IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NYARANGI, PLATT & GACHUHI, JJ.A.)

CIVIL APPEAL NO. 152 OF 1986

BETWEEN

DAVID OLOO ONYANGO.....APPELLANT

AND

THE ATTORNEY GENERAL .....RESPONDENT

(Appeal from thejudgmentof the High courtof Kenya at

Nairobi(SheikhAmin, J.)dated 14th day of October, 1986

in

The High Court Civit Suit No. 1423 of 1986)

JUDGMENT OF THE COURT

This is an appeal by the prisoner against a decision made by the High Court, (Sheikh Amin J) on 14th October, 1986 in favour of the Respondent Republic.

The matter arises, quite shortly, in the following way. On 1st November, 1982 the appellant was convicted of an offence under Section 57 (1) and (2) of the Penal Code by the Senior Resident Magistrate Nairobi and sentenced to 5 years imprisonment. Upon his admission into prisons, the appellant was entitled under section 46(2) of the Prisons Act, Cap 90

> "to be credited with the full amount of remission to which he would be entitled at the end of his sentence if he lost no remission of sentence."

What happened later was this. On 17th February, 1983, the Commissioner of Prisons wrote to the officer-in-charge, Kamiti Main Prison, at which prison the appellant was serving the sentence of imprisonment and stated that he, the Commissioner of Prisons, (the commissioner) considered that it is in the interests of the reformation and rehabilitation of the said prisoner that he be deprived of remission earned under section 46(1) of the Prisons Act (the Act). The Commissioner continued

> "**Now therefore, in exercise** of the powers conferred by Section 46 (3a) (a) of the Prisons Act, I ……..

Do hereby direct, that the said prisoner convicted of the aforesaid offence be deprived of all remission granted to him under section 46(1) of the Prisons Act."

It would not be wearisome to state sub-section (3a) (a) of Section 46 which provides,

"(3A) A prisoner may be deprived of remission ____

(a) Where the Commissioner considers that it is in the interests of the reformation and rehabilitation of the prisoner."

Before coming to the issue in this case, I will mention that in his plaint, the appellant averred that prior to the receipt of the Commissioner's letter, he had not been charged, tried and found guilty or punished for any offence against prison discipline, that he was not informed what he had done to warrant reformation and rehabilitation over and above the lawful sentence, that he was not given any opportunity to be heard or explain or make representations as to why he should not be deprived of his remission, that the decision of the Commission of Prisons was arbitrary, in breach of natural justice, *ultra-vires* Section 46 of the Act, and therefore illegal, null and void. The further contention is that the appellant's continued imprisonment after 4th March, 1986 is illegal and a false imprisonment.

The appellant as plaintiff prayed for judgment against the defendant for:

(i) A declaration that the decision of the Commissioner of Prisons depriving the plaintiff of his remission was made in breach of the rules of Natural Justice and it is null and void *ab initio*.

(ii) A declaration that the decision of the Commissioner of Prisons was a nullity since it was unreasonable, *ultra-vires*, and not based on any material facts.

(iii) A declaration that the plaintiff was entitled to be released after serving two thirds of his sentence.

(iv) A declaration that the imprisonment of the plaintiff after 4th March, 1986 was / is illegal and a false imprisonment.

(v) General damages for false imprisonment.

Sheikh Amin J found in favour of the Respondent on the basis of arguments advanced in proceedings under a Notice of Motion which was taken under

Order XIV r 2 and Order L r 1 of the Civil Procedure Rules and Rule 3 of the High Court (Practice and Procedure) Rules and Section 3A of the Civil Procedure Act. The issues of law on which the suit was to be disposed of were:

(i) Whether or not the plaintiff was entitled to be credited with full remission under Section 46(2) of the Act.

(ii) Whether or not the plaintiff was entitled to be released in accordance with Rule 95 (1) of the Prisons Rules.

(iii) Whether or not the decision of the Commissioner of Prisons depriving him of his remission is null and void for breach of the rules of natural justice and unreasonableness.

This appeal was argued on two grounds i.e

1. That the learned judge erred in law in holding that the decision of the Commissioner of Prisons depriving the appellant of remission was not null and void for breach of rules of natural justice.

2. That the learned trial judge erred in law in holding that the decision of the Commissioner of Prisons was null and void as it was not based on any of the material facts.

Mr Kiraitu Murungi for the appellant contented that the main issue is the interpretation of Sub section (3A) (a) of Section 46 of the Act and submitted that even if there are no words limiting, the Commissioner is bound to follow rules of natural justice, that there was no evidence to support the view that the appellant required further rehabilitation and that the Commissioner could not impose this substantial loss of liberty without giving the appellant an opportunity to be heard. Finally Mr K Murungi urged that the Commissioner's decision is erroneous because there is no evidence what matters the Commissioner took into account and so it is not possible to tell if correct matters were borne in mind.

For the respondent Republic, Mr Chege, in an able submission, argued that the trial judge decided the case on the interpretation of Section 46(3A) (a), gave the words in that provision their common meaning and applied common sense. Mr Chege boldly argued that the commissioner has not got to hear anybody, that there is nothing in the Section which even remotely suggests that an inmate has to be heard, that if the legislature intended that the prisoner should be heard, there would have been a specific provision such as Section 52 and 53 of the Act and that in the instant case the Commissioner considered what there was to consider and that it could not reasonably be said that the decision complained of is so unreasonable as no reasonable executive authority could make.

Mr K Murungi made much of the point, and properly made much of the point, that the Commissioner's decision has resulted in substantial loss of liberty.

The commissioner's decision was an administrative act. Nevertheless rules of natural justice apply to the act in so far as it affects the rights of the appellant and the appellant's legitimate expectation to benefit from the remission by a release from prison some 20 months earlier than if he had to serve the full sentence of imprisonment. Lord Denning MR (as he then was) put it thus in *Reg v Gaming Board, Ex P Benalim*, (1970) 2 QB 417 at p 430, letter B,

> "It is not possible to lay down rigid rules as to when the principles of natural justice are to apply nor as to their scope and extent. Everything depends on the subject matter ……At one time it was said that principles only apply to judicial proceedings and not to administrative proceedings. That heresy was scotched in *Ridge v Baldwin* 1984 AC 40."

I would say that the principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly. In this instant case, reasonable people would expect the commissioner to act fairly in considering whether or not to deprive an inmate of his right of remission earned in accordance with the provisions of the **Prisons Act**. Reasonable people would expect the Commissioner to act on reports, containing information concerning the appellant. The reports will obviously have been prepared by the Officer-in-charge of the Kamiti Main Prison. The inmate may or may not be aware of the reports

on him. There was no evidence here that he was made aware of what was afoot. An inmate has no right to come in at the stage when the Officer-in- Charge is gathering information for the purpose of preparing a report on him. However, in order to act fairly, the Commissioner is expected to hear the inmate on whatever reports he has on him. Sub-section (3A) (a) of section 46 does not expressly limit the Commissioner as he considers whether or not to deprive an inmate of remission. That, however, does not free the Commissioner from acting fairly and in my judgment, the Commissioner could not act fairly and be seen to have acted fairly without giving an inmate an opportunity to be heard before imposing loss of the liberty and in this case, it is substantial loss of liberty. As was said in *Fairmount v Environment Sec* [1976] 1 WLR 1255 of page 1263,..

> "For it is to be implied unless the contrary appears, that parliament does not authorize… the exercise of powers in breach of the principle of natural justice…"

There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore

that in applying the material sub-section the Commissioner is required to act fairly and so to apply the principle of natural justice.

The *Chambers Twentieth Century Dictionary*, New Edition, at page 276 defines the term "consider" as follows:

> "to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion,…"

If the Commissioner were to act without hearing the affected inmate, there would be neither"**'deliberation'** nor '**taking into account'**. **'Consider'** implies looking at the whole matter before reaching a conclusion. The commissioner is required to act objectively as to act fairly. Decisions affecting rights of people at liberty. Mr Chege argued that unless the decision of the commissioner is wholly unreasonable, it should not be questioned or interfered with. The obvious answer to that argument is that one cannot tell if the commissioner acted subjectively and arbitrarily. A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at: *De Souza v Tanga Town Council* [1961] E A 377 at page 338, letter E-G. In *Associated Provincial Picture Houses Limited v Wednesbury Corporation*, [1948], KB 223 (a decision which was cited by both parties) at page 228-229, Lord Greene MR distinguished judicial acts from an executive act, such as the act of the Commissioner in this case, and continued,

> "What, then, is the power of the Courts? They can only interfere with an act of executive authority if it be shown that the authority has contravened the law…….. It is not to be assumed *prima facie* that responsible bodies …….. will exceed their powers."

Later in the judgement, Lord Greene had this to say,

> "It is true discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretion often used the word""unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of things that must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey these rules, he may truly be said and often is said to be acting 'unreasonably'. Similarly there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L J in *Short v Poole corporation* gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters".

Relying on the passage, Mr Chege urged that the Commissioner's act has to be shown to be as unreasonable as the dismissal of the red haired teacher because she had red hairs before the act can be held to be unfair. That submission overlooks the fact that there is no evidence what matters the Commissioner took into consideration. Therefore it is not possible to tell if matters which were irrelevant to what he had to consider were taken into account. It is not possible to say if any matters were taken into account. It is not possible to say if any matters were taken into consideration. There simply is no way of knowing how the Commissioner acted. The executed decision to deprive the appellant of remission may or may not be as bad a that of the employer who dismissed the red haired teacher. It is improper and not fair, that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial results in substantial loss of liberty leaves the appellant and other concerned guessing about what matters could have persuaded him to decide to deprive an inmate of remission.

Mr Chege submitted further that it would be wrong in principle for the Commissioner to enquire on an inmate if he thought he should be further reformed. Even if it be wrong in principle for some such enquiry to be made, in the context of the subsection, that is not the task that has to be undertaken in the exercise of

the Commissioners's discretion. The basic requirement is for the commissioner to cause the inmate the subject matter of the consideration to be given an opportunity to be heard so that the Commissioner is able to weight the reports unfavourable to the inmate against the inmate's own explanation. That does not constitute a request by the Commissioner put to the inmate if he thinks he should be further reformed and rehabilitated before being released. In any case, with or without remission, an inmate is entitled to be released on completion of the sentence whether or not he will have reformed. The Commissioner would not lawfully keep him a minute longer in prison just because he though he needed more reform.

It is not unusual for decisions affecting the rights of prisoners to be subjected to rules of natural justice. It would seem to me extra ordinary that a conclusion such as we have here was reached without the appellant even knowing that the Commissioner was considering the matter. One has the advantage of knowing that the view being suggested is not new. In *R v Hull Prison Board of Visitors exp st. Germin* (1979) 1 All ER 701 a board of visitors pursuant to their powers under the English Prisons Act heard charge against five applicants who had been involved in rioting. The board imposed various penalties including loss of remission. The applicants appealed to the Divisional Court on the ground that the board had failed to observe the rules of natural justice. The Divisional Court held that the board was a closed body dealing with private and domestic disciplinary matters and rejected the case of the applicants. There was a further appeal to the English Court of Appeal which held that the courts were the ultimate custodians of the rights and liberties of people whatever the status, and that there was no rule of law the courts are to abdicate jurisdiction merely because the proceedings under review are of an internal disciplinary character. The decision in that case is persuasive authority for the proposition that notwithstanding that the Commissioner might regard the issue for his consideration under the sub-section as an internal disciplinary matter, all the same because rights of an inmate would be affected, the Courts have a duty, unless their jurisdiction is clearly excluded by some statutory provision, to concern themselves with the manner in which the Commissioner considers before he concludes. There is no provision in the Prisons Act which excludes the jurisdiction of Courts to concern themselves with the rights of inmates however circumscribed by a penal sentence. In order to consider fairly, the Commissioner has to observe the basic principles of fundamental justice. That would require that the inmate affected be fully informed of the disciplinary offence which he is alleged to have committed, that he be given sufficient time to prepare his case, that in his consideration the Commissioner takes into account the material presented by the inmate and the Commissioner indicates that he has weighed all evidence before him before reaching the conclusion to deprive remission.

The fact that, with regards to sub-section (3A) (a) of Section 46, there is no specific reference to enquiry to be held as under Section 52 and section 53 does not exclude the necessity for the Commissioner to act fairly and so follow rules of natural justice. To urge that the Commissioner can act subjectively and get away with it is in my judgment to urge that Courts should retreat from their position as custodians of the rights of inmates.

Under Section 53 no prisoner shall be punished for a prison offence he has not had an opportunity of hearing the charge against and making his administrative act deprive an inmate of remission would include minor and aggravated offences as well as any misbehavior intended to disrupt the proper management of prisons.

If the Commissioner were to deprive a prisoner of remission under Subsection (3a) (a) of Section 46 and so impose a punishment before hearing the prisoner, that would in any view conflict with Section 53 which provides as under,

> "No prisoner shall be punished for a prison offence until he has had an opportunity of hearing the charge against him and making his defence."

To summarise and answer the principal substantive point of this appeal Iwould say the Commissioner erred in law in that he decided to deprive the appellant of his rights without affording him an opportunity to be heard. The Commissioner is required to act fairly towards the appellant. At the very least, the Commissioner ought to do the following acts:

1. To inform the appellant in writing in a language the appellant understands the disciplinary offence he is alleged to have committed and the particulars of the offence.

2. To afford the appellant an opportunity to be heard in person and to fix reasonable time within which the appellant (or an inmate) must submit his written answer to the officer-in-charge of the particular prison for onward transmission to the Commissioner.

3. Thereafter within reasonable time, the Commissioner should inform the appellant (or the inmate concerned) that pursuant to Section 46 (3A) (a) he has directed his mind at the allegation made against the appellant that he requires further reformation and rehabilitation, has considered the grounds for the allegation and the defence of the appellant (or inmate) and has decided to deprive the appellant of all remission granted to him under Section 46 (1) of the Prisons Act, but that he the appellant (or inmate) may petition the Minister in writing, through the Commissioner, to restore the forfeited remission in whole or in part under Sub-section 5 of Section 46. The result of my conclusion is that the trial judge misdirected himself in his statement on page 19 of the record of appeal that the High Court, was

> "not in a position to launch an inquiry or investigation into the workings of prisons. It is not equipped to … direct the Commissioner on these matters.

In the upshot in my judgment the appeal should be allowed, the judgment of the High Court set aside and there will be substituted therefore a declaration that the decision of the Commissioner dated 17th February, 1983 to deprive the appellant of his remission is null and void and is quashed. The Commissioner is required to follow rules of natural justice by giving the appellant a full opportunity of hearing what is alleged against him and of presenting his own case by doing the acts enumerated herein before and in default the inmate is to be released unless unlawfully held.

As Platt and Gachuhi JJA have reached the same conclusion, it is ordered accordingly.

Costs of this appeal and of the High Court to the appellant.

Platt JA. In general I agree. It is only out of courtesy to the learned Judge and out of respect to the late Commissioner of Prisons that I venture to add a few comments of my own, on the nature of their decisions.

The facts have been amply set out by Nyarangi JA and I need not repeat them. I shall commence with the issue at stake in this important appeal. The first ground of the appeal will suffice for that purpose. It was:

> "That the learned trial Judge erred in law in not finding that the decision of the Commissioner of Prisons was null and void for breach of rules of natural justice."

It is therefore queried whether Rules of Natural Justice applied to the making of the decision of the Commissioner in this case. In the course of decision making, the Rules of Natural Justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responding officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the Rules apply depends on the particular nature of the proceedings.

What Rules, if any, would apply to the decision to be made by the Commissioner under Section 46 (3A) of the Prisons Act (Cap 90)? This piece of legislation forms part of PART VII of the **Act** entitled Remission of Sentence. It provides:

> "(3A) a person may be deprived of remission
>
> (a) where the Commissioner considers that it is in the interest of the reformation and rehabilitation

of the prisoner;

(b) Where the Minister for the time being responsible for internal security considers that it is in the interests of public security or public order".

It follows that the Commissioner must consider the prisoner's ability to perform as a citizen reformed and rehabilitated, while the Minister must consider the welfare of the public. It was the intention of parliament to use imprisonment as a means of achieving these different purposes.

This now must be read in the context in the whole of Section 46. Remission of Sentence, we find is explained in sub-section (1). Convicted Criminal prisoners sentenced to imprisonment for a period exceeding one month, "may by industry and good conduct earn a remission of one-third of their sentence." Certain exceptions are provided, of which we need only notice that remission granted shall not result in the immediate release of the prisoner. He must undergo at least one month's imprisonment. In those exceptional cases the prisoner will automatically lose some remission.

But to give effect to sub-section (1) sub-section (2) provides that each prisoner on admission shall be credited with the full amount of remission to which he would be entitled at the end of his sentence, if he lost remission, if he lost no remission to which he would be entitled at the end of his sentence, if he lost no remission of sentence. In that case the industry and good conduct referred to in sub-section (1), earn remission in the sense that the credited remission will not be withdrawn.

Sub-section (3) explains how remission may be lost. It may be forfeited for an offence against prison discipline. But then it shall not be earned, (as I think as an instance of lack of industry), for time spent in hospital through his own fault or while malingering; or (as I think for lack of good conduct) for the period he undergoes confinement as a punishment in separate cell.

Forteiture in Section 51 of the Prisons Act (Cap 90) is one of the punishments prescribed for those found guilty of minor offences by a senior prison officer, and of aggravated prison offences, by a senior prison officer, or in both cases by an Administrative Officer. Section 52 prescribed for the hearing of charges brought against prisoners, and the full extent of the Rules of Natural Justice is provided for. Sec 53 makes sure of that; it provides that no prisoner shall be punished for a prison offence until he has had an opportunity of hearing the charge against him and making his defence. As Mr Chege pointed out for the Republic, the formal acknowledgment of the Rules of Natural Justice is not provided for in sub-section 3A where a prisoner maybe deprived of remission.

To complete the review of Sec 46 of the Act, interesting provisions are made for the Minister to grant even more than one third of the sentence as remission on grounds of exceptional merit, permanent ill-health or other special grounds, and the Minister has power to restore forfeited remission in whole or in part.

This review prompts the question whether there is any difference between 'forfeited' remission and 'deprived' remission. If there is no difference then the appellant might have appealed to the Minister. But it seems to me that forfeited remission is especially aptly named, as being the punishment for the commission by the prisoner of prison offences, aggravated or minor. By such activities he forfeits remission for committing offences and he may not earn remission for lack of industry or good conduct. He may or not have forfeited all remission for the periods provided in subsection (3), because he could not earn the remission during those periods.

What then is the purpose of sub-section (3A)? For what reason is the Commissioner to deprive the prisoner of remission? It must at least cover cases where the prisoner had not forfeited remission; perhaps it covers a lost chance of earning a period of remission; or if his conduct is such that by reason of lack of industry or good conduct, the prisoner has demonstrated that he has not reformed or rehabilitated himself. Perhaps there are other reasons or situations which might cause the Commissioner to act. For instance it may be that the prisoner has committed a minor offence within the jurisdiction of a junior prison officer who cannot impose forfeiture. Perhaps there are cases of what is called colloquially "dumb insolence," or

where a person does affects his fellow prisoners. It would seem to me that it must be in this general area that the Commissioner may need to operate.

If this is correct, it follows that there must be some activity on the part of the prisoner which is the foundation of the Commissioner's order. These are the matters he may be called upon to consider before he makes his order. These matters are susceptible of being brought to the attention of the prisoner. As Nyarangi, JA has pointed out, it is unlikely that the Commissioner himself will have seen or experienced the reprehensible conduct of the prisoner himself. He may do so of course, in which case he can inform the prisoner what it is that is held against him. But more often than not, the Commissioner will act upon reports made to him. It is especially in the area where the Commissioner must rely upon the judgment of others, that he ought to consider both sides. Even in his own case, it would be wise to consider what the prisoner has to say, on a dispassionate occasion.

The word 'consider' as Nyarangi JA has explained, conveys the idea of taking into account the different aspects of a problem, it would be absurd to hold that to take into account one side of the problem would be a 'consideration' of it. That would only be half a consideration. Consequently when sub-section (3A) (a) requires that the Commissioner should 'consider' the problem relating to the state of the prisoner, it would not be a full consideration of the prisoner's development that requires his participation. It is also reason that requires the contents of the Minister's 'consideration' to be left open in sub-section (3A) (b). Whether that is the same type of consideration, I leave to the day when that problem is raised. But it is plain in my judgment, that a consideration of the prisoner's likely reformation or rehabilitation must include a consideration of his side of the story upon which the decision is to be made; it requires the substance of the faults found with his conduct to be put to him, and for him to have the opportunity to answer and give his defence. In that day, the Commissioner will have before him both sides of the matter and can give full consideration to the case.

I have attempted to show that the substance of the consideration is one which is capable of being put to the prisoner, and that it is the statutory duty of the commissioner to give consideration by both sides of the problem. It is not to be implied that the Rules of Natural Justice are to be

excluded, unless parliament expressly so provides (See the *Fair-mount Investments Ltd vs Secretary for the Environment* (1976) 1 WLR 1255) .That involves following the Rules of Natural Justice to the degree indicated. In this type of case, I would not find it necessary for the prisoner to be afforded a physical hearing by the Commissioner. His full case can

be submitted in witting to the Officer Commanding the Prison where he is as long as he knows what fault it is that he has to defend. The last part of the argument now falls for consideration. It is whether this Court may interfere.

It is important to hold in mind first of all that is a matter of punishment. This is part of the process of exacting the final sanction of imprisonment. It is a question whether the full sanction is to be expected. It concerns the crediting of remission by industry and good conduct. The Commissioner entered into this process and decided to deprive the prisoner of the remission at first credited to him. That means that the punishment is to be extended to its full length. It is painful punishment, as it involves the loss of rights credited and hoped for. It is therefore a case, where the Commissioner acting in an administrative capacity, has the discretion to interfere with the liberty of the subject. It is an area in which the courts have the right to ensure that the procedure by which such discretion is exercised, gives assurance that the prisoner has been dealt with fairly; in short, that the Commissioner has exercised his discretion fairly by giving the prisoner a chance to understand faults found with him and put forward his defence, so as to enable the Commissioner to complete his 'consideration' before making his decision.

The learned Judge took another view, which was supported by the Republic that this would be an intolerable invasion of the Commissioner's proper responsibility for controlling the prisoners under his command. With respect I cannot take the view where the liberty of a citizen is at stake. No doubt the Commissioner will make his decision after consideration, and that decision will then be final. The Minister will not be able to interfere with the remission deprived, under sub-section (5) of section 46.

There is no appeal and the prisoner will have no redress. In these circumstances it must surely be right to construe this penal provision strictly. There is no appeal and the prisoner will have no redress. In these circumstances it must surely be right to construe this penal provision strictly. There is also the decision of the English Court of Appeal in *R v Hull Prison Board of Visitors, ex parte St Germain and Others* (1979) 1 all ER 701. It is clear that the English courts have taken the view that the courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal character. It is a lead which I think the courts in Kenya would do well to follow, in carrying out their task of balancing the interests of the executive and the citizen. It is to everyone's advantage if the Executive exercises its discretion in a manner which is fair to both sides, and is seen to be fair. This process was started as long ago as 1966 when Lord Parker, the Chief Justice of England decided in *re H K* (an infant (1967) 2 QB 617, a decision which has been approved by the House of Lords in *O'Reilly v Mackman* (1982) 3 All ER 680. At page 680 Lord Parker pointed out:-

> "But at the same time, I must think that even if an immigration officer is not in a judicial or quasi judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the subsection and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not, as I see it, a question of acting or being required to act fairly. Good administration and an honest or bona fide decision must, as it seems to me, require not merely impartiality nor merely bringing one's mind to bear on the problem, but acting fairly; and to the limited extent that the circumstances of any particular case allow, and within the legislative framework under which the administrator is working, only to that limited extent do the so-called Rules of Natural Justice apply, which in a case such as this is merely a duty to act fairly."

That was a case in which an immigrant had to be under 16 before he could enter England. The Immigration Officer had power to refuse entry if he were not under 16. It was held that when the immigrant made his application he must be advised that the immigration officer did not find evidence that he was under 16, in order that the immigrant could disabuse him and so put his full case. The case before this Court is not entirely similar, but it approaches the exercise of power by an administrator, the effect of which may be to affect the rights of a person in a serious manner.

It is therefore wise to bear in mind that the usual method of acting fairly and being seen to act fairly, is to give the person affected a chance to know what lies against him so that he can put his defence or objectives to the course of action which may be taken.

It remains now to relate those principles to the facts of this case. They were taken from the plaintiff, the defence being a general denial, but they do not seem to have been denied. The Appellant was imprisoned on 1st November, 1982 for five years. If he served his full sentence he would be due for release on 31st October, 1987. But with the normal remission accredited to him under Section 46(1) and (2), he would have been due

for release on 4th March, 1986. One-third remission must have been credited to him on 1st November, 1982; but in February, 1983 the Commissioner's letter deprived him of remission. It was dated 17th February 1983 and served on 26th February, 1983. There is no evidence to counter the appellant's complaint that he was not informed of the faults held against him nor afforded an opportunity to defend himself. It is not known on what ground the appellant was deprived of his remission. But lack of knowledge of this matter is not important. It leads to the position that the Appellant might not or might have been dealt with fairly. Therefore fair play cannot be demonstrated; accordingly the second ground of appeal is not relevant. It is clear that unfortunately, the Commissioner did not employ the Rules of Natural Justice so as to be seen to have acted fairly.

The court must therefore interfere and declare that the Commissioner's decision was null and void, and thus the High Court's judgment must be set aside. It must then be decided what follows, which concerns the judgment to be substituted for that set aside.

Looking back at the plaint, it can be seen that the complaint that Sec 46(2) had not been compiled with

cannot be dealt with. It is presumed that on 1st November, 1982 the remission was credited, of which the appellant was deprived in February, 1983.

Secondly, it is argued that in accordance with Rule 95(1) of the Prison Rules, the appellant is entitled to be released. The appellant is still in prison. The Commissioner can still act under Sec 46 (3A) (a). It may still be that the appellant should be deprived of remission. It has not been accepted that if the Commissioner's decision is void, there would be no reason to detain the appellant. It is not clear that the prisoner was due for release on remission; that matter should be left to the Commissioner.

For those reasons, I confine myself to the specific issues before the Court, which I find best defined in issue (iii) framed in the High Court, and I would declare the decision of 17th February, 1983 null and void. The Appeal should be allowed, the judgment of the High Court set aside and I also agree with the consequential orders proposed by Nyarangi, JA and the order for costs.

Gachuhi JA. I had the advantage of reading the judgment prepared by Nyarangi JA in draft form and I agree with the reasoning therein stated. However, I would add that in the absence of any material facts upon which the Commissioner had to consider, it is difficult to decipher upon what grounds the Commissioner based his decision that it was in the interest of the reformation and rehabilitation of the appellant that he be deprived of remission earned under Section 46(1) of the Prison Act (Cap 90). One would expect that the Commisioner in exercising powers conferred by Section 46(3A) (a) of the Prison Act, he would be acting reasonably within the rules of natural justice.

The Appellant in his plaint stated that prior to the issue of directive by the Commissioner, he had not been charged, tried, found guilty or punished for any offence against prison discipline as set out in the Prisons Rules. If the appellant had not committed any offence, then the action taken by the Commissioner was arbitrary and made without consideration of natural justice. Without any offence committed how would the Commissioner know that an inmate required more time to reform and to be rehabilitated.

If an inmate is to be punished by the Commissioner, an inquiry has to be made by him as provided by Section 52 of the Act. Section 53 is in conformity with natural justice. Denial of this statutory provision to an inmate renders any decision made affecting the inmate null and void *ab initio*. Because of this provision, the Commissioner cannot claim that he had not to make inquiry as Mr Chege submits. In any view, the steps taken by the Commissioner is *ultra vires* this section. It calls to be quashed. I would allow this appeal with costs. I also agree with the orders Nyarangi JA proposes that this court should make.

Dated and delivered at Nairobi this 7th day of May, 1987

J.O. NYARANGI

.....

JUDGE OF APPEAL

J.M. GACHUHI

.....

JUDGE OF APPEAL

H.G PLATT

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR