *Durayappah v. Fernando* [1967] 2 A.C. 337, 354: 'if the decision is challenged by the person aggrieved on the grounds that the principle [*audi alteram partem*] has not been obeyed, he is entitled to claim that as against him it is void ab initio and has never been of any effect.'

[31] *Buckoke v. Greater London Council* [1970] 1 W.L.R. 1092, 1097.

[32] *R. v. Oxford University, Ex parte Bolchover:* see *The Times* 7 October 1970.

[33] *Glynn v. Keele University* [1971] 1 W.L.R. 487, 496.

Both cases offered some comment on the status of the enrolled university students *vis a vis* the university. Unlike those seeking admission to the university, they were like members of a club which gave more than social privileges since continued membership was a *sine qua non* for achievement of graduate status with its professional and economic advantages.[34]

The tendency to expand the scope of natural justice is apparent here.[35] In matters of serious import to the student, university authorities must give the student involved some opportunity to present his side of the case. The courts are clearly prepared to exercise a final supervision in such matters.[36] However, while broadening the scope of natural justice, there seems in these cases to have been a significant weakening of its impact. Of itself the breach of natural justice is treated as giving rise to no rights; it all depends on whether the judge considers there has been a 'real and substantial injustice'.[37]

Such an attitude does not appear in the case of *Dimes v. Grand Junction Canal (Proprietors of)*[38] where the House of Lords while insisting that no injustice had been done by the Lord Chancellor, Lord Cottenham, still invalidated his ruling since he had had a pecuniary interest in the proceedings.

> No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred.[39]

While this case dealt, of course, with bias through pecuniary interest, the principle can, I believe, be fairly applied to the *'audi alteram partem'* rule of natural justice. Professor Wade writes:

> It is inconsistent with all the decisions to say that after a breach of natural justice has been found there must then be a further inquiry to ascertain whether there has been a miscarriage of justice. The breach of natural justice is itself the miscarriage of justice which enables the applicant to succeed, and never before has it been held that the court is entitled to refuse him relief.[40]

Moreover, the actual use of the judicial discretion in these cases could be questioned.[41] Comment has already been made on the view taken by the court that Mr Roffey suffered no real injustice in being 'sent down' since he gained entrance into another tertiary institution. Donaldson J. in deciding whether to exercise his discretion in favour of Pantridge stated 'that a very important factor is the likelihood that the ultimate decision would have been any different if a right of audience had been extended to Mr Pantridge'.[42] After some considera-

[34] *R. v. Aston University Senate, Ex parte Roffey and Another* [1969] 2 Q.B. 538, 556.

[35] See Megarry J.'s comments in *Gaiman v. National Association for Mental Health* [1970] 3 W.L.R. 42, 57.

[36] *Cf.* the response of the Court to a law student's claim that his examination papers had been negligently mismarked: 'The High Court does not act as a court of appeal from university examiners.' *Thorne v. University of London* [1966] 2 Q.B. 237, 243 *per* Diplock L.J.

[37] *R. v. Aston University Senate, Ex parte Roffey and Another* [1969] 2 Q.B. 538, 551 *per* Donaldson J.

[38] [1852] 3 H.L.C. 759.

[39] *Ibid.* 793 *per* Lord Campbell.

[40] Wade, *op. cit.* 111-2.

[41] It is worth noting that Lord Parker C.J. was quite definite in refusing to exercise his discretion, although he gave no reasons for so doing. *R. v. Aston University Senate, Ex parte Roffey and Another* [1969] 2 Q.B. 538, 560.

[42] *Ibid.* 555.

tion of the matter he decided that it was impossible to determine, and went on to state that 'in this situation' (presumably where one cannot decide about the effect of having no hearing) 'I regard the time factor as decisive'.[43] It would appear that in the exercise of the judicial discretion the onus of proof of real injustice suffered was placed on Mr Pantridge.

In *Glynn's* case,[44] Pennycuick V-C. in an instructive exercise of judicial discretion admitted that Glynn given the hearing he should have received from the vice-chancellor might have pleaded mitigation; but presumably such a plea had to do with mercy not justice, and hence, *pace* Portia in The Merchant of Venice (Act IV, Scene I) 'the quality of mercy is not strained . . .', the learned judge held 'that the plaintiff has suffered no injustice'.[45]

Apart from the uncertainty that such a highly subjective use of judicial discretion must bring, a further question seems to pose itself: if natural justice is 'common fairness' and there was no injustice worth mentioning suffered (for the purposes of giving a remedy), what does it mean to hold that there was a failing in natural justice?

B. A. Hepple's comment could perhaps incorporate more than a statement of fact:

> In modern times no student seems to have succeeded in having a university decision set aside by legal action.[46]

J. E. WILLIS.

[43] *Ibid.*
[44] [1971] 1 W.L.R. 487.
[45] *Ibid.* 497.
[46] B. A. Hepple, 'Natural Justice for Rusticated Students' (1969) *Cambridge Law Journal* 169.