NATURAL JUSTICE AND THE ATKIN FORMULA

BY E. I. SYKES* AND R. R. S. TRACEY**

[*The 'Atkin Formula' has long been accepted as stating the preconditions for the applicability of the rules of National Justice. However, interpretative difficulties still remain. In this article, Professor Sykes and Mr Tracey attempt to clarify some of these and suggest alternatives for the proper attainment of administrative justice.*]

In 1924 in *R. v. Electricity Commissioners, ex parte London Electricity Joint Committee*,[1] Atkin L.J. (as he then was) uttered the oft-quoted *dictum*:

> Wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench exercised in [the writs of prohibition and certiorari].

On the face of it, this purports to state the conditions of the availability of the prerogative writs in cases of defect of jurisdiction. It is remarkable that so little attention has been paid to the fact that Lord Reid in *Ridge v. Baldwin*,[2] in dealing with interpretative difficulties surrounding this passage, assumed that it also stated the pre-condition for the applicability of the rules of natural justice. This was a considerable step to take as the remedies for the breach of the rules of natural justice in a situation in which they are applicable are not confined to the prerogative writs. *Ridge v. Baldwin*[3] itself was a case where the remedy successfully sought was a declaration.

However, the transference of the Atkin formula to the field of natural justice is now a *fait accompli* and this would be so in relation to Australia as well as in relation to the United Kingdom as Barwick C.J. in *Banks v. Transport Regulation Board*[4] explicitly expressed his 'entire agreement' with the judgment of Lord Reid in *Ridge v. Baldwin*.[5]

The question whether the reference to a duty to act judicially involves

* B.A. (Qld.), LL.D., Barrister and Solicitor, Supreme Court of Victoria, Barrister at Law, Supreme Court of Queensland, Professor Emeritus, formerly Professor of Public Law, University of Melbourne.

** LL.M., Barrister and Solicitor, Supreme Court of Victoria and Australian Capital Territory, Barrister, Supreme Court of New South Wales, Lecturer in Law, University of Melbourne.

1 [1924] 1 K.B. 171, 205.
2 [1964] A.C. 40.
3 *Ibid.*
4 (1968) 119 C.L.R. 222, 233.
5 [1964] A.C. 40.

a separate super-added requirement, after a rather long history,[6] seems now to have been clearly answered in the negative[7] and the rationalization accepted is that the duty to proceed judicially may be inferred from the nature of the power.[8]

It is not proposed therefore to discuss this issue. However, many doubts arise from the formulation of the *first limb* of the Atkin formula. Key words and phrases on which much may hang are 'having legal authority', 'to determine questions', 'affecting' and 'rights'. Each of these will be separately considered. The last one has survived earlier restrictive interpretations but still involves many uncertainties.

1. 'HAVING LEGAL AUTHORITY'

This of course excludes domestic tribunals whose authorization comes from contract.[9] The authority however need not flow from statute or regulation, as the tribunal may be set up in pursuance of the prerogative.[10] Nor is it necessary that the decision is in pursuance of a power to create a binding obligation.[11]

2. 'TO DETERMINE QUESTIONS'

It seems that it is necessary for the statute to contemplate that the body is to decide some question *posed by the statute* before it can take certain action. This requirement is clearly satisfied in *Ridge v. Baldwin*[12] and *Durayappah v. Fernando*,[13] where the police constable could only be dismissed in the one case and the Council dissolved in the other case if certain things were proved to exist. The determination of such questions implies the right to be heard thereon. Certain of the more modern cases[14] are somewhat difficult to fit into this strait-jacket, but it seems clear that a mere 'acting' power does not carry with it a duty to conduct a hearing before deciding to act. Thus the Board in *East Suffolk Rivers Catchment Board v. Kent*[15] did not have to accord the landowner a hearing before it decided

[6] *Viz. R. v. Legislative Committee of the Church Assembly, ex parte Haynes-Smith* [1928] 1 K.B. 411; *Nakkuda Ali v. Jayaratne* [1951] A.C. 66; *Testro Bros Pty Ltd v. Tait* (1963) 109 C.L.R. 353.

[7] See *Ridge v. Baldwin* [1964] A.C. 40.

[8] *Ibid.* 76; *Durayappah v. Fernando* [1967] 2 A.C. 337, 349.

[9] However, domestic tribunals are subject to the implications of natural justice. This shows that the Atkin formula does not spell out the full extent of application of the natural justice principle. After all it is primarily a statement defining the scope of the prerogative writs.

[10] *R. v. Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 Q.B. 864.

[11] *Ibid.*

[12] [1964] A.C. 40.

[13] [1967] 2 A.C. 337.

[14] *E.g. Re H.K.* [1967] 2 Q.B. 617. It may be, however, that this case spelled out no more than a duty to act fairly which may not be as wide as the duty to accord natural justice in the sense of giving a hearing and complying with procedural niceties. It may be that there are grades of natural justice.

[15] [1941] A.C. 74.

to attempt to repair the breaches in his wall. Nor would the Council in *Fisher v. Ruislip-Northwood*[16] have had to accord the right to a hearing to all road users in the vicinity before it decided what steps it should take to prevent the air-raid shelter from becoming a menace to traffic or pedestrians.

It is arguable that the requirement does not exist in the case of deprivation of or interference with *land* or interests in *land*. It is, for instance, somewhat difficult to discern any 'question' in the well-known 'natural justice' case of *Cooper v. Wandsworth Board of Works*[17] in the sense of one explicitly posed by the legislature for decision by the administrative body as a necessary preliminary to acting. It is probable that interests in land *do* create an exception and that the explanation lies in the traditionally strong veneration accorded in English law to land, a veneration which ante-dated the more sophisticated attempts of recent years to deal with administrative law concepts.

A somewhat 'grey area' would appear to be presented by the statute which allows some act to be done in the 'absolute discretion' of the donee of the power. Here it can be argued that there is an absence of any 'question' to be decided in terms of the Atkin formula. On the other hand, it is possible to contend that the statute still focuses attention on the decision-making element and since *Padfield v. Minister of Agriculture, Fisheries and Food*[18] seems to suggest that there cannot be such a thing as a completely uncontrolled discretion, the discretion cannot be exercised without making a series of decisions on relevant factors. This cannot be said of a mere 'acting' power. There seems some difference between a decision to grant a man a trading licence (even though the bases of the decision are not expressed) and a decision to build another bridge over the Yarra River.

This part of the formula also appears to exclude subordinate legislative activities, for example the making of regulations by the Governor-in-Council or the making of by-laws by local authorities. A price fixing inquiry may be a borderline case[19] but Lord Reid in *Ridge v. Baldwin*[20] envisages the parameters of the natural justice rule as not extending to ministerial decisions relating to schemes having a wide range of application.

3. 'RIGHTS'

It is more convenient to consider this word before 'affecting'. Its meaning in the context of the Atkin formula has undergone a rapid transformation

[16] [1945] K.B. 584.
[17] (1863) 14 C.B. (N.S.) 180; *cf. Dunlop v. Woollahra Municipal Council* [1975] 2 N.S.W.L.R. 446.
[18] [1968] A.C. 997.
[19] This issue is discussed rather inconclusively in *New Zealand United Licensed Victuallers' Association v. Prices Tribunal* [1957] N.Z.L.R. 167, 206, 213-4. In such cases the grant of a full right of hearing may often be ruled out by considerations of practicality. In practice, the difficulty may be met by inviting interested groups or organizations to submit representations.
[20] [1964] A.C. 40, 72.

over recent years ranging from a strict jurisprudential interpretation[21] to its total omission in a 1967 restatement of the formula by Lord Parker in *R. v. Criminal Injuries Compensation Board; ex parte Lain*[22] where his Lordship said that:

> We have reached the position where the ambit of certiorari can be said to cover every case in which a body of persons of a public as opposed to a purely private or domestic character has to determine matters affecting subjects provided always that it has a duty to act judicially.[23]

In *Lain* it was held that certiorari was available against a tribunal responsible for *ex gratia* compensation payments to the victims or relatives of victims of criminal violence notwithstanding the fact that an applicant for compensation had no legally enforceable right to a payment.

This more liberal interpretation of 'rights' has also been evident in natural justice cases. In *Re H.K.*,[24] a prospective immigrant to Britain was held entitled to a hearing to give him the opportunity of satisfying immigration authorities that he met the admission criteria laid down by the relevant Act. In *Schmidt v. Secretary of State for Home Affairs*,[25] the Court of Appeal held that a minister was entitled to refuse to grant an extension to a temporary entrance permit without according the applicant a hearing. The Court however held that its decision would have been otherwise had the minister purported to revoke a current permit without a hearing because then the holder would have had a 'legitimate expectation' of remaining until the permit expired.[26]

The main battles have been fought in relation to licences. The prior attitude was to regard a licence as not involving a significant commercial interest and its revocation as involving no more than the executive withdrawal of a privilege.[27] Such a process did not involve a duty to accord natural justice. However there has been a dramatic change and it is now clear that trading or commercial licences may not be revoked without the holder first being accorded natural justice[28] unless the licence is granted

[21] *Nakkuda Ali v. Jayaratne* [1951] A.C. 66; *R. v. Metropolitan Police Commissioner, ex parte Parker* [1953] 1 W.L.R. 1150; [1953] 2 All E.R. 717.

[22] [1967] 2 Q.B. 864.

[23] *Ibid.* 882.

[24] [1967] 2 Q.B. 617.

[25] [1969] 2 Ch. 149.

[26] *Ibid.* 171. *Cf. Ivusic v. R.* (1973) 47 A.L.J.R. 671 where the High Court declined to decide whether natural justice had to be accorded before an immigrant could be deported because of a criminal conviction.

[27] *Nakkuda Ali v. Jayaratne* [1951] A.C. 66; *R. v. Betting Control Board Ex parte Stone* [1948] Tas. S.R. 4 (F.C.).

[28] *Gardiner v. Land Agents Board* (1976) 12 S.A.S.R. pt 4; *Stollery v. Greyhound Racing Control Board* (1972) 128 C.L.R. 509; *South Otago Hospital Board v. Nurses and Midwives Board* [1972] N.Z.L.R. 828. This conclusion finds indirect support from *R. v. Gaming Board of Great Britain; ex parte Benaim and Khaida* [1970] 2 Q.B. 417 where the Court of Appeal held that a hearing had to be given to applicants for a licence under a new licensing system. The applicants were already conducting a business and a refusal to grant a licence would have had the same effect as a revocation of an existing licence. The final report of the Australian Government's Committee on Administrative Discretions (the Bland Committee) has recommended that this position be put beyond doubt at a federal level in Australia by means of legislation: para. 178.

subject to a condition that it may be revoked at any time for reasons unrelated to the licensee's conduct.[29] The holder has an interest which will be affected by cancellation whether that interest be characterized as a property right,[30] a right in the nature of a proprietary right,[31] or as a privilege or liberty. At the minimum he has a 'legitimate expectation' of the licence remaining effective for its stated term. The case will be even stronger where revocation can only be effected if misconduct of some kind is established.

A refusal by a licensing authority to renew a licence can have the same practical consequences for the licensee as would revocation of a current licence. Yet courts have tended to treat renewal as being more akin to an application for the granting of an initial licence than to revocation. In *Ex parte Fanning; Re Commissioner for Motor Transport*[32] Sugerman J., with whom Herron C.J. and Walsh J. agreed, said that:

> In the absence of statutory provision to the contrary, the renewal of an annual licence is a fresh grant of a new licence and not a continuance of the old. . . . 'Renewal' is a convenient term, whose use draws attention to practical differences which may be found to exist between the initial granting of a licence and subsequent grants of new licences in respect of the same subject-matter. For instance, information furnished with the first application may suffice for subsequent applications as well; and investigations once made may not have to be repeated, or not to the same extent. These, however, are merely practical differences; and, in the absence of express provision in the Statute, do not import any difference in the applicable legal principles or in the discretionary character of the grant. It is only because licensing bodies, taking a sensible and practical view of their functions, are usually prepared to renew a licence, once granted, in the absence of countervailing cause, that renewal may often appear to be less a matter of discretion, and something more approximate to a matter of right, than initial grant.[33]

Such a statement is consistent with the *Schmidt*[34] reasoning. If a statute makes express provision for regular renewal, then this would give rise to a 'legitimate expectation' of such renewal. Similarly, a right to renewal subject to cause shown will mean that natural justice must be accorded before renewal is refused.[35] But if such provisions are absent then there will be nothing on which to found a 'legitimate expectation.'

More difficulties surround the question of the *granting* of a licence. Given that the possession of a liberty, interest or privilege is enough to satisfy the Atkin formula, at first blush the fact that the applicant has no pre-existing liberty, interest or privilege would seem to be fatal.

[29] *Attorney-General v. Cochrane* (1970) 91 W.N. (N.S.W.) 861 (C.A.).

[30] *Banks v. Transport Regulation Board* (1968) 119 C.L.R. 222, 232 (*per* Barwick C.J.). This holding was however for the purposes of the applicability of s. 35(1)(a)(2) of the Judiciary Act (Cth).

[31] *Fagan v. National Coursing Association of South Australia* (1974) 8 S.A.S.R. 546, 562.

[32] [1964] N.S.W.R. 1110 F.C.

[33] *Ibid.* 1112; *cf. R. v. Liverpool Corporation; Ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299, 304 *per* Lord Denning M.R. *arguendo*: 'But a person who has a licence has a settled expectation of having it renewed, and that is a thing of value.'

[34] [1969] 2 Ch. 149.

[35] *Re Holden* [1957] Tas. S.R. 16.

However one special situation is that wherein a licensing scheme is imposed on existing enterprises. The issue was raised in *R. v. Gaming Board of Great Britain; ex parte Benaim and Khaida*[36] where a licence application under newly-implemented gaming laws was being considered. The Court of Appeal held that the applicants were entitled to the benefits of the requirements of natural justice insofar as a duty to act fairly was concerned. It is submitted that this was a correct approach for the Court to adopt. The position is analogous to revocation of an existing licence; the practical effect of revocation and a failure to permit an existing activity to continue is exactly the same.

Lord Denning M.R. indeed said in the *Gaming Board* case that no rights were there involved.[37] It is true that the applicants had no strict legal right, in an analytic jurisprudential sense, whether of property or anything else, but it is surely somewhat naive to pretend that they had no *interest*. They had an existing business interest; maybe the carrying on of the business was illegal but enforcement of the law had been sporadic.

An even more complex situation is an application for an initial licence where the situation is that a person, previously not engaged in a field covered by an existing licensing system, applies for a licence. Four possibilities can be envisaged; namely that where no limit is placed on the number of licences which may be granted; that where the number is limited; and those where, in respect to each of the above, the relevant legislation contains or fails to contain criteria governing approval of applications.

The 'no upper limit — no criteria' form of licensing[38] is usually employed to enable governments to impose conditions on the conduct of certain businesses and is sometimes used as a revenue-earner. An application for this type of licence, made in the proper form, ought not to be rejected without the applicant first being accorded natural justice because he will have a legitimate expectation of obtaining the licence.

The second situation is where entry into professions or callings is not restricted in numbers but criteria are laid down which aspirants for admission must satisfy. In the same way that the would-be immigrant in *Re H.K.*[39] had to be given the opportunity to satisfy the immigration authorities that he possessed the qualifications needed for entry into Britain before his request could be refused, so too should applicants for 'no upper limit — criteria' licences be heard before they are denied professional admission.

Thirdly, criteria can be imposed where limits are placed on the total number of licences available.[40] The possibility of hundreds of qualified

[36] [1970] 2 Q.B. 417.
[37] *Ibid.* 429.
[38] See *e.g.* the Secondhand Dealers Act 1958.
[39] [1967] 2 Q.B. 617.
[40] Taxi-cab licences, licences to operate radio and T.V. stations and bus route licences, are typical cases.

people applying for a handful of licences is immediately apparent. The rejection rate will be high and in most cases will not be based on non-possession of the necessary qualifications. In this situation it can be argued that the analogy with *Re H.K.*[41] breaks down because an applicant will be aware that only a limited number of licences can be granted and that as a result he can have no legitimate expectation of success even if he meets all the criteria. On the other hand it may well be that applicants have no idea of how many other qualified persons are likely to apply at the same time as themselves and that the mere possession of qualifications gives rise to some legitimate expectation. The answer to this difficulty is not hard to find. Since natural justice does not require an oral hearing[42] all that the licensing authority need do is to ask that details of the necessary qualifications be included on application forms and so long as they make their choice solely from among the qualified applicants there can be no complaint that natural justice has been denied.

The final possibility is the combination of an upper limit and no criteria. In this situation there can be no legal basis for arguing the existence of a legitimate expectation[43] and an application can be refused without a hearing.

The more liberal approach to the interpretation of 'rights' evident in the licence cases is also to be found in other areas. In *Ridge v. Baldwin*[44] the House of Lords held that a person could not be dismissed from an office which he held subject to something being shown against him which warranted his dismissal, without first being accorded natural justice. It was also held that this requirement was not present where the office was one held at pleasure or where the usual master-servant relationship applied. But recently the House of Lords has modified its dogmatism in the 'office held at pleasure' situation by holding that even here a hearing will be necessary before dismissal if some statutory indicia of the need for a hearing such as an obligation of 'due deliberation' cast on the relevant authority, can be found.[45]

Courts have long required that members of clubs and unions have a contractual right to continued membership and a proprietary right to any property owned by such organizations which can only be disturbed after natural justice has been afforded.[46] More recently there has been a realistic recognition that more than contractual and proprietary rights might be

[41] [1967] 2 Q.B. 617.
[42] *Wiseman v. Borneman* [1971] A.C. 297.
[43] It is possible to mount a statistical argument by relating applicants to available positions and determining the statistical likelihood of success but in both *Re H.K.* and *Schmidt* the basis for a 'legitimate expectation' was said to be alleged compliance with *statutory* criteria.
[44] [1964] A.C. 40.
[45] *Malloch v. Aberdeen Corporation* [1971] 1 W.L.R. 1578.
[46] See *e.g. Fisher v. Keane* (1878) 11 Ch.D. 353; *Burn v. Amalgamated Labourers' Union* [1920] 2 Ch. 364.

involved: membership of such organizations may confer 'valuable . . . social rights'.[47]

4. 'AFFECTING'

Given that there are 'rights' in the extended sense indicated by the foregoing cases, the decision must 'affect' those rights. It is in this aspect that the most difficulties appear to arise and many of the decisions are hard to reconcile. The basic question is of course whether 'affecting' means 'directly affecting'. Some of the decisions do not concern natural justice but jurisdictional questions, but it is considered that they are none the less relevant for that, because the applicability of the prerogative writs in cases of jurisdictional defect is what the Atkin formula primarily contemplates though it has been extended to the natural justice question.

In the *Electricity Commissioners Case*[48] prohibition was issued against the Commissioners despite the fact that their decision affected nobody until ratified by the Board of Trade, the House of Commons, and the House of Lords. It is therefore clear that Atkin L.J. did not intend the word 'affecting' to mean that a decision had to be self-executing. Subsequent interpretation supports this contention. In *Estate and Trust Agencies (1927) Ltd v. Singapore Improvement Trust*[49] the Privy Council upheld the issue of prohibition against the Trust even though the declaration complained of had no effect until approved by the Governor-in-Council, and in *Wiseman v. Borneman*,[50] the House of Lords held that a tribunal which was charged only with determining whether a *prima facie* case existed, thereby justifying action by another body, could be bound to accord natural justice. There are recent Australian *dicta* to the same effect in a unanimous High Court decision in *Brettingham-Moore v. St. Leonard's Municipality*.[51]

Although a tribunal's decision does not have to be self-executing, there are some cases which suggest that it does have to have some potential for action. In *R. v. Fowler; ex parte McArthur and Murray*[52] certiorari was sought against a magistrate appointed by a minister to conduct an investigation into charges made against two members of the Queensland Police Force. The rules governing such investigations required the magistrate to hear and examine witnesses, to record testimony, and to report to the Police Commissioner his opinion on whether or not he found the charges proved. The Commissioner was then permitted to impose certain penalties. It was held that the writ would not issue, *inter alia*, because the investigator was not empowered to make the decision regarding penalty and could

[47] *Martin v. Davis* [1970] Ch. 345, 397.
[48] *R. v. Electricity Commissioners, ex parte London Electricity Joint Committee Co.* [1924] 1 K.B. 171.
[49] [1937] A.C. 898.
[50] [1971] A.C. 297.
[51] (1969) 121 C.L.R. 509, 522.
[52] [1958] Qd. R. 41.

not therefore affect the policemen in any way. Similarly, in *Testro Bros Pty Ltd v. Tait*[53] the High Court held that an inspector appointed to investigate the affairs of a company did not have to hear officers of the company before reporting to the Attorney-General because, *inter alia*, although the report could be admissible in evidence in any prosecution for alleged criminal acts by officers and although it could recommend winding up of the company, it could not, of its own force, penalize anyone. The officers could be heard in any criminal trial or winding up proceedings launched by the Attorney-General as a result of the report.[54] *Testro Bros Pty Ltd v. Tait*[55] was later followed by the New South Wales Court of Appeal in *Ex parte Evatt; Re N.S.W. Bar Association*[56] when it held that a barrister who was the subject of a Bar Association enquiry and report was not entitled to be heard by the Association because the enquiry was preliminary to a decision on whether to approach the Supreme Court to seek a ruling on the fitness of the barrister for continued membership of the profession.

The authority of *Testro Bros Pty Ltd v. Tait*[57] has been somewhat undermined recently by a decision of the Court of Appeal in *In re Pergamon Press Ltd*[58] in which it was held that company inspectors vested with substantially the same powers were bound by the rules of natural justice and were thereby required to hear any person before any critical reference could be made to him in their report. In his leading judgment Lord Denning M.R. said that:

> They [the inspectors] have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those who they name. They may accuse some; they may condemn others; they may ruin reputations or careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about the winding up of the company, and be used itself as material for the winding up. . . . When they do make their report the Board [of Trade] are bound to send a copy of it to the company; and the Board may, in their discretion, publish it, if they think fit, to the public at large.
>
> Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. . . . The inspectors can obtain information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him.[59]

It is therefore possible to assert that natural justice is attracted even when determinations are not self-executing and even when their effect is not legal in nature.

The cases just examined suggest that a distinction needs to be made between determinations which involve criticism of individuals and the majority of cases where no criticism is made. In the latter situation the

[53] (1963) 109 C.L.R. 353.
[54] Winding up proceedings were launched as a result of the report and were unsuccessful: *Re Testro Bros Consolidated Ltd* [1965] V.R. 18.
[55] (1963) 109 C.L.R. 353.
[56] [1967] 1 N.S.W.R. 695.
[57] (1963) 109 C.L.R. 353.
[58] [1971] Ch. 388.
[59] *Ibid.* 399-400.

principles of natural justice can be called in aid where a body makes a decision which will affect subjects either of its own force or as a result of subsequent ratification. It is submitted that the critical distinction between *Fowler*[60] and the decisions in *Electricity Commissioners*[61] and *Singapore Improvement Trust*[62] is that the magistrate in *Fowler* had no power to make any order against the policemen. The most he could do was to say whether or not he found the charges proved. It was then for the commissioner to determine whether he agreed and whether any penalty should be imposed. If it was it was on the commissioner's order. The commissioner was not bound to walk on the same procedural track at all; he could start *de novo* in his decision-making; he could in fact consign the magistrate's report to the waste-paper basket and make a decision which had no relation to it. On the other hand, the Board of Trade and the Houses of Parliament in *Electricity Commissioners* could only endorse, amend or reject the commissioner's order. If approved, albeit with amendment, it was the commissioner's order which came into force. Even less discretion was granted the ratifying authority in *Singapore Improvement Trust*. There, the Governor-in-Council had to endorse the Trust's declaration if no objection was made and to either approve or reject it outright if an objection was lodged.

The formal decision in *Wiseman v. Borneman*[63] is not inconsistent with this analysis but the speeches do indicate that a more sophisticated approach is being taken by contemporary judges. The tribunal in question had the power to determine whether a *prima facie* case of additional tax liability existed against a taxpayer. If the tribunal decided in favour of the taxpayer, that was an end to the matter, but if a *prima facie* case was found to exist, the tax commissioners could levy higher payments subject to a right of appeal to the commissioners and the tribunal. The House of Lords held that the natural justice requirement of access to prejudicial statements in the hands of tribunal did not apply and that the taxpayer was therefore rightly denied access to a submission made to the tribunal by the commissioners. However, all five Law Lords did hold that the tribunal was bound to accord the taxpayer natural justice notwithstanding that an adverse decision could have no application to him.[64] The fact that the *prima facie* case decision did not and could not *itself* affect the taxpayer was important in determining whether 'the principles of natural justice in their full vigour'[65] were to be employed. Had the tribunal's decision contained some order enforceable against the taxpayer then Lord Reid and Lord Wilberforce would have required that the commissioner's submission

[60] [1958] Qd. R. 41.
[61] [1924] 1 K.B. 171.
[62] [1937] A.C. 898.
[63] [1971] A.C. 297.
[64] *Ibid.* 308 (*per* Lord Reid), 308-10 (*per* Lord Morris of Borth-y-Gest), 310-11 (*per* Lord Guest), 315-6 (*per* Lord Donovan) and 318 (*per* Lord Wilberforce).
[65] *Ibid.* 311.

be made available to the taxpayer.[66] But because the tribunal was only carrying out a preliminary procedure the standard it had to observe was less stringent; that standard was said to be fairness 'in all the circumstances'.[67] Their Lordships detected the possibility of some unfairness arising (for instance in the case of a taxpayer who could not afford to appeal against a commissioners' levy) but held that, in view of the detailed procedures laid down by Parliament, the fact that most taxpayers knew the commissioners' position anyway and also knew the avenues of appeal open from an adverse decision of the commissioners, it was not unfair to the taxpayer that the tribunal had not given him access to the commissioners' submission.

The potential inherent in *Wiseman v. Borneman*[68] for an extension of natural justice requirements into the area of preliminary hearings was short-lived. Less than three years later in *Pearlberg v. Varty*[69] five other Law Lords held that a commissioner who had power to give leave for an assessment to income tax to be made out of time did not have to hear the person to whom the assessment was directed before granting leave on the *ex parte* application of a tax inspector. Their Lordships acknowledged that the commissioner had to be satisfied that there were 'reasonable grounds for believing that tax has or may have been lost to the Crown owing to the fraud or wilful default or neglect of any person' but held that the taxpayer would have the opportunity to put his case by exercising his right of appeal against any assessment made pursuant to leave.

A finding that grounds existed for believing that a taxpayer had defrauded the revenue or wilfully defaulted in making payments is far more serious an accusation than a finding that a *prima facie* case of additional tax liability exists as a result of non-culpable activity by a taxpayer. And yet Lord Hailsham said:

> It is true, of course, that as was said repeatedly in *Wiseman v. Borneman*,[70] the fact that a decision is only that a *prima facie* case has been made out is not itself a reason why both parties should not be heard. *But it is a significant factor.*[71]

Lord Salmon went further in his speech:

> A decision [on whether to grant leave] . . . is in the class of purely administrative preliminary decisions, taking away no rights and in respect of which neither reason nor justice requires the persons concerned to be heard before the decision is made.[72]

Since an adverse finding by a commissioner can suggest some form of conscious impropriety, *Pearlberg*[73] marks a retreat, not only from *Wiseman*

[66] *Ibid.* 308 and 320. The same conclusion is implicit in Lord Donovan's speech, 316.
[67] *Ibid.* 308 (*per* Lord Reid) and 309 (*per* Lord Morris of Borth-y-Gest).
[68] [1971] A.C. 297.
[69] [1972] 1 W.L.R. 534.
[70] [1971] A.C. 297.
[71] [1972] 1 W.L.R. 534, 539. Emphasis added.
[72] *Ibid.* 551-2.
[73] [1972] 1 W.L.R. 534.

v. Borneman[74] but also from *In re Pergamon Press Ltd.*[75] The retreat[76] was confirmed soon afterwards by a Privy Council constituted by five Law Lords only one of whom had decided *Pearlberg.*[77] The case was *Furnell v. Whangerei High School's Board*[78] and the issue was whether a teacher was entitled to a hearing before being suspended pending a hearing of charges of misconduct. The majority distinguished *In re Pergamon Press Ltd*[79] on the basis that the suspension did not carry with it any express criticism or condemnation and held that a hearing was unnecessary. However the minority pointed out that suspension carried with it a stigma which could be equally as damaging as critical words. Moreover, there was a directness not present in *Pergamon*: an order that the teacher not attend his classes.

The pendulum has swung back and the law remains in a state of flux. In view of *Furnell*[80] it may not even be safe to conclude that natural justice will have to be accorded by tribunals which make determinations which of their own force (albeit subject to ratification or amendment) affect subjects. It can however be hoped that the weight of previous authority will prevail and that the judicial retreat will be short-lived.

5. CONCLUSION

The foregoing represents some attempt to state and assess the present-day position in relation to the interpretation and application of the Atkin formula. However the present position is far from static and the courts are likely to take new approaches or vary existing ones as litigation continues to throw up varying and perhaps novel fact situations. Denning-esque surprises may well be the order of the day!

It seems sure that the courts will display more and more sophistication in dealing with cases as they develop. One very probable development is some increasing dichotomization of the natural justice *requirements* themselves. Cases over the recent years, notably *Wiseman v. Borneman*[81] and *Re H.K.*[82] have suggested strongly a difference of application between

[74] [1971] A.C. 297.

[75] [1971] Ch. 388. See also *R. v. Collins; Ex parte A.C.T.U. — Solo Enterprises Pty Ltd* (1976) 8 A.L.R. 691 (H.C.) where Stephen J. held that certiorari was not available to quash critical conclusions made by a Royal Commission because the report neither directly affected nor in any way subjected to new hazard the rights of the company whose activities were criticized.

[76] On the post-*Wiseman v. Borneman* period see generally Taylor G. D. S., 'The Unsystematic Approach to Natural Justice' (1973) 5 *New Zealand University Law Review* 373; Northey J. F., 'The Aftermath of the Furnell Decision' (1974) 6 *New Zealand University Law Review* 59; and Taylor G. D. S., 'Natural Justice — The Modern Synthesis' (1975) 1 *Monash Law Review* 258.

[77] [1972] 1 W.L.R. 534.

[78] [1973] A.C. 660.

[79] [1971] Ch. 388.

[80] [1973] A.C. 660. Canadian law is beset with similar problems. See: Howe R. D., 'The Applicability of the Rule of Natural Justice to Investigatory and Recommendatory Functions' (1974) 12 *Osgoode Hall Law Journal* 179.

[81] [1971] A.C. 297.

[82] [1967] 2 Q.B. 617.

on the one hand natural justice in the full sense of a right to an oral hearing with such accompaniments as the right of cross-examination and the right to legal representation, and on the other hand, a less rigorous requirement expressed in the notion of doing what is 'fair' in the particular situation. Such a distinction could cope with different situations and would have merits from the viewpoint of flexibility and pragmatism in the pursuit of administrative justice.