IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015 HCV 05981

BETWEEN	**LINTON C. ALLEN**	**CLAIMANT**
AND	**HIS EXCELLENCY THE RIGHT HON. SIR PATRICK ALLEN**	**1ST DEFENDANT**
AND	**THE POLICE SERVICE COMMISSION**	**2ND DEFENDANT**

OPEN COURT

Mr. Douglas Leys QC, Ms. Kimone Tennant and Ms. Kenik Brissett instructed by LeySmith for the Claimant/Applicant

Ms. Susan Reid-Jones and Ms. Jenielle Rose instructed by the Director of State Proceedings for the Defendants/Respondents

Heard: 9th - 10th of January and 17th February 2017

Judicial Review – Certiorari – Error of Law – Unreasonableness – Breach of Natural Justice – Failure to provide reasons – Procedural Impropriety – Appropriateness of Penalty – Jamaica (Constitution) Order in Council 1962 – Constabulary Force Act – Police Service Regulations

STRAW J

[1] Prior to the hearing of this application for judicial review, leave was duly sought by way of Amended Notice of Application for Court Orders, filed on the 28th of July 2015 which was granted by my brother, Sykes J on the 1st of December 2015.

THE PARTIES

[2] The claimant, Sergeant Linton C. Allen, ('Sergeant Allen') is a member of the Jamaica Constabulary Force and is stationed at the Denham Town Police Station in Kingston. He has brought a claim for judicial review against His Excellency the Right Hon. Sir Patrick Allen, the Governor-General, appointed pursuant to section 27 of the **Jamaica (Constitution) Order in Council**, 1962, ('the Constitution') and the Police Service Commission, ('the Commission') a body established pursuant to the **Constitution**.

BACKGROUND

[3] In or about June 2010, three (3) charges of misconduct, contrary to various Force Orders, were brought against Sergeant Allen. These charges are as follows -

> *Charge 1*
>
> *Misconduct tending to undermine the good order of the Jamaica Constabulary Force contrary to Code 12 of the Force Order # 2287 dated 4th day of April 1991*
>
> *Particulars of Misconduct*
>
> *On the 20th day of April 2010, being a member of the Jamaica Constabulary Force at the rank of Inspector and Sub-Officer in charge of Operations, your conduct was unbecoming when you wilfully disobeyed the verbal lawful command or order of Senior Officer Deputy Superintendent Michael Scott in charge of operations, St. Andrew Central Division when he gave you instructions to accompany him along with a team to carry out an operation at the Lime Lite Club, Kingston and you told him, to wit, "I am not coming on duty as I have gotten written instruction from Mr. Derrick Knight as to my role and function as a Divisional Duty Sub-Officer."*
>
> *Charge 2*
>
> *Misconduct tending to undermine the good order of the Jamaica Constabulary Force contrary to Code 14 of the Force Order # 2287 dated 4th day of April 1991*
>
> *Particulars of Misconduct*
>
> *On the 7th day of May 2010, being a member of the Jamaica Constabulary Force at the rank of Inspector and Sub-Officer in charge of Operations, your conduct undermined the discipline, good order and guidance of the Force in that you made a false statement or intentionally misrepresented facts when you misled Senior Officer Deputy Superintendent Michael Scott in charge of operations, St. Andrew Central Division, into believing that you had contacted Inspector Aaron*

> *Wilson of the Motorised Patrol Division Special Squad for assistance to carry out an operation and you were told that the team was not available for that day.*
>
> *Charge 3*
>
> *Misconduct tending to undermine the good order of the Jamaica Constabulary Force contrary to Code 12 of the Force Order # 2287 dated 4th day of April 1991*
>
> *Particulars of Misconduct*
>
> *On the 7th day of May 2010, being a member of the Jamaica Constabulary Force at the rank of Inspector and Sub-Officer in charge of Operations, your conduct was unbecoming when you wilfully disobeyed the verbal lawful command or order of Senior Officer Deputy Superintendent Michael Scott in charge of operations, St. Andrew Central Division when he gave you instructions to lead an operation to 1 – 1 ½ Campbell Boulevard, Kingston 11 and you told him, to wit, "I am not going as Superintendent Knight had given me instructions to await his arrival at base with Corporal Fraser."*

[4] Sergeant Allen denied each of the three (3) charges and as such, a Court of Enquiry was constituted for the hearing of the charges. This hearing took place over the course of three (3) days, on the 2nd, 11th and 22nd of July 2013.

[5] Sergeant Allen contends that in or about October 2013, he was informed that the Court of Enquiry found him guilty of misconduct and that the penalty imposed was one of reduction in rank from the post of Inspector to the post of Sergeant.

[6] He further contends that in response to the decision, he invoked his constitutional right to have the matter referred to the Privy Council for review. On the 7th of May 2014, he was informed by letter that the Governor-General acting on the advice of the Privy Council ordered that his referral should be refused, the appeal denied and that the penalty imposed should stand.

[7] On or about the 18th of September 2014, Sergeant Allen claims that he petitioned the Privy Council a second time, in light of material evidence which was not presented to the Court of Enquiry. In response, he received a letter from Mrs. D. Tracey Daniel, the Governor-General's Secretary and Clerk to the Privy Council, dated the 12th of January 2015. The said letter stated as follows –

> *...I write to advise that the Petition made by Inspector Linton C. Allen under Section 42(2) of the Police Service Regulations, was refused by the Privy Council at its meeting held January 6, 2015. It was the view of the Privy Council that the*

new facts, namely, the statement by Corporal Frazer was not material to the case and therefore would not have affected the former decision.

The Police Service Commission has been advised of the ruling.

[8] It is against this background that he is seeking judicial review of the decision that he is guilty of misconduct. He is also seeking judicial review of the imposition of the penalty of a reduction in rank from Inspector to Sergeant.

RELIEF SOUGHT

[9] In the Fixed Date Claim Form filed on the 14th of December 2015, Sergeant Allen is seeking the following orders/reliefs:

1. An order of certiorari quashing the decision of the 2nd defendant that the claimant is guilty of misconduct and should be reduced from the rank of Inspector to the rank of Sergeant;

2. An order of certiorari quashing the decision of the 1st defendant (acting on the advice of the Privy Council) to refuse to overturn the decision of the 2nd defendant namely that the claimant is guilty of misconduct and should be reduced from the rank of Inspector to the rank of Sergeant;

3. An order of certiorari quashing the finding of the 1st defendant (acting on the advice of the Privy Council) that the statement by Corporal Frazer was not material to the case and therefore would not have affected the decision of the 1st defendant;

4. Further or alternatively, a declaration that the penalty imposed on the claimant, namely that he be reduced to the rank of Sergeant, was unreasonable in all circumstances and an order of certiorari accordingly;

5. A declaration that the claimant is still the lawful holder of the rank of Inspector;

6. Costs to be awarded to the claimant; and

7. Any other remedy that this Honourable Court deems just.

SUBMISSIONS BY COUNSEL FOR THE CLAIMANT

[10] Counsel for the claimant, Mr. Douglas. Leys QC, filed written submissions on the 8th of July 2016 which he supplemented with oral submissions at the hearing. He relied on four grounds, namely –

A. The 1st and 2nd defendants erred in applying the provisions of the Jamaica Constabulary Force Orders/ policies to the circumstances of this case.

B. No reasonable tribunal addressing its mind to the facts and the orders/policies of the Jamaica Constabulary Force could have reached the same conclusion.

C. The penalty imposed, namely the reduction in the claimant's rank from Inspector to Sergeant was harsh, disproportionate and manifestly excessive in the circumstances and accordingly was unreasonable in the circumstances. Further the penalty was imposed in breach of the rules of natural justice.

D. The 1st and 2nd defendants have failed to provide the applicant with reasons for their decision.

[11] In both his written and oral submissions, Mr. Leys sought to deal with grounds C and D first. He also spent a considerably longer time advancing grounds C and D in his oral submissions. I will therefore review the grounds relied on in that order.

GROUND C – The penalty imposed was harsh, disproportionate, manifestly excessive, unreasonable and in breach of the rules of natural justice

[12] Mr. Leys submitted that judicial review has been used to quash disciplinary orders which are wholly disproportionate to the offence. He further submitted that this court has the jurisdiction in its supervisory capacity to consider whether the penalty of

reduction in rank was harsh and oppressive in the circumstances. Reliance was placed on **R v St. Albans Crown Court, ex parte Cinnamond** [1981] 1 All ER 802.

[13] Mr. Leys contended that the grounds of judicial review in this case overlapped and such he would be advancing more than one ground simultaneously. To this end, the court has observed that he launched a four-fold attack under ground C. Mr. Leys was essentially contending that, (1) the penalty was unreasonable; (2) natural justice required that Sergeant Allen should have been allowed an opportunity to be heard, specifically as it relates to the appropriateness of the penalty; (3) the failure to hear Sergeant Allen on the appropriateness of the penalty resulted in relevant considerations not being taken into account, namely his unblemished record and financial consequences; and (4) there was procedural impropriety at the disciplinary proceedings stage, insofar that the Sole Enquirer discounted the relevance of calling a character witness.

[14] The case of **R v Admiralty Board of the Defence Council, ex parte Coupland** [1995] Lexis Citation 1721, CO/2683/94 was cited by Mr. Leys and he quoted extensively from the dicta of Stuart Smith LJ in support of his submission that a less severe penalty should have been imposed on Sergeant Allen. He asked the court to have regard to the fact that the nature of the offences for which Sergeant Allen was found guilty fell within the “lower scale of offending” and also his unblemished service to the Jamaica Constabulary Force (‘JCF’).

[15] In his oral submissions, Mr. Leys also asked to court to have regard to Sergeant Allen’s age, the fact that he was approaching retirement and the impact that the penalty will have on his retirement. Without reference to any authority, Mr. Leys advanced that Sergeant Allen’s pension would be calculated by reference to his last earnings therefore, inferentially, Sergeant Allen would earn less at that rank and as such his pension would be less than what he would be entitled to if he retired as an Inspector. Mr. Leys then stressed that neither the Commission nor the Privy Council provided Sergeant Allen with an opportunity to make a plea in mitigation.

[16] Queen's Counsel referred the court to the cases of **Ridge v Baldwin** [1964] AC 40 and **Rees v Crane** [1994] 2 AC 173 in support of the applicability of the rules of natural justice. He further submitted that the rules of natural justice, in particular the right to be heard, ought to apply where a decision is being made to impose a penalty. Even more so where the decision is final and one's status and property will be affected. In the instant case it was submitted that the reduction in rank is a final decision and that Sergeant Allen's designation as an Inspector and his emoluments and pension entitlement were all affected.

[17] In support of the issue of natural justice, it was submitted that even though there is no legislative provision for any hearing prior to the imposition of the penalty, Sergeant Allen should have been afforded an opportunity to be heard on the nature of the penalty which ought to be imposed on him. Mr. Leys relied on the dicta of Byles J from **Cooper v Wandsworth Board of Works** 863 14 CB (NS) 180,194 in support of his submission:

> *...It seems to me that the board are wrong whether they acted judicially or ministerially. I conceive they acted judicially, because they had to determine the offence, and they had to apportion the punishment as well as the remedy. That being so, a long course of decisions, beginning with Dr. Bentley's case (a), and ending with some very recent cases, establish although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature.*

[18] Further, it was submitted that there were no extenuating circumstances such as urgency or administrative necessity which would justify the abrogation of the right to be heard.

[19] Mr. Leys asked the court to have regard to the writing of the learned authors of **The Law and Practice of: Disciplinary & Regulatory Proceedings** 2nd edn., at page 307, where it is opined that whether the defendant admits guilt or is found guilty, he is entitled to address the tribunal on any issues relevant to the orders which the tribunal may make, i.e. make a plea in mitigation. Further he quoted from page 308, wherein it was opined that –

> *Mitigation may consist, for example, of extenuating circumstances or of personal factors that would make the infliction of a particular or any penalty unduly harsh.*

[20] Mr. Leys submitted that Sergeant Allen should have been given the opportunity to make a plea in mitigation prior to the penalty being imposed. He further submitted that had he been given this opportunity, then relevant matters would have been considered, namely, Sergeant Allen's unblemished record in the JCF and the presence/absence of past disciplinary rulings.

[21] Mr. Leys then made reference to the conduct of the disciplinary proceedings. In his written submissions he submitted that the Sole Enquirer disallowed Sergeant Allen from calling a character witness. In his oral submissions Mr. Leys however retracted the word "disallow" and instead submitted that the Sole Enquirer discounted the relevance of calling a character witness. In support, he referred the Court to the following portions of the transcript from the proceedings –

> ***Pages 72-73 of the transcript of 11th of July 2013***
>
> *Mr. Bryan: M'Lord, at the extent of incurring your wrath, I would ask M'Lord if we could arrange for a further date for two reasons, or perhaps three, M'Lord. One, we would wish to call a character witness who is not here today, that should be pretty short evidence.*
>
> *President: So why you didn't call him today or her?*
>
> *Mr. Bryan: Wasn't available M'Lord for today that he turns out. That's one. And secondly M'Lord, I didn't anticipate we would have been here at this time, based on what was intimated the last time we were here and I made other arrangements in regards to professional services and to be very candid with you Mr. Chairman, that I had arranged an identification parade for 4 o'clock in regards to a client of mine who has been a patient chained to a hospital bed from the past three weeks and we would really like to give him an opportunity to have his parade done, we have been seeking to arrange it over the last two weeks but it keeps falling through.*
>
> *President: But you shouldn't have agreed to a time for 4'oclock today, we had agreed to sit until 4:00 today.*
>
> *Mr. Bryan: Well, no M'Lord. In fact, I thought on the last occasion we perhaps might have concluded a bit early based on certain things that are said.*
>
> *President: Well...*
>
> *Mr. Bryan: So I had taken that risk and thinking that four 4:00 would have been a reasonable time.*
>
> *President: You know, there are – don't want to prolong these discussions, but there are a couple of observations: One is, I am not sure to what extent character evidence is relevant you know, as I have no doubt that Mr. Allen is man [sic] of*

> *good character, he wouldn't be in the Force for 34 years if he wasn't generally speaking...*
>
> ***Page 77 of the transcript of 11th of July 2013***
>
> *President: This is a suggestion, I am not making any ruling about you calling a character witness, I just don't know that it is going to assist us in anyway.[sic] Because character witness – at this stage of the proceedings anyway.*
>
> *Mr. Bryan: I am guided.*
>
> ***Page 1 of the transcript of 22nd of July 2013***
>
> *President: Good morning all. Let us start the proceedings. When we took the adjournment, Mr. Bryan needed some time so he could make submissions in relation to the evidence which has all been taken.*
>
> *Mr. Bryan: Is it that I am to make submissions? Well, I think we had stated that is our case for the defence. I had indicated that we were calling a character witness but given the dialogue on the last occasion we indicated that we needed some time as well, so we will forgo that and that the evidence as given by the member is the case for the defence.*

[22] Mr. Leys submitted that by discounting the relevance of a character witness which would speak to the penalty to be imposed, the Sole Enquirer breached 'one essential' underpinning of the rules of natural justice, namely that the person concerned should have a reasonable opportunity of presenting his case. He stated that Sergeant Allen was never given an opportunity of 'making a case' regarding the nature of the penalty to be imposed. The Commission at its meeting held on the 20th of September 2013 unilaterally decided on the penalty without hearing from Sergeant Allen, as the only opportunity he had to present character evidence was discounted by the Sole Enquirer. He contends therefore that it is at the stage of the making of the recommendation by the Commission (to impose the penalty without any opportunity granted to Sergeant Allen to be heard) that the breach of natural justice took place.

[23] Mr. Leys contends that where a tribunal is required to observe the principles of natural justice and fails to do so, its act is invalid and this invalidity cannot be cured by any subsequent appeal, further evidence or in any other manner short of a hearing *de novo*. In support of this contention he cited the cases of **Annamunthodo v Oilfields Workers' Trade Union** [1961] AC 945 and **Leary v National Union of Vehicle Builders** [1971] Ch 34.

[24] In light of the foregoing, it was submitted that the recommendation to reduce his rank should be quashed, it having been made in breach of the rules of natural justice. The reference to the Privy Council was not a fresh hearing and could not have cured the procedural failings of the Commission in reaching its decision to recommend and subsequently impose the penalty of a reduction in rank. The corollary of that is that the decision of the Governor-General to impose the penalty, which was made on the invalid recommendation of the Commission, should be likewise quashed.

[25] In relation to this ground also, Mr. Leys submitted that Governor-General's and the Commission's decision to impose a reduction in rank is one which no reasonable tribunal addressing its mind to the facts, orders, policies and **Police Service Regulations** could make in the circumstances of this case. A series of submissions were advanced in support. It was submitted that (1) Sergeant Allen was not afforded the facility before the Court of Enquiry to present evidence of his character from an officer under whom he had served in accordance with section 52(4) of the **Police Service Regulations** (the 'Regulations'). (2) The President of the Court of Enquiry gave no weight to the evidence of good character even though Sergeant Allen was given a legitimate expectation that no such evidence would need to be called and this was to his detriment. It is to be noted that Mr. Leys qualified this submission orally to state that no weight was given, as far as could be seen. (3) The evidence supporting the charges for which Sergeant Allen was found guilty was not of such a nature that a penalty of reduction in rank could support having regard to the fact that the claimant was of a good character. (4) The penalty was harsh, oppressive and disproportionate in the circumstances. It was also submitted that the penalty imposed was entirely disproportionate to the charges which were made out against Sergeant Allen, and it was an aberration.

GROUND D – The defendants failed to provide reasons for their decisions

[26] Mr. Leys acknowledged that there is no general duty imposed on tribunals to give reasons for their decisions, however he submitted that the circumstances of the instant case 'cry out' for reasons for the decision in relation to the penalty. He submitted that in the absence of such reasons the decision is unlawful. The penalty negatively affected Sergeant Allen's livelihood and status and in the circumstances the Governor-General and the Commission ought to have given reasons for their decisions. Reference was made to the dicta of Leggatt LJ in **ex parte Cunningham** at page 325, where he opined –

> *The cardinal principles of natural justice are that no one shall be judge in his own cause and that everyone is entitled to a hearing. But the subject-matter of the decision or the circumstances of the adjudication may necessitate more than that. An award of compensation by the board concerns the applicant's means of livelihood for the period to which the award relates. The board's determination binds the Home Office, and also the applicant subject to his right to challenge it by applying for judicial review. But that right is nugatory unless the award is so aberrant as to compel the inference that it must have been wrong, or unless the board explains how the figure was arrived at, so as to enable the applicant to tell whether the award can be successfully impugned.*

[27] Reliance was placed on **R v Civil Service Appeal Board, ex parte Cunningham** [1991] 4 All ER 310 in which he contends that the Court of Appeal found that a statutory tribunal's refusal to give reasons for its decision rendered the decision unlawful and susceptible to judicial review. Mr. Leys also quoted extensively from the dicta of Lord Donaldson of Lymington MR and referred to the dicta of Leggatt LJ wherein the rationale for providing reasons was discussed.

[28] Mr. Leys submitted that the reasoning of their Lordships in **ex parte Cunningham** is applicable to the instant case. He stated that the Court of Enquiry of the Commission is a full judicial body, it determines disciplinary issues as between Sergeant Allen and the JCF and there is no appeal from that tribunal. The additional procedural safeguard required in such circumstances to ensure fairness is the provision of reasons so that the affected party may know what factors were considered by the tribunal and a determination may then be made as to whether the decision was lawful. No reasons were given by the Commission for its recommendation to the Governor-

General for Sergeant Allen's rank to be reduced. He asked the court to note the penalty was one of the more severe for a breach of the **Regulations** and one which should be reserved for the most egregious kind of behaviour. Under those circumstances, no reasonable tribunal such as the Governor-General and the Commission should fail to give reasons.

GROUNDS A and B – The defendants erred in applying the provisions of the JCF Orders/policies; and No reasonable tribunal addressing its mind to the facts and the JCF Orders/policies could have reached the same conclusion

[29] Mr. Leys chose to advance grounds A and B together. He submitted that the manner in which the defendants applied the provisions of the JCF Orders/policies to the circumstances of Sergeant Allen's case was erroneous or alternatively, unreasonable. Reliance was placed on the oft-cited case of **Associated Provincial Picture Houses Ltd. v Wednesbury Corporation** [1948] 1 KB 223, for the test of reasonableness. In particular the dicta of Lord Greene at page 229 –

> *...a person entrusted with discretion must, so to speak, direct himself properly in law. He 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 those rules, he may truly be said, and often is said, to be acting 'unreasonably'...*

SUBMISSIONS BY COUNSEL FOR THE DEFENDANTS

[30] Before addressing the grounds, counsel for the defendants, Mrs. Reid-Jones commenced her submissions by stating the purpose of judicial review proceedings and the grounds for judicial review. She quoted from the dicta of Lord Hailsham of St. Marylebone L.C. and Lord Reid from their respective judgments in **Chief Constable of The North Wales Police v Evans** [1982] 1 WLR 1155 and **Anisminic Limited v Foreign Compensation Commission** [1968] App LR 12/17.

[31] The essence of her submissions is that the tribunal did not deviate from the rules of natural justice, nor ask itself the wrong questions, nor take the wrong matters into consideration. She stated that Sergeant Allen received a full hearing where the relevant

persons were examined and cross-examined and final submissions were made at length. The eventual ruling was detailed and was made available to him. Therefore, in all the circumstances, it was reasonable for the Governor-General (acting on the advice of the Privy Council) and the Commission to accept the ruling of the Court of Enquiry and rely upon that ruling for their reasons.

[32] Mrs. Reid-Jones then addressed each of the four (4) grounds raised by Mr. Leys, separately and in order.

GROUND A– The defendants erred in applying the provisions of the JCF Orders/ policies to the facts of the case

[33] Mrs. Reid-Jones submitted on the various ways in which errors of law may be committed. She commended to the Court the following passage from the learned authors of **Constitutional and Administrative Law**, 5th edn., at page 741 –

> *An error of law may take several forms. An authority may wrongly interpret a word to which a legal meaning is attributed... Questions may also arise as to whether there has been a legal exercise of power in relation to the objectives of relevant legislation, or whether a discretion has been properly exercised, or whether relevant considerations have been taken into account, or irrelevant considerations have been excluded from the decision making process.*

[34] It was submitted that the disciplinary charges against Sergeant Allen were aired before the Sole Enquirer, the Hon. Justice Roy Anderson (Ret'd), in accordance with the provisions of the **Police Service Regulations**. The Sole Enquirer was responsible for applying the relevant **Force Orders** to the evidence before him, and determining whether the charges had been proved against Sergeant Allen. Mrs. Reid-Jones then made submissions in relation to each charge and concluded that there was ample evidence upon which the Sole Enquirer could conclude that the charges had been made out.

[35] She submitted that Sergeant Allen had failed to demonstrate that the Court of Enquiry misdirected itself on the law and the evidence to support the charges. There is also no evidence that the Sole Enquirer took into account irrelevancies or failed to take into account relevant considerations. The transcript and findings of the Court of Enquiry

provided sufficient grounds on which the Commission could accept that Sergeant Allen was guilty of the charges laid against him.

[36] It was further submitted that the Commission is empowered under regulation 42(1)(a) of the **Police Service Regulations** to recommend that a member of the JCF should be subjected to a disciplinary penalty. However, it is the Governor-General who is vested with the power to exercise disciplinary control over holders of public office pursuant to section 125(1) of the **Constitution**. Where the disciplinary offence has not been tried summarily, Part III of the second schedule of the **Police Service Regulations** provides a range of penalties which may be imposed upon Inspectors of Police. These are –

> *(a) Dismissal*
>
> *(b) Reduction in rank*
>
> *(c) A fine not exceeding one-fourth of the sum payable by way of salary in respect of a period not exceeding six months*
>
> *(d) Forfeiture of seniority*
>
> *(e) Severe reprimand*
>
> *(f) Reprimand*

[37] Mrs. Reid-Jones submitted that it is clear that the penalty of reduction in rank fell within the purview of the Commission in accordance with the **Police Service Regulations.** It was further submitted that Sergeant Allen has not provided any evidence to show that the Commission acted outside the scope of its jurisdiction.

GROUND B –No reasonable tribunal addressing its mind to the facts and the JCF Orders/policies could have reached the same conclusion

[38] Mrs. Reid-Jones also referred the court to the well-known test for reasonableness as propounded in **Associated Provincial Picture Houses Ltd. v Wednesbury Corporation**. She then submitted that Sergeant Allen must demonstrate that the decision of the Commission to accept the finding of the Court of Enquiry and to recommend the penalty of reduction in rank was so absurd that no authority would have

arrived at the same conclusion. Further, he must also demonstrate that the Commission excluded relevant matters from its consideration, or took irrelevant matters into consideration.

[39] It was argued that there is no merit to Sergeant Allen's contention that the finding of misconduct was devoid of evidence to support it or that no tribunal would have concluded in the same way. Accordingly, it was submitted that it was open to the Sole Enquirer to hold, on the available evidence, that Sergeant Allen was guilty of the misconduct as alleged.

GROUND C – The penalty imposed was harsh, disproportionate, manifestly excessive, unreasonable and in breach of the rules of natural justice

[40] Similar to Mr. Leys, Mrs. Reid-Jones spent considerably more time making submissions in relation to ground C. She also referred to two (2) of the cases cited by Mr. Leys, namely, **ex parte Cinnamond** and **ex parte Coupland**.

[41] She submitted that the penalty of reduction in rank was one which the Commission could properly recommend to the Governor-General in accordance with the **Police Service Regulations**. It was emphasised also that there is no provision under the said **Regulations** or the **Force Orders** which prescribes a particular penalty for the offences for which Sergeant Allen was charged. The reasoning of Donaldson LJ from **ex parte Cinnamond**, at page 805, was commended to the court, particularly that the severity of the punishment, by itself, would not be sufficient to invoke the supervisory jurisdiction of the Court. Instead, it must be shown that the punishment was harsh and oppressive.

[42] Mrs. Reid-Jones submitted that the disparity between the treatment of Sergeant. Allen and the treatment of other members of the JCF in similar proceedings must be so great as to lead to the inevitable conclusion that the Commission erred in law in recommending the particular penalty. She argued that Sergeant Allen has not provided any evidence to the court of such disparity. In particular, he has not shown that the penalty imposed was in excess of what was applied in like circumstances.

[43] The case of **ex parte Coupland** was helpfully summarised and distinguished by Mrs. Reid-Jones. She submitted that the Court had to consider an application for judicial review of the decision of the Admiralty Board of the Defence Council to uphold the dismissal of the applicant from the Naval Service. At the time of dismissal the applicant had served for twenty-seven (27) years. He was tried by a court martial on two (2) charges of wilfully disobeying the lawful command of his superior officer. He pleaded guilty to the charges and the sentence of the court was dismissal from Her Majesty's Service. He petitioned to the Admiralty Board on the ground that the court may have given insufficient weight to the mitigating factors in his case, and insufficient credit to his guilty plea. The Board found that the sentence was neither wrong in principle nor manifestly excessive. The applicant obtained leave to apply for judicial review of the refusal of his petition.

[44] The **Naval Discipline Act** provided a range of penalties which could be imposed on persons convicted of disciplinary offences. The penalties included death, imprisonment, dismissal, forfeiture of seniority, disrating, fine, reprimand or severe reprimand. Stuart-Smith LJ accepted that disobedience to an order was a serious offence, as disobedience by a Naval Officer was inimical to the efficiency and discipline of the force. However, he considered that the gravity of the disobedience would depend on the particular circumstances of each case. Stuart-Smith LJ concluded that the offence 'fell towards the lower end of the scale' and was not one 'for an exemplary or deterrent sentence'. He also considered that there was substantial mitigation which rendered the sentence disproportionate to the offence, namely –

a) The long service of the applicant and his unblemished record;

b) The plea of guilty;

c) The remorse and apology of the applicant to the court martial; and

d) His compliance with the command/order on the very next day after he obtained legal advice.

[45] **Ex parte Coupland** was contrasted with the instant case where Sergeant Allen was charged with wilfully disobeying the commands of Deputy Superintendent Michael

Scott to accompany him on an operation on the 10th of April 2010 and to lead an operation on the 7th of May 2010. Sergeant Allen was also charged with making a false statement to, or intentionally misrepresenting to Deputy Superintendent ('DSP') Michael Scott and misleading him into believing that the Motorised Patrol Division was not available on the 7th of May 2010 to assist with an operation.

[46] She submitted that the disobedience of Sergeant Allen was a serious offence. Reference was made to paragraph 21 of the affidavit of Judith Cheese-Morris (Secretary of the Commission), where she deponed that the penalty was considered to be commensurate with the seriousness of the charges, given the importance of command and control within the JCF. Reference was also made to Sergeant Allen's testimony at the Court of Enquiry on the 11th of July 2013 (at page 49 of the transcript) in which he admitted that *'I think wilful disobedience of any command will undermine the Force.'* He also accepted that disobedience would have affected the effectiveness of the JCF.

[47] Mrs. Reid-Jones, highlighted Sergeant's Allen's view (at page 45 of the transcript) that his functions as a Shift Inspector were mostly administrative and that most of the time he would have been exempt from operations. It was therefore submitted that the tribunal would have been entitled to infer that the decision of Sergeant Allen to disobey the orders of DSP Scott could have been informed by his view that he was exempt from going on operations. Reference was also made to Sergeant Allen's agreement (at page 46 of the transcript) that he voluntarily entered the JCF and accepted the rules, regulations, guidelines and policies.

[48] She also made reference to Force Order #2247 dated 28/6/9, in particular number 5, 'Conflicting Orders', which states –

> *Upon receipt of an order which is in conflict with a previous order, the affected member will advise the person issuing the superseding order of the conflict. If the person insists on compliance it shall be obeyed. In general, orders will be countermanded only when in the best interest of the Jamaica Constabulary Force.*

It was noted by Mrs. Reid- Jones that at the Enquiry, ACP Knight indicated that he was aware of this Force Order.

[49] It was submitted that having regard to pages 13 and 14 of the transcript of the 2nd of July, that DSP Scott was insisting on compliance as he says he 'again' instructed Sergeant Allen to accompany him on the operation, to which Sergeant Allen did not.

[50] Reference was made to pages 15 to 18 of the transcript, which describes the second instance of disobedience, which took place on the 7th of May 2010. DSP Scott told Sergeant Allen to seek additional resources form the Motorised Patrol Division Special Squad and Sergeant Allen said that he had spoken to the Inspector in charge of the squad and was told that the team would not be available. DSP Scott then made his own checks which resulted in a team reporting to his office along with about fourteen (14) other ranks. The three (3) team leaders indicated that they did not speak with Sergeant Allen. DSP Scott repeated his instruction to Sergeant Allen to lead the team at which time Sergeant Allen said that he had instructions from ACP Knight to wait at the Half Way Tree Court along with a Corporal Fraser. DSP Scott repeated his instruction to him at which time he alleges that Sergeant Allen got up, braced backward and walked away from his office. Eventually, an Inspector Wilson carried out the operation which resulted in the arrest of five (5) persons and the recovery of a firearm and ammunition.

[51] She submitted that the gravity of the disobedience should not be understated as it would have directly impacted the performance of duties under the **Constabulary Force Act** to detect and suppress crime and apprehend suspected offenders. Therefore, she contends that the offences for which Sergeant Allen was convicted are not comparable to the offences of wilful disobedience that were discussed in **ex parte Coupland**.

[52] Mrs Reid- Jones has also asked that the court bear in mind that the mitigating factors in **ex parte Coupland** ought to be considered in totality when assessing the Court's decision on proportionality. The disobedience in that case was seen as falling 'to the lower end of the scale' as there were no actual or potential hazardous

consequences of the failure. Additionally, the fact of a guilty plea would have been a significant factor in determining whether the sentence was wholly disproportionate to the offence. In the instant case, she has submitted that Sergeant Allen admitted that he was instructed to obtain police personnel for and lead the operation on the 7th of May 2010. The failure to comply with this order could have had significant and potentially hazardous consequences for the effectiveness of the operation. The tribunal was at liberty to conclude on the evidence that the explanations given by Sergeant Allen for failing to comply with the instructions were disingenuous and incredible, and that the failure was unbecoming of an officer of his rank and experience.

[53] Finally, it was submitted also that the penalty of dismissal in **ex parte Coupland** should not be treated as comparable to the penalty of reduction in rank in the instant case. Sergeant Allen has not demonstrated that the penalty of reduction in rank was unduly harsh or oppressive in the circumstances. Further, Mrs. Reid-Jones asked the court to note generally that the cases relied on by Mr. Leys pertained to dismissal and as such were distinguishable.

Breach of the rules of natural justice

[54] Mrs. Reid-Jones referred the Court to the dicta of Langrin J (as he then was) from **R v Commissioner of Police, ex parte Keith A. Pickering** (1995) 32 JLR 123, in which the key principles of natural justice were set out at page 127 -

> *The law therefore contemplates a hearing prior to the deprivation of the office held by the applicants and any failure to allow the said hearing would amount to procedural impropriety and accordingly a breach of natural justice. The ingredients of a fair hearing may be divided into three (3) categories:*
>
> *[1] Advanced notice of charges or accusations*
>
> *[2] Right to see factual evidence in the possession of the decision-maker*
>
> *[3] Right to make representations*
>
> *Whichever of these processes is adopted will depend upon the particular circumstances of each case. A formal hearing may well be unnecessary but an enquiry on the facts should be carried out and common prudence should dictate that the report or at least its substance should be shown to the applicants and an opportunity afforded to them to comment on it before the final decision was taken by the respondent.*

[55] It was submitted that the Court of Enquiry heard evidence from ACP Knight, DSP Scott, Inspector Wilson and Sergeant Allen, himself. All of the parties were examined and cross-examined and questioned were asked by the President of the Court. Opportunities were given to the parties to explain themselves and it was submitted that the rules of natural justice were observed.

[56] She stated also it was not disputed that Sergeant Allen received the findings of the Court of Enquiry, he accepted that this was so in his affidavit. It was noted that the said findings were discussed at the Commission's meeting on the 20th of September 2013. As such, it was submitted that Sergeant Allen was apprised of the material that was before the Commission for its consideration, and that it would have bearing on the penalty to be recommended. It was further submitted that Sergeant Allen would also have been aware of the range of penalties prescribed by the **Police Service Regulations** and would not have been uninformed that the penalty of reduction in rank would be available for consideration.

[57] Mrs. Reid-Jones submitted that the power to impose a penalty of disciplinary measure is vested in the Governor-General acting on the advice of the Privy Council. It is not disputed that Sergeant Allen availed himself of the opportunity to refer the matter to the Privy Council and to make submissions with respect to the penalty before it was imposed. He was furnished with the verbatim notes of evidence and the report of findings of the Sole Enquirer. Sergeant Allen submitted seven (7) grounds of appeal for the consideration of the Privy Council in the first instance. On his further reference, he deponed to a lengthy affidavit in support of his petition. On both occasions, he was afforded ample opportunity to place material before the tribunal in mitigation of the finding of his guilt.

[58] It was argued that the right to a fair hearing espouses the opportunity to put one's case before a decision is made. There is no requirement that there be an oral hearing to fulfil the requirements of natural justice. It was submitted that the reference to the Privy Council was in keeping with the provisions of the **Constitution**, the **Police Service Regulations** and the principles of natural justice. The fact that a finding adverse to

Sergeant Allen was made, does not, in itself, establish that he was not given a fair opportunity to be heard. In the circumstances, he has not demonstrated that he was denied a fair hearing.

GROUND D – The defendants failed to provide reasons for their decisions

[59] Reference was made by Mrs. Reid- Jones to paragraph 31 of Sergeant Allen's affidavit, where he alleges that he was not able to have the benefit of the reasons for the decision of the Governor-General (acting on the advice of the Privy Council) to uphold the recommendations of the Commission to impose the penalty which it did.

[60] Counsel referred the Court to **Regina v The Police Service Commission Ex parte John Luke Davis** (unreported) Supreme Court, Jamaica, Suit No. M82 of 2000, judgment delivered 10 November 2000. She stated openly in her oral submissions that this was the only case she could find which was similar to the case at bar. In **ex parte John Luke Davis**, the applicant sought an order of certiorari to quash the advice of the Police Service Commission to recommend to the Governor-General that he be reduced in rank from Inspector consequent on disciplinary charges against him being established. The applicant argued that he had not been given a fair hearing by the Commission and that no reason was given by the Commission for its recommendation or advice. It was further claimed that the reduction in rank from that of Inspector to Sergeant was excessive, harsh and/or unreasonable in the circumstances of the case.

[61] The dicta of Harris J (as she then was) was referred to the Court wherein the legal position was stated as follows –

> *As a matter of law, the Commission is not empowered to make such orders touching disciplinary matters of persons of the Applicant's rank and above. The Commission is endowed with power only to advise the Governor General and make recommendations. It has no power to make orders. It is the Applicant's complaint that he was never given a fair hearing, or any hearing at all by the Police Service Commission and that no evidence was presented at the Enquiry to establish any misconduct on his part. The Commission never presided over the hearing. A sole Enquirer, the Honourable Mr. Justice C. Orr was appointed president of the Tribunal which heard the matter. There is no evidence to establish that the Commission was in anyway instrumental in Mr. Justice Orr's appointment.*

> *The Applicant was informed of the charges against him. He so asserts in paragraph 3 of his Affidavit. A full hearing was conducted as demonstrated by the Notes of Evidence. Evidence was presented by witnesses. The applicant was represented by counsel. His complaint therefore, is devoid of merit.*
>
> *It was also declared by him that no reasons were given by the Police Service Commission for its Order and or advice. No order with respect to the Applicant was ever made by the Commission. The role of the Commission is exclusively advisory. In submitting recommendations to the Governor General it would not be enjoined to give reason. It had not participated in the trial process. It was under no obligation to give any reasons to the Applicant.*

[62] In relying on **ex parte John Luke Davis**, it was submitted that the Commission was not obliged to give reasons for its recommendation of the penalty. Furthermore section 136 (a) of the **Constitution** provides:

> *The question whether –*
>
> *(a) any Commission established by this Constitution has validly performed any function vested in it by or under this Constitution; ...*
>
> *shall not be enquired into in any court.*

[63] It was submitted that Harris J (as she then was) affirmed that unless it was shown that the Commission acted ultra vires, the court would not interfere with the exercise of its powers to make a recommendation of a penalty. Further, Harris J confirmed the principle that the remedy of certiorari does not operate to quash a recommendation or advice given by the Commission. In support of this reference was made to the English decision, **Regina v Statutory Visitors to St. Lawrence's Hospital Caterham, ex parte Pritchard** [1953] 2 All ER 766.

[64] In **ex parte Pritchard**, the statutory visitors had submitted a report to the Board of Control recommending that the detention order in respect of an infant should be extended. The mother of the infant applied for an order of certiorari to quash the report of the visitors. Lord Goddard CJ construed the provisions of the **Mental Deficiency Act** and concluded that the power to make a decision of the detention of the infant rest with the Board of Control. The report of the visitors was prescribed by the Act, and was 'no more than material which was put before the Board to enable the Board to come to a decision.' He continued, at page 771, –

> *It is impossible, looking at the whole of the section, to say that the visitors are to hold anything which can be called an inquiry in the sense that persons shall be allowed to be present at the inquiry or that they shall hear evidence. They have to form an opinion and report to the board, and to say that their report, which is nothing more than a report of their opinion, can be brought up to be quashed by this court by means of certiorari would be extending the doctrine relating to certiorari to an unlimited and an unfortunate extent.*

[65] With regards to the instant case, it was submitted that the recommendation of the Commission cannot be the subject of an order of certiorari. Further, the finding of the Court of Enquiry provided sufficient reasons for the imposition of the particular penalty. The Governor-General considered written representations from Sergeant Allen together with the findings of the Court of Enquiry before imposing the particular penalty. It was argued that Sergeant Allen has not shown that the decision was reached in a manner which betrayed substantive and procedural fairness in the circumstances.

ANALYSIS

The Role of the Court in Judicial Review

[66] The process of judicial review is the basis on which courts exercise supervisory jurisdiction in relation to inferior bodies or tribunals exercising judicial or quasi judicial functions or making administrative decisions affecting the public. It is trite that judicial review is concerned only with the decision making process of a tribunal and not with the decision itself. Lord Hailsham of St. Marylebone L.C. expressed in **Chief Constable of the North Wales Police v Evans** [1982] 1 WLR 1155 at page 1161a that the purpose is to ensure that the individual receives fair treatment and not to ensure that the authority which is authorised by law to decide for itself reaches a conclusion which is correct in the eyes of the court. Lord Diplock in **Council of Civil Service Unions v Minister for the Civil Services** [1985] AC 374 at page 410 F-H, discussed the principle of judicial review in relation to decision making powers and spoke to three heads -- illegality, irrationality and procedural impropriety:

> *By 'illegality' as a ground for judicial review, I mean that the decision–maker must understand correctly the law that regulates his decision–making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.*

> *By 'irrationality' I mean what can now be succinctly referred to as "Wednesbury unreasonableness'" (**Associated Provincial Picture Houses Ltd v Wednesbury Corporation** [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it...*
>
> *I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involves any denial of natural justice.*

[67] The balancing and weighing of relevant considerations is primarily a matter for the public authority, not the courts (per Lord Green MR in **Wednesbury**, at page 231; and per Lord Hailsham in **Chief Constable of the North Wales Police** at page 1160 H). However, if there has been an improper exercise of power, it will be viewed as unreasonable, irrational or an abuse.

The Relevant Statutory Provisions

[68] Sections 125 and 130 of the **Constitution** vest authority for the removal or exercise of disciplinary control over police officers above the rank of Inspector, in the Governor-General. He exercises this authority acting on the advice of the Commission. In this matter, disciplinary proceedings were initiated against the then Inspector Allen by virtue of regulation 31(2) of the **Police Service Regulations**, 1961 (the 'Regulations') and conducted by virtue of regulation 46 (1) of the said **Regulations**. Reference to this latter section appears in the letter dated the 7th of May 2014 from the Office of the Commissioner to Sergeant Allen.

[69] Sections 125(1) to (4) and 130 of the **Constitution** provide –

> ***125.** – (1) Subject to the provisions of this Constitution, power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in any such offices is hereby vested in the Governor-General acting on the advice of the Public Service Commission.*
>
> *(2) Before the Public Service Commission advises the appointment to any public office of any person holding or acting in any office power to make appointments to which is vested by this Constitution in the Governor-General acting on the advice of the Judicial Service Commission or the Police Service*

> *Commission, it shall consult with the Judicial Service Commission or the Police Service Commission, as the case may be.*
>
> *(3) Before the Governor-General acts in accordance with the advice of the Public Service Commission that any public officer should be removed or that any penalty should be imposed on him by way of disciplinary control, he shall inform the officer of that advice and if the officer then applies for the case to be referred to the Privy Council, the Governor-General shall not act in accordance with the advice but shall refer the case to the Privy Council accordingly:*
>
> *Provided that the Governor-General, acting on the advice of the Commission, may nevertheless suspend that officer from the exercise of his office pending the determination of the reference to the Privy Council.*
>
> *(4) Where a reference is made to the Privy Council under the provisions of subsection (3) of this section, the Privy Council shall consider the case and shall advise the Governor-General what action should be taken in respect of the officer, and the Governor-General shall then act in accordance with such advice.*
>
> ***130.*** *Section 125 of this Constitution (with the substitution therein of the words, "the Police Service Commission" for the words "the Public Service Commission" wherever the same occur and of the words "the Public Service Commission" for the words "the Police Service Commission" in subsection (2) thereof) shall apply in relation to police officers as it applies in relation to other public officers.*

[70] Regulation 46 of the **Regulations** speaks to disciplinary proceedings where the Commission is of the opinion that the misconduct is not so serious as to warrant proceedings under regulation 47 with a view to dismissal. Regulation 47 of the **Regulations** speaks to the process to be followed where there is an intention to proceed towards dismissal. It does appear however that the proceedings that were adopted in the case at bar are the same that should be adopted under regulation 47 (which speaks to the establishment of a Court of Enquiry).

[71] Mrs. Reid-Jones has set out the penalties that could be imposed by virtue of the **Regulations** and these are referred to at paragraph [36] of this judgment. It is to be noted that the penalty of reduction in rank is the second most severe that can be imposed.

The Process

[72] Having enquired into the matter, the Court of Enquiry is to furnish a report of its findings to the Commission, together with a copy of the evidence and all material documents relating to the case (per regulation 47(i) of the **Regulations**). Regulation

47(k) allows the Commission to recommend some punishment other than dismissal, if it is of the opinion that a lesser penalty is deserved.

[73] Regulation 42 of the **Regulations** allows a member who has been subjected to a disciplinary penalty to apply for a reference to the Privy Council of that recommendation. This is actually in accordance with section 125(3) of the **Constitution** which has been set out above.

[74] Section 125(4), which has also been referred to at paragraph [69] of this judgment, speaks to the end result of the process of the disciplinary proceedings.

[75] A second reference to the Privy Council is allowed if new and material facts come to light which might have affected the former decision and adequate reasons given for the non disclosure of such facts at an earlier date (regulation 42 (2) of the **Regulations**). Sergeant Allen actually availed himself of this second referral in relation to the evidence of one Corporal Fraser. The records indicate that the Privy Council considered the statement of the said Corporal Fraser and came to the conclusion that it would not have led to an alternative decision.

[76] Mr. Leys has attacked the decisions of the Court of Enquiry, the Commission and the Governor-General (acting in accordance with the advice of the Privy Council), both procedurally as well as the actual determination of the issues for which Sergeant Allen was charged. It is necessary therefore to examine critically the role and processes of each of these three divisions to see if there is any validity to any of the complaints of Sergeant Allen and if so, to determine if it warrants the intervention of this court by way of the writ of certiorari.

GROUNDS A and B – The defendants erred in applying the provisions of the JCF Orders/policies; and No reasonable tribunal addressing its mind to the facts and the JCF Orders/policies could have reached the same conclusion

The Court of Enquiry

[77] Both of these grounds will be considered together as there is overlapping of the relevant submissions. Apart from citing the well known case of **Associated Provincial Picture Houses Ltd. v Wednesbury Corp.** which speaks, *inter alia*, to the issue of the unreasonableness of a decision, Mr. Leys has not sought to expound in any detailed manner as to why the decision reached by the defendants is to be considered unreasonable.

[78] In **Associated Provincial**, at page 229, Lord Greene M.R. spoke to some issues to be considered when the test of unreasonableness is being considered:

> *It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He 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 those 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*** *(1) 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. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.*

[79] Mr. Leys referred the court to paragraphs 17 to 27 of Sergeant Allen's affidavit as containing the arguments against reasonableness. Except for the referral to a statement of one Corporal Fraser (who was never called as a witness before the Court of Enquiry), Sergeant Allen repeats the evidence and submissions made on his behalf before that Court. The Sole Enquirer gave a detailed ruling as to why he found the charges proved, who he accepted as credible witnesses and why he rejected Sergeant Allen as one such. He also reminded himself that the burden to establish the facts is on preponderance of evidence and not beyond a reasonable doubt. There was also an examination of the legal issues as to whether wilful disobedience was proved. As

submitted by Mrs. Reid-Jones, the Sole Enquirer was responsible for applying the relevant **Force Orders** to the evidence. She has also submitted that there was ample evidence for his decision that the charges had been made out. Having reviewed the notes of evidence and the ruling made, I am in total agreement with her and I am of the opinion that Mr. Leys' submission on this ground lacks any merit. Sergeant Allen was represented by counsel, Mr. Donald Bryan, who had full opportunity to cross examine all the witnesses and also to call witnesses if he so desired. Mr. Bryan made fulsome submissions both at the end of the prosecution's case and at the end of the presentation in evidence. I note that Sergeant Allen did not dispute that the three (3) incidents on the basis of which he was charged occurred, but questioned the validity of the assessment that there was misconduct on his part. All of this was amply ventilated and the Court of Enquiry gave reasons for its judgment.

[80] I am also satisfied that there is no evidence of breach of natural justice or issues of procedural irregularity on the part of the Sole Enquirer. Based on the evidence presented and the reasons given, this court has found no evidence of unreasonableness in the decision reached. In fact, in examining the decision, it cannot be said that no reasonable authority could have reached this decision without a self-misdirection of some sort.

Lack of Character Evidence

[81] However, a secondary issue to be considered under this heading is whether the reference by the Sole Enquirer as to the relevance of calling character evidence on Sergeant Allen's behalf was a breach of the principles of natural justice or evidence of unreasonableness. Although Queen's Counsel did not expand on this issue in his oral submissions, his written submissions accused the Sole Enquirer of such a breach as he submitted that Sergeant Allen should have had a reasonable opportunity of presenting his case. However, it is to be noted that his submissions were directed in particular to the penalty imposed as the report before the Commission would contain no such character evidence. The record of the words used by the Sole Enquirer has already

been set out at paragraph [21] of this judgment. The relevant regulations are 47(i) and 52(4) which are set out below:

> *47(i) The court shall furnish to the Commission a report of its findings (which may include a report on any relevant matters) together with a copy of the evidence and all material documents relating to this case; if the Commission is of the opinion that the report should be amplified in any respect or that further enquiry is desirable, it may refer any matter back to the court for further enquiry or report accordingly.*
>
> *52 (4) The member charged shall be given every facility as regards the obtaining of evidence of character from any Officer under whom he has served.*

[82] It is Mr. Leys' submission that the Commission would not therefore have had any character evidence before it and it is not known whether the issue of good character was taken into account and the fact that he could have raised it on appeal is not an answer. He relies on **Annamunthodo** and **Leary** in support of his contentions. These two cases will be considered later in this judgment. Mr. Leys has further submitted that the court ought not to separate the three (3) stages of the disciplinary proceedings so as to review whether certiorari ought to be granted only in relation to the final two (2) stages but that the proceedings taken together demonstrate that there was, at the least, breaches of natural justice and the entire proceedings ought to be quashed.

[83] While I would agree that Sergeant Allen should have put his character evidence before the Court of Enquiry, if that were indeed his intention, it is clear that Mr. Bryan could have called such a witness if he thought fit. Based on the transcript, he was never prevented from doing so. Although the Sole Enquirer did make statements in relation to the necessity of character evidence at that stage, it is clear that he did not prevent such evidence from being elicited, and, at any rate, stated that he had assumed the good character of Sergeant Allen as he had been in the JCF for a considerable number of years.

[84] The lack of such evidence is therefore not the result of any procedural impropriety by the Court of Enquiry that would taint the subsequent review and recommendation by the Commission and ultimately the decision of the Governor-General (acting on the advice of the Privy Council).

The Commission and the Governor–General (acting on the Advice of the Privy Council)

[85] In relation to the role of the Commission, it is abundantly clear that Mrs. Reid-Jones is correct in her submissions as to the role played by them. I would agree that the transcript and findings of the Court of Enquiry provided a rational and reasonable basis on which they could accept the findings of guilt. They played no role in the Enquiry and they were empowered by law to recommend the penalty imposed. This argument also holds true for the confirmation of the findings of the Court of Enquiry and recommendation of the Commission by the Governor-General (acting on the advice of the Privy Council). Sergeant Allen has indeed failed to establish that the decision was unreasonable and that there was any failure on the part of either of the defendants to properly apply the provisions of the **Jamaica Constabulary Force Orders**/policies to the circumstances of the case.

GROUND C – The penalty imposed was harsh, disproportionate, manifestly excessive, unreasonable and in breach of the rules of natural justice

Was the Penalty Harsh and Oppressive?

[86] It is Mr. Leys' contention that the penalty was unreasonable and no tribunal directing its mind to the issues therein could come to the conclusion that the penalty of a reduction in rank must be imposed. I have examined the cases relied on by Mr. Leys in relation to the above issue. These include **ex parte Cinnamond**, **ex parte Coupland**, **Cooper v Wandsworth**, **Ridge v Baldwin**, **Rees v Crane**, **Annamunthudo**, and **Leary**.

[87] In **ex parte Cinnamond**, a writ of certiorari was requested by the applicant before the High Court to quash a sentence for traffic offences imposed by the Crown Court. It is to be noted that the Crown Court had imposed the sentence within statutory limits but was found to have exceeded the normal discretionary sentence for the offence. It is to be noted also that by virtue of section 10(2) of the **Courts Act** 1971, any decision of the Crown Court could be questioned by any party on the ground that it is

wrong in law or in excess of jurisdiction. The High Court held that a discretionary sentence was wrong in law or in excess of jurisdiction, within section 10(2), if it was harsh and oppressive or so far outside the normal sentence imposed so as to enable the court in the exercise of a jurisdiction analogous to its jurisdiction in respect of administrative decisions to hold that the imposition must have involved an error of law. The court considered, *inter alia*, the cases of **Associated Provincial** and **ex parte Coupland**.

[88] Mr. Leys argues therefore that this court has jurisdiction in its supervisory capacity to consider whether the penalty imposed on Sergeant Allen was harsh and oppressive. He also submits that the nature of the offence for which Sergeant Allen was found guilty fell within a lower scale of offending and taken against his background of service to the Jamaica Constabulary Force, a less severe penalty should have been imposed.

[89] The court in **ex parte Coupland** followed the reasoning in **ex parte Cinnamond** but based their decision on the finding of unreasonableness (the test promulgated in **Associated Provincial**). Mrs. Reid-Jones summarized the facts in the above case in her submissions and this is to be found at paragraphs [43] and [44] of this judgment. Stuart Smith LJ, at pages 5 and 6, accepted that disobedience to an order is always a serious offence but spoke to the balance that is to be taken into consideration:

> *At one end of the scale there is disobedience in an operational context where the failure may involve risk to life or safety of ships or other property. At the other end, there is the failure to obey instantly an order of someone of higher rank which may have little or no bearing on the smooth running or the administration of the service. There are no actual or potential hazardous consequences of the failure. Nevertheless, it is the failure to obey the order which is the gravamen of the offence. In my judgment, this offence fell well towards the lower end of the scale...the disobedience was persisted in until the next day and to that extent it can be said to be protracted...That can be balanced against a powerful mitigation of his long service and hitherto unblemished record...*
>
> *There was here plainly very substantial mitigation: the plea of guilty, his remorse and apology through his counsel to the court martial, his long service and hitherto good conduct and his compliance with the order next day after he had sought to obtain legal advice.*

[90] Stuart Smith LJ also noted, at page 6, that there was little guidance for the Navy Board from comparable cases but came to the conclusion that this was not the type of case for an exemplary or deterrent judgment. He stated also that the sentence, in accordance with ordinary principles of sentencing, should be no greater than that was necessary to punish the offender for the seriousness of the offence after taking into account the powerful mitigation in his favour. He concluded also that the Board could not have considered the financial consequences of the effect of dismissal.

[91] Butterfield J, who agreed with the reasoning of Stuart Smith LJ, made it clear that the case was difficult and troubling as he was conscious that the Navy should be permitted as far as possible to exercise discipline over serving sailors unfettered by interference from these courts. He felt however that, in the special circumstances of this case, the sentence was very severe. He described his conclusion, at page 8, as follows:

> *In this wholly exceptional case...the sentence was wholly disproportionate to the gravity of the offence bearing in mind the mitigation available and, as such, was so unreasonable that this court should, in these circumstances, interfere.*

[92] Mrs. Reid-Jones has emphasized that the actual penalty in the case at bar was one which could be recommended and that, as pointed out in **ex parte Coupland**, severity by itself would not be sufficient to invoke the jurisdiction of the court (per Stuart Smith LJ, at page 4).

[93] Can it be said, looking at this case, that the sentence was so harsh or oppressive to invoke the supervisory jurisdiction of the court? Parliament has vested these agencies with the authority to deal with matters affecting the Jamaica Constabulary Force, which is a disciplined body, and members are required to obey established Rules, Regulations and Codes of Conduct.

[94] As submitted by Mrs. Reid-Jones, the gravity of Sergeant Allen's disobedience should not be understated as it would have directly impacted the performance of a police operation. She stated also that his conduct threatened the performance of duties under the **Constabulary Force Act** to detect and suppress crime and to apprehend suspected offenders. Mrs. Reid-Jones further submitted that the offences for which he

was convicted are not comparable to the offences of wilful disobedience discussed in **ex parte Coupland**. She has also asked that the court bear in mind the mitigating factors in **ex parte Coupland** which must be considered in totality when assessing the court's decision on proportionality. These mitigating factors were mentioned above in paragraph [44] of this judgment.

[95] In coming to a conclusion regarding the submissions under this heading, the court considers the evidence before the Sole Enquirer and what he found as proved against Sergeant Allen. The court also considers the importance of not attempting to substitute its own views into the matter under the guise of exercising its supervisory jurisdiction. It is to be noted also that Sergeant Allen was not visited with the ultimate sanction. There was no plea of guilty and apology by Sergeant Allen before the Court of Enquiry, although his long and hitherto unblemished record would have been accepted (as indicated in the transcript of records of the Court of Enquiry). The court notes also that Mr. Leys has not sought to bring any evidence of comparable cases where the sentence was less severe. In fact, in **ex parte John Luke Davis**, although the actual circumstances of that matter are not available to this court, the applicant, who had been the subject of four (4) disciplinary charges, was similarly reduced in rank from Inspector to Sergeant. Although no reasons have been given by the Privy Council for affirming the actual penalty, in relation to the Commission, I note that Mrs. Reid –Jones has pointed the court to the affidavit of Mrs. Cheese-Morris where she stated as follows at paragraph 21:

> *These penalties were considered by the Police Service Commission. After extensive deliberations, reduction in rank was considered to be the most appropriate and was considered to be commensurate with the seriousness of the charges given the importance of command and control.*

[96] These same set of circumstances would have been before the Privy Council. In the round, when the court considers all of the above, it cannot be said that the penalty was harsh or oppressive so as to warrant a declaration that it was unreasonable in all the circumstances. Here also, the court bears in mind the necessity of judicial restraint which is reinforced by the understanding that the primary decision maker is better

placed than the court to evaluate these matters falling within its area of expertise (Michael Fordham QC, **Judicial Review Handbook**, 6th edn, page 148, paragragh13.4)

Was the Penalty Imposed in Breach of Natural Justice?

[97] Mr. Leys has submitted that prior to the imposing of the penalty, Sergeant Allen should have been afforded an opportunity to be heard on the nature of the penalty despite the absence of any provision in the legislation. In the case of **Cooper v Wandsworth** relied on by Queen's Counsel, the district board made a decision to demolish a house without any notice to the owners. Byles J stated, at page 420, that there were two sorts of notices which may have possibly being required, notice of hearing that the party may be heard if he had anything to say against the demolition, secondly notice of the order that he could consider whether he could mitigate the wrath of the board or in any way modify it. None of these notices were given. In fact, Byles J pointed out that by the express provision of the relevant Act, they were obliged to give notice of the order for demolition. It is within this context that Byles J stated that the justice of the common law will supply the omission of the legislature where a statute may be silent in regards to a party being heard and the court came to the conclusion that the board exercised their power wrongfully.

[98] Mr. Leys has also relied on **Rees v Crane**, a judgment of the Privy Council. The respondent was a High Court Judge in Trinidad and Tobago who had been removed from presiding in court by the Chief Justice. This decision had subsequently been confirmed by the Judicial and Legal Service Commission. Lord Slynn of Hadley, who delivered the judgment of the court, at page 191, examined the issue as to whether the rules of natural justice were required at the stage of a preliminary investigation of complaints when there would be full opportunity to deal with the complaints later. Mr. Leys quoted from the judgment as follows:

> *It is clear from the English and Commonwealth decisions which have been cited that there are many situations in which natural justice does not require that a person must be told of the complaints made against him and given a chance to answer them at the particular stage in question. Essential features leading the courts to this conclusion have included the fact that the investigation is purely preliminary, that there will be a full chance adequately to deal with the complaints*

> *later, that the making of the inquiry without observing the audi alteram partem maxim is justified by urgency or administrative necessity, that no penalty or serious damage to reputation is inflicted by proceeding to the next stage without such preliminary notice, that the statutory scheme properly construed excludes such a right to know and to reply at the earlier stage.*
>
> *But in their Lordships' opinion there is no absolute rule to this effect even if there is to be, under the procedure, an opportunity to answer the charges later. As Professor de Smith puts it in* de Smith's Judicial Review of Administrative Action*, 4th ed. (1980), p. 199:*
>
> > *"Where an act or proposal is only the first step in a sequence of measures which may culminate in a decision detrimental to a person's interests, the courts will* ***generally*** *decline to accede to that person's submission that he is entitled to be heard in opposition to this initial act,* ***particularly*** *if he is entitled to be heard at a later stage." (Emphasis added.)*
>
> *In considering whether this general practice should be followed the courts should not be bound by rigid rules. It is necessary, as was made clear by Tucker L.J. in Russell v. Duke of Norfolk [1949] 1 All E.R. 109, 118 (as approved by Lord Guest in Wiseman v. Borneman [1971] A.C. 297, 311, and by Lord Morris of Borth-y-Gest in Furnell v. Whangarei High Schools Board [1973] A.C. 660, 679) to have regard to all the circumstances of the case:*

[99] Mr. Leys is contending therefore that the rules of natural justice should apply to the penalty as both Sergeant Allen's status and property have been affected. He contends also that if the Court of Enquiry, or the Governor-General or the Commission were minded to impose the penalty of reduction in rank then Sergeant Allen should have been afforded the opportunity to be heard and address the tribunal on any issues of relevance. In dealing with this issue, I will consider the roles of the Commission and the Governor-General (acting on the advice of the Privy Council) separately.

The Role of the Commission

[100] It is my view that the role of the Commission is somewhat distinct. Mrs. Reid-Jones has emphasized the fact that, while the Commission recommends, it is the Governor-General who is vested with the power to exercise disciplinary control over public bodies. She has further submitted that Sergeant Allen has not provided any evidence that the Commission acted outside the scope of its jurisdiction in order to open itself to the intervention of this review court. However, any reliance placed by the Commission on section 136 (a) of the **Constitution** would only avail, as counsel has admitted, if this court were to conclude that the Commission did not act ultra vires. That

section is commonly referred to as an ouster clause but it is to be noted that the courts will not allow such clauses to shield Service Commissions if the error they have been deemed to commit is found to be fundamental (**Thomas v A-G of Trinidad and Tobago** [1982] AC 113, a decision of the Privy Council; and **Anisminic Ltd v Foreign Compensation Commission**, a decision of the House of Lords, per Lord Reid at paragraph 13.)

[101] In relation to the issue of the penalty recommended by the Commission as well as the lack of reasons given for their recommendation, Mrs. Reid-Jones referred the court to **ex parte John Luke Davis** and the decision of my sister, Harris J (as she then was) which is quoted in paragraphs [60] to [63] of this judgment. The essence of her judgment was to the effect that the role of the Commission is exclusively advisory and there was no participation by them in the trial process. Harris J came to the conclusion based on the *ratio decidendi* in **ex parte Pritchard** that the role of the statutory visitors was merely one of forming an opinion and making a recommendation to the Board. Under those circumstances, the court would not extend the doctrine of certiorari to quash what is merely a report of their opinion. I would agree that the Commission played no role in the enquiry into the matters concerning Sergeant Allen. Their role was to examine the report, and if necessary refer back for further enquiry. Once the determination of the Court of Enquiry is accepted, the Commission would then recommend a penalty to the Governor-General.

[102] Mr. Leys is contending however that the role of the Commission goes beyond a recommendation as the Governor-General has to act on their advice as set out in section 125(1) of the **Constitution**.

[103] Bearing this in mind, he has asked the court to consider the assessment made by the court in **R v Agricultural Dwelling-House Advisory Committee for Bedfordshire, Cambridgeshire and Northamptonshire, ex parte Brough** [1987] 1 EGLR 106, a judgment of the Queen's Bench Division of the English courts. Hodgson J, at pages 6 and 7 of that judgment, stated that the question of law which may be at the heart of this decision is whether certiorari would go to quash an advisory decision of the

nature (as existed in that case) when the determination is to be of another body. He answered the question as follows:

> *In my judgment, particularly when one is considering the procedural impropriety or otherwise by which a decision of this nature — that is, one which is not finally determined — can be subject to judicial review, one has to pay great regard to a consideration which appears in a sentence of de Smith at p 234:*
>
> *The degree of proximity between the investigation in question and an act or decision directly adverse to the interests of the person claiming entitlement to be heard may be important.*
>
> *I think that is right. Merely because a decision to give advice, or the advice itself, is not finally determinative of a question is not in my view the determining factor. I think it is important to look at all the facts and see in general terms what part that subdecision, if I can coin a phrase, plays in the making of the decision as a whole.*
>
> *If it is only a decision to give evidence one way or the other, then plainly it would not be subject to judicial review. But where that advice is sought by the determining authority from a committee of whose decision the authority is required by statute to take full account, and where there is some evidence that in practice the advice is — to put it no higher — highly likely to be followed, then I think it would be wrong to allow the proceedings to go further and require the applicant to wait until the decision of the local authority is made against him, if it is, before attacking that decision on the basis that the material upon which it was based was flawed.*

[104] It is to be noted that in **ex parte Brough**, there had been irregularities during the proceedings of the said advisory committee. Each party had been heard in the absence of the other and the respondent had made allegations of bad faith against the applicant which he had no opportunity to rebut. In addition, the advisory committee's report failed to state adequately why they rejected the application, although they were **required to give reasons for their decision** by virtue of the relevant statute.(emphasis supplied)

[105] It can easily be appreciated therefore why the court exercised its discretion to quash the decision of the advisory committee for procedural impropriety. That committee had been appointed to advise the local housing authority on applications for possession and in the process of so doing met with both parties as indicated above. In relation to the Commission in the case at bar, they had no involvement in the Enquiry, neither is there any evidence of procedural impropriety. The issue therefore is whether the recommendation (without any hearing from Sergeant Allen) to the Governor-General can be said to have being procedurally incorrect to the extent that the **Constitution**

states that the Governor-General is to act on that advice. Mr. Leys has submitted that the case of the statutory visitors in **ex parte Pritchard** can therefore be easily distinguished as their role was merely one of offering an opinion.

[106] Queen's Counsel has also submitted that Sergeant Allen's inability to be heard before the Commission on the recommended penalty bears further scrutiny as any breach of natural justice before this body could not be cured by the subsequent reference to the Privy Council. He relies on both **Annamunthudo v Oilfield Workers' Trade Union** and **Leary v National Union of Vehicle Builders** in this regard. He is essentially submitting that the reference to the Privy Council was not a fresh hearing and could not cure the procedural failings of the Commission in reaching its decision on the penalty which would have breached the principles of natural justice.

[107] In **Annamunthudo**, an appeal from the Federal Supreme Court of the West Indies to the Privy Council, the General Council of the trade union was found to have acted ultra vires by imposing a penalty that could not be imposed upon the appellant as well as breached the principles of natural justice by imposing the said penalty for contravention of another rule (rule 11(7)) for which he had not been charged and which was actually found proved in his absence.

[108] The Privy Council also held that the appellant's subsequent appeal from the General Council to the Annual Conferences of Delegates, did not result in him losing his right to complain of rule 11(7) being invoked (that is, he could still complain that the original order was invalid for want of the observance of natural justice). The decision in **Annamunthudo** can clearly be distinguished as the circumstances in the case at bar do not reveal any breach of natural justice or other procedural irregularity by the Commission, except to the extent that this court was to reach the conclusion that Sergeant Allen was entitled to a hearing before the penalty was recommended.

[109] Similarly in **Leary**, the circumstances of the present case can again be distinguished .The plaintiff's purported expulsion from membership of a union was held to be ultra vires as there had been a breach of natural justice at the first level hearing

by the branch committee. The plaintiff had been unaware of the meeting of the branch committee that made the said orders. The court held that, while a complete rehearing by an original tribunal or by some other body competent to decide an issue might satisfy the requirements of natural justice, where there was a right of appeal from the original decision, a plaintiff was entitled to natural justice both before the original and appellate tribunal.

[110] This court takes into consideration that there is no rule or requirement for the Commission to afford a hearing before recommending the penalty, so unlike the cases relied upon, there was no established or expected procedure (i.e. legitimate expectation) that would have been breached. This court would now be advocating that there ought to be a procedure that would allow those affected to have some input at the stage where the penalty is first being considered. The question, I would think, is whether the procedure taken as a whole was objectively fair (Michael Fordham QC, **Judicial Review Handbook**, page 172, paragraph 16.5).

[111] However, even if it could be argued that the process was not objectively fair, there is to my mind, a greater bar to any merit being accorded to Mr. Leys' submission in relation to the Commission. An examination of sections 125 (3) and (4) of the **Constitution** makes it abundantly clear that the Governor-General is not permitted to act on the advice of the Commission at the time of recommendation of the penalty, as Sergeant Allen had the constitutional right to refer and had indeed activated that right, to refer the matter to the Privy Council.

[112] The process envisioned is that the Governor-General would have informed Sergeant Allen of the decision of the Commission. He had to do this before he acted on that advice. Once Sergeant Allen activated his right of referral, the recommendation would be suspended. Once this process was completed, that is, the referral to the Privy Council, the Governor–General would have then been constrained to act on the advice of the Privy Council.

[113] It seems clear to this court, therefore, that the penalty remained in the vein of an unactivated recommendation until Sergeant Allen could exercise his constitutional right to refer the matter to the Privy Council. In unforensic words, the Governor–General would have said to the effect, *'this is the result of the enquiry and this is what the Commission has recommended, do you wish to say anything about this by exercising your right of referral'.* In my opinion therefore, the Commission would have had no duty under the common law to grant Sergeant Allen any hearing before recommending the penalty. He would be granted the right to be heard on the referral to the Privy Council before any penalty was actually imposed on him. At the end of the day, the court is examining the proceedings for fairness. In **Ramjohn v Permanent Secretary, Ministry of Foreign Affairs and Another; Kissoon v Manning and Another** [2011] UKPC 20 at paragraph [39], the court expressed, *"As is trite law, the requirements of fairness in any given case depend crucially upon the particular circumstances."*

[114] I would therefore agree with my sister, Harris J (as she then was) in her decision in **ex parte John Luke Davis** as to the advisory role of the Commission and as such, fairness would not require that Sergeant Allen should be heard before the recommendation of the penalty by the Commission.

The Privy Council

[115] Did Sergeant Allen have an opportunity to be heard in relation to the issue of the penalty before the Privy Council? I would agree that natural justice required that he be given some such opportunity, not only because of the consequences resulting from the penalty imposed but also because it cannot be argued that there were any circumstances of urgency or administrative necessity to justify the abrogation of such a right as submitted by his counsel. However, having been told of the findings by the Court of Enquiry and the recommendation by the Commission, it is clear that Sergeant Allen's voice was heard before the penalty was imposed.

[116] There is of course, no statutory requirement for any oral hearing and it is clear that the requirements of natural justice can be served without an oral hearing depending

on the circumstances as Tucker LJ pointed out in **Russell v Duke of Norfolk** [1949] 1 All ER 109, at page 118:

> *There are in my view, no words which are of universal application to every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case.*

[117] In examining this issue also, I have regard to the words of Lord Denning MR in **Regina v Race Relations Board**, **ex parte Selvarajan** [1975] 1 WLR 1686 at pages 1693H-16949D:

> *In recent years we have had to consider the procedure of many bodies who are required to make an investigation and form an opinion. Notably, the Gaming Board, who have to inquire whether an applicant is fit to run a gaming club: see **Reg. v. Gaming Board for Great Britain, Ex parte Benaim and Khaida** [1970] 2 Q.B. 417; inspectors under the **Companies Act** 1948 who have to investigate the affairs of a company and make a report: see **In re Pergamon Press Ltd.** [1971] Ch. 388; and **Commissioners of Inland Revenue** who have to determine whether there is a prima facie case: see **Wiseman v. Borneman** [1971] A.C. 297. In all these cases it has been held that the investigating body is under a duty to act fairly: but that which fairness requires depends upon the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely afflicted by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given.*

[118] Mr. Leys' complaint is that Sergeant Allen should have been given the opportunity to be heard on matters such as his record in the Jamaica Constabulary Force, the presence or absence of any past adverse disciplinary rulings recorded against him and to pray in aid his unblemished record. It is clear however that he did put those issues before the Privy Council. The Privy Council had both the affidavit of Sergeant Allen and the grounds of appeal filed on his behalf which placed the issues to be considered regarding sentence before this body, as submitted by Mrs. Reid-Jones. At paragraphs 29 and 30 of his affidavit, he stated as follows:

> *29. This also would no doubt have weighed in the minds of the Privy Council and the severity of the penalty imposed on me would in all likelihood not have been so severe as a reduction in rank.*
>
> *30. This is to be seen against the background that I have been in the JCF for the past 35 years and 6 months and **as the President had acknowledged, I had to be of good character to have been there so long.** My retirement from the JCF is due in the very near future and the penalty of a reduction in rank will severely affect my pension emoluments which will no doubt be a second penalty imposed on me albeit indirectly.(emphasis added)*

[119] The court notes that paragraph 7 of the grounds of appeal also reads as follows:

> *The recommended sentence is harsh, disproportionate and manifestly excessive especially as there was no blatantly wilful disobedience regarding the duties assigned among other mitigating factors such as the apology given to Deputy Superintendant Scott, the assignment given by the Court, the good record of the Applicant/Appellant and so on.*

[120] In relation to the issue of the character evidence, all empathy aside, I bear in mind the circumstances of this case and the fact that his good record was acknowledged, as admitted by Sergeant Allen. I bear in mind also that he was never prevented from presenting character evidence and that all other relevant factors were put before the Privy Council. Under those circumstances, it is difficult to accede to Mr. Leys' submission that Sergeant Allen was not given an opportunity to be heard.

[121] Mrs. Reid-Jones has pointed the court to the dicta of Lord Hailsham of St. Maryleborne LC in **Chief Constable of The North Wales Police v Evans** where he identified the scope and purpose of judicial review proceedings and stated as follows at page 1160F-G:

> *But it is important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law.*

[122] She also referred the court to the decision of the Full Court in **ex parte Keith A. Pickering**. In that case Langrin J (as he then was) who delivered the judgment of the court, affirmed the key principles of natural justice. These principles are set out in paragraph [54] herein.

[123] In conclusion, it is therefore fair to say that Sergeant Allen had the opportunity to be heard (orally) before guilt was determined and to be heard (in writing) before the sentence was imposed. He has not shown this court that he has suffered any injustice in relation to these issues. Mr. Leys' submission is therefore patently misguided and incorrect as far as a hearing before the Privy Council is concerned.

GROUND D – The defendants failed to provide reasons for their decisions

[124] Bearing in mind my findings on the role of the Commission, there would be no necessity for reasons to be provided by that body. In relation to the Court of Enquiry, it is clear that the Sole Enquirer did give reasons for his decision. I must confess, however, in relation to the Governor-General (acting on the advice of the Privy Council), that I have experienced some degree of concern. Although Mr. Leys has admitted that there is no general duty imposed upon tribunals to give reasons for its decision, he has submitted quite forcefully that the circumstances of this case cry out for reasons, in particular for the reduction of rank from Inspector to Sergeant.

[125] Although reasons were requested by Sergeant Allen's Attorney-at-Law in relation to the penalty imposed, no reasons have been given. Mr. Leys has submitted that the penalty was disproportionate and an aberration and since it affected the economic status of Sergeant Allen, the defendants ought to have given reasons for the decision. He referred the court to the reasoning of Leggatt J in **ex parte Cunningham** (at pages 325 and 326) as referenced in paragraph [26] of this judgment.

[126] However, my concern in relation to the lack of reasons has been mitigated to the extent that I consider that the rationale (for both the findings of guilt and the subsequent penalty) can be clearly deduced from the contents of the transcript of evidence along with the Court's findings. Mr. Leys' reliance therefore on **ex parte Cunningham** fails to take into account some subtle distinctions when one examines that court's adoption (at page 319) of the reasoning of Lord Lane CJ from **R v Immigration Appeal Tribunal, ex parte Khan (Mahmud)** 2 All ER 420 at 423:

> *'The important matter which must be borne in mind by tribunals in the present type of circumstances is that it must be apparent from what they state by way of reasons first of all that they have considered the point which is at issue between the parties, and they should indicate the evidence upon which they have come to their conclusions. Where one gets a decision of a tribunal which either fails to set out the issue which the tribunal is determining either directly or by inference, or fails either directly or by inference to set out the basis on which it has reached its determination on that issue, then that is a matter which will be very closely regarded by this court, and in normal circumstances will result in the decision of the tribunal being quashed. The reason is this. A party appearing before a tribunal is entitled to know, either expressly stated by it or inferentially stated, what it is to which the tribunal is addressing its mind. In some cases it may be perfectly obvious without any express reference to it by the tribunal; in other cases it may not. Second, the appellant is entitled to know the basis of fact on which the conclusion has been reached. Once again in many cases it may be quite obvious without the necessity of expressly stating it, in other cases it may not.'*

[127] It is to be noted that the factual circumstances of **ex parte Cunningham** concerned an award of compensation to a prison officer who was dismissed from service and whose appeal to the Civil Service Board was upheld as being unfair with reinstatement recommended. As a prison officer, the applicant was barred from making any complaint to an industrial tribunal. The Home Office, as it was entitled to do, refused to reinstate him and the Board assessed compensation for unfair dismissal. The Board however had refused to give reasons. The English Court of Appeal considered that the right to challenge the award by applying for judicial review is nugatory unless it is so aberrant so as to compel the inference that it must be wrong or unless the Board explains how the figure was arrived at so as to enable the applicant to tell whether the award could be successfully impugned. It is to be noted also, that there was an issue regarding the method that was used to compute the award granted to the applicant for the dismissal.

[128] The court held that, having regard to the fact that the Civil Service Appeal Board carried out a judicial function and that Industrial Tribunals were required to give reasons in comparable circumstances, natural justice required the Board to give reasons when deciding if dismissal was fair or unfair, and if unfair when assessing the amount of compensation. The circumstances of the case at bar can easily be distinguished.

[129] Mr. Leys is also relying on **Clifford Jackson v Police Service Commission** (unreported), High Court, Antigua and Barbuda, Claim No. ANUHCV 2010/0487,

judgment delivered 23 August 2012. In that case the applicant, a police officer, was charged with two (2) disciplinary charges. He was tried and convicted and recommended to the Commissioner of Police for dismissal. Based on the relevant statutory provisions, the claimant lodged an appeal against sentence as well as the verdict to the Police Service Commission. It is to be noted however, that unlike the case at bar, the Police Service Commission heard the appeal nearly two (2) years after it was filed but by then he had already been dismissed by the Commissioner. The Police Service Commission rendered its decision which is found at paragraph [35] of the judgment of Astaphan J as follows:

> *[35] The Police Service Commission rendered its Decision in the Appeal on the 18th day of September, 2009. That Decision which is exhibited to the Affidavit of Stephans Winters and marked "S.W.-2", is as follows:*
>
> > *"The Police Service Commission in the Appeal Hearing of Commissioner of Police vs. No. 53 Constable Clifford Jackson held on the 18th September, 2009, arrived at the following conclusion after hearing the submissions from both the Defendant's Counsel and the Prosecution.*
> >
> > *The evidence submitted to the Police Service Commission by its investigators...and the evidence from the transcript of the trial, left no doubt of the defendant's guilt of Insubordination and Discreditable Conduct. The Commission believes that the incident was an extremely serious incident and that a clear message needs to be sent to the members of the Police Force as to their conduct and behavior. The seriousness of the offence left no other choice but for the Police Service Commission to affirm the decision of the Dismissal by the Commissioner of Police."*

[130] In his grounds of appeal, the applicant had requested, *inter alia*, an order of certiorari to quash the decision of the Commissioner of Police and subsequent confirmation by the Police Service Commission dismissing him from the Police Force. It is to be noted that at paragraph [55], Astaphan J, found that the conviction of the applicant on charges of discreditable conduct and insubordination were irrational as each was one *'which no sensible person who had applied his mind to the question to be decided could have arrived at'*.

[131] Astaphan J also noted that no reasons were given by the tribunal for its factual findings upon which it based its conviction of the applicant on Disorderly Conduct as

what was said under the heading 'The Verdict' were not reasons and were not satisfactory reasons sufficient to meet the threshold required by law. He also found that the Tribunal took into consideration matters which it ought not to have done. He stated also that his assessment above also applied equally to the charge of insubordination.

[132] In relation to the issue of sentence, while Astaphan J found that the Tribunal had the power to reprimand the applicant on the conviction of Discreditable Conduct, the sentence would not survive his findings on the issue. However Astaphan J went on at paragraph [62] onwards, to deal with the totality of the sentences handed down including the dismissal from the point of view of the lack of reasons.

[133] Astaphan J stated that, even if the Tribunal was empowered to make the recommendation which it did, the tribunal gave no reasons for its recommendation for dismissal. It is his view that since there were a range of options open – seven (7) such ranging from caution to dismissal, the Commission, the Commissioner of Police and his delegate (where applicable) were exercising a discretion and making a decision as to which one is to be imposed. He stated that it must be rational, reasoned and since the accused had a statutory right of appeal, that in itself required reasons both on the findings of guilt and on sentencing. Astaphan J, at paragraph [69] also quoted from **De Smith's Judicial Review** 6th edn. at page 410, paragraph 7-087:

> *"A failure by a public authority to give reasons, or adequate reasons, for a decision may be unlawful in two ways. First, it may be said that such a failure is procedurally unfair. Secondly, a failure to give adequate reasons may indicate that a decision is irrational."*

[134] It is important however to note paragraphs [70],[71],[73] and [124] - [126] of Astaphan J's judgment:

> *[70] The Tribunal gave no reasons for its decision to recommend the dismissal of the Claimant, notwithstanding the fact that the uncontroverted evidence before me clearly shows that it was the settled practice to impose a fine on Officers convicted of Insubordination.*
>
> *[71] There is therefore no basis upon which this Court can examine that Decision to determine whether it was fair, reasonable and rational.*
>
> *[73] That, in my view, constitutes procedural unfairness. The decision is unreasonable. It is unreasoned. These, in my view, make the Decision to make*

> *that recommendation irrational. No rationale has been provided by the Tribunal, by way of Reasons, upon which to base the draconian recommendation of Dismissal. None have been offered by the Commissioner as to why to "affirm" the decision of the Tribunal. The Commission fails in this respect also.*
>
> *[124] Wade continues at page 527: "The time has now surely come for a court to acknowledge that there is a general rule that reasons should be given for decisions, based on the principle of fairness which permeates administrative law, subject only to specific exceptions to be identified as cases arise." Wade, at page 522: "Unless the citizen can discover the reasoning behind the decision, he may be unable to tell whether it is reviewable or not, and so he may be deprived of the protection of the law. A right to reasons is therefore an indispensable part of a sound system of judicial review. Natural Justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice. It is also a healthy discipline for all who exercise power over others. 'No single factor has inhibited the development of English [Caricom] administrative law as seriously as the absence of any general obligation upon public authorities to give reasons for their decisions'."*
>
> *[125] I adopt the above statements from Wade. The time has surely come when that "inhibiting factor" must be wrested from its comfortable perch of judicial inactivity, and cast away into the oblivion of irrelevance to our evolving Constitutional construct. Our Justice must be forged in the context of our Constitutional climate, which finds its genesis in our written Constitutions, all of which are premised on the core element of Fundamental Justice. Fundamental Justice, like Natural Justice which evolved in the context of an unwritten constitutional climate, demands fairness. Fairness demands that reasons be given by public authorities, and other decision-makers when making decisions.*
>
> *[126] I hold that, as a matter of Law, there is a general rule that reasons should be given for decisions, based on the principle of fairness...*

[135] The court notes that this judgment has been appealed, (**Police Service Commission v Clifford Jackson** (unreported), Court of Appeal, Antigua and Barbuda, Appeal No. ANUHCVA2012/0028, oral judgment delivered 28 November 2013.) The appeal was allowed and the Court of Appeal gave a short oral judgement. That judgment indicated that Astaphan J erred as the respondent's submission had referred to his sentence and not his conviction for insubordination. The Court of Appeal also held that Astaphan J erred in holding that the inadequacy of reasons given for the decision led to the conclusion that the members of the Tribunal did not give the issues before them any or any adequate consideration before affirming the Commissioner's decision. It is to be noted that the Court of Appeal considered that Astaphan J had erred in this regard because insufficiency of reasons was not a ground of review. The Court of Appeal did not refer to the issue of lack of reasons at all.

[136] In the case at bar, the issue to be decided is whether the lack of reasons given for the penalty recommended by the Commission and confirmed by the Governor-General (acting on the advice of the Privy Council) is sufficient cause, in all the particularities existing, to exercise my discretion either to quash the proceedings in its entirety or even to the limited extent of the penalty imposed.

[137] Mr. Leys, in advancing his arguments, posed certain questions (which were no doubt influenced by the discourse in **ex parte Coupland**) in relation to the considerations that could be borne in mind before passing sentence. They are as follows:

> ***i.*** *Did the Commission or Privy Council look at the context of the breach;*
>
> ***ii.*** *Did the breach impair operations that was to be carried out on a particular day;*
>
> ***iii.*** *Was it a situation that immediate obedience was required; and*
>
> ***iv.*** *Did the misconduct undermine DSP Scott's authority in the eyes of other officers who may or may not have been listening?*

[138] According to Mr. Leys, we are left in a state of ignorance in relation to the weight of these issues including the weight attached to his unblemished record for thirty-five (35) years and to the detrimental effect on his economic status. I would comment however that the transcript and reasons for decision by the Court of Enquiry leads one to the inference that the answer to all those questions would be in the positive.

[139] Counsel, Mrs. Reid-Jones has reiterated that Sergeant Allen has not shown that the decision was reached in a manner which betrayed substantive and procedural fairness. She has contended that the Governor-General considered written representations from Sergeant Allen together with the findings of the Court of Enquiry.

CONCLUSION

[140] It is clear that there is no statutory requirement for the Commission or the Governor-General (acting on the advice of the Privy Council) to give reasons for decisions made.

[141] Albert Fiadjoe in **Commonwealth Caribbean Public Law**, 3rd edn., at page 52, points out that *'...the courts have been reluctant to provide a general duty to give reasons,* ***it is recognized more and more that the giving of reasons is an aspect of natural justice and that the failure to do so may be controlled by the ultra vires doctrine****.'* (emphasis supplied)

[142] Fiadjoe examined the UK approach and stated that the question whether there is a duty to give reasons for administrative decisions is fraught with raging controversy. The learned author also referred to Evans et al in their text, **Administrative Law**, 1995, at pages 479-82, where the authors provide evidence of the balance between the two sides of the argument by offering eight arguments for and against the duty to give reasons. Fiadjoe admits, at page 53, that while the position at common law is that an administrator need not give reasons for his decisions, there has been serious inroads into this common law position although he has reported that *'...English law is still at the recommendation stage, as the proposals of the Justice-All Souls Review Committee and recent case law show.'*

[143] Also at pages 53 to 54, the learned author opines that in the Caribbean today,

> *a failure to state reasons for administrative decisions ought to be regarded as wrongful in law for the fact of the constitutional prescription of fairness which natural justice now imports in Caribbean public law in the context of fundamental rights infringements. Thus far, Caribbean courts have tended to favour the 'error approach' and to hold that a failure to give reasons amounts per se to an error in law.*

[144] For example in **Buxo v Commissioner of Police** (unreported), High Court, Grenada, Suit No. 515 of 1991, judgment delivered 23 September 1992, St. Paul J pointed out as follows:

> *... though there may be no general principle in English law that reasons must be given for an administrative decision...once reasons are given they must be such as would fall within the provisions of the law in which the discretion to act had been exercised. If those reasons fall outside the scope of the Act the discretion would have been exercised ultra vires the Act.*

[145] There is no issue that either the Commission or the Governor-General (acting on the advice of the Privy Council) acted outside the scope of the **Constitution** or the **Police Service Regulations** in this case. However, in general there are increasingly compelling arguments for a duty to give reasons in cases such as these. I am limiting this opinion however, to the Governor-General (acting on the advice of the Privy Council) as I have already indicated this court's position on the role of the Commission.

[146] Generally speaking, the basis of a court at this time finding that such a duty is necessary would be on the basis of a requirement to be fair, so that the parties can know the issues to which it addressed its mind and that it acted lawfully. In such a case a failure to give reasons as Fiadjoe opined, at page 54, could be analysed for illegality or irrationality.

[147] In **ex parte Cunningham**, Lord Donaldson MR expressed, at page 316, that at the least, the court may be entitled to know the reasons for the decision under certain circumstances:

> *...once the public law court has concluded that there is an arguable case that the decision is unlawful, the position is transformed. The applicant may still not be entitled to reasons, but the court is.*

[148] Bearing in mind all the above considerations, the issue, however, is whether the failure by the Governor-General (acting on the advice of the Privy Council) to give reasons in this particular case can be a basis for this court to conclude that there was irrationality or illegality in the decision making process. In coming to a conclusion on this issue, I bear in mind the words of Sedley J in **R v Higher Education Funding Council ex parte Institute of Dental Surgery** [1994] 1 WLR 242, at page 257:

> *each case will come to rest between two poles, or possibly at one of them: the decision which cries out for reasons, and the decision for which reasons are entirely inapposite. Somewhere between the two poles comes the dividing line separating those cases in which the balance of factors calls for reasons from those where it does not...At present, however, this court cannot go beyond the*

> *proposition that, there being no general obligation to give reasons, there will be decisions for which fairness does not demand reasons.*

[149] When one examines all the circumstances of this case, it is difficult to conclude that the failure reflects that the decision was unreasoned and irrational. It is clear that illegality does not exist as the penalty could be legally imposed. As indicated previously, it is my opinion that the rationale for the penalty can be lifted from the findings of the Sole Enquirer whose reasoning clearly speaks to his assessment of Sergeant Allen's behaviour. The impact of this would have been clearly appreciated by the Privy Council who subsequently advised the Governor-General. The circumstances are also to be contrasted to the facts in **Clifford Jackson** where that applicant placed before the court evidence that the tribunal had deviated from the historical punishment for convictions on charges of insubordination (which was usually fines).

[150] I would therefore agree with the assessment of Sedley J, set out at paragraph [148] herein, in relation to what has been described as 'the dividing line' and its impact on the assessment of fairness. It is my opinion and I so conclude that the balance of factors in this particular case weighs more heavily towards not calling for reasons than calling for reasons. It is on this basis that this court will not exercise its discretion to grant any order to quash the decision in relation to the penalty imposed.

CONCLUDING REMARKS

[151] It is my belief that we are approaching a time, when the circumstances will demand that fairness has been breached by the lack of reasons. I note that Barbados has sought to reform this area of law and that the duty to state reasons now finds statutory expression in the **Administrative Justice Act**,1980. This Act mandates a conditional duty to state reasons imposed on any person or body making a decision. The duty only arises however when a statement of reasons is requested within fourteen (14) days of the decision. However, I note that there are some exceptions to this duty which includes both the Police Service and Public Service Commissions. There is therefore, a healthy tension to be observed between judicial vigilance and judicial restraint and while the courts will do what is required to ensure fairness, it must also

grapple with the question of *'where precisely to draw the line, in deciding when a public body goes so 'badly wrong' as to warrant interference by the Courts.'* (Michael Fordham QC, **Judicial Review Handbook**, page 156 paragraphs 14.1 and 14.2).

[152] I would however remind our Legislature that Parnell J (as he then was) made a certain recommendation from as far back as 1970 in **R v Licensing Authority ex parte Panton Ltd.** [1970] 15 WIR 380, 386 and his words bear repeating:

> *The episode of the case has impelled us to make a certain recommendation. With the proliferation of statutory bodies and other tribunals which are given power to hear and determine causes affecting the rights of citizens and others within our shores, Parliament should require that these tribunals or those to be specified should give reasons for any order or judgement made by them and in particular, every party who is affected should be given the right to demand the drawing up of the order and a copy of the same. The report of the Franks Committee touching Administrative Tribunals and Enquiries [Cmnd. 218,July 1957] recommended as follows in paragraph 98 of the report:*
>
> > *"Almost all witnesses have advocated the giving of reasoned decisions by tribunals. We are convinced that if tribunal proceedings are to be fair to the citizens reasons should be given to the fullest practicable extent. A decision is apt to be better if the reasons for it have to be set out in writing because the reasons are then more likely to have been properly thought out. Further, a reasoned decision is essential in order that where there is right of appeal, the applicant can assess whether he has good grounds of appeal and know the case he will have to meet if he decides to appeal".*

DISPOSITION

[153] This court declines to grant any of the orders for certiorari or declarations as sought by the claimant in the Fixed Date Claim Form.

No order for costs made.