

(1979) 05 DEL CK 0029

In the Delhi High Court

Case No : Civil Writ Appeal No. 725 of 1977

Shrik R. Raghavan

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 04-05-1979

Acts Referred:

Citation : (1979) ILR Delhi 1 : (1979) LabIC 1294 : (1980) 1 LLJ 463

Hon'ble Judges : V.S. Deshpande, C.J.; M.L. Jain, J.; H.L. Anand, J

Bench : Full Bench

Advocate : G.L. Sanghvi, Bishambar Lal, S.C. Malik, K.N. Kataria, L.M. Sanghvi, Mohinder Narain, Manju Malhotra, L.K. Pandey, Raj Panjwani, Raj Panjwani and Vijay Panjwani, for the Appellant;

Judgement

V.S. Deshpande, C.J.

(1) The relevant facts of this case are few but they give rise to some questions of law which are important and yet not covered by judicial decisions. Hence the reference to the Full Bench. Initial Appointment Of Respondent NO. 6 And His Subsequent Appointment As Income Tax Officer, Class Ii

(2) The Federal Public Service Commission held a combined competitive examination in 1945 to as many as eight Central Services including (1) Indian Audit and Accounts Services, (2) Military Accounts Department, and (3) The Income Tax Officers (Class I Grade II) Service. Shri Ranbir Chandra, respondent No. 6 Qualified in this examination and was appointed to the Emergency Cadre of the Military Accounts Department on the 10th January, 1947 by a gazette notification dated 22nd February, 1947. He was also made to execute a contract of service which was to continue initially for three years and subsequently on like terms and conditions until terminated by three months' notice. In 1950 the Government thought that the Emergency cadre would have to be seen wound up and would not last beyond 31-3-1952. With a view to consider the then incumbents of the Emergency Cadre for absorption in some other Class I service, the Government constituted a Special Recruitment Board which interviewed

them, including respondent No. 6, and placed them in three categories (a) those suitable for absorption in Class I Service, (b) those suitable for permanent appointment to posts of Income Tax Officers Class Ii and Ministry of defense, and (c) those who were not suitable for either (a) or (b). Respondent No. 6 was placed in category (b) for permanent appointment to a Class Ii post in the Income Tax Department. He says "He wanted to refuse this "offer", but the defense Accounts Department informed him in writing that persons like him would be retrenched with the winding up of the Emergency Cadre shortly Under these circumstances the petitioner had no other course but to accept this offer." (vide paras 3 and 6 of his representations to Government dated 18-7-1967 and 8-10-1973 respectively). He was appointed as Income Tax Officer, Class H, on 2-3-1951. According to the later finding of fact by the Union Public Service Commission (UPSC) even on 8-3-1951 the Government informed respondent No. 6 and officers like him that there was no guarantee than they would continue to be retained in the Emergency Cadre even up to 31-3-1952 and they were advised to be on the look out for offers of appointment either through Government sources or otherwise. On these facts respondent No. 6 takes the stand that he was forced by the Government to take such a decision (vide Upsc letter dated "22-9-1975).

(3) Representations By Respondent NO. 6: Right from October, 1951 and particularly in 1957, 1967 and 1974 respondent No. 6 made repeated representations to the Government pointing out that he was made to accept a Class Ii service on the representation that the Emergency Cadre would soon be wound up and the persons serving in it would have to find out jobs for themselves. Actually, persons who continued in the Cadre having been graded by the Special Recruitment Board below respondent No. 6 and as not fit for absorption either in Class I or Class Ii service were eventually absorbed permanently in Class I service because the Emergency Cadre continued till 1957 contrary to the representation made to Shri Ranbir Chandra in 1950 and 1951. These persons also got partial benefit of their previous service rendered in Class I Emergency Cadre. Respondent No. 6 complained in his representations that he did not get any benefit of Class I service rendered by him from 1947 to 1951 when he was appointed to Class Ii Income Tax Officers service. After his earlier representations were rejected summarily on technical grounds, the Government rejected his 1967 representation after consultation with the Upsc on the ground that "there is no question of comparison of service prospects between two services and, Therefore, the seniority of Shri Ranbir Chandra need not be revised only because certain persons who were not found suitable even for Class Ii appointment by Special Recruitment Board held in 1950 continued in the Emergency Cadre of the Military Accounts Department and later got enhanced seniority on being absorbed in Class I regular cadre of the Military Accounts Department." (vide Upsc letter dated 22-9-1975).

(4) Decision To Review The Administrative Action : The representation of 1974 was, however, accepted by the upsc on 22-9-1975 for the following reasons :

1. the perusal of the relevant paper shows that it would not be correct to hold that Shri Ranbir Chandra voluntarily accepted class II post of Income Tax Officer in 1951. The Commission notes that on 8-3-1951, officers like him were informed by the authorities that there was no guarantee that they would continue to be retained in Emergency Cadre of Military Accounts Department even up to 31-3-1952 and they were advised to be on the "look out for offers of appointment either through Government sources or otherwise." This shows that Shri Ranbir Chandra was forced by Government to take such a decision although in fact Emergency Cadre continued far beyond 31-3-1952 and even up to 1957. It could, therefore, be argued that when Government decided to continue the Class I Emergency Cadre of Military Accounts Department far beyond 31-3-1952 Shri Ranbir Chandra who had been appointed one year earlier as Class II Income Tax Officer, should have been given an opportunity to opt whether he would like to revert to the Class I post in Military Accounts Department or continue in Class II post of Income Tax Officer. The Commission, therefore, considers that on grounds of equity such an option should have been given to Shri Ranbir Chandra, particularly when he had not been confirmed till March, 1952."

2. "It has also been contended that since the Special Recruitment Board did not assess him as fit for Class I appointment in 1950 selection, he cannot get any enhanced seniority with reference to his service either in Class I post in Military Accounts Department or in Class II Income Tax Service. The Commission notes that there was no finality in the recommendations of the Special Recruitment Board so far as inter se ranking was concerned. Thus, the inter se seniority of certain officers, who had originally belonged to Emergency Cadre of Military Accounts Department but later on absorbed in class I regular Cadre of Ides was revised and the original ranking of Special Recruitment Board was not respected. It could, therefore, be argued that whatever applied to inter se ranking of officers adjudged suitable for Class I Posts should have also applied to inter se ranking given by the Special Recruitment Board between officers adjudged fit for Class I and those fit for Class II. In view of this, the Commission sees no sufficient justification for denying Shri Ranbir Chandra the benefit of his past service in Class I post prior to 1951 and his service as Income Tax Officer Class II to the extent it was governed by NI N2 Formula even though such course might not fall in line with the recommendations of Special Recruitment Board."

3. "Having regard to all the aspects of the case, the Commission on reconsideration, advises that Shri Ranbir Chandra's seniority may be determined as below : Date of appointment in Emergency Cadre 10-1-47 Date of appointment to Class II (ITO) 2-3-51 Date of promotion, to Class I 2-1-57 The year of allotment = 1957 (O+1/2 of 10). = 1952/ "(NI stands for the period of officiation in senior scale or on a pay of Rs 600.00 or more and N2 for completed years of gazetted service excluding NI). Fixation of year of allotment of 1952 would mean that Shri Ranbir Chandra would be junior to direct recruits of 1950 examination. The Commission considers that there is no justification for assigning him seniority above 1950 direct recruits to Class I of the Income Tax service

because the fact remains that while he was not found suitable for Class I appointment in 1950, such direct recruits had been recruited through the Commission on the basis of combined competitive examination."

(5) The Government accepted the recommendation of the Upsc and by the impugned letter of 22-7-1977 refixed the seniority of Shri Ranbir Chandra in Income Tax Officers Class I Service, firstly by giving him the benefit of Class I service actually rendered by him in the Emergency Cadre from 10-1-1947 to 1-3-1951 and then by equating his Class Ii service from 2-3-1951 to 2-1-1957 with only half of that period and adding these two periods to the actual Class I service rendered by him from 2-1-1957 onwards. By the enhancement of seniority the place of Shri Ranbir Chandra in the seniority of Income Tax Officers Class I became higher than the place of the petitioners.

(6) The Writ PETITION: The petitioners who are members of Income Tax Officers (Class 1 Grade II) service were senior to Shri Ranbir Chandra on the basis that Shri Ranbir Chandra joined the said service only from 2-1-1957 by way of promotion from Class Ii service. The refixation of the seniority of Shri Ranbir Chandra by the order of the Government, dated 22-7-1977 made them junior to Shri Ranbir Chandra. They have, Therefore, filed the writ petition seeking to quash the impugned order dated 22-7-1977. The grounds urged by them as also by the intervener, Shri S. G. Jaisinghani, and by their learned counsel Shri G. L. Sanghi in his comprehensive oral argument against the impugned order may be summed up as below :

(1)The administrative action allotting Shri Ranbir Chandra to the Emergency Cadre of the Military Accounts Department in 1947 was final. It could not be reviewed by the Government in 1977 by deeming that Shri Ranbir Chandra was allotted to Income Tax Officers (Class I Grade II) Service, in 1950; (2) The impugned order was contrary to the 1946 Recruitment Rules of Income Tax Officers (Class I Grade II) Service because they provided for entry to that service either by competitive examination or by promotion and in no other way. Shri Ranbir Chandra was not allotted to that service initially as a result of the competitive examination of 1945. Similarly, he was not promoted to it in 1950, but only in 1957. The order was also contrary to the seniority rules of 1973 under which the seniority in the Income Tax Officers (Class I Grade II) Service had to be reckoned strictly in accordance with the length of service. Shri Ranbir Chandra could count his length of service only from 1957 and not from 1950; (3) Having rejected Shri Ranbir Chandra's representation of 1967 on the advice of the Upsc, the Government could not accept a subsequent advice of the Ltpsc and pass the impugned order; and (4) The impugned order of 1977 was passed 30 years after the allotment of Shri Ranbir Chandra to the Emergency Cadre of the Military Accounts Department. Such delay disabled the Government from reviewing the case of Shri Ranbir Chandra.

(7) The writ petition was resisted by the Government and Shri Ranbir Chandra, who maintained that Shri Ranbir Chandra was a direct recruit from the

competitive examination of 1945, to the Central Service Class I and was wrongly appointed to a Class II service. He was forced to accept the Class II Service only because of the misrepresentation made by the Government that the Emergency Cadre was going to be wound up even before 31-3-1952. It was the duty of the Government to withdraw the representation once the Government came to know that the Emergency Cadre was not going to be wound up on 1952 and might continue indefinitely. It could not be said, Therefore, that Shri Ranbir Chandra gave his free consent to his appointment to Class II Service in 1951. Shri Ranbir Chandra had the right to make representations to the Government repeatedly and the Government had the right to accept his representation and redress the injustice done to him. As no illegality is attached to the impugned order this court cannot interfere with it.

(8) Questions Of Law Referred To The Full Bench On These Facts And Pleadings :

"1. What is the true distinction between administrative action, on the one hand, and the administrative decision, on the other ? 2. What is the distinction between the reviewability of administrative action and/or administrative decision, on the one hand, and a judicial or quasi-judicial decision, on the other? 3. Whether an administrative action or a decision ceases to be reviewable either by passage of time or by rejection of representation and by failure of the person aggrieved to have recourse to a court of law? 4. Whether in granting relief to a representationist the Government can decide questions of fact and mixed questions of fact and law ? 5. Does the Government have an inherent power to redress injustice caused to its employee by administrative action or decision ? 6. Are any rules or law contravened by the impugned order. dated 22nd July, 1977 ? 7. Whether respondent No. 6, Shri Ranbir Chandra, could be regarded as a direct recruit to Income Tax Officers (Class I Grade II) Service or only a promotee to it ? 8. Whether the appointment of respondent No. 6 to Class II of Income Tax Officers Service in 1951 is to be regarded as an ordinary appointment or an appointment made with the background of service put in by him in Central Service Class I Emergency Cadre of the Military Accounts Department from 1947 to 1951 ? 9. Was the consent of Shri Ranbir Chandra to that appointment caused by wrong representation made by the Government and if so with what effect ? 10. Was the Government under a duty to give an option to respondent No. 6 to go back to" the Emergency Cadre after the Government realised that the said Cadre was not going to be wound up by 31-3-1952? 11. Whether the enhancement of the seniority of respondent No. 6 violates any rights of the petitioners ? 12. Could the Government exercise its power under Rule 7 of the 1945 Recruitment Rules to the Income Tax Officers (Class I Grade II) Service to allot respondent No. 6 to the said service as if he was a direct recruit from a competitive examination held in 1945 (or in 1948 if the enhancement of seniority was to be on the basis that his service in Class II was to be regarded as half the period of that service in Class I) or whether this right of the Government came to an end under Rule 7 after Shri Ranbir Chandra was allotted to the Emergency Cadre? 13. Is the impugned decision of the Government arrived at in

consultation with the Union Public Service Commission such as no reasonable person could have arrived at or is it contrary to any law and is it Therefore or for any other reasons reviewable by this. court under Article 226 of the constitution ?

(9) Question 1: Administrative action is divisible into two broad classes. On the one hand is ministerial action where the reasoning process is minimum and almost routine. Along with this may also be grouped exercise of discretionary power where the administrative authorities are able to choose alternative courses of action. On the other hand is the administrative decision. The process of decision involved an objective standard on the determination of which opinions may differ. The reasoning process takes into account the pros and cons and then comes to a decision. This distinction is important because administrative action is always reviewable while administrative decision is reviewable in special circumstances.

(10) While the decision of the Government to appoint respondent No. 6 to Income Tax Officers, Class Ii, was mere administrative action simply following the recommendation of the Special Recruitment Board the later rejection of the representations of respondent No. 6 by the Government and the ultimate acceptance of his representation were administrative decisions. Firstly, the Government reviewed by the impugned order the administrative action of appointment of respondent No. 6 to Income Tax Service Class II. Secondly, it reviewed the administrative decisions by which the previous representations of respondent No. 6 were rejected. The next question for consideration, Therefore, is whether administrative action as well as administrative decisions could be reviewed by the Government.

(11) Question 2: Curiously enough the distinction drawn above is one of the least investigated areas of administrative law. Only Dr. Rubinstein has studied the question of conclusiveness from various angles in Chapter 11 of his book "Jurisdiction and Illegality". We are here concerned with the conclusiveness of an administrative act or decision as against the authority doing the act or arriving at the decision. From general principles and scattered decisions, the following Rules have been enunciated by Dr. Rubinstein : If the statute giving the power of action or decision itself says that the act or the decision shall be final, the power to revoke or review the same is thereby negated. Conversely, any provision which explicitly or impliedly allows the authority to alter, revoke or rescind its act reserves the power to review.

(12) The exercise of ministerial or discretionary power is not final in any sense. Firstly, the power can be exercised not only once and for all, but as often as it is required according to change in circumstances. Secondly, the very fact that the exercise of the power does not exhaust the power of the authority to exercise it again means that the power is revocable. The result of the exercise of the power on the second occasion may be different from the result of its exercise on the first occasion. This is the general principle governing all administrative acts in the Indian as also in the English law. The principle is embodied in section 14 of our

General Clauses Act, 1897, which is as below:

"(1)Where, by any Central Act or Regulation made after the commencement of this Act, any power is conferred then unless a different intention appears that power may be exercised from time to time as occasion requires (2) This section applies also to all Central Acts and Regulations made on or after the fourteenth day of January 1887."

(13) This is analogous to section 32(1) of the English Interpretation Act, 1889, which is as below:

"32. Construction of provisions as to exercise of powers and duties. (1) Where an Act passed after the commencement of this Act confers a power or imposes a duty, then unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires."

Relying on section 32 of the English Interpretation Act, Professor H. W. R. Wade in his book "Administrative Law", 4th Edition, Page 214, states the law as follows:

"In the interpretation of statutory powers and duties there is a rule that, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires."

He recognises that there may nevertheless be special circumstances which may make an administrative action or decision irrevocable. but none of these are present here.

(14) Another distinction is between the essential revocability of an administrative act or a decision and the finality or conclusiveness of a judicial decision. A judicial decision is *res judicata* between the parties. This is one reason why not only the parties cannot reopen it, but even the judicial authority which made the decision is prevented from reviewing it on merits. On the contrary, an administrative decision which is not based on a dispute between the two parties and which is not given after hearing the parties does not operate as *res judicata*. Indeed, one of the tests applied by Prof. Smith in identifying a judicial function is the test of conclusiveness which includes *res judicata* and finality attending a judicial decision, but not an administrative decision (S. A. De Smith, *Judicial Review of Administrative Action*, 3rd Edn. pp. 68 to 70). The party affected by it as also the authority making the decision are both able to reopen and review the same. Since the administrative decision as also a judicial decision are not mere administrative or legislative action, the General Clauses Act does not expressly deal with them. But there is some analogy between an administrative act or decision and a legislative act or decision inasmuch as none of them are made on the existence of a dispute and after hearing the parties to the dispute. It is well known that the exercise of a power to make subordinate legislation includes the power to rescind the same- This is made clear by section 21 of our General Clauses Act and section 32(3) of the English Interpretation Act. On that analogy an administrative decision is revocable while a judicial decision is not revocable except in special

circumstances.

(15) Prof. S. A. De Smith in his "Judicial Review of Administrative Action", 3rd Edn. pp 92 to 94. deals with this subject under the caption "Inconclusive note on Conclusiveness". Like Wade, Smith also deals with administrative action and administrative decision together and not separately. In respect of both of them, inter alia, he observes at page 94 as follows :

"The interests of fairness to individual whose interests will otherwise be directly and prejudicially affected may lead the courts to attribute binding effect to administrative acts and decisions which the competent authority wishes to repudiate or rescind. Indeed, it would seem that the legal competence of administrative bodies to rescind their decisions depends at least as much on considerations of equity and public policy as on conceptual classification."

(16) The highest watermark of conceptual classification of separating the administrative, quasi-judicial and judicial acts of administration was reached in the report of the Committee on Ministers' Powers, (1932), of which Sir William S. Holdsworth, K. C., and Prof. Harold J. Laski, were members. At page 81 the Committee says, "Decisions which are purely administrative stand on a wholly different footing from quasi-judicial as well as from judicial decisions . . . Indeed the very word "decision" has a different meaning in the one sphere of activity and the other. When a person resolves to act in a particular way, the mental step may be described as a "decision". Again, when a Judge determines an issue of fact upon conflicting evidence, or a question of law upon forensic argument, he gives a "decision". But the two mental acts differ. In the case of the administrative decision, there is no legal obligation upon the person charged with the duty of reaching the decision to consider and weigh submissions and arguments or to collate any evidence, or to solve any issue. The grounds upon which he acts, and the means which he takes to inform himself before acting, are left entirely to his discretion."

(17) At page 73, the Committee characterizes a judicial or quasijudicial decision as possessing the features which are not to be found in an administrative decision, namely, (i) the existence of a dispute between two or more parties, (2) the presentation (not necessarily orally) of their Cases by the parties to the dispute, and (3) the ascertainment of the fact by means of evidence adduced by the parties to the dispute with the assistance of arguments by them.

(18) Our answer to question 2 is that not only administrative action but also administrative decision can be reviewed to redress injustice caused thereby. It is implicit in this principle that in redressing injustice to one injustice should not be caused to some other. The question then arises whether injustice was in fact caused to respondent No. 6 and whether it could be redressed after the lapse of so much time.

(19) Questions 3, 4, 5, 9 and 10: The Emergency Cadre was added to the Military Accounts Department only due to the exigencies of the war. It was not

meant to be permanent. "The Government, however, made a wrong forecast that it would be wound up by 31-3-1952. This forecast was communicated to Shri Ranbir Chandra and others serving in the Emergency Cadre in 1950. Actually, the Emergency Cadre continued till 1957. It is obvious, Therefore, that the representation made by the Government to Shri Ranbir Chandra was a "misrepresentation" within the meaning of section 18(1) of the Indian Contract Act, 1872, because it was a positive assertion in a manner not warranted by the information of the Government of that which was not true, though the Government in 1950-1951 believed it to be true. Shri Ranbir Chandra says that it was because of this representation that he had to accept his appointment to Income Tax Officers (Class Ii Grade III) service and this is also the conclusion of the UPSC. It must be held on this material that the consent of Shri Ranbir Chandra to accept the Class Ii appointment was "caused by misrepresentation" within the meaning of section 19 of the Contract Act. This had a double result. Firstly, it became the duty of the Government to correct the misrepresentation which had been made to Shri Ranbir Chandra as soon as the Government realised that the Emergency Cadre was not being wound up even by 31-3-1952. Secondly, it also became the duty of the Government to offer an option to Shri Ranbir Chandra to go back to the Emergency Cadre if he so desired. For, as observed by the Upsc, Shri Ranbir Chandra was not still confirmed in his Class Ii post around 31-3-1952. Just as the act of allotment in 1947 was only administrative action, so also the act of allotting Shri Ranbir Chandra to Income Tax officers Class Ii Service was also a mere administrative action of the Government in 1951. When the Government realised its mistake and the injustice which had been caused thereby to Shri Ranbir Chandra, the Government had the power to rectify the mistake and restore the previous position by sending back Shri Ranbir Chandra to the Emergency Cadre. The reviewability of administrative action is the rule. Its finality is occasioned only by special circumstances none of which attended the case of Shri Ranbir Chandra. The Government had, Therefore, the power and the duty to review its action of 1951 in good time and to send back Shri Ranbir Chandra to the Emergency Cadre which still existed in 1952. If the Government die not realise this from 1952 to 1975 in spite representation", made by") Shri Ranbir Chandra from 1951 to 1974 the reviewability of the administrative actions taken by the Government in 1947 and 1951 did not change into unreview ability. The only difference that was caused by the delay in dealing with the representations of Shri Ranbir Chandra by the Government was that the Emergency Cadre had come to an end in 1957-58 and Shri Ranbir Chandra had served in the Income Tax officers Class Ii Service from 1951 to 1957 and in Income Tax Officers (Class I Grade II) Service from 1957 to 1975.

(20) It is true that no rule provides for the power of the Government to rectify its mistake and to put Shri Ranbir Chandra back into position in which he was if the mistake and the unconstitutionality had not been committed. But no rule is necessary. The power to undo unconstitutionality and mistake is inherent in the

Government (State of Mysore and Another Vs. Syed Mahmood and Others, in which the Government was directed to do in 1968 what it should have done in 1959 and to take action by deeming that the Government was in fact doing so in 1959. See also State of Mysore Vs. S.R. Jayaram, , where it was observed "For the purpose of seniority the respondent will be treated as appointed on October 20, 1962 according to his rank in the order of merit," and Manohar Singh Lamba v. Dr. Gurbir Singh Dhillon, 1974 S. L. W.R. 479 , where a Division Bench of the Punjab & Haryana High Court pointed out that when the Government was trying to undo the wrong it had done, the petitioners had no right to enjoy the advantage gained by them only by the said wrong and to prevent the wrong being rectified).

(21) The Nature Of Government Decision Rejecting Shri Ranbir CHANDRA'S Representation In 1967 : Since no dispute existed between shri Ranbir Chandra and other person, and neither written oral submission from two parties were received nor evidence and arguments from them heard, the reference of the representation of Shri Ranbir Chandra by the Government to the Upsc and rejecting the said representation in 1967 cannot be said to be a judicial or even a quasi-judicial decision in terms of "the test laid down by the Committee of Ministers" power referred to above. It was not merely administrative action, but an administrative decision because the reasoning process in arriving at the said decision considered more than one courses of action. In Nakkuda Ali v. M. F. De Jayaratae, (1951) A. C. 66 , Lord Radcliffe speaking for the Judicial Committee of the Privy Council was considering the meaning of a defense Regulation 62 which empowered the Controller of Textiles to cancel a license. "Where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer." While it was recognised by the Privy Council that "reasonable grounds" must be based on objective material, the Privy Council proceeded to observe as follows:

"But it does not seem to follow necessarily from this that the Controller must be acting judicially in exercising the power. Can one not act reasonably without acting judicially ? It is not difficult to think of circumstances in which the Controller might, in any ordinary sense of the words, have reasonable grounds of belief without having ever confronted the license holder with the information which is the source of his belief. It is a long step in the argument to say that Because a man is enjoined that he must not take action unless he has reasonable ground for believing something he can only arrive at that belief by a course of conduct analogous to the judicial process."

(22) It is established, Therefore, that the function of the Government in considering the representation of Shri Ranbir Chandra in the light of the advice received from the Upsc is still administrative action and not judicial or quasi-judicial, the main reason being that there was an absence of hearing given to the two opposite sides to adduce evidence and to address argument. The question is, should the decision of 1967 rejecting the representation of Shri Ranbir Chandra

be regarded as conclusive and not liable to be reviewed ?

(23) Review Of Administrative Decision The answer is that the government in course of administrative is constantly receiving representation and reviewing action and decisions. The functions on the Upsc is purely advisory. The only difference between the advice which is given by the Ministry of Law or any other department of the Government and the advice given by the Upsc is the independent status given to the latter in the Constitution. The advice is, however, directory and not mandatory. The Upsc itself in advising the Government is not performing a judicial function, if it is not considering a dispute between the two parties and is not hearing the evidence and arguments from both of them. The Administration of justice is a primary function of the state. The justice has to be done according to law, so that the discretionary element in the State action should be reduced. If the Government makes a mistake or commits injustice it has the inherent power to correct its mistake and redress the injustice. It is in this way that justice according to law develops .In his book, "The Sense of Injustice" Professor Edmond N. Cahn (page 13), contrasts "the sense of justice" with "sense of injustice". Again in his book "Confronting Injustice", page 10, he asks the question "Why do I propose we speak of the "sense of injustice" rather than the "sense of justice" ?" and says, "There are various reasons, each of them related in one way or another to our taking a consumer's or anthropocentric perspective..... if justice were only an ideal mode or state or condition, our response as human beings would be merely contemplative, and as we all know contemplation bakes no loaves. But the response with which men meet a real or imagined instance of injustice is entirely different; it is alive with warmth and movement that courses through the entire human organism." Reverting back to his book "The Sense of Injustice", Page 28. Prof. Cahn treats the relationship between law and justice as follows:

"There are great realms of justice outside of positive law ; there are wide areas of positive law where justice is of weak or indifferent influence. But as justice without law is often ineffectual, law without justice is quite unthinkable. A system of utterly unjust law could exist in the imagination only and could serve none but casuistic purposes." .

(24) Assuming for the sake of argument that it was open to the Government in 1975 in considering Shri Ranbir Chandra's representation of 1974 to reject it only because his previous representation of 1967 was also rejected, can that be a sufficient reason for rejection ? Is there any principle by which the Government is estopped from reviewing a previous administrative action ? Even if the decision of 1967 had been a decision of an administrative Tribunal arrived at after hearing the parties, a judicial review of such a decision would have been competent because the decision of 1967 was based on a totally irrelevant consideration, namely, the comparison of prospects between two services. In fact that was not the ground on which Shri Ranbir Chandra's repeated representations were based. He. was complaining of injustice and illegality and not of missing

prospects in a certain service. If the mistake of the Government could be corrected by a court of law in judicial review, why should the Government itself be stopped from correcting its own mistake, particularly when it knew that mistake had not been committed during the course of a judicial or quasi-judicial decision by the Government but only during the course of an administrative decision ? It would be strange if a civil servant aggrieved by administrative decision is forced to go to a court of law even when the Government is ready to consider the representation and give him relief.

(25) Dr. Rubinstein recognises (page 30 of his book) that an administrative decision (as distinguished from mere action) which is not expressly preliminary or provisional may become final and conclusive and may not be alterable or revocable. This is especially true where the person affected by the act has relied on it. The learned author observes, however, that "this rule is applicable only where the act has conferred a benefit on the person concerned. Where a decision has been detrimental to the person concerned -as in cases of a refusal to grant a license or a decision to revoke it. it can be assumed that. the power to reconsider that decision would be readily implied "

(26) Question Of DELAY:A State claim is not considered favorably because the petitioner is presumed to have slept over his right from which an inference of abandonment of the right or acquiescence in the denial of the right may be drawn. But Shri Ranbir Chandra continued to make repeated representations and did not allow his claim to become stale. Another reason why delay comes in the way of the Government doing equity to persons suffering from injustice is that rights of other persons are also to be considered. The observation of the Supreme Court in Rabindranath Bose and Others Vs. The Union of India (UOI) and Others, , is often cited in this connection. "We are not anxious to throw out petitions on this ground (of delay), but we must administer justice in accordance with law and principles of equity, justice and good conscience. It would be unjust to deprive the respondents of the rights which have accrued to them. Each person ought to be entitled to sit back and consider that his appointment and promotion effected a long time ago would not be set aside after the lapse of a number of years." The context in which this observation was made was that the 1952 Seniority Rules were challenged by the petitioners in that case after a lapse of 15 years. The respondents had acquired rights against the petitioners under those very Rules. This kind of context is absent in our case. Shri Ranbir Chandra is not the petitioner coming to this court for extraordinary relief which is in our discretion under Article 226. On the other hand, he was diligently pursuing his claim with the Government and has succeeded in obtaining the relief from the Government. Even in the impugned order there is no conflict between Shri Ranbir Chandra and the petitioners in the first fact. The conflict comes only in the record part because the Government reached a wrong conclusion after having a right reason to redress injustice. Delay would not prevent redress of injustice. It would, however, be material in so far as the interest of the innocent petitioners were prejudiced by the record part of the impugned order.

(27) Initially Shri Sanghi for the petitioners wanted to argue that the impugned decision should not have been taken by the Government without hearing persons who would be superseded by Shri Ranbir Chandra by the refixation of his seniority. But we made it clear that this was a preliminary objection and would have to be decided as such. If we were to be of the view that the decision of the Government was vitiated by their failure to hear the petitioners then the only relief that we could grant was that the Government should hear the petitioners and then pass orders on the representation of Shri Ranbir Chandra. The petitioners thereupon did not press that preliminary objection and no argument was addressed on that point. The question. Therefore, does not survive. Moreover, there was no conflict between the rights of the petitioners and Shri Ranbir Chandra in respect of the first part of the impugned order and the decision of the Government was not judicial or quasijudicial, but was restricted to the consideration of there being a reasonable ground to review Shri Ranbir Chandra's case. We do not, Therefore, decide whether in such a case any hearing was required to be given by the Government. We are of the view, Therefore, that the administrative decision rejecting the representation of Shri Ranbir Chandra in 1967 was reviewable Firstly because it was based on irrelevant ground and, secondly because it was unjust, and lastly because the Government is entitled to review an administrative decision which is unjust and contrary to law.

(28) The principle on which the review of previous administrative decision and administrative action could be based by the Government is this. What the Government should have done in 1951 or 1952 when it came to know that the Emergency Cadre of the Military Accounts Department was not going to wound up by 31-3-1952 should be done now. How to apply this principle ? By deeming that in 1951 or 1952 the Government gave an option to Shri Ranbir Chandra to revert back to the Emergency Cadre of the Military Accounts Department. Since the only reason why respondent No. 6 had to accept the appointment in a Class Ii service, presumably he would have gone back to the Emergency Cadre of the Military Accounts Department at that time. Had he done so, he would have been in the same position as his other colleagues who continued to be in the Emergency Cadre and who were ultimately absorbed permanently. The deeming would be complete when respondent No. 6 would be placed by the Government in that permanancy in the accounts department with that seniority which he would have had along with the other incumbents of the Emergency Cadre. They were given some weightage for having served in the Emergency Cadre at the time of their selection. Respondent No. 6 should have been given the same weightage in the concerned accounts service.

(29) What the Upsc thought was, however, that respondent No. 6 could not be transferred from the Income Tax Department in 1975 as he had served in that department from 1951 onwards. The Government also accepted this thinking. Hence the impugned order.

(30) Questions 6, 7, 8 and II: Both the 1945 Recruitment Rules and the 1973 Seniority Rules governing the Income Tax Officers Class I Service contemplate only two avenues for entry into it. One is direct recruitment by competitive examination and the other is promotion. On the one hand, respondent No. 6 was a direct recruit from the competitive examination of 1945. On the other hand, he was a promotee from Income Tax Officers Class II service. On the basis of the former, respondent No. 6 argued that he should not be regarded as an ordinary appointee to a Class II service. The Class I service rendered by him from 1947 to 1951 should be taken into account. On the other hand, it was pointed out by the petitioners that the Class I service from 1947 to 1951 was not taken into account and could not be taken into account when respondent No. 6 was appointed to Income Tax Service Class II. In giving enhanced seniority to respondent No. 6 in Income Tax service Class I and as a Commissioner of Income Tax, the Upsc have given to respondent No. 6 partial benefit of his Class I service from 1947 to 1951. Such partial benefit was rightly given to the incumbents of the Emergency 24 Cadre of the Military Accounts Department, who were subsequently confirmed in the accounts department. The reason was that there was a continuity of service by them in the same department. Such benefit could not, however, be given to respondent No. 6 as there was no continuity of service between Class I service from 1947 to 1951 and the Class II service from 1951 to 1957.

(31) The -very important reasons why respondent No. 6 could not be given such a benefit are, however, that the statutory rules do not allow it. Dr. Singhvi for respondent No. 6 contended that Article 320(3)(b) of the Constitution implies that the Government can transfer an officer of one service to another service in its discretion. Fundamental Rule 15 expressly authorises the Government to do so. The learned counsel, however, could not show how the Government could exercise that power in respect of respondent No. 6. The impugned order is not an order of transfer. Nor could an order of transfer be passed in favor of respondent No. 6 to give him enhanced seniority . as has been done by the impugned order. We do not think, Therefore, that this argument helps respondent No. 6.

(32) Once we come to the conclusion that respondent No. 6 could not get the benefit of the Class I service from 1947 to 1951 in his new appointment to Class II service in 1951, it would follow that in the Income Tax Officers Class II Service he could not be regarded as a direct recruit to Class I service. That background was eliminated altogether. For the same reason he is to be regarded as a promotee to the Income Tax Officers Class I Service and cannot be regarded as a direct recruit to the Income Tax Officers Class I service. The simple rule of seniority is the length of service in the Cadre. The Upsc and the Government were greatly exercised as to how to give respondent No. 6 some benefit of his Class I service from 1947 to 1951 and how to remedy the injustice done to him by leading him to accept the Class II service from 1951 to 1957. The problem was a hard one. It has, however, to be solved in some way which does not contravene law and does not do injustice to innocent parties. .

(33) The law is the Recruitment Rules of 1945 and the seniority Rules of 1973. It is immaterial whether the Recruitment Rules are administrative or statutory. In either event they are binding on the Government. It is also immaterial whether the Seniority Rules came into force from 1959 onwards. Either they apply to respondent No. 6 or the impugned order has to be justified on principles of justice outside these rules. Our view is that these rules have to apply to respondent No. 6. The application of the 1945 Rules to him means that 25 he should be regarded as a direct recruit only if he had been allotted to Income Tax Officer Class I Service as a result of the competitive examination. Since he was not so appointed to that service his appointment in 1957 was in fact and in law an appointment by promotion. It is only when there is nothing contrary in the context that the 1973 Rules apply from 1959. In this case the context of the appointment of respondent No. 6 in 1957 would make these Rules applicable to him either from 1957 or at any rate in 1975 when the impugned order was passed. The contentions of the petitioners have, Therefore, to be upheld since both the 1945 and 1973 Rules were contravened by the impugned order resulting in the violation of the rights of the petitioners in regard to seniority.

(34) Question 12: The allotment of respondent No.6 to the Emergency Cadre of the Military Accounts Department as a result of the 1945 examination by the orders passed in 1947 and the contract entered into in 1947 were correct. Respondent No. 6 never disputed their correctness. It "was never his stand that in 1947 he should have been allotted to Income Tax Officer Class I service. In the representations made by him to the Government he never took this stand. Nor was this stand taken by him before us. We cannot, Therefore, hold that the power of allotment under Rule 7 of the 1945 Recruitment Rules should be exercised by the Government now in his favor. For so holding, it had to be shown by respondent No. 6 that the Government ought to have done so in 1947, and further that not doing so was an injustice done to him. Since this has not been shown this question is answered against respondent No. 6.

(35) Question 13 : The advice of the Upsc and the action of the Government thereon are clearly divisible into two parts. The finding of fact arrived at by the Union Public Service Commission and agreed to by the Government is that it was the duty of the Government to inform respondent No. 6 by 31-3-1952 that the earlier representation which had been made to him and which was the cause of his going to the Income Tax Officers Class II Service was wrong and to give him an option to go back to the Class I Emergency Cadre. This finding is reasonable and no reason is shown why this court should interfere with it. This is the valid part of the impugned order.

(36) Logically, the conclusion should have been that what was not done in 1952 should be done by Government in 1975. That would be to deem that an option was given to respondent No. 6 in 1952 and was accepted by him at that time. Respondent No. 6 would then have been deemed to have been gone back to the Emergency Cadre and his prospects would have been precisely the same as

those of the other incumbents of the Emergency Cadre appointed to it in 1947 and absorbed permanently in 1957. The Government could not carry their reasoning to this logical conclusion probably because they thought that respondent No. 6 had served the Income Tax Department from 1951 to 1975 while he has no experience of working in the accounts department after 1951 and that he may be more useful in the Income Tax Department and may not be so useful in the accounts department. This may be so. But this would be only an argument for not disturbing the stay of respondent No. 6 in the Income Tax Department. It cannot be an argument for enhancement of his seniority in that very department. The reason for enhancement of seniority has no connection at all with the Income Tax Department. The principle established by the Supreme Court decision referred to above is that injustice can be redressed provided that it does not cause injustice to others and does not contravene any rules. The second part of the order does not follow from the first. The reasoning of the first part of the order does not support the result in the second part of the order.

(37) For the above reasons, if we had simply quashed the impugned order, it would have deprived respondent No. 6 of his enhanced seniority in spite of the fact that we have agreed with the Government that injustice had been done to respondent No. 6. We, Therefore, thought it fit by our orders of 25-9-1978 and 20-11-1978 to inform the parties and the Government of this view. We informed the Government that while we agree with their decision that injustice done to respondent No. 6 should be redressed we did not agree with the particular mode of redress adopted in the impugned order. The Government had sought time from us to find out a suitable appointment for respondent No. 6 which would redress the injustice done to him without contravening rules and without doing injustice to the petitioners.

(38) In these circumstances, Therefore, we allow the present writ petition partly. While we agree with the first part of the impugned order that injustice was done to respondent No. 6 when option was not given to him to revert to the Emergency Cadre of the Military Accounts Department on or about 31-3-1952, we do not agree with the refixation of the seniority of respondent No. 6 in the Income Tax Department by its enhancement as is done by the impugned order. The refixation of his seniority and its enhancement by the impugned 27 order is, Therefore, quashed. At the same time we do not wish to cause avoidable harm to respondent No. 6. We, Therefore, order that the quashing of the impugned order will take effect from the date on which suitable orders are passed by the Government in replacement of the impugned order. The Government must do so within a reasonable time. At any rate the Government will have to do so in three months time at the latest. Till then respondent No. 6 is allowed to retain his present position, but will not be entitled to any further promotion on the basis of his present position as a Commissioner of Income Tax Department itself.

(39) In view of the special circumstances of the case there will be no order as to costs.