IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. 2016 HCV 00066

THE HONOURABLE MS JUSTICE CAROL LAWRENCE-BESWICK

THE HONOURABLE MR JUSTICE COURTNEY DAYE

THE HONOURABLE MRS JUSTICE SHARON GEORGE

IN THE MATTER OF A WARRANT ISSUED PURSUANT TO S.4(3) AND NOTICES ISSUED PURSUANT TO S.21 BOTH OF THE INDEPENDENT COMMISSION OF INVESTIGATIONS ACT

AND

IN THE MATTER OF THE INDEPENDENT COMMISSION OF INVESTIGATIONS ACT 2010

AND

IN THE MATTER OF THE EMERGENCY POWERS ACT AND THE EMERGENCY POWERS (NO.2) REGULATIONS 2010

AND

IN THE MATTER OF THE OFFICIAL SECRETS ACT 1911 & 1920

BETWEEN **MAJOR GENERAL ANTONY ANDERSON** **1ST CLAIMANT**
CHIEF OF DEFENCE STAFF

AND	**JAMAICA DEFENCE BOARD**	**2ND CLAIMANT**
AND	**INDEPENDENT COMMISSION OF INVESTIGATIONS**	**DEFENDANT**

IN OPEN COURT

Walter Scott Q.C. and Matthieu H.J. Beckford of Rattray Patterson Rattray for the 1st claimant

Nicole Foster-Pusey Q.C., Monique Harrison and Faith Hall of the Office of the Director of State Proceedings for the 2nd claimant

Tana'ania Small Davis, Yanique Taylor and Mikhail Jackson instructed by Livingston, Alexander and Levy for the defendant

Heard: 11th – 14th April, 2016, 17th May, 25th & 28th June and 30th July 2018

Judicial review - Retrospectivity of the INDECOM Act - Legislative Interpretation - INDECOM Act - Official Secrets Act- Public Interest Immunity - INDECOM's jurisdiction - Disclosure - Warrants and Notices issued under the INDECOM Act

LAWRENCE-BESWICK, J

[1] This is an application by Major General Anthony Anderson as Chief of Defence Staff ("the CDS") (as he then was), the 1st claimant, and the Jamaica Defence Board ("the Board"), the 2nd claimant, for judicial review of a decision of the Independent Commission of Investigations (INDECOM), the respondent.

[2] The CDS is the officer in command of the Jamaica Defence Force ("the JDF"), and is appointed by the Governor General[1]. The Board has responsibility for matters including the command, discipline and administration of the armed forces.[2]

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[1] Section 170 Defence Act.

[2]Section 9 Defence Act

[3] INDECOM has taken the decision to issue a warrant[3] to the CDS to enter Up Park Camp to have access to and enter offices, buildings and facilities of the JDF and to make enquires, and inspect documents, records, information and property pertaining to certain listed matters. Up Park Camp is described as the headquarters of the JDF[4].

[4] The warrant was accompanied by seven notices[5] to members of the JDF and or its agents who participated in the execution of an order to fire mortar rounds into Tivoli Gardens and its environs during the State of Emergency in May 2010. These notices sought to compel the members to give evidence on oath concerning the operation.

BACKGROUND

Operations

[5] In May 2010, the JDF and the Jamaica Constabulary Force (JCF) conducted joint operations in West Kingston in an effort to execute a warrant on a fugitive pursuant to an extradition request from the United States of America. During the operations, more than seventy persons lost their lives. There is the possibility that at least one of them died as a result of mortars fired by the JDF.

[6] INDECOM as a commission of Parliament[6] sought to investigate the use of mortars by the JDF on 24 May 2010 to determine whether there are any reasonable grounds to suspect that during the operations any member of the

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[3]Pursuant to section 4(3) of the Independent Commission of Investigations Act

[4]1st Affidavit of Antony Anderson in support of Notice of Application for Court Orders filed 8 January 2016

[5]Issued pursuant to section 21 of the Act

[6]Established pursuant to section 3 of the Independent Commission of Investigations Act.

JDF contravened the law and whether recommendations ought to be made by INDECOM concerning the operations.

Correspondence

[7] INDECOM wrote on 15 September 2011 advising the JDF that it had commenced an investigation into the fatalities that occurred in Western Kingston during the State of Emergency which existed in May 2010. INDECOM requested the CDS to furnish a report by 31 October 2011 with information on:

> *a. The activities of members of the force*
>
> *b. The command structure that existed within the sphere of the operation*
>
> *c. An account of persons whose lives were lost including their names, when, where, and how they were killed.*
>
> *d. A copy of any debriefing notes, statements, diary entries, records and other documents collected, received or held by JDF force concerning these matters.*
>
> *e. A list of all personnel who took the life of a citizen together with the date, time, and place that the life was taken; the name of the deceased and the circumstances under which the deceased died.*

Almost four months passed without a response to that letter.

[8] On January 10, 2012 INDECOM again wrote to the CDS requesting that the JDF respond to the September 15, 2011 letter and also to its earlier letter of September 13, 2011 which had been addressed to a Lieutenant Colonel of the JDF.

[9] It was a month later before the CDS responded to INDECOM on February 9, 2012 submitting a report pertaining to the JDF's activities being investigated by INDECOM. This report did not include details on the use of mortars. INDECOM

replied, asking for the additional specific information requested which the JDF should by then have had.

[10] June 6, 2012 saw the Bureau of Special Investigations (BSI), a branch of the JCF, handing over to INDECOM, material from its own investigation of the operations. This "handing over" was in the form of a letter which included a list of police involved, statements of civilians, information on a missing person subsequently identified and post mortem examination reports. This investigation did not disclose or concern the use of mortars.

On June 13, 2012 INDECOM again wrote to the CDS referring to the earlier letters which it had sent and also to the insufficient response which JDF had made.

Local and foreign news media

[11] Meanwhile local and foreign news media carried reports referring to the JDF having launched mortars in the West Kingston operations to break through barricades which supporters of the fugitive had erected to block entry to an area where it was suspected he may have been.

[12] JDF in a press release informed that under normal circumstances it does not discuss details surrounding operational tactics or procedures, but because of the potential for speculation and misunderstanding it confirmed that mortars and bulldozers had been used as part of the May 2010 operation and sought to clarify the circumstances surrounding their use.

Public Defender

[13] The Office of the Public Defender had carried out its own investigations. It had received civilian allegations of bombs being used during the operation and

almost a year after its initial enquiries forwarded their files to INDECOM in August 2012**.**

Further requests

[14] INDECOM continuing to make requests of JDF, wrote on March 11, 2013 asking to interview senior officers who may have intimate knowledge of the operation. A particular officer was specified. In the ensuing months, INDECOM and the JDF had discussions concerning the ballistics analysis of the operation.

Search Warrant

[15] By December 3, 2015 a Ballistic Examination Report was available. Speculation was rife. A few weeks later, on December 22, 2015 INDECOM, utilising the Independent Commission of Investigations Act ("the Act"), wrote the JDF attaching a warrant[7] and seven notices pertaining to the Joint JDF/JCF Operation in West Kingston, May 2010". The warrant was to be executed at the JDF's premises on Thursday, 12 January 2016 at 9:30 a.m. The notices required named members of the JDF to attend upon the Commissioner of INDECOM for questioning on oath.

[16] December 30, 2015 saw JDF informing INDECOM by letter that a copy of their December 22, 2015 letter had been forwarded to the Defence Board. The new year brought an objection to a search of JDF by INDECOM.

Objection to search warrant

[17] The Attorney General's chambers by letter of January 8, 2016, objected to the search of the JDF, referring to the Official Secrets Act and the perceived impropriety of the execution of a search warrant on the premises in all the

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[7] Section 4(3)

circumstances. The Solicitor General's opinion was that the court should be asked to consider the situation because weighty and complex issues were being raised.

[18] Within days, on January 12, 2016, attorneys-at-law for INDECOM indicated that the warrant was not in fact a search warrant. INDECOM had no intention of conducting a search of the headquarters, but rather, expected to be given access to the records and other items for inspection and copying as considered necessary and pertinent. **The Official Secrets Act** would not prevent such disclosure.

Application for Judicial Review

[19] Thereafter, the claimants filed Notices of Application for Court Orders[8] for leave to apply for judicial review of the decision of INDECOM to issue the warrant and notices and seeking specified reliefs. On 20 January 2016, JDF was granted leave to seek judicial review. INDECOM, through its counsel, gave an undertaking not to execute the warrant or to give effect to the notices until the determination of the Fixed Date Claim Form filed in the matter.

Certificate of immunity

[20] Meanwhile, the Minister of National Security had issued a certificate of immunity dated 7 January 2016 certifying that no action, suit, prosecution or other proceedings shall be brought or instituted against any Officers or Ranks of the JDF in respect of the orders to fire and the firing of mortar rounds during the emergency period as defined and interpreted in regulation 45(5) of the **Emergency Powers (No.2) Regulations 2010**.

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[8] Filed January 8, 2016

Fixed date claim form

[21] On 29 January 2016, the claimants filed a fixed date claim form with supporting affidavits, seeking the following reliefs.

1. An Order of Certiorari quashing the Warrant dated December 22, 2015 issued by a Justice of the Peace on an application by the Independent Commission of Investigations pursuant to section 4(3) of the Independent Commission of Investigations Act and directed to the 1st Claimant (hereinafter called the "Warrant").

2. An Order of Certiorari quashing all Notices to persons unnamed issued pursuant to section 21 of the Independent Commission of Investigations Act and dated December 21, 2015 (hereinafter called "The Notices").

3. An Order of Prohibition to prevent the Independent Commission of Investigations whether by itself, its servants and/or agents or otherwise howsoever, from executing at the premises of the Jamaica Defence Force, the Warrant.

4. An Order of Prohibition prohibiting the Independent Commission of Investigations and its servants and/or agents, or otherwise howsoever from commencing a search, enquiring about, inspecting, coping by any means whatsoever, uplifting , seizing, detaining, or any means whatsoever interfering or interacting with the documents, records, property, and information in whatsoever format it may be recorded, as requested in the Warrant.

5. An Order of Prohibition, prohibiting the Independent Commission of Investigations whether by itself, its servant and/or agents from seeking to take evidence on oath from any person pursuant to the Notices.

6. A declaration that some of the documents, records, property, and information in whatsoever format they may be recorded, requested in the Warrant and as set out in the Certificate of The Minister of National Security dated 13 January, 2016 are protected by Public Interest Immunity to the extent claimed in the Certificate of The Minister of National Security on behalf of The Defence Board, and to such further extent as this Honourable Court deems fit.

7. A declaration that the "JDF doctrines rules or protocols that were in force in May 2010 concerning the firing of Mortar rounds" requested at Item 1(a) of the Warrant does not and has never existed.

8. A declaration that notwithstanding the provisions of the Independent Commission of Investigation Act, the Jamaica Defence Force is restricted from allowing access to and/or is entitled to prevent access to or disclosure of the documents or information requested by the Independent Commission of Investigations at items A, D, E and F of the Warrant pursuant to the Official Secrets Acts 1911 and 1920 and in particular, sections 2 (1) and 2 (1A) of the Official Secrets Acts 1911.

9. A declaration that notwithstanding the provisions of the Independent Commission of Investigations Act and the issue of the Notices to persons unnamed, members of the Jamaica Defence Force are restricted from providing evidence on oath which reveals or discloses documents or information in breach of the Official Secrets Act and in particular sections 2(1) and 2(1A) of the Official Secrets Act 1911.

10. A declaration that the pursuits of Investigations by the Independent Commission of Investigations including the application for the Warrant is, in the particular circumstances, an unreasonable exercise of power.

11. A declaration that the execution of the Warrant on the Jamaica Defence Force's premises is likely to be prejudicial to the interest of the State including Jamaica's interest of national security, defence and international relations.

12. Such further and other orders as this Court deems just to ensure that documents, records, property, and information in whatsoever format it may be recorded over which it is alleged that the Public's Interest Immunity attaches are safeguarded and not disclosed without further determination and/or Order of this Honourable Court.

13. Alternatively, an Order that the Independent Commission of Investigations whether by its self or its servants and/or agents or otherwise howsoever be permanently restrained from executing the Warrant and /or from enquiring about, inspecting, coping by any means whatsoever, uplifting, seizing, detaining, or any means whatsoever interfering or interacting with the documents, records, property, and information in whatsoever format it may be recorded, requested in the Warrant.

14. Costs and

15. Any such further and/or other relief as this Honourable Court deems fit.

[22] The argument by the claimants was that the Act did not apply to the JDF at the time of the operations and that INDECOM could not properly exercise authority over JDF concerning actions that took place before its formation. The Commissioner of INDECOM proposed that he would discuss the issues with the JDF to get information whilst safeguarding institutional secrecy[9]. The JDF declined, maintaining that it was inappropriate to have discussions given that the issue is before the court.

RESPONSE OF INDECOM

[23] INDECOM's response to the claimants' argument is that it has the authority to execute the warrant and notices. It is the contention that the Act should be applied retrospectively, that public interest immunity does not apply to the requested information, that the **Official Secrets Act** does not prevent the disclosure of information by members of the JDF and that the court should declare the certificate of immunity from prosecution and suit issued by the Minister null and void.

FUNDAMENTAL ISSUE

[24] An examination of the reliefs sought shows that the fundamental challenge is to the authority of INDECOM to examine the information which the JDF may possess, whether as an institution or through individual officers, concerning the use of mortars in the operations in West Kingston in May 2010.

RETROSPECTIVE PROVISIONS

West Kingston Operations

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[9]Letter dated 9th March, 2016 from Mr. Terrance Williams, Commissioner of Indecom

[25] The event which INDECOM seeks to investigate in West Kingston was in May 2010, some three months before the inception of INDECOM in August 2010. An important question must be whether the provisions of the Act empowering it to investigate, apply to that period before the Act was passed, that is, whether it is retrospective in its application.

Claimants' Submissions

[26] Counsel for the CDS and the Board submits that the INDECOM Act does not provide for retrospective application of its provisions and it can therefore not inquire in any way about JDF's activities in May 2010. He argues that to do so would be (a) unfair and (b) unlawful.

Unfairness

[27] The submission is that the Act was created to investigate the JCF, not the JDF.

[28] Further, according to the claimants the powers which INDECOM has been given are quasi-judicial and quasi-prosecutorial and criminal sanctions can flow from the exercise of those powers by INDECOM. Although no new offences are created by the Act the liberty of members of the JDF could be threatened if an adverse finding is made by INDECOM. Counsel for the claimants argues that it would be grossly unfair to the JDF for a retrospective application of the law to be allowed to take place. Such an application would be in breach of the constitutional rights of the members of the JDF.[10] No specific rights were itemised.

[29] The submission continued that on the other hand, members of the public would not face unfairness if there is no retrospective application of the INDECOM Act.

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[10]**Director of Public Prosecutions v Mark Thwaites & Ors** consolidated with **The Attorney General Mark Thwaites & Ors** [2012] JMCA Civ 38

They would not be deprived of any measure which was available prior to the creation of INDECOM.

Unlawfulness

[30] In addition, counsel for the claimants submits that it would be unlawful to apply the Act retrospectively. The absence of direct words providing for the retrospective application of INDECOM's powers over JDF should be regarded as being significant when viewed against the specific reference to retrospective application to the JCF.

[31] Counsel argued that prior to the creation of INDECOM, complaints against the JDF were either handled internally by way of Court Martial or other internal procedure. If there was some action which prima facie gave rise to criminal sanctions the JCF would have investigated individual members for the purpose of laying criminal charges. The claimants emphasized that there had been no independent oversight body or authority empowered to investigate the JDF as a body before the Act.

[32] There was a Bureau of Special Investigation (BSI), which was an arm of the police force. However, the position of the CDS is that the BSI did not have powers to investigate the JDF. He says that this is evidenced in the investigations carried out by the BSI which were handed over to INDECOM and which related solely to the JCF[11].

[11] Paragraphs 9-10 of the Second Affidavit of Antony Anderson filed 10 March, 2016

Defendant's Submissions

Procedural Act

[33] Counsel for INDECOM contends that although there is a general rule prohibiting the retrospective effect of statutes, that only applies to provisions that change the character of past actions. INDECOM's argument is that the Act does not create new obligations in respect of transactions in the past nor does it impact any vested rights under existing legislation or criminalise or otherwise penalise actions in a way that did not exist prior to the enactment.

[34] Counsel says further that the procedure for investigating members of the security forces previously existed at common law and is simply now enshrined in the statute. The State was obliged to cause an investigation into the JDF whenever required.

[35] Counsel for INDECOM submits that prior to the commencement of the Act, the JDF could have been investigated by the JCF and other prescribed bodies. The Act did not change the character of possible actions available prior to its commencement. Thus, the power which INDECOM derived from the Act did not alter any of JDF's rights which existed before INDECOM's inception.

[36] The argument is that the Act is purely procedural as it does not affect any substantive rights of any member of the JDF and it must therefore be construed retrospectively. The provisions, being procedural, may thus be applied to events which occurred prior to August 2010 when the Act was passed as long as rights which existed at the time in question were not affected.

[37] Counsel for INDECOM submits that section 40 of the Act supports the proposition that it was Parliament's intention to make the procedural powers conferred by the Act retrospective. That section states;

> *"Notwithstanding the repeal of the Police Complaints Act (hereinafter referred to as "the repealed Act")-*

(a) ….

(b) Any complaint which immediately before the date of the commencement of this Act, is pending before or otherwise being dealt with by the Authority, may as from that date be continued by the Commission."

[38] Although this section applies to the JCF, Counsel for INDECOM says the legislation has therein demonstrated that INDECOM is empowered to act from a time before the Act was passed. The statute creating that "Authority" to which reference was made, was repealed. INDECOM was to substitute for it and assume conduct of existing police complaints.

[39] Whilst submitting that the court should consider that the Act is procedural, Counsel for INDECOM argued that whether provisions are procedural or substantial is not determinative though it should be considered. The Act must be considered as a whole to ascertain the intention of parliament.[12]

Unfairness

[40] Counsel for INDECOM stated that the court should examine if any rights accruing to the members of the JDF would be impacted by INDECOM's investigation. If so, the court should then assess the unfairness of any such deprivation on the members of the JDF. She emphasized the importance of the right to life of all, and concluded that in the circumstances where civilian lives had been lost the retrospective application of the provisions would not be unfair or unlawful.

Intent of Parliament

[41] In giving some background to the establishment of INDECOM Counsel says that INDECOM was formed to give effect to the recommendation of the Inter American Commission on Human Rights so that Jamaica would properly comply with its international obligations under the **American Convention on Human**

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[12]**Brown v Brown** [2010] JMCA Civ 12, Morrison JA

Rights. The submission is that it could not have been the intent of parliament that possible breaches by members of the security forces could not be investigated because the acts were committed prior to the Act.

[42] Counsel for INDECOM argues that the discretion to extend the limitation period to receive complaints and the failure to attach a limitation period for investigations initiated at the Commission's volition are indicative of the intention that procedural aspects may harken back to acts prior to the Act's commencement date. Further, there are instances as in a case like this, where evidence of the possible pre-enactment breach only becomes known post-enactment. Counsel for INDECOM argues that a purposive construction of the legislation achieves the will of parliament and Jamaica's compliance with its international treaty obligations and proper observance of human rights.

Previous Authorities

[43] Counsel for INDECOM submitted further that prior to the creation of INDECOM the BSI was the special unit with authority to investigate the JDF, and had the usual common law power to obtain a warrant and to require JDF's attendance to answer questions. The BSI she says, had an open investigation on the Joint Operation which INDECOM now wished to also investigate. According to the defendant's evidence the BSI handed over its investigation into the West Kingston Joint Operation to INDECOM. The handing over of files of investigation by the BSI transferred responsibility for investigation to INDECOM.

Absurd Result

[44] INDECOM submits that the court should seek to avoid a construction that produces an absurd result. Counsel relied on **Bennion on Statutory Interpretation** which states;

> *"[312] The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by Parliament. 'Absurd' means 'out of harmony with reason or propriety; incongruous, unreasonable, illogical".*

Counsel's view was that a construction interpreting the Act as not being retrospective would be absurd.

DISCUSSION

Functions and Powers of INDECOM

[45] In this matter, INDECOM's interest is in the actions of the JDF as an entity, and also those of some specific members, in operations in West Kingston in May 2010. The interest extends to JDF's documents, de-briefings after the operation and other details within the sole knowledge of the JDF.

[46] However, INDECOM was not constituted until months later in August 2010. It is a creature of the statute, the INDECOM Act. It is not a consolidation of pre-existing statutes. Section 3 of the Act provides;

> *"(1) For the purposes of this Act, there is hereby constituted a Commission of Parliament to be known as the Independent Commission of Investigations."*

[47] All its authority and powers are derived from that Act. The functions are specified[13] and are to:

(a) conduct investigations

(b) carry out in furtherance of an investigation and as the Commission considers necessary or desirable –

(i) inspection of a relevant public body . . . .

(ii) periodic reviews of the disciplinary procedures applicable to the Security Forces . . . .

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[13]Section 4(1)

(c) . . . ensure that the responsible heads and responsible officers submit to the Commission, reports of incidents and complaints concerning the conduct of members of the Security Forces . . . .

In short, the JDF is now by the Act, subject to oversight of certain of its activities by INDECOM.

Retrospectivity of the Act

[48] INDECOM's awesome powers would commence at its effective date of August 16, 2010 unless the provisions of the Act creating it are retrospective, and thus able to be applied prior to that date.

[49] Though the general rule is that an Act is not retrospective[14], nonetheless it can be so construed if;

1. It is expressly so stated; or

2. It can be implied from the language of the legislation[15]

In any event though, the Act being considered must be construed as a whole. Simple fairness is the issue.

[50] In my view the absence of direct words in the INDECOM Act providing for the retrospective application of INDECOM's powers over the JDF is significant. The Act provides specifically for its retrospectivity to complaints against the JCF. Section 40(1)(b) of the **INDECOM Act** states:

> *"Any complaint which immediately before the date of commencement of this Act, is pending before or otherwise being dealt with by the Authority, may as from that date be continued by the Commission."*

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[14]**Phillip v Eyre** (1870) LR QB 1, 23 and **Annette Brown v Orphiel Brown** [2010] JMCA Civ 12.

[15]**Brown v Brown** [supra]

"Authority" is used here to refer to the Police Complaints Authority. Therefore, complaints under the Act include earlier complaints before the Authority against the JCF. There is no equivalent provision concerning complaints against the JDF before the commencement of the Act being continued by INDECOM

[51] The affidavit of the Commissioner of INDECOM, Mr. Terrence Williams[16] supports the view that prior to the Act there was no power by a named body to investigate the JDF. There he says:

> *"Prior to the establishment of INDECOM there was a statutory body known as the Police Public Complaints Authority (PPCA). The PPCA had no authority to investigate the JDF although the JDF would often act in support of the JCF in internal security operations."*

In the INDECOM Act there is no clear provision for it to be retrospective nor for it to be so implied, and it should therefore in my judgment not be construed retrospectively unless further consideration of the Act as a whole shows otherwise, at least from the aspect of fairness.

Procedural Act

[51] In view of the submission of INDECOM that a procedural Act could properly be construed as being retrospective, I turn now to consider if the INDECOM Act is procedural.

[52] An Act is regarded as being procedural where it provides no new substantive law but merely provides for the procedure to perform acts which were already being performed[17].The procedural Act may be viewed as putting order to existing legal

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[16] Filed January 29 2016

[17] **Attorney General v Vernazza** [1960] AC 965 and **R v Makanjuola; R v Easton** [1995] 3 All ER 730

provisions and/or practices. Nothing of substance changes. No new substantive law is created.

[53] Here there is no evidence that prior to August 16, 2010 any authority, could require the JDF and specified officials of the JDF to:

(a) *furnish information relating to any matter specified in a request.*

(b) *give access to records, documents or other information relevant to any complaint or other matter being investigated.*

(c) *furnish in the manner and at such time as may be specified information which is relevant to any matter being investigated.*

(d) *furnish a statement, signed before a Justice of the Peace and examine on oath any member of the security forces.*

INDECOM was so empowered by the Act

[54] In my view, the Act makes provisions which impact the JDF in a manner which did not exist before. It provides for the JDF to be accountable to INDECOM, a non-military entity, for its actions and plans, and thus the Act places new obligations on the JDF to be ready to respond to INDECOM's enquiries and directions. JDF by virtue of the Act, must now allow an entity external to it to:

i) investigate it;

ii) inspect it;

iii) periodically review its disciplinary procedures;

iv) submit reports of incidents and complaints to it[18];

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[18]Section 4(1) INDECOM Act

To my mind, this must require the JDF at the very least to chronicle and retain information in such a manner and at such periods as to make it accessible to and readily understandable by a non-military entity. This is new.

v) Further, INDECOM is empowered to **ensure** [emphasis supplied] the "responsible heads and responsible officers" of JDF submit specified reports to INDECOM.

No external authority was so empowered before the Act.

To whom were the JDF/CDS accountable prior to INDECOM?

Internal Investigation of the JDF before INDECOM

[54] The soldiers and officers are accountable to the CDS for the operations. The CDS is responsible for the operations, subject to the overall direction of the Cabinet or of the Prime Minister in certain circumstances[19] and is accountable to the Board. However, the command, discipline and administration of the JDF is the responsibility of the Board under the general authority of the Minister[20] The Defence Act contains the law applicable to the operations, the command, discipline and administration of the JDF.

[55] Where criminal offences are alleged, the police are at liberty and are expected to investigate with the Director of Public Prosecutions being free to prosecute as necessary.

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[19] Section 9(2) of the Defence Act

[20] Section 9(1) of the Defence Act

[56] There is also provision for Court Martials. Persons subject to military law are tried by Court Martials for offences created under the Defence Act[21] and punishment ranges from death to damages[22].

External Investigation of the JDF before INDECOM

[57] Unlike the situation in the JCF which was subject to investigation by the Police Complaints Authority, there is no evidence that entities outside of the JDF itself and outside of the Board could require answers of the JDF. The exception of course would be the police investigating a criminal offence. The BSI was a division of the JCF that carried out such investigations. On this occasion, the BSI investigation did not reveal any information relating to the use of mortars by the JDF during the operation[23].

Conclusion re Investigations

[58] It is in my view clear that before the INDECOM Act there was legislation, namely, the Defence Act, for the JDF itself and the Board to monitor the JDF's actions and to investigate its conduct. The common law governed some criminal conduct alleged of the JDF as an entity, or of members or officers of the JDF. The INDECOM Act introduced an entirely different non-military entity and endowed it with powers resulting in the JDF being answerable to a new regime and being liable to exposing its innermost confidential operations.

I conclude that these powers given to INDECOM are far outside of any powers which could be exerted over the JDF prior to the Act.

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[21] Section 90 of the Defence Act

[22] Section 78 of the Defence Act

[23] Para 18, First Affidavit of Terrance F. Williams in Opposition to the Fixed Date Claim Form filed February 29, 2016.

[59] The enquiries which the BSI were empowered to make, as an arm of the JCF, were far less than the enquiries which INDECOM could. I therefore regard the Act as being not merely procedural, but rather, as substantive in its effect.

Intention of Parliament

JCF v JDF

[60] INDECOM has acknowledged that there was no corresponding statutory independent authority for the investigation of the JDF before the Act. Counsel for INDECOM posed the question that given the demonstrated intention that independent investigation of existing complaints against the JCF should be assumed by INDECOM, why then would there be a different standard for existing complaints against the JDF. I reject the submission made on behalf of INDECOM that Parliament intended to make the provisions retrospective as it concerns JDF. Firstly, Parliament had every opportunity to so state and it did not. This Act has far reaching consequences. The expectation must be that it was subject to mature and careful consideration by Parliament.

[61] Secondly, Parliament dealt with the retrospectivity of the Act as it concerns the JCF where it provided for matters which were pending before the Police Public Complaints Authority to be dealt with under the **INDECOM Act**. Section 40 states;

> *"Notwithstanding the repeal of the Police Complaints Act (hereinafter referred to as "the repealed Act")-*
>
> *(a) ….*
>
> *(b) Any complaint which immediately before the date of the commencement of this Act, is pending before or otherwise being dealt with by the Authority, may as from that date be continued by the Commission."*

[62] The Act was silent as it concerns matters pending before any authority or body in matters concerning the JDF. This begs the question as to why Parliament was

silent. The answer, to my mind, is that the issue of retrospectivity was considered and was determined to apply specifically to the JCF and not the JDF.

Unfairness - Unlawfulness

[63] In my view, it would in any event, be unfair to suddenly subject JDF to scrutiny of its practices from years long gone, without legislation specifically and clearly so providing. If it is to be subject to such scrutiny, it may opt to keep its records differently, to allow for more ready comprehension by "strangers" to the JDF as mandated. Similarly, its debriefing procedure may be done differently for more ready understanding by non-military persons.

[64] If the Act is taken to be retrospective, officers could be required to submit reports for operations long past and which conceivably had involved dynamic circumstances, details of which could not be expected to be readily recalled now. It would not be fair or practical to expect a JDF officer to be precise in reporting to an external body as to an operation which occurred years before any such law existed.

Human Rights

[65] Jamaica as a civilised nation, must comply with its obligations under the American Convention on Human Rights. To ensure that this is done may be seen as one of the primary purposes of INDECOM. When the Act was passed, the destruction of civilian lives by the Security Forces, both JCF and JDF, had been of great concern[24]. INDECOM may well have been expected to provide the solution, or part of the solution to this unsatisfactory state of affairs.

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[24]Hansard

[66] The Act allowed for direct oversight into the actions of the Security Forces, with the consequent accountability. The advantage of this to society is obvious. However, in my judgment, the Act is plainly not retrospective as it concerns JDF. All the advantages and good order and examination of human rights which it may bring commence from 16th August 2010.

Response of the JDF/CDS to INDECOM's enquiries

[67] The response of the JDF/CDS to INDECOM's enquiries did however, leave much to be desired. As a critically important body in our society, the JDF, in my view, had a duty, even if not written, to respond responsibly to the enquiries of INDECOM, a Commission of Parliament, to indicate its posture that it did not intend to provide the information sought. INDECOM's mandate was very important. It was commissioned to investigate actions by members of the Security Forces and other agents of the State that result in death or injury to persons or the abuse of the rights of persons. The continued silence and/or minimal response of the JDF/CDS to INDECOM were unacceptable and bordered on showing disregard and disrespect for the importance of the Commission of Parliament.

Non Retrospectivity of the INDECOM Act

[68] There is neither an explicit nor implied provision that the **INDECOM Act** is to be construed retrospectively. Further, I have considered the Act as a whole, focussing on fairness to all. My conclusion is that the **INDECOM Act** is not retrospective.

Other reliefs

[69] The claimants have sought other reliefs. I address them briefly as the substantive issue, that concerning the authority, and the correctness of issuing and executing the warrant and the notices, has been addressed in the previous paragraphs.

Official Secrets Act

[70] Two of the reliefs sought by the claimant rely on the Official Secrets Act 1911, as amended by the Official Secrets Act, 1920, in particular section 2(1) and section 2(1)(A) of the Official Secrets Act 1911.

[71] One of the reliefs sought is for a declaration that the JDF is restricted from allowing access to the documents requested by INDECOM on the warrant, pursuant to the Official Secrets Act. The second relief is for a declaration that unnamed members of the JDF are restricted from providing evidence on oath which discloses information in breach of the Official Secrets Act. Both reliefs seek the declaration "notwithstanding the provisions of the Independent Commission of Investigations Act".

[72] The Official Secrets Act, 1911, provides as follows: -

> *" 2. (1) If any person having in his possession or control any secret official code word, or pass work, or any sketch, plan, model, article, note, document, or information which relates to or is used of this Act, of which has been entrusted in confidence to him by any person holding office under Her Majesty, or which he has obtained or to which he has had access owing to his position as a contract made on behalf of Her Majesty, or as a person who is or has been employed under a person who holds or has held such an office or contract, -*
>
> *a) communicates the code word, pass work, sketch, plan model, article, note, document, or information to any person, other than to whom he is authorised to communicate it, or a person to whom it is in the interests of the State his duty to communicate it; or*
>
> *b) .....*
>
> *c) ..... or*
>
> *d);*
>
> *that person shall be guilty of a misdemeanour.*
>
> *(1A) If any person having in his possession or control any sketch, plan, model, article, note, document, or information which relates to munitions of war, communicates it directly or indirectly to any foreign power, or in any other manner prejudicial to the safety or interests of the State, that person shall be guilty of a misdemeanour."*

[73] Section 5 of the Defence Act provides that the JDF shall be charged with the defence of and maintenance of order in Jamaica and with such other duties as may from time to time be defined by the Defence Board. It seems to me therefore, that charged as it is with such awesome and critical responsibilities, the information which is under the control of the Jamaica Defence Force must be taken to be of a sensitive nature and to be confidential unless and until the contrary is shown. Thus, the information under the control of the Jamaica Defence Force necessarily falls within that contemplated by sections 2(1) and 2(1A) of the Officials Secret Act, 1911.

[74] The JDF must, by its very nature, be in possession of information which would or might be directly or indirectly useful to persons who are acting contrary to maintaining order in Jamaica. Any release of information to the public in general or to INDECOM in particular, must be clearly provided for by law in order to secure the national interests.

[75] I have earlier concluded that at the relevant time the INDECOM Act, which might have allowed for particular disclosure of specific information, did not apply to the operations which are the subject of this suit. It follows therefore in my judgment that in keeping with the Official Secrets Act, the JDF would be restricted from allowing access to its documents without legal authority so to do. In the circumstances of this case there was no legal authority at that time overriding the restrictions of the Official Secrets Act. The JDF as an entity, and individual members of the JDF, would thus be restricted by that Act, from sharing information with entities outside of the JDF in the particular circumstances of this case.

[76] Nonetheless, given that the JCF and JDF have responsibilities which are very similar in nature, that is, the protection of Jamaica, it would not appear to be a breach of the Act for those two authorities to share information with each other. That position however, cannot apply to INDECOM whose remit is of a different character and who would need to be treated as an authorised person in order for

the JDF to share secret information with it. That authorisation does not appear expressly in the INDECOM Act and in my view ought not to be implied. In any event INDECOM was not operational at the time and in my view cannot be retrospectively authorised.

Public Interest Immunity

[77] As indicated earlier, the Minister of National Security has issued a certificate purporting to provide immunity to the JDF from disclosure of certain documents due to national interests. The claimants also seek a declaration that some of the information requested by INDECOM in the warrant and set out in the certificate of the Minister of National Security is protected by Public Interest Immunity.

[78] From my perspective, this sensitive information sought must be protected from revelation and disclosure to the public because there is no legal basis to disclose it. The INDECOM Act would not apply to the information sought since it did not have the authority in my view to demand it.

Unreasonable exercise of power

[79] Another relief sought is a declaration that the pursuit of the investigations by INDECOM including the application for the warrant is, in the particular circumstances, an unreasonable exercise of power. As far as I view this matter, INDECOM has no power to investigate the operations which are the subject of this suit. It follows therefore that such a declaration is unnecessary.

Prejudice to the interests of the State

[80] The claimants seek a declaration that the execution of the warrant on the JDF's premises is likely to be prejudicial to Jamaica's interests of national security, defence and international relations inter alia. That declaration I would make because of my conclusion that INDECOM has no power to issue the warrant, moreso to execute the warrant. Any execution of the warrant would be outside of the jurisdiction of INDECOM as it concerns matters emanating from a time before

INDECOM's existence and would likely prejudice the interests of the state because it would be based on no legal authority.

Certificate of Immunity from Prosecution

[81] Years subsequent to the operations of May 2010, the Minister of National Security issued certificates which purport to offer immunity from prosecution, to certain persons who were involved in the operations. Although there have been submissions in these proceedings as to the validity of these certificates, none of the reliefs sought touch and concern that validity. That is not without logic because the issue in these judicial review proceedings does not concern prosecution of anyone. The issue is the authority and jurisdiction of INDECOM to obtain and execute a warrant against the JDF, and notices directed to certain of its members to give evidence. Neither the Minister of National Security nor the Office of the Director of Public Prosecutions was a party in these proceedings and would thus not have had the opportunity to submit on the purported immunity from prosecution which is an issue with which both would have been expected to be concerned. In these circumstances therefore where those interested parties were not involved in this judicial review and where the fixed date claim form does not seek such a relief, I will not pronounce judgment as it concerns the validity of the purported certificates of immunity from prosecution.

Conclusion

[82] INDECOM was seeking to investigate certain aspects of operations carried out by the JDF in May 2010 involving the use of mortars. The JDF declined to provide some of the information sought and filed this suit in an effort to prevent, inter alia, the execution of a warrant on its premises and also to prevent unnamed members of the JDF being required to give evidence as to the operations.

[83] The information which INDECOM sought of the JDF is based on the **INDECOM Act**. Any thirst by the public for this information could be understood. However,

we are governed by laws, not by passion or by the desire to quench curiosity. Indeed it has been said that, "the law is reason set free from passion[25]". In my view the law does not permit INDECOM to access information about activities which occurred before INDECOM existed. INDECOM's power to investigate derives from the INDECOM Act, and cannot be applied retrospectively unless the legislation is stated to be retrospective, or can be construed as operating retrospectively.

[84] If the Act is interpreted retrospectively there would be nothing to prevent INDECOM demanding a report concerning an incident from decades before the inception of the Act. The unsatisfactory possibilities are patent.

[85] Laws must be certain insofar as is possible so that the society knows the rules under which it is operating at any given time. In the same way that civilised society must control its crime, so too must its citizens be assured of certainty in the law. The citizens' actions on a given date must be governed by the laws on that date, not by the laws which may be subsequently passed, unless the legislature clearly states otherwise or it is so determined according to law.

[86] Although the information being sought by INDECOM might be useful for a thorough examination of the role of the JDF in the operations of May 2010, the law does not allow INDECOM to now acquire it, when in May 2010 INDECOM could not have acquired it, indeed INDECOM did not even exist in May 2010.

[87] The INDECOM Act's effective date is 16th August, 2010. In my view, that is the date from which it has effect, not an earlier, undefined date.

[88] It follows that in my judgment, INDECOM is not empowered to make requests of the JDF as it concerns operations which occurred in May 2010, prior to its

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[25] Aristotle

effective date of August 2010. The warrants and notices were issued in excess of the jurisdiction of INDECOM existing at that time.

[89] I make no decision as to INDECOM's powers to investigate the JDF after the INDECOM Act came into force in August 2010 because these proceedings concern May 2010.

I would therefore order as follows as it concerns the fixed date claim form filed 29 January, 2016;

1. In terms of paragraph 1:

   An order of certiorari to quash the warrant dated December 22, 2015 ; and

2. In terms of paragraph 2:

   An order of certiorari to quash all Notices to persons unnamed in the JDF ; and

3. In terms of paragraph 3:

   An order of prohibition preventing INDECOM from executing the Warrant at the premises of the JDF; and

4. In terms of paragraph 4:

   An order of prohibition to prohibit INDECOM from commencing a search; and

5. In terms of paragraph 5:

   An order of prohibition to prohibit INDECOM from seeking to take evidence on oath from any person.

In addition, I would grant the declarations:

6. In terms of paragraph 6:

That information requested in the Warrant as set out in the Certificate of the Minister of National Security dated 13 January 2016 is protected by Public Interest Immunity.

7. In terms of paragraph 8:

That the JDF is restricted from allowing access to the information requested in the Warrant under the Official Secrets Act

8. In terms of paragraph 9:

That members of the JDF are restricted from providing evidence on oath which reveals information in breach of the Official Secrets Act.

9. In terms of paragraph 11:

That the execution of the Warrant on the JDF's premises is likely to be prejudicial to the interests of the State.

I would refuse the declarations:

10. In paragraph 7:

That the "JDF doctrines rules or protocols that were in force in May 2010 concerning the firing of mortar rounds" does not and has never existed; and

11. In paragraph 10:

That the pursuit of investigations by INDECOM in the particular circumstances is an unreasonable exercise of power.

12. I would further grant the order in terms of paragraph 13:

That INDECOM be permanently restrained from executing the Warrant

DAYE, J

[90] Parliament in the exercise of its constitutional powers[26] to maintain the peace, order and the good governance of the State and citizen makes, passes or enacts legislation from time to time which confers on different or separate persons, authorities, bodies, institutions and/or agencies the duties or functions to protect or secure the interests and welfare of the citizens and the State.

[91] Some of these authorities, bodies or institutions are known[27] traditional[28] entities. In recent years, Parliament has created such new[29] and contemporary authorities, bodies or entities.

[92] These separate and different bodies, authorities and institutions in the pursuit of the discharge of the understanding of their functions, duties, and responsibilities are sometimes faced with the competing and conflicting interests of each other. They are unable to resolve these conflicts or differences by themselves and the court, whose role or duty which is to interpret the laws and declare rights and duties in the state or society, has to resolve these disputes.

[93] Much more is at stake than the resolution of the dispute between these bodies and authorities. It is the welfare, the basic and fundamental rights of the citizen and the foundation of the State or society that is endangered, impaired or denied or at risk when these disputes remain unresolved.

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[26]Section 48(1) of the Constitution of Jamaica 1962

[27]Sec 3(1), (5), 13 and 50(B) of the Jamaica Constabulary Force Act 1935

[28]Sec 4, 5 and 9 (b) of the Defence Act 1962

[29]Sec 4 of the Public Complaint Authority Act 1992, and Sec. 4, 11, 17, 21 of the Independent Commission of Investigations Act 2010

[94] The events before and after the Governor General of Jamaica made a Proclamation[30] on the 23rd May 2010 declaring that a state of public emergency exists for the parishes of Kingston and St. Andrew to be in force for one month brought to the fore sharp differences, conflicting and competing interests between the Jamaica Defence Force (JDF) and the Independent Commission of Investigation (INDECOM) regarding the execution of their duties. All of this took place as the citizens and residents of Western Kingston cried out that some family members, friends, and neighbours lost their lives, suffered serious injuries and abuses, and their homes were damaged and destroyed by the operations of the Security Forces in their community which was a joint military operation of the JDF/JCF.

[95] The Operation of the Security Forces was a joint operation of the JDF and JCF in Western Kingston to execute a Provisional Warrant of Arrest in extradition proceedings for Christopher 'Dudus' Coke resident of Western Kingston, Tivoli Gardens. It was an "Internal Security Operation"[31] and was lead by the Jamaica Defence Force.

[96] The Act[32] establishing the bodies or authorities, i.e. the Commission, the Independent Commission of Investigation[33] and a Commissioner[34] was passed on the 12th of April 2010. However, the Act did not come into force until the 16th of August 2010 when it was published in the Gazette.[35]

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[30]Section 26 (4)(b)of the constitution of Jamaica and section 20 (1)(2)(3)(4) Jamaica Gazette Supplement Proclamation Rules of Regulations. Vol CXXXIII Sunday, May 23, 2010 No. 98A. Proclamation 6/2018 Jamaica Gazette Supplement, Proclamations Rules and Regulations Vol. CXXXIII, Sunday, May 23, 2010 No. 198 No. 43 The Emergency Powers Regulation 2010 Sec. 3 of the Emergency Act 1938.

[31] First Affidavit of Major General Antony Anderson in support of a Fix Date Claim Form dated 28th January, 2016, para 10 and 13.

[32] Act 12 of 2010

[33]Sec. 3(1)

[34]Sec 3(13)

[35]Para 5 of the 1st Affidavit of Terrence Williams in opposition of the Fix Claim Date Form filed January 29, 2016, see 1st Affidavit of Major General Antony Anderson para 1

[97] The immediate complaints of the citizens and residents of Western Kingston, Tivoli Gardens regarding the joint JDF/JCF Internal Security Operation were about the Security Force's actions on the 24th and 25th May 2010 at the commencement of the state of emergency.

[98] Investigations commenced into these complaints and allegations regarding the Security Forces by the Bureau of Special Investigation (BSI) established under the **Police Public Complaint Act, 1992**[36] and the office of the Public Defender. In due course, these bodies passed over their files to INDECOM[37]. INDECOM on the 15th of September 2011, informed the JDF in writing that it was commencing an investigation in fatalities that occurred in Western Kingston during the state of emergency on the 24 and 25th of May 2010 as also the killing of one Keith Clarke in upper St. Andrew.

[99] These chain of events meant that INDECOM commenced investigations concerning the conduct of members of the JDF in May 2010 before the law establishing INDECOM came into force in August 2010 a few months after the Declaration of the State of Emergency.

[100] The JDF challenged the power and authority of INDECOM[38] to investigate its members for any conduct during their operations in Western Kingston in May 2010.

[101] Though the JDF cooperated in some instances with INDECOM in their investigations of May 2010, they asserted that this was a matter of their discretion and they were not obliged by any law.[39] In particular, the JDF objected

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[36] Act 4 of 1992

[37] Act 10 of 2010

[38] Fix Date Claim Form orders 1-15

[39]Major General Antony Anderson 1st Affidavit para 31-34

and refused to respond to a Warrant and Notices served on them by INDECOM for documents, reports, statements, and information in their possession and concerned about the Internal Security Operations.[40]

WARRANT AND NOTICES

[102] These Warrants and Notices were served by INDECOM under Sec. 4 and 21 of the **INDECOM Act** on the 22nd of December 2015 and to be executed on the 12th of January 2016. The JDF's objection is based on several grounds and which will be examined closer. The JDF by their Fix Date Claim Form of the 29th of January 2016 has ineffect asked the Court to judicially review INDECOM's action.

[103] In the Fixed Date Claim Form the 1st Claimant Major General Antony Anderson and the 2nd Claimant Jamaica Defence Board seek the following orders:

1. An Order of Certiorari quashing the Warrant dated December 22, 2015 issued by a Justice of the Peace on an application by the Independent Commission of Investigations pursuant to section 4 (3) of the Independent Commission of Invesitgation Act and directed to the 1st Claimant (hereinafter called "The Warrant")

2. An Order of Certiorari quashing all Notices to persons unnamed, issued pursuant to section 21 of the Independent Commission of Investigation Act and dated December 21, 2015 (hereinafter called "The Notice")

3. An Order of Prohibition to prevent the Independent Commission of Investigations whether by itself, its servants and/or agents or otherwise howsoever, from executing at the premises of the Jamaica Defence Force, the Warrant.

4. An Order of Prohibition prohibiting the Independent Commission of Invesitgations and its servants and/or agent, or otherwise howsoever from commencing a search, enquiring about, inspecting, copying by

[40]Major General Anthony Anderson 1st Affidavit para 50 and 51

any means whatsoever, uplifting, seizing, detaining or by any means whatsoever interfering or interacting with the documents, records, property, and information in whatsoever format it may be recorded, as requested in the Warrant.

5. An Order of Prohibition prohibiting the Independent Commision of Investigations whether by itself, its servants and/or agents from seeking to take evidence on oath from any person pursuant to the Notices.

6. A Declaration that some of the documents, records, property, and information in whatsoever format they may be recorded, requested in the Warrant and as set out in the Certificate of the Minister of National Security dated January 13, 2016 are prtoected by Public Interest Immunity to the extent claimed in the Certificates to the Minister of National Security on behalf of The Defence Board and to such further extent as this Honourable Court deems just.

7. A Declaration that the “JDF doctrines rules or protocols that were in force in May 2010 concerning the firing of Mortar rounds” requrested at Item 1(a) of the Warrant does not and has never existed.

8. A Declaration that notwithstanding the provisions of the Indepdent Commission of Investigations Act, the Jamaica Defence Force is restricted from allowing access to and/or is entitled to prevent access to or disclosure of the documents or information requested by the Independent Commission of Investigations at items A, D, E, and F of the Warrant pursuant to the Official Secrets Acts 1911 and 1920 and in particular, sections 2 (1) and 2 (1A) of the Official Secrets Act 1911.

9. A Declaration that notwithstanding the provisions of the Independent Commission of Investigations Act and the issue of the Notices to persons unnamed, members of the Jamaica Defence Force are restricted from providing evidence on oath which reveals or discloses documents or information in breach of the Offical Secrets Act and in particular sections 2 (1) and 2 (1A) of the Official Secrets Act 1911.

10. A Declaration that the pursuit of the investigations by the Independent Commission of Investigations including the application for the Warrant is, in the particular circumstances, an unreasonable exercise of power.

11. A Declaration that the execution of the Warrant on the Jamaica Defence Force’s premises is likely to be prejudicial to the interests of

the State including Jamaica's interests of national security, and international relations.

12. Such further and other orders as this Honourable Court deems just to ensure that documents, records, property, and information in whatsoever format it may be recorded over which it is alleged that Public Interest Immunity attaches are safeguarded and not disclosed without further determination and/or Order of this Honourable Court.

13. Alternatively, an Order that the Independent Commission of Investigations whether by itself or its servant and/or agents or otherwise howsoever be permanently restrained from executing the Warrant and/or from enquiring about, insepcting, copying by any means whatsoever, uplifting, seizing, detaining, or by any means whatsoever interfering or interacting with the documents, records, property, and information in whatsoever format it may be recorded, requested in the Warrant.

14. Costs; and

15. Any such further and/or other relief as this Honourable Court deems fit.

[104] The grounds on which the orders are sought by the 2nd Claimant, the Defence Board are:

I. The Jamaica Defence Force (JDF) is the repository of secret and top secret documents related to the security, defence and international relations of Jamaica as well as information communicated in confidence to the Government of Jamaica by and on behalf of foreign governments.

II. Certain information, documents and records including those relating to arms and ammunition are held at the premises of the JDF at Up Park Camp. These documents held at the JDF premises are covered by the Official Secrets Acts.

III. The Official Secrets Act prohibits unauthorised disclosure of information or documents kept in prohibited places for any purpose or

in any manner which is prejudicial to the safety or interest of the State.

IV. The Official Secrets Act obliges the confidentiality and non-disclosure of certain documents and information requested in the search warrant.

V. The JDF and its members are bound by the Official Secrets Act and therefore cannot allow and/or facilitate the access to its premises in breach of the said Act or enquiring into and inspection of the information and confidential documents.

VI. The entry of a person onto the premises of the JDF in order to search, have access, make enquiries, collect, record, obtain and inspect documents, records and information and property is highly likely to and will prejudice and damage the safety and interests of Jamaica as well as its international partners who will no longer feel safe in having the nation retain top secret and confidential documents and material at Jamaica's established repository for such a purpose.

VII. The aforementioned entry and execution of the Warrant will damage the international relations of Jamaica and Jamaica's own national security.

STATUTORY PROVISION OF WARRANT AND NOTICES

The basis on which INDECOM issued the Warrant[41] to the then Chief of Defence Staff, the 1st Claimant is sec 4 (3) of the **Independent Commission of Investigation Act**. It provides:

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[41] Warrant exhibiting in First Affidavit of Major General Anthony Anderson pp. 44 – 46 Index to Judges Bundle of Documents.

> *(3) For the purpose of the discharge of its functions under this Act, the Commission shall, subject to the provisions of this Act, be entitled—*
>
> *(a) upon the authority of a warrant issued in that behalf by a Justice of the Peace—*
>
> *(i) to have access to all records, documents or other information relevant to any complaint or other matter being investigated under this Act;*
>
> *(ii) to have access to any premises or other location where the Commission has reason to believe that there may be found any records, documents or other information referred to in sub-paragraph (i) or any property: which is relevant to an investigation under this Act; and*
>
> *(iii) to enter any premises occupied by any person in order to make such enquiries or to inspect the documents, records, information or property as the Commission considers relevant to any matter being investigated under this Act; and*

[105] The Commissioner of the Independent Investigation explained the circumstances how the Warrant was issued[42] in his 1st Affidavit.[43] He wanted to pursue investigations about the use of mortars by members of the JDF during the joint JDF/JCF operation in West Kingston in May 2010.

[106] The Chief of Defence Staff, Major General Antony Anderson explained in his first Affidavit the background leading to the participation of the JDF in the Internal Security Operations and the Commissioner's of the Independent Commission of Investigation cover letter about the Warrant and Notices[44].

[107] I refer back to section 4 (1) and (2) of the Independent Commission of Investigation Act. These provisions proceed Sec. 4 (3). They deal with the functions of the Commission. In fact, the words that introduce this section are:

> *4—(1) Subject to the provisions of this Act, the functions of the Commission shall be to–*

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[42] 1st Affidavit of Terrence Williams para 26 – 28 reference to the [WKCOE]

[43] para 24-34 of Major General Antony Anderson 1st Affidavit

(a) conduct investigations, for the purpose of this Act;

(b) carry out in furtherance of an investigation and as the Commission considers necessary or desirable—

(i) inspection of a relevant public body or relevant Force, including records, weapons and buildings;

(ii) periodic reviews of the disciplinary procedures applicable to the Security Forces and specified officials;

(c) take such steps as are necessary to ensure that the responsible heads and responsible officers submit to the Commission, reports of incidents and complaints concerning the conduct of members of the Security Forces and specified officials.

(2) In the exercise of its functions under subsection (1) the Commission shall be entitled to –

(a) have access to all reports, documents or other information regarding all incidents and all other evidence relating thereto, including any weapons, photographs and forensic data;

(b) require the Security Forces and specified officials to furnish information relating to any matter specified in the request; or

(c) make such recommendations as it considers necessary or desirable for—

(i) the review and reform of any relevant laws and procedures;

(ii) the protection of complainants against reprisal, discrimination and intimidation; or

(iii) ensuring that the system of making complaints is accessible to members of the public, the Security Force and specified officials;

(d) take charge of and preserve the scene of any incident." (emphasis supplied)

[108] I consider the language that is the words or phrases used in the provision of this enactment. For example, INDECOM is entitled to have in the exercise of its power of investigation of the relevant body or Force :-

A. Access to **all** reports, etc. Sec. 4 (2) (a)

B. Regarding **all** incidents Sec. 4 (2)

C. **All** other evidence relating thereto

D. Including **any** weapons, photographs and forensic notes, and requires securityforce to furnish.

E. **Any** matter specified in the request.

[109] The use of the words "**All**" and "**Any**" in this enactment in my view mean Parliament intended to confer wider and extended powers of investigation on INDECOM. The dictionary meaning and the plain and ordinary meaning of these words would support this view. These are not words of limitation. These words are not ambiguous.

[110] Then under section 4(1)(b) INDECOM is given the power to:

(a) Inspect a relevant body or Force
(b) Inspect records, weapons, building respectfully

In my respectful view, again, the language, that is the words used in this provision, is clear, unambiguous, and plain. It means INDECOM has the power to inspect: documents, weapons and buildings of a Security Force as defined by the Act. In order to inspect any of the items or places listed INDECOM needs to have access to them. This is what is needed to give effect to what sec 4 (1) (b) provides.

[111] These are wide powers of investigation expressly provided by the **Act**. Do these powers conflict with or contradict any statutory prohibition or fundamental rule of common law or principle that any of the relevant bodies or relevant Force is subject to? In the eyes and the submission[45] of the 1st Claimant (CDS) these powers are ***ultra vires*** in relation to the JDF because that was not the intention of Parliament. In the eyes and submission[46] of the 2nd Claimant (Defence Board) these powers conflict with the duties and obligations of the JDF under the **Official Secrets Act 1911 and 1920.**

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[45]Written Submission – 1st Claimant -- Index to the Bundle of submission pp. 547 – 583.

[46]Skeleton Submission for 2nd Claimant -- Index to Bundle of Submission pp. 584 – 613.

[112] The power conferred on INDECOM to investigate incidents and complaints against the Security Forces though wide and extended in my view, is none the less qualified and limited by the Act. In each of the provisions: sec 4 (1) and sec 4 (3) giving powers to INDECOM, the provision commences with the words "***subject to the provision of the Act***" (emphasis supplied). It means INDECOM's powers are limited. The extent to which they are limited must relate to these provisions. For example, sec 28 imposes a duty of secrecy and confidentiality on the Commissioner and his staff relating to any document, report or information disclosed to them for the purposes of the **Act**. Also, under section 18, the Commissioner of INDECOM has a duty to consult the Director of Public Prosecution (DPP) when public hearings are to be conducted. Sec. 14 (1) (a) (b) (c) (d) and (j) direct what considerations the Commissioner of INDECOM should apply before he decides what method of investigation is appropriate to the incident or complaint referred to his office.[47] This latter provision will be considered in terms of the arguments and submissions on the claims for public interest[48] immunity, claimed by the 1st and 2nd Claimants i.e. the CDS and the Jamaica Defence Board.

[113] Apart from the limits or qualifications placed on the powers of INDECOM to investigate under the Act itself there are other limits and qualifications on its powers. In principle, it is subject to other Acts or laws and fundamental rules. The issues remains what is the extent of these limitations.

PRINCIPLES OF STATUTORY INTERPRETATION

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[47]Para 77-90 of Skeleton Submission of 2nd Claimant pp. 609-61 of Index of Bundle of Submission para 54-130 of Respondent Written Submission, pp. 634-650 Index of Written Submission.

[48]CF sec. 22(2) of the Act that directs the Commissioner of Police to implement measures to facilitate INDECOM's duty to preserve a crime scene

Here, as I consider the wider and extending powers of investigation conferred on INDECOM and the limits of such powers, I pause to look at the recent Court of Appeal decision **The Police Federation, Merrick Watson (Chairman of the Police Officers Association), The Special Constabulary Force Association, Delroy Davis (President of the United District Constables Association v The Commission of Independent Commission of Investigation and the Attorney General.**[49] The powers of INDECOM were challenged by the Appellants, in particular, the purported power to arrest and prosecute.

[114] Phillip J.A. in delivering the unanimous judgment of the court, except in the issue of sec. 33 of the **INDECOM Act** with which Brooks J.A. differed,[50] discussed how to approach the interpretation of a statute in order to ascertain the intentions of Parliament.

[115] The learned Judge of Appeal at para [73] applied Viscount Simmonds' **dicta** in the House of Lords' decision in **Attorney General v Prince Ernest Augustus of Hanover** [1957] AC 436, at 461 that:

> *"For words, and particular general words cannot be read in isolation: their colour and context are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use 'context' in its widest sense, which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy."*

[116] Then at para [75] , relating this to the **INDECOM Act**, she stated:

> *"In the instant case, it would be relevant to examine the overall context of the Act, including the words in the preamble and other relevant legislation such as the Police Public Complaints Authority Act which the Act repealed."*

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[49][2018] JMCA Civ. 10 S.CCA 23/2013 delivered March 16, 2018. Facts alleged an unlawful shooting in Negril, Westmoreland INDECOM investigator took a police officer involved from the scene to the parish court in Westmoreland at Sav-la-mar. Arrested, charged and prosecuted him for the offence of murder.

[50]Para 82, 192 Ibid

And then she also at para [76] stated:

> *"I will now examine the overall scheme of the Act, in order to ascertain whether the overall context of the Act supports the plain and ordinary meaning given to its provisions in the Act in order to determine whether the act confers the power to arrest and prosecute on INDECOM"*

[117] This was the principal issue in that case. The ***ratio decidendi*** of the case was that INDECOM did not under the Act have powers of arrest or to charge and prosecute anyone. However, the judge's opinion was that INDECOM had vast powers of investigation. She concluded at para [83]:

> *"From a review of the sections detailing INDECOM's powers and functions it is indeed true INDECOM has very wide and substantive investigative powers"*

[118] In further analysis of sec. 20 of the Act which gave INDECOM staff *"like powers, authorities and liabilities of a constable for the purpose of giving effect to sec 4, 13 and 14 of the Act"* the Court of Appeal held these powers did not extend to powers of arrest and prosecution.

[119] The WARRANT issued to the Chief of Defence Staff (CDS) on the 22nd of December 2015 reading in part:

> *"Authority is hereby given for Nigel Morgan and any investigator of the Independent Commission of Investigations to enter premises [JDF at Up Park Camp, Kingston 5 in the parish of St. Andrew] to have access to and to inspect the premises and its aforementioned documents, records and information and to retain the aforementioned documents, records and information….."*

[120] The aforementioned documents were:

a. The J.D.F's doctrines, rules and protocols that were in force in May 2010 concerning the firing of mortar rounds [which I find to exist and applied to the JDF].

b. The issue of mortar rounds during or before May 2010 for use in Tivoli Gardens and its environs during the State of Emergency in May 2010.

c. The return of unused or unexploded mortar rounds that had been issued during or before May 2010 for use in Tivoli Gardens and its environs during the State of Emergency in May 2010.

d. The type, caliber, description, place of manufacture and batch of mortar rounds issued during or before May 2010 for use in Tivoli Gardens and its environs during the State of Emergency in May 2010.

e. The Operational Orders to fire mortar rounds into Tivoli Gardens and its environs during the State of Emergency in May 2010.

f. Debriefing records, After Action Reports, and any other review or report on the execution of the orders to fire mortar rounds into Tivoli Gardens and its environs during the State of Emergency in May 2010.

g. The names, ranks and functions of the members of the JDF who were responsible for, or participating in, the decision to fire mortar rounds into Tivoli Gardens and its environs during the State of Emergency of May 2010.

h. The names, ranks and functions of the members of the JDF who participated in the execution of the orders to fire mortar rounds into Tivoli Gardens and its environs during the State of Emergency in May 2010. This includes Mortar Fire Control Officers, Mortar Line Personnel and observers

[121] Now the basis of the Notice issued to the members of the JDF is sec. 21 of **the INDECOM Act**. It provides:

> *21—(1) Subject to subsection (5), The Commission may at any time require any member of the Security Forces, a specified official or any other person who, in its opinion, is able to give assistance in relation to an investigation under this Act, to furnish a statement of such information and produce any document or thing in connection with the investigation that may be in the possession or under the control of that member, official or other person"*
>
> *(2) The statement referred to in subsection (4) shall be signed before a Justice of the Peace.*
>
> *(3) Subject to subsection (4), the Commissions, may summon before it and examine on oath –*
>
> *a) any complainant; or*
>
> *b) any member of the Security Forces, any specified official or any other persons who, in the opinion of the Commission, is able to furnish information relating to the investigation.*
>
> *(4) For the purpose of the investigation under this Act, the Commission shall have the same powers of a Judge of the Supreme Court in respect of the attendance and examination of witnesses of the production of documents.*

> *(5) A person shall not, for the purpose of an investigation, be compelled to give any evidence or produce any document or thing, which he could not be compelled to give or produce in proceedings in any court of law.*
>
> *(6) Sections 4 of the Perjury Act shall apply to proceedings under this section in relation to an investigation as it applies to judicial proceedings under that section.*

[122] The Notices sent to the CDS do not name any members of the JDF, presumably, INDECOM expects the CDS to identify the members who the Notices describe and serve it on them. This is not an unreasonable expectation. The CDS can identify members who the Notices concern and then supply their names to INDECOM. The duty imposed on CDS as a responsible officer under the Act does not go so far as to demand that he complete an imperfect notice. In my view all these (6) unnamed notices are defective as they lack material particulars. It is the duty of INDECOM to perfect these notices. The defect in the Notices is not incurable.

[123] Of greater concern is the power INDECOM has under section 21 of the Act to issue such Notices to the CDS. INDECOM's power under section 21 has been tested directly, including the constitutionality of the provisions of section 21 in decisions of the court. The constitutionality of section 21 was challenged by police officers in ***Gerville William and Others v The Commissioner of the Independent Commission of Investigations*** (2012) JMFC del. May 25, 2012. The applicants were unsuccessful. Also, INDECOM's power to obtain documents and information was challenged in the High Court in ***Digicel (Jamaica) Ltd. v Independent Commission of Investigations*** [2013] JMSC civ. 87 and in the Court of Appeal ***the Independent Commission of Investigation v Digicel (Jamaica) Ltd.*** [2015] JMCA civ. 32.

WHAT ARE MORTARS

[124] The Warrant and the Notices relate to the JDF's use of mortars during the State of Emergency in May 2010 in Western Kingston, Tivoli Gardens.

[125] During sittings[51] of the West Kingston Commission of Enquiry (WKCOE), commenced in December 2014, there was evidence from then Chief of Staff Major General Saunders and Major Warrington Dixon that rounds of mortar were used in the Internal Security Operations on the 24th of May 2010 at a target area, which was a football field in Tivoli Gardens.[52]

[126] Mortar is an indirect fire weapon that fires high explosion (H.E.) rounds. The JDF had and used the 81mm mortar which was a medium heavy weapon. When fired it bursts into fragments and numerous small jagged objects. It has a smoke effect and an illuminating characteristic. It also has a high trajectory. The JDF used the high explosive and one parachuting round on the 24th of May 2010 in Tivoli Gardens.

[127] The absolute adjudged safety distance for targets, where there are friendly forces, which include civilians, is 700 meters. 550 meters is a reduced safety distance after mortar fire is observed by a forward observer. Mortar is used to support units on the ground such as the Engineer Unit on the 24th of May 2010.

[128] The Commissioner of INDECOM who had a direct and substantial interest in the Enquiry was present as a person with standing. One area of the terms of reference of the Commission of Enquiry was to enquire into the events of May 2010, which involved the death, and injury of several persons and the conduct of the Security Forces during the State of Emergency.

[129] INDECOM's duty is to investigate complaints about conduct of the Security Forces that result, among other things, in the death and injury to any person or is likely to result in death or injury. Section 10 (1) (a) of the Act.

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[51]Terms of Reference Commission of Enquiry, pp185 et seq. – Judges Bundles of Document

[52]Verbatim notes – June 22 and 23, 2015 and December 2 and 3, 2105 (exhibit AA3 1st Affidavit of Major General Antony Anderson and Terrence Williams)

[130] At the time of the Commission of Enquiry INDECOM had taken over from the BSI, its "predecessor", the investigations into the fatalities occurring in the 2010 Internal Security Operations. It had possession of a file that contained a post mortem report of a deceased Carl Henry dated the 23rd of June 2010. His body was discovered between the 23rd of May and 25th of May 2010 at Chang Avenue in Tivoli Gardens in the vicinity of the football field where the firing of mortars was a target area.

[131] The reported Cause of Death was:

(a) Hemorrhage and shock.
(b) Perforating wound (shrapnel wound) to the abdomen.

[132] There were several wounds on the deceased body associated with metallic fragments and projectiles. The pathologist described the wound in the deceased abdomen:

"10. A penetrating laceration 0.8 x 0.5cm on upper posterior abdomen 66.5cm below top of the head and 9cm away from the midline. Round in shape and exocentric abrasions 1 x 0.7cm between 4 'o' clock and 11 'o' clock positions of the margins lacerations. The projectile travelled through the underlying tissues and muscles of posterior abdomen lodged in deep muscle of the right upper posterior abdomen corresponding to transverse process of 1st Lumbar vertebrate. The recovered 1.3 x 0.9cm metallic fragment handed over to police for necessary action."

[133] INDECOM initiated investigations to determine if the shrapnel taken from the deceased abdomen was a fragment from the mortar rounds used by the JDF. In other words, they began investigations to see if the JDF's actions caused the injury and death of Carl Henry. Of course, the JDF refutes this and point to improvised incendiary devices (IED) that were used by gunmen in Tivoli Gardens and which were to bar the security forces from entering the community to execute the warrant.

[134] It is INDECOM's further probe into this killing that led to the Warrant and Notices to the JDF. At the WKCOE sitting on the 16th of February 2016 the Commission's Counsel[53] read in the records that INDECOM requests to have a metallurgical testing of the shrapnel and a decommissioned round of mortar from the JDF.

JURISDICTION – RETROSPECTIVE LEGISLATION – RULE OF STATUTORY INTERPRETATION

[135] The CDS objected to the execution of what he called the search Warrant and the Notices. He applied to the court to quash the Warrant and the Notices and to issue a Prohibition to INDECOM in the execution of the search Warrant – (1st Affidavit CDS para. 50). He claims that INDECOM do not have any retrospective powers under the **Independent Commission of Investigations Act**. Further, he says that the Warrant and the Notices issued are ***ultra vires*** as it relates to matters outside the jurisdiction of INDECOM (1st Affidavit CDS para 48).

[136] Also, the CDS claimed that neither the JDF nor the CDS has waived any right to accept the jurisdiction of INDECOM by cooperating previously with INDECOM in facilitating their requests for statements and answering questions from them. (1stAffidavit CDS para 49).

[137] In this affidavit the issues are raised about the retrospective application of the **Independent Commission of Investigations Ac**t, the jurisdiction and effectively the true interpretation of the Act.

[138] Also raised is the issue that public interest immunity attaches to documents, reports and information that INDECOM seeks from the Warrant and the Notices. In addition, the JDF Board contends that the **Official Secrets Act 1911 and**

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[53] Transcript February 16, 2016, page 217-228 Bundle of Documents

1920 prohibit INDECOM from entering the JDF HQ and the unauthorized disclosure of information it possesses. Thus, the impact of the **Official Secrets Act** and the **Independent Commission of Investigations Act** is raised.

SUBMISSIONS

[139] Mr. Walter Scott Q.C. analysed each of the powers conferred on INDECOM under sec. 4 and 21 of the Act. Counsel concisely submitted these sec 4 2) (3) (4), 21 (4) are "entirely new creation of powers and jurisdiction". These newly created power/function, he submitted did not exist in any body prior to the creation of the INDECOM. Again, he repeats in relation to each of the powers conferred on INDECOM that neither the JCF nor any other body had, prior to the 16th of August 2010, such broad powers and I believe he must mean broad powers of investigation[54].

[140] Parliament has the power to create new bodies, new powers and benefits for the citizens and the State. That does not mean the law or an enactment of a provision is unlawful. However, the substance of Counsel's submission is that the power INDECOM seeks to exercise is not derived from any pre-existing bodies or authority [e.g. PPCA] nor the common law but from statute and therefore it is necessary that the **INDECOM Act** operates retrospectively to affect the JDF. He then relies on the common law rule or presumption that Parliament does not intend for retrospective application of legislation unless there is express language or it is a necessary implication.

[141] Counsel supports his submission by two authorities: **Phillips and Eyre** (1870) LR 6 Q.B. 1 28 and **Annette Brown v Orphiel Brown [2010]** JMCA Civ. 12**.**

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[54]Written submission of 1st Claimant para 30 et seq.

[142] In addition Counsel Mr. Walter Scott, Q.C. submitted that sec 40 (1) (b) and 40 (2) only permit INDECOM to take over investigations pending by PPCA before the Act came into force against the JCF. He contented there was no general or unrestricted implied power of retrospective application by the Act on constructing this provision.

[143] INDECOM's Counsels submitted in their written submission that the Act was concerned with the powers of investigation and gathering evidence of possible misconduct or abuse of powers by the Security Forces. The Act, it was contended, did not affect substantive rights. In other words, it was a procedural act and the exception to the common law rule that an act does not apply retrospectively does not apply to a procedural act such as the **INDECOM Act**. INDECOM therefore claims it has the necessary statutory power under sec 4 and 12 of the Act as well as the jurisdiction to investigate the JDF and compel them to supply the documents, reports, information and statements in question. They ground support from the following authorities: **Secretary of State for Social Security v Tunnicliffe** [1991] 2 All. ER. 712. per Lord Straughton at page 173, **Yew Bon Tew v Kanderaan Bas Mar** [1982] 3 All ER 833 **L'Office Cherifien des Phosphates v Yamashita and Shinnihon Steamship Company Ltd, the Boucraa[55],** per Mustil LJ, p526 c-d, **ABU v Comptroller of Income Tax** [2015] SGCA 4.

[144] INDECOM's Counsel also submitted the application for judicial review was premature as their investigation was not a prosecution at that stage. Also, they contended that the application was not made in time within CPR 56.6 (5) and delay was a bar to the claimants' relief.

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[55]Halsbury's Law of England 5th ed. Vol. 95 para. 1186 "nature of retrospectivity

ANALYSIS

[145] I find **Phillips v Eyre** useful and interesting. The facts related to the political and constitutional history of Jamaica: The Morant Bay Rebellion of 1865. The Captain-General and Governor of Jamaica, the defendant, with the advice of the War Council declares martial law; which has features of a state of emergency: in the county of Surrey, except Kingston, to suppress the rebellion. The claimant sued the Governor of Jamaica in England for several acts of assault and false imprisonment committed on him by the military forces. He was forcefully taken from his house in Kingston to Up Park Camp, then to a courthouse, then to a wharf, placed on a boat, taken to the Morant Bay Court House. He was flogged and beaten.

[146] Issues were raised on his claim about retrospectivity and the **Indemnity Act** passed after the rebellion. A Plea of Bar to his action was raised by the Governor.

[147] Also, the Defendant raised the issue of public interest immunity or rather indemnity under the **Indemnity Act**. Similar issues are present in the instant application. Other issues arose about whether the island was a settled or conquered or ceded country of Britain and the power of the local legislation to make law.

[148] The Court of Exchequer Chamber with a bench of seven Judges considered this claim on appeal or error from the decision of a 3 member Queen's Bench Court that held the Governor was indemnified and those acting under his orders and who acted during the rebellion to prevent it, from civil suit or criminal prosecution.

[149] Wiles J. delivering the judgment of the court quoted part of the judgment of Chase J., US Supreme Court, ***Calder v Bull:***

> *"Every law that takes away or impairs rights vested agreeable to existing laws is retrospective and is generally unjust, and may be oppressive; and it is a good general rule that a law should have no retrospectivity; but they are cases in which laws may be justly, and for the benefit of the individual, relate to a time*

> *antecedent to their commencement; and statutes of oblivion or of pardon. They are certainly retrospective, and literally both concern before and after the facts committed. But I do not consider any law **ex post facto** within the prohibition that mollifies the rigor of the criminal law, but only those that create or aggravate the crime or increase the punishment or charge the rules of evidence for the purpose of conviction. Every law that is to have an operation before the making thereof, or to commence at an antecedent time, as to save time from the statute of limitations, or to excuse acts which were unlawful and before committed, and the like is retrospective. But such law may be proper or necessary as the case may be. There is a great or apparent difference between making an unlawful lawful and the making an innocent action criminal and punishing it as a crime."*

[150] And further:

> *"In fine, allowing the general inexpediency of retrospective legislation, it cannot be pronounced naturally or necessarily unjust. There may be occasions and circumstances involving the safety of the state, or even the conduct of individual subjects, the justice of which the execution of the law as it stood at the time may involve practical public inconvenience and wrong …"*

[151] The case was addressing the construction of the clause in the USA constitution: "*No state shall pass any **ex post facto** law*". The state of Connecticut passed a law to set aside a decree of a court of probate and granted a new hearing, which was held valid though it deprived the litigant who got the benefit of it. Wiles J. applied the principles of this early case to uphold the validity of the colonial law that was challenged. The case anticipated that the basis of the law against retrospectivity was fairness and not a rigid classification whether the law acts retrospective and if the law is procedural.

[152] There are two observations about this case: counsel Mr. Walter Scott Q.C. did not go further to show that the court upheld the colonial law of indemnity in Jamaica even though there was no express language that stated that it was retrospective. He only submitted that in the case **Phillip v Eyre** there was a disposition against applying a statute retrospectively. The other is that in this **Colonial Act of Indemnity** the wording used is that it was "conclusive". It was held to be a Plea in Bar.

[153] This is contrasted with a Certificate of Immunity from civil action or prosecution from the Minister of National Security dated the 7th of January 2016 which was issued under sec. 45 (3) of the **Emergency Powers (2) Regulations, 2010**. The

language of this provision is that under the certificate any act of a member of the Security Forces done in the exercise of his functions or in the public interest is sufficient evidence that he was so acting and is deemed to be done in good faith unless the contrary is proved. This means that the unlawfulness of the act of a member of the Security Forces act would still be at large. And I say no more now as a result of the ruling of this Full Court about the validity of this certificate.

[154] In the consolidated appeals of the **DPP v Mark Thwaites and others and the Att. Gen. v Mark Thwaites and others** [2012] JMCA Civ. 38, Phillips J.A. delivering the judgment of the court held the purported actions of the Financial Service Commission (FSC) staff under the **Financial Services Commission Act 2001 (FSCA**) towards the respondent who operated in the insurance field between 2001 and the date of the commencement of Financial Service Commission (Appointed Day) order 2005 was without authority and jurisdiction. In other words, the order did not apply retrospectively and whatever action the commission staff did under the **Insurance Act 2001** was administrative. The court found the charges laid in the indictment against the each respondent where for offences for periods between 2001 and 2004 before the **Order of 2005** brought into force the function of the FSC in relation to insurance and included them in the definition of 'financial services'. The Court granted the declaration that **FSC Act** breached the constitutional rights of the respondents under section 20 (7) of the Constitution and the subsequent **Indemnity Act of 2006** did not give them authority or jurisdiction. Therefore, the issue of retrospectivity had to be looked at by construing the relevant Act taking into account the effect it has on the parties who may be affected.

[155] Morrison J.A., as he then was, summarized the principles in **Brown v Brown** (supra) about retrospective legislations Counsel on all side accept these principles. Counsel Mr. Walter Scott, Q.C. did not believe the principles applied to the INDECOM Act. While Counsel for INDECOM believes it supported the jurisdiction of INDECOM.

[156] Now the principles summarized are as follows:

i. The determination of the question of whether an Act of Parliament was intended by the legislation to have retrospective effect is primarily one of construction of the language of the particular statute. Having regard to the relevant background (which includes the particular mischief which it was sought by Parliament to correct).

ii. In construing the Act the first and most important consideration is the natural and ordinary meaning of the words used by the legislation. If there is an indication in the Act that in clear and unmistakable terms that it was intended to have retrospective effect or operation, then it is the duty of the court to give effect to the plain meaning of the Act accordingly.

iii. Even where the language of the Act does not reveal in clear and expressed terms what Parliament intended, an implication of retrospection may nevertheless be derived from a reading of the Act as a whole, such as for example, where it is necessary to give reasonable efficacy to the Act.

iv. Unless it appears plainly or unavoidable from the language of the Act or by necessary implications, that it was intended to have retrospective effect, then it is at common law a prima facie rule of construction against retrospectivity, that is to say, the court is required to approach questions of statutory interpretation with a disposition, in such cases a very strong disposition, to assume that a statue is not intended to have retrospective effect.

v. The prima facie rule of construction is based on simple fairness, thus giving rise, whenever questions of retrospectivity arise the single indivisible question, which is would the consequence of applying the Act, be so unfair that Parliament could not have intended it to be applied in this way[56].

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[56] The statutory provisions against retrospective operation of a law, sec 25 (2) (a) to (e) of the Interpretation Act, 1968 [J]

[157] The issue in **Brown v Brown** was whether the **Property (Rights of Spouses) Act 2004**, which came into operation on 1st April 2006 covered the claim of the applicant wife for 50 percent share or equal share of the home she lived in, in the context of her claim that it was the 'family home' under section 6 of the Act.

[158] She was divorced in 2005 before the Act came into force and she filed her claim in 2007. Counsel for the husband submitted to the court that it had no jurisdiction to hear the matter because the Act could not be applied retrospective. The trial judge agreed with this submission but the Appeal Court allowed the wife's appeal and held the court had jurisdiction and hence the principles stated above were applied.

[159] I highlight some **dicta** from the cases cited by counsel in order to show the reasoning behind the rule against retrospective legislation. In **Tunnicliffe** (supra) Straughton, L.J. observed:

> *"It is well established that the presumption against retrospective legislation does not necessarily apply to an enactment merely because a part of the requisites for its action is drawn from time antecedent to its passing."*[57]

See Re.: Solicitor's Clerk [1975] 3 All ER 617 and R (on the application of Lewis) Prosthetists and Orthotists Board [2001] EWCA Civ. 837. And further he continued (page 12, paragraph 3):

> *"It is my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them unless a contrary intention appears. It is not, a simple question of classifying an enactment as retrospective. Rather it may well be a matter of degree – the greater the degree of the unfairness, the more it is to be expected that Parliament will make it clear if that is intended."*

[160] Then Lord Brightman in **Yew Bon Tew v Kenderaan Bas Mars** (supra) dealing with the consequences of the **Limitation Act** that extended the period of bringing

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Tunnicliffe discuss similar statutory provisions.

[1]The statutory provisions against retrospective operation of a law, sec 25 (2) (a) to (e) of the Interpretation Act, 1968 [J] Tunnicliffe discuss similar statutory provisions.

[57] See Re.: Solicitor's Clerk [1975] 3 All ER 617 and R (on the application of Lewis) Prosthetists and Orthotists Board [2001] EWCA Civ. 837.

an action against a public body from 12 months to 36 months and a writ claiming damages for personal injuries to the driver of a motor cycle filed 14 months outside the 12 months but 9 months within the new extended time, opined :

> *"Apart from the provisions of the Interpretation statutes, there is at common law a prime facie rule of construction that a statue should not be interpreted retrospectively so as to impair an existing right or obligation, unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. There is however, to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules of conduct of an action for in time being in forced" (page 16, paragraph 4)*

And he continued:

> *"Whether a statue is to be construed in a retrospective sense, and if so to what extent, depends on the intentions of the legislature as expressed in the wording of the statute, having regard to the normal canons of construction, and to the relevant provisions of any interpretation statute." (page 9, para 2)*

And further again he states:

> *"Whether a statue has a retrospective effect cannot in all cases, safely be decided by classifying the statute as procedural or substantive" (p. 6, para 3).*
>
> *"Their Lordships consider the proper approach to the construction of the 1974 Act is not to decide what label to apply to it, procedural or otherwise but to see whether the statute if applied retrospectively to a particular type of case would impair existing rights and obligations" (p 16, para 11)*

> *Then in* ***L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Company Limited*** *[1994] 1 All ER 20. Lord Mustil discusses the issue of retrospective application of legislation in these terms:*
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> *" … the real contest on the present appeal was not whether sec 13A was retrospective in the ordinary sense, but whether the provisions which were undeniablly prospective in the conferring of powers enabled those powers to be exercised by reference to acts or omissions which had taken place before the new section came into force" (p. 524 para c)*
>
> *"… it would be impossible now to doubt that the court is required to approach the question of statutory interpretation with a disposition to assume that a statute is not intended to have retrospective effect. Nor, indeed, do I wish to cast any doubt on the validity of this approach for it ensures that the courts are constantly on the alert for the kind of unfairness which is found in, for example, the characterisation as criminal of past conduct which was lawful when it took place,*

or in the alterations to the antecedent national, civil or familial status of individuals. Nevertheless, I must own up to the reservations about the reliability of generalised presumptions and maxims when engaged in the task of finding out what Parliament intended by particular forms of words, for they readily confine the court to perspective which treat all statutes, and in all situations to which they apply, as if they, were the same. This is misleading for the basis of the rule is no more than simple fairness, which ought to be the basis of every rule. True it is to change the legal character of a persons' act or omission after the event will often be unfair, and since it is rightly to be taken for granted that Parliament will rarely wish to act in a way which seems unfair it is sensible to look very hard at a statute which appears to have this effect, to make sure that this is what Parliament really intended. This is, however, no more than common sense, the application of which may be implied rather than helped by recourse to formula which do not adopt themselves to become the subject of minute analysis, whereas what ought to be analysed is the statute itself."

"Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factions, each of them capable of varying from case to case. Thus, the degree to which a statute has retrospective effect is not constant. Nor is the value of the right which the statute affects, or the extent to which the value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree or likelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it, by the consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together. All these factors must be weighed together, to provide a direct answer to the question whether the consequence of reading the statute will suggest the degree of retrospectivity is so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say. My Lords, whilst this approach which I propose involves the single indivisible question to be answered largely as a matter of impression. It is convenient for the moment to look separately at its various factors." (p. 525 para C – H and p 526-529)

Lord Mustil then considered the factors:

a) To what degree the statute is retrospective of it bears the meaning for which the ship owner contends.

b) The nature of the claimants' rights on which the retrospective legislation will impinge.

c) The practical value and nature of the rights presently involved as a step towards an assessment of the unfairness of taking them away after the event.

d) The language of sec 13A construed in the case of doubt by reference to the legislative background.

[161] The factual background to cases and decisions on the application of the retrospective application of legislation as well as claims of public interest immunity cited and discussed or reviewed in the list of authorities disclosed firstly that they emerged from civil suits by private individuals against public departments, authorities or institutions and private suits by party and party where one party seeks to obtain information or documents from a public body. It seems that the application of the rule against retrospectivity were in the context where it seems the rights, privileges, obligations or duties alleged to be impaired is that of the individual against the public body and not the public body against the individual.

[162] But in this fixed date claim form for judicial review the application for determination of rights or duties is by a public body against another public body. Each of these public bodies has duties and responsibilities to protect the public, e.g. safety of the public in one case and the fundamental rights of the individual in another case. As the JDF is the applicant the matter invariably has to be approached as to what rights they are claiming are unfairly affected. I bear in mind that INDECOM is representing the individual's fundamental and basic rights guaranteed under the Charter of Rights.[58]

[163] I return to the **Independent Commission of Investigations Act** to see if there are any **indicia** that point to the necessary implication of retrospectivity. I refer to my view that the breath of the language used in the Act is such an indication of retrospectivity. [para 20 – 22]

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[58] Act 11 of 2011.

[164] The nature and object of the Act is to investigate incidents and complaints against the Security Forces relating to death and serious injuries arising from their operations. The right to life and security of the person is fully recognised by international standards as fundamental and basic rights of the person or individual that are inviolable. These are at the top of the hierarchy of rights in modern civilized society and measures to give effect to these rights and to secure them ought to be interpreted as arising immediate and not in the future. So fundamental are these rights that the Privy Council in **Neville Lewis**,[59] a consolidated appeal from Jamaica joined in by Belize, Trinidad and Tobago and the Bahamas, reversed its own rule of the doctrine of binding precedent that a condemned man who applies to the Governor-General under the relevant constitution to set aside the sentence of death imposed on him did not have the right to know and to make representation before the respective Governor-General's body what was the grounds taken into consideration to decide whether to refuse his application or not. This in my view is one of the paramount **indicia** of retrospectivity of the **INDECOM Act**.

[165] The definition of in Sec. 2 of the INDECOM Act meaning of "concerned officer":

(a) any member (of whatever rank) of the Jamaica Constabulary Force;

(b) **any member (of whatever rank) of the Jamaica Defence Force when acting in support of the Jamaica Constabulary Force;** (emphasis supplied)

(c) any member (of whatever rank) of the Island Special Constabulary Force and any person appointed as a parish Special Constable under the Constables (Special) Act;

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[59] Neville Lewis and others v The Attorney General and Superintendent of St. Catherine District Prison [2000] UK PC 35 cf Convention Rights and Retrospectivity in the case of Porter v Magill [2001] UKHL 76 (para 82 – 86)

(d) any member of the Rural Police, about whom a complaint is made is pertinent.

By sec. 2 (b) the JDF and its members are integrated with the JCF where they are jointly involved in an operation.

The CDS in his Affidavit outlined that the JDF was requested by the JCF to support and did support the JCF in the operation of May 24 and 25 May during the state of emergency in West Kingston, Tivoli Gardens. Under the doctrine of joint enterprise the parties acting together for a common purpose are jointly liable for acts done in pursuit of that joint purpose. It would lead to an absurd, inconvenient or unreasonable result if in those circumstances INDECOM could investigate only one member of the Security Forces, the JCF, for the events of the Internal Security Operation of May 24 and 25 in Tivoli Gardens concerning death and serious injury of a citizen but not the other JDF.

A fortiori, the result would be more unreasonable if a member of the security force who was the leader of the joint operation was excluded from investigation and where that member, the JDF, was a party directly (used mortars) involved and responsible for the use of the chosen force to deal with the incidents of May 24 and 25, 2010. To my mind this is another strong indicator that the Act was intended to include the JDF from it came into operation and for the events before it came into operation that is the May 2010 Operation in Tivoli Gardens.

[166] There was an amendment to section 9 of the **Defence Act** in 1994 that added the following provison:

> *"9.(2) The responsibility of the Defence Board shall not extend to the operational use of the Jamaica Defence Force, for which use and responsibility shall be vested in the Chief of Staff subject to the overall direction of the Cabinet.*
>
> *Provided that the Prime Minister may give to the Chief of Staff such directions in respect to the operational use of the Jamaica Defence Force in Jamaica for the purpose of maintaining and securing public safety and public order, notwithstanding that the directions of the Cabinet have not been obtained, and the Chief of Staff shall comply with these directions or cause them to be complied with."*

> *"9.(3) Where any member of the Jamaica Defence Force is acting pursuant to direction referred to in the proviso to subsection (2), such member shall, while so acting, enjoy all such immunities, privileges and protection as are enjoyed by a member of the Jamaica Constabulary Force."*

This is another instance where the JDF is integrated fully with the JCF for the purposes of maintaining and securing public safety and public order, even though subsection (3) does not include the word "liabilites". These provisions appear to be the statutory basis for the JDF's Internal Security Operation in May 2010. In the same way the JCF and its members would be liable if they exceeded the boundary of their mandate so too would be the JDF and in my view Parliament intended likewise that they should be amenable to investigation immediately by INDECOM.

[167] In 1994 there were also amendments made to **sec. 50 to 54 of the Jamica Constabulary Force Act** that gave additional powers to the JCF to impose cordons and curfew to deal with internal security. The measures were a limited invasion of the citizen's freedom of movement, security of the person, private and family life and unreasonable search of the person. These were also the powers that the JDF obtained and with these extra powers there was more reason to have measures to hold the members of the Security Forces accountable for any misconduct and for any incident relating to the death and serious injuries to the citizen and abuse of their rights.

[168] I now ask myself what rights and to what are extent any rights of the JDF impaired or what new duty or obligation is placed on the JDF that is unfairly introduced by the **INDECOM Act** to investigate them for the May 2010 Tivoli Garden incident before the Act came into Force in August 2010, so that it ought not to be applied retrospectively. The power to investigate the JDF and its members for alleged misconduct in the Internal Security Operation do not take away or impair rights they have. It does impose a duty to report incidents of misconduct to INDECOM, to produce documents, reports and information in their possession needed for investigation of incidents. Further, it obliges members of the JDF to give statements and items to INDECOM under the pain of penalty for

the purposes of their investigation. There is no risk of physical harm or threat to life of these members of the JDF if they comply with these directions nor, in my view, will the public safety be harmed if they do so nor will it prevent their members from freely and frankly making reports.

The public safety or interest is another matter that arises under public interest immunity which the JDF claims which I will address.

Then I ask what is the value of the right to be impinged. As I indicated the effect of INDECOM's powers on the JDF and its members is to impose a clear duty of reporting incidents between its members and the public. It exposes the JDF to greater scrutiny of their actions by the public through the agency of INDECOM. The members of the JDF are not deprived of any fundamental right of movement, freedom of expression or security of the person. These legal demands are not disaproprationed as to be so unfair having regard to the inviolablilty of the right of the citizen to life and security of their person and property.

My reasons stated above is applicable to the consideration as to what is the practical value and nature of any right involved.

[169] A consideration of all these factors leads me to the view that there is no unfairness in the application of the **INDECOM Act** concerning investigations of incidents and complaints of alleged misconduct by JDF and it members that result in either death or serious injuries or damage to the property of the citizens of Tivoli Garden or any other abuse of rights occurred before the **INDECOM Act** was passed in August 2010. INDECOM therefore have jurisdiction to investigate JDF for the events of May 2010.

Waiver of Jurisdiction

[170] In my view the JDF did not waive its right to assert the lack of jurisdiction of INDECOM by responding to and facilitating dialogue and request for information about the events of May 2010 and particularly the use of mortars in the Internal

Security Operation. When they filed their claim in January 29, 2016 for Judicial Review of INDECOM's action it was in direct response to the Warrants and Notices sent on the 29 December 2015.[60]

Delay

[171] It is not accurate to compute the time the JDF knew or had knowledge of the investigation from the date of the 22 of September 2011 when INDECOM sent a letter advising the JDF it was commencing investigations into fatalities arising from the May 2010 Operation in Tivoli Gardens as the time in which to rule for Judicial Review. I hold there is no bar on the grounds within R 51 of the CPR 2002 as amended by the JDF. They did act promptly to seek the court's interpretation of INDECOM's powers under the Act.

Public Interest Immunity

[172] Both the CDS and the Defence Board, (through the Minister of National Security) as the 1st and 2nd claimant claim they have the right to withhold certain of the documents demanded by INDECOM under the Warrant issued on 22nd December 2015 on the grounds that disclosure would be injurious to the public interest.

Certificates of Immunity

[173] At para. 38, 40, 41, 43 and 44 of Major General Antony Anderson's First Affidavit he asserts claims for public interest immunity for certain documents and information demanded by the Warrant.

He also exhibited to his Affidavit dated January 29, 2016 two Certificates of Immunity BY the Minister of National Security. The 1st dated 7th January 2016

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[60] I accept and apply the reasoning of The Caribbean Examination Council v The Industrial Dispute and Tribunal and Gerard Philip [2015] JMSC Civ. 44

and is a Grant of Immunity to all police officers and ranks from all actions and prosecution or other proceedings for acts done relating to the firing of mortars.

The second was dated the 13th of January 2016 related to the Search Warrant of INDECOM for certain documents and it claims public interest immunity for some documents.

The Minister gave some reasons for the claim of public interest immunity, which mirror the reasons given by Major General Antony Anderson, then Chief of Defence Staff. He explained in para 38:

> *"Certain other documents such as Operational Orders and After Action Reports were not released on a claim of public interest immunity because they contain sensitive information directly related to the operation and tactical manoeuver of the JDF."*

Major General Antony Anderson further recited the Ministers' certificates of the 13th of January 2016 in para 41 of his affidavit;

> *"Public interest immunity attaches to some of the documents and information sought by the respondent under the warrant…. as some contain sensitive, confidential and highly classified details and secrets of national security importance…."*

Retired Chief of Defence Staff Rear Admiral Hardley Lewin gave an Affidavit dated the 16th of March 2016 which supported the claim of public interest immunity. In essence, he asserts that the intelligence gathering and capability of the JDF would be undermined if information is released to the Commissioner of INDECOM. Also, he says the JDF would lose the trust and confidence of international partners as the information they shared would be released to the public.

[174] The issue relating to the first certificate of the Minister of National Security deals with a wider matter of the validity of that certificate to grant immunity to officers and ranks involved in the use of mortars in the May 2010 Operation in Tivoli Gardens. There was a narrower issue whether the wording:

> ***"…. the grant of immunity to all officers and other ranks from all actions, suits, prosecution or other proceedings which may be brought and instituted"*** *(Emphasis supplied)*

covers the power of INDECOM to summons members of the JDF to give evidence under oath as requested by the Notices.

Full Court Reconvened – Issue of Apparent Bias

[175] The Full Court was reconvened on the 16th of April 2018 to consider an application by INDECOM that Mrs. Justice Carol Beswick recuse herself from any further deliberation and delivery of judgment in the claim. The grounds of their application was that Defence Attorney, Retired Captain Paul Beswick who is the husband of Mrs. Justice Carol Beswick, an attorney at law appeared on behalf of the three soldiers on trial and charged for the murder of Keith Clarke in the Home Circuit Court on the 9th of April 2018. He took a preliminary point that the Minister of National Security granted immunity to the soldiers from prosecution and that this ought to prevent or stop their trial.

In this application INDECOM claims that there was a real possibility that a fair minded and informed observer would conclude that the learned judge would be subconsciously biased in her assessment of the public interest grant of immunity issue [apparent bias] reserved for judgment. (cf the test for Apparent Bias **Porter v Magill** [2001] UKHL 67 at para 100)

The members of the Full Court after hearing the outline of this claim withdrew from open court and considered it. It was the opinion of all members of the Full Court that the wider issue of the validity of the first Certificate by the Minister of National Security was not necessary for us to determine the claim of INDECOM's Warrant And Notices sent to the JDF for information, documents and for certain members of the JDF to attend INDECOM's office to give statements under oath. Accordingly, the Full Court gave this ruling in open court and dismissed this application for Notice of Court Order.

[176] We took the opportunity of this sitting to ask counsel for JDF to produce the documents they claim should be withheld to the court at a later date for inspection. Then on the 25th of June 2018, these documents were produced and we inspected each of them. The narrower issue still remains does the words **"or other proceedings"** cover INDECOM's investigation of the JDF. In my view based on the ***ejusdem generis*** rule that is, the meaning of general words are controlled by the specific words they precede, it means that the words **' other proceedings'** relate to trial proceedings and not to the investigatory process that INDECOM exercises.

[177] The Commissioner of INDECOM deponed in his first affidavit that the Warrant for information is not a search warrant for the JDF HQ. It was not intended as a general search. It is limited to obtaining information and documents about the use of mortars in the Internal Security Operation. Director of Complaint, Nigel Morgan similarly deponed in his affidavit. INDECOM's counsel in her written submission says the Warrant is for a limited purpose and seems to indicate there is no risk intended to national security by it.

Judging by this posture, the disclosure INDECOM seeks is more limited than wording used in the Warrant. In due course, I will address this.

[178] In **Commissioner of the Independent Commission of Investigations v the Commissioner of Police, the Jamaica Constabulary Force and the Attorney General** [2016] JMSC Civ. 20 Sykes J., as he then was, considered among other things, sec 21. of the INDECOM Act where the Commissioner of INDECOM sent a letter of request to the Commissioner of Police pursuant to sec 4, 12 and 21 of the Act for:

> *a) copies of all documents, orders, instructions and memoranda establishing the Street Crime Unit in Clarendon between 2009 and the date of letter*
>
> *b) a list of members assigned to the Street Crime Unit and their role from its formation in the Clarendon Division to the date of the letter,*

c) copies of the disciplinary records of persons assigned to the Street Crime Unit before such assignment,

d) notes of administrative review.

e) copies of operation plan for operations at the time.

[179] The Commissioner of Police claimed to withhold the administrative review as aspects of it involve confidential discussions between its Chaplain and the officers. It would undermine trust if it were disclosed.

The commissioner of INDECOM had commenced investigations of alleged planned extrajudicial killings by the Street Crime Unit in the parish of Clarendon.

After examining the several sections of the Act, Sykes J. concluded:

> *"that no compulsory process under the Act authorized the COI to take documents or things subject to legal profession privilege and public interest immunity… and the right to privacy under the Charter of Rights may be implicated."*

He held the Commissioner of INDECOM was entitled to a declaration (B) to obtain the disciplinary records of the members of JCF requested under sec 21 because it was relevant to the investigation and (C) and (D) and refused the declaration for administrative review for operations of the Street Crime Unit in the division of Clarendon.

[180] In the **Independent Commission of Investigation v Digicel (Jamaica) Ltd.** [2015] JMCA Civ. 32. Brooks JA delivered the judgment of the Court of Appeal from a decision of Mangatal J. in **Digicel (Jamaica) Limited v Independent Commission of Investigation** [2013] JMSC Civ. 87. regarding INDECOM's use of section 21 of the Act.

INDECOM served notices on LIME and Digicel under sec 21 of the INDECOM Act requesting call data information, the telephone numbers of certain persons who it was alleged were part of a conspiracy plot surrounding the fatal shooting of the deceased by members of the Security Forces. LIME complied with the request but Digicel did not on the grounds that it was prohibited by the **Telecommunication Act** and the **Interception of Communications Act** from

disclosing this information. INDECOM did not disclose that the information was needed for a criminal investigation.

Digicel then filed a Fixed Date Claim Form and Affidavit seeking Declaration among other things, that INDECOM was not entitled to customer information pursuant to section 47 (2) (b) (i) of the **Telecom Act**. The judge made Declaration in favor of Digicel. The appeal was allowed in part and there was a modification of Declaration 6 to include the words "if INDECOM had properly specified the purpose for which the Notice was issued was the investigation of a criminal offence it would have been entitled to the subscriber information."

The underlying reason for its decision is that certain statutory prohibitions were placed on Digicel by the **Telecom Act** and **Interception of Communications Act** and it was bound thereby. Where a statute prohibits disclosure by a person of information requested by another any disclosure must be within the specified terms of the Act[61].

[181] In the House of Lords decision **Conway v Rimmer** [1968] AC 910 which overruled **Duncan v Cammell, Laird and Co. Ltd.** [1942] All ER 587 HL. (E) the House was concerned with a case in which a former police constable began an action for malicious prosecution against his former superintendent and the documents which gave rise to appeal were four reports made by the superintendent about the plaintiff during her period of probation and a report made by him to her chief constable to be forwarded to the DPP for criminal prosecution. The plaintiff was charged and acquitted of the criminal charge.

[61]The cases of Norwich Pharmaceutical Company and others v Custom and Excise Commissioner [1972] 1 WLR and Rowett v Pratt [1938] AC 102, principles applied – the court recognized Statutory Prohibitions as a bar to disclosure.

[182] The Minister that is the Home Secretary for Home Land Department issued a certificate claiming privilege against disclosure of the document. It was said the reports belonged to a class of documents to which immunity should attach on the grounds of candour and completeness of communication was necessary for the maker of these reports. It was necessary for efficient function of the public service. At that time the Minister's certificate was stated as conclusive. The court established that it had a power to override its Minister's objective.

[183] In Lord Reid's judgment, **Duncan's case** was rightly decided on its facts. The plaintiff was refused discovery of document relating to a submarine Thetis including a contract for the haul and machinery and plans and specifications on the grounds it was injurious to the public interest and it may affect security of the State. This was a case decided in war times, Lord Reid held routine reports could not be required as documents that could be injurious to the public and to withhold these reports was not necessary to the efficient function of the public service.

Lord Reid explained Public Interest Immunity may be claimed on documents either due to its **content** or it belonged to a **class document** which ought to be withheld whether or not there is anything in the document that is injurious to the public interest. The case of Conway was about a claim on a document due to class.

Lord Reid explained that the court had the duty to balance the public interest to withhold certain documents with other public interest in securing and ensuring the proper administration of justice.

The reasons for withholding a whole class of documents do not lie solely in Minister's judgment. He said the court is well able to assess the likelihood that, if the writer of a certain class of documents knew that there was a chance that his report might be produced in legal proceedings, he would make a less full and candid report than he would otherwise have done.

Examples of documents like Cabinet minutes, policy making documents, and minutes with junior officials and correspondence with outside bodies were class documents which ought to be withheld. Then he explained that there should be no disclosure of anything by the police that may be useful information to criminals. There should also be no disclosure in civil proceedings of pending criminal prosecutions.

The Test for Claim of Public Interest Immunity

[184] The proper test to be applied is whether the withholding of the document because it belongs to a particular class is really "necessary for the proper functioning of the public services." The judge's duty is to assess the importance of the document to the case. If on a balance he finds it favours its production he should order inspection before he orders production. **Burmah Oil Company Limited v Bank of England** [1980] A.C. 1090, Highlight the duty to inspect documents.[62]

The decision of the Court was that routine probation report made internally was not necessary for protection in the interest of the function of the public service.

[185] In **R v Chief Constable of West Midlands, Ex parte Wiley, Regina v Chief Constable of Nottinghamshire, Ex parte Sunderland** [1995] 1 AC 274 H.L. the issue of Public Interest Immunity of document and a class basis was raised in the context that Part IX of the Police and Criminal Evidence Act 1984 introduced a code for investigating complaints against the police. This would correspond to certain procedure about investigations against the Security Forces under the PPCA and the INDECOM Act.

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[62] It seems this case takes a different approach to the duty to inspect in Balford v Foreign and Commonwealth Office [1994] 2 All ER 558, Where the claim of public interest rests on national defence and security where it upheld the Employment Tribunal Decision to refuse disclosure of classified documents under the Official Secrets Act.

In each case the applicant brought civil action against the Chief Constables respectively for malicious prosecution and assault in civil proceedings after their criminal prosecution was dismissed. The Chief Constable refused to give any undertaking that if these applicants gave statements under the complaints procedure they could not claim public interest immunity. On the grounds that internal generated documents were protected in a class.

The court granted the Declaration that internal generated documents arising from complaints to a police complaint authority did not belong to a class of documents that was protected. In other words, immunity was not necessary to protect the public service. The interest of the public in the administration of justice outweighs the keeping of those documents confidential.[63]

Analysis

[186] It must now be accepted that public interest immunity is seen as evolving and not immutable and fixed. In relation to the documents[64] the Warrant which the Commissioner of the Independent Commission Investigation seeks to execute and obtain information about the use of mortar by members of the JDF in the May 2010 Operation in Western Kingston, Tivoli, which the JDF claims, is protected and they will not disclose. There are two aspects of public interest involved:

a. the public interest to withhold information that would endanger or harm the security or defence of the State and the efficient function of the public service

b. the public interest in the effective administration of justice in the independent and full investigation of Security Forces involving operation

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[63] See Paper, Public Interest Immunity, Judge of Appeal FA Smith, and Retired Comments on Willard Williamson v R [2015] JMCA Crm. 8.

[64] The claim for public interest rest on National Defence and Security or intelligence. It upheld the employment tribunal decision to

resulting in possible serious injury to the citizen and unlawful death and abuse of fundamental rights.

Exercise of the duty to Inspect

[187] The members of the Full Court on the 25th of June 2018 on an adjournment after it reconvened inspected and examined the bundle of documents the JDF claimed immunity for. In my view the documents and the information a – f in the Warrant prima facie fall in documents which the public intended that immunity should attach as a class. They relate to national security. The documents which are the 6 Notices in paragraphs (g) and (h) of the warrant public interest immunity is based on content.

Documents Submitted

(a) There was no document in the bundle submitted relating to item (a) of the Warrant. The reason given is that such a document does not exist.
However, I agree with the submission of INDECOM that at the WKCOE the mortar control officer was cross-examined about a document relating to the operational safety rules for the use of mortars. Excerpts from parts of a document which was a pamphlets **No. 1 and NO. 24 titled Infantry Training use of Heavy Weapon (Mortars) copyright 1987 and Infantry Tactical Doctrine Volume 2** were exhibited in the agreed bundle of documents. This document is relevant and necessary to INDECOM's investigation, on a balance of the competing public interests involved it should be disclosed. Its production will not harm the public interest in national security. Public interest immunity should not attach to it. It would be critical information by which to judge if the JDF complied with the standards and norms of upholding the inviolable rights to life and security of the person and basic human rights. It is also relevant to credibility .

b) Issue of receipt/voucher record dated 19th May, 2010 relate to the issue of mortar items (b) and (c) in the Warrant.

This document and the information it contains relates to ammunition storage and capability of the JDF. Its potential can harm and endanger the public interest and National Security.[65]

However, it is directly relevant to the specific investigation of the use of mortar in the Internal Security Operation and the possible association of death of citizens and injuries to citizens and damage to property. It is also relevant to the credibility of members of JDF on the operation. It is necessary for INDECOM's investigations, one caveat is that the document as a whole covers a period of months and years prior to 2010. The document should be disclosed and redacted to exclude the months prior to May 2010 and the years before 2010. Otherwise, it would expose a general audit of the ammunition stock pile of the nation which would be harmful to the public.

c) This document is similar to the document in (b) above

d) Shipment documents dated May 20, 2010 relate to item (d) of the Warrant.

This document is relevant to the investigation of mortars available to the JDF in May 2010 at the time of the Internal Security Operation in Tivoli Gardens. It is necessary to INDECOM's investigation and on the balance of public interest does not endanger the national security and it should be redacted to the period May 2010 to December 2010.

e) Operational Order

This document relates to item relates to item (e) in the warrant it broadly outlines the plan of operation, how it is to be executed, and the coordination

[65]Choudry v Attorney General [2000] 2 LRC 427 where the Prime Minister New Zealand to Certificate of Immunity on the grounds of National Security for the breaking an entry in the home of the Claimant under a Warrant of the SIS Act was not upheld. It breached the Claimant's common law right and constitution right to protection from unreasonable search of private property.

of units in operation and secret method of communication. Though no details are given, I rule it is to be withheld from disclosure and public interest immunity is attached to it.

f) After Action Report

This is a review of the Internal Security Operation in Western Kingston and its environs in May 2010. It relates to the operation report and to HCM of the Warrant to that extent it several planning and strategies and security information which could harm the public interest if in the wrong hands. However, it outlines the review in a general way and not in detail. It is deprived after the event. Its purpose is to assess action in other to improve future operation. IN the same way it have assert the JDF to make recommendation to improvement of com also helps INDECOM to discharge its statutory function to investigate any make recommendation by the Security Forces about complaints and incident from citizens about the operation. In my view once balance of weighing the public interest involved it is to be disclosed as it will not prejudice national security.

[188] As regard to the six Notices sent to the Chief of Defence Staff of JDF on the 25th of December 2015, it seeks statements from these members about their functions relating to the use of mortars. This is relevant and necessary information to INDECOM's investigation. It is my view that it cannot be reasonably said that it is necessary to withhold these statements as it is necessary for the efficiency of the function of the public services that these members' expectation of completed candour in making reports will be damage such reports and these reports will not be forthcoming in the future. The balance of the competing interest of full and complete and independent investigations into incident and complaints about conduct of the Security Forces surrounding in deaths and serious injury to citizen outweigh the public interest claimed for these members. The statements requested under these Notices are not barred on the grounds of public interest immunity.

The Notices now lack the material particulars of the names of the individual members of the JDF from whom the information is needed. The Notices are to be perfected by including their names when the JDF comply and supply the names. The defect in the Notices are not incurable.

OFFICAL SECRETS ACT

[189] The Solicitor General Mrs. Nicole Foster Pusey, Q.C. submitted in her written skeleton submission public interest immunity attached to the documents and information INDECOM demands under the warrant by virtue of the **Official Secret Act (OSA).** She contends the **Official Secret Act** obliges the confidentiality and now disclosures of certain document and information requested in the search Warrant. She quotes sections from the OSA (sec. 2, 2(1A), 2 (2), 7, 8, speaking notes) which create offences of misdemeanor and felony for any disclosure by members of the JDF of confidential information. In order words the Act creates criminal sanctions for the disclosure of any unauthorised information.

Further, she submitted under the definition of section 3 of the **OSA** of *'prohibited place'* which includes any work of defence and any place used for the purpose of building, repairing and making or storing munitions of war. The JDF Head Quarters (HQ), Up Park Camp is a "*prohibited place".*

In addition she submitted any communication made of any note, document or information by relating to or used in a public place by any person other than a person acting under lawful authority shall be deemed prejudicial to the safety and interest of the State unless the contrary is proved by virtue of section 1 (2).

Her argument is that INDECOM's warrant of the 22nd of December 2015 seeks to enter a *"prohibited place"* and is ***ultra vires***. It is against the public interest and would implicate members of the JDF in criminal offences under the **OSA**.

Therefore, the authority of **Barrington Gray v Resident Magistrate Hanover** SCCA 89 of 2009 del. September 27, 2007 the court should order Prohibition to prevent INDECOM from executing this warrant.

The Solicitor General does impliedly accept that sec 4 of the **INDECOM Act** empowers INDECOM to have access and to have entering to the JDF HQ, Up Park Camp and the place it has the information and records it demands under the warrant. But she argues that **OSA** contains special provision about access to JDF HQ on the principle of statutory interpretation that general powers do not override a specific power contain that Latin maxim ***"generalia specialibus non derogate"*** she argue the power of INDECOM is general in particular in relation to entry and access to confidential information at the JDF HQ and do not override the special powers of JDF to guard the confidential information.

The Authority of **R v Secretary of State for the Home Department, Ex parte Hickey** (no. 2) [1995] Q.B. 43 at 56 held that where two Acts of Parliament cover the same subject matter the general act cannot override the special act.

Also, she submitted on the authority of **Seward v The Vera Cruz (owner)** (1884) 10 App 59 at 68 that there is a presumption against implied repeal of a latter Act by an earlier Act unless such an intention appear to be necessary by implication. Walker J.A. held that the **Security Commission Act** which was passed later to the Fair Trading Act impliedly repealed the provision in relation to the Stock Exchange in ***Jamaica Stock Exchange v Fair Trading Commission*** SCCA 93/97del. January 29, 2001 at p68-69.

Counsel for INDECOM in her written submission did not contend that the **INDECOM Act** expressly or impliedly repealed the **OSA**. Her position was that Parliament's intention was that the **INDECOM Act** should operate in cooperation with the **OSA** and not in conflict with it. This submission is supportable in reason and on the interpretation of the limitation of INDECOM's powers under the Act.

Parliament also subjected INDECOM and its staff to the Official Secrets Act by virtue of oath each takes under sec. 9 of the Act and by reference to sec 28 of the Act. Section 28 (a) and (b) provides for occasion where INDECOM is exempt from its oath of servicing.

Solicitor General says [at para 24 of its speaking notes] that sec. 28 gives no express authorisation for the Commission to receive documents covered by OSA where authorization for the receipt of the said information is not forthcoming by the responsible officer.

[190] I am unable to accept this line of reasoning because it seems to be predicated on the view that the duty of the JDF to have permission of confidential/secret information is absolute. The **OSA** shows that it is not absolute. The **INDECOM Act** shows that the JDF's duty is not absolute. Sec. 4 gives INDECOM the authority under a warrant issued by a Justice of the Peace to have access to a place in the JDF and to inspect and obtain information for the purposes of the **INDECOM Act**. To my mind if INDECOM have authority to obtain the information, they also have like authority to receive the information of the person supplying this information to INDECOM which would not be in breach of the **OSA** and would not be committing a criminal offence.

Neither would the powers of INDECOM would be in conflict with statutory provisions placed on JDF and be unlawful as described in **Digicel v INDECOM** (supra)

[191] Sec. 14 of the **INDECOM Act** gives the commission a discretion and directions to take into account such factors as public interest consideration before deciding what method is appropriate to use investigation. Again, to my mind this is Parliament's way of imposing on INDECOM the responsibility of to be guided by public interest immunity claims. (sec 14(1)(c)) Therefore the principle that the powers of INDECOM under sec. 12 and 21 of the Act does not take away fundamental common law principles of legal profession privilege or public interest

immunity (per **Grenville Williams** per Sykes J) and Statutory prohibition (per Brook J **Digicel v INDECOM**) do not in the instant application considering the issue of the Warrant and the Notices INDECOM in my view do not run afoul of these cardinal principles

It means that JDF has a duty to cooperate with INDECOM not as discretion but by law regarding the Warrant and Notices issued. This brings me to the measures INDECOM tries to employ to have the Warrant executed and the notices served.

PROTOCOL

[192] INDECOM sent a copy of a protocol for the use of the handling, transporting and retaining of reports, documents and things they need to access, to inspect and examine.

It is clear that such a protocol is necessary. There are technical rules and practice dealing with handling such material and items.

This protocol is based upon the Chilcot Protocol used in the Iraq Enquiry in the UK established in 2009. It covers and recognized that fundamental common law principles and practices such as legal profession privileges and public interest immunity must be observed.

[193] The Solicitor General questions the need for such a protocol. But she nonetheless asked the court to give guidance of it in the written submission. In her oral submission she argued a protocol could not override what was directly unauthorized. She also says that the protocol could only come into place after authorisation is given by the JDF board.

[194] The Solicitor General position is that the very proposal for protocol by INDECOM acknowledges that JDF has sensitive and confidential information that the public interest in national security requires to be protected.

[195] In view of my opinion that the Warrant issued by INDECOM on the 22nd of December 2015 is the proper source of authority to access, enter, inspect and examine the necessary document at the JDF HQ then I have to look at the Solicitor General's view of the proposal for a protocol differently. It means I accept Counsel's submission on behalf of INDECOM on the protocol as the better view and the way forward to approach the protocol. A protocol is necessary to ensure the seamless operation of obtaining the document and information requested.

[196] In Light of my opinion on the several issues raised, the Orders I would make are as follows:

1. Certiorari quashing the Warrant dated December 22, 2015 issued by a Justice of the Peace on an application by the Independent Commission of Investigations pursuant to section 4 (1) of the Independent Commission of Investigations Act and directed at the 1st claimant Is Hereby Refused.

2. Certiorari quashing all Notices to persons unnamed and issued pursuant to section 21 of the Independent Commission of Investigations Act dated December 21, 2015 (hereinafter called "the Notice") Is Hereby Refused.

3. Prohibition to prevent the Independent Commission of Investigations whether by itself, its servant and/or agent or otherwise howsoever, from executing at the premises of the Jamaica Defence Force, the Warrant Is Hereby Refused.

4. Prohibition prohibiting the Independent Commission of Investigation and its servants and/or agents or otherwise howsoever, from commencing a search, enquiry about, inspecting, copying by any means whatsoever, uplifting, seizing, detaining, or by any means whatsoever interfering or interfacing with the documents, property and information in whatsoever format it may be recovered as requested in the warrant Is Hereby Refused.

5. Prohibition prohibiting the Independent Commission of Investigations whether by itself, its servants and/or agents from seeking to take evidence on oath from any person pursuant to the notice Is Hereby Refused.

6. Declaration that the following documents are not subject to Public Interest Immunity:

(a) The JDF's doctrines, rules and protocol that were in force in May 2010 concerning the firing of mortar rounds [which documents I find exist and applied by the JDF]

(d) The type calibre, description, place of manufacture and batch of mortar rounds issued during May 2010 for use in Tivoli Gardens and its environs during the State of Emergency in May 2010.

(f) Debriefing records, After Action Reports, and any other review or report or its execution of the order to fire mortar rounds into Tivoli Gardens and its environs during the State of Emergency in 2010.

However public interest immunity is attach to:

(e) The Operation Orders to fire mortar rounds into Tivoli Gardens and its environs during the State of Emergency in May 2010.

7. Declaration Is Hereby Refused that the "doctrine, rules or protocols that were in force in May 2010 concerning the firing of Mortar rounds" do not and never existed.

8. Declaration Is Hereby Refused that notwithstanding the provisions of the **Independent Commission of Investigations Act**, the Jamaica Defence Force is restricted from allowing access to and/or is entitled to prevent access to and/or to disclosure of the documents or information requested by the Independent Commission of Investigation at items listed in the Warrant:

a. Doctrine and rules

d. The type, calibre, description of mortar rounds

f. After Action Reports

However, Declaration Is Hereby Granted in item:

e. The Operational Orders to fire

9. A Declaration that notwithstanding the provisions of the Independent Commission of Investigations Act and of the issue of the Notices to persons unnamed, members of the JDF are restricted from providing evidence on oath which reveals or discloses documents or information in breach of the Official Secrets Act and in particular sections 2 (1) and 2 (1A) of the **Official Secrets Act** 1911 Is Hereby Refused.

10. Declaration that the pursuit of the investigations by the Independent Commission of Investigations including the application for the Warrant is in the particular circumstances an unreasonable exercise of power Is Hereby Refused.

11. Declaration that the execution of the Warrant on the Jamaica Defence Force's premises is likely to be prejudiced to the interest of the State including Jamaica's interest of national security, defence and international relations Is Hereby Refused.
12. Further Order And Direct that before any execution of the warrant herein or any enforcement of any of the Notices served under section 21 of the **INDECOM Act** counsel for CDS and the Jamaica Defence Board and INDECOM consult, propose, exchange draft protocols and agree the terms of a protocol for the production, handling, transport, inspection, seizing and detaining the documents, reports and information relating to mortars at the JDF HQ within 30 days of the date of the Orders herein:

13. Order Is Hereby Refused that the Independent Commission of Investigations whether by itself or its servants and/or agents or otherwise howsoever be permanently restrained from executing the Warrant and/or from enquiry about, insepcting, copying, or by any means whatsoever interefering or interfacing with the documents, records, property, and information in whatsoever format it may be recorded, requested in the Warrant.

14. No order as to costs.

GEORGE, J

Background

[197] This case involves the by now eminent Independent Commission of Investigations which hereinafter shall be referred to as INDECOM. At the heart of this matter lies an attempt by INDECOM to enter or gain access to the precincts of the Jamaica Defence Force which hereinafter shall be referred to as JDF. INDECOM's reason for seeking to enter the precincts of the JDF is to gain information that may prove to be useful with another of its investigation. As appears to be the norm, the jurisdictional powers of INDECOM are once again brought under scrutiny.

[198] INDECOM's investigation stems from the actions of the security forces during the joint JDF and Jamaica Constabulary Force (JCF) operation conducted in Tivoli Gardens and surrounding areas of West Kingston in May of 2010. The purpose

of this operation was to capture the then fugitive Mr. Christopher Coke, in order to execute a warrant on him in furtherance of an authority to proceed on an extradition request from the United States of America. The results of this operation was that approximately 73 persons lost their lives, and it is alleged that at least one of these individuals may have come to his demise as a result of a mortar fired by members of the JDF.

[199] These series of events gave rise to the West Kingston Commission of Enquiry. The purpose of this enquiry was to inter alia investigate the conduct of operations by the security forces of Jamaica in Tivoli Gardens and related areas in May 2010, as well as to investigate what arrangements and precautions were taken to protect the citizens from unnecessary injury or property damage. These investigations sought to unearth whether the rights of any person were violated, and the manner and extent of any such violations.

[200] From the evidence garnered at the Commission of Enquiry, a report was published on the 16th June 2016. This report made several Recommendations. As regard the use of mortars and other indirect fire weapons, it was outlined that contemporary international best practice and international humanitarian law do not advocate the use of these weapons in built up areas. Consequently, it was recommended that, in future, the leadership of the JDF pay careful regard to contemporary best practice and learning in relation to the use of these weapons of indirect fire and that consistent with international humanitarian law, the use of these weapons in built up areas should be prohibited. It should be noted that this report was published subsequent to the filing of the claim herein; but appears to give fodder to the motive of INDECOM in its submissions and their given mandate by the INDECOM Act as to investigation, and review of the actions and standards of the security forces with a view to recommend, inter-alia, best practice guides and improvement, where this is deemed desirable.

[201] INDECOM, by virtue of the authority bestowed on it to investigate complaints against members of the JDF, (this authority emanates from the Independent

Commission of Investigation Act), sought to conduct its own investigation into the JDF's use of mortars on the 24th May 2010. Following a series of letters and oral discussions, whereby almost all attempts by INDECOM's Commissioner to obtain certain information and documents, in particular those relating to mortar fire at the joint operation of the JDF and JCF in May 2010 at West Kingston proved futile, the 2nd Claimant was served a warrant dated 22nd December, 2015. This warrant was obtained by INDECOM pursuant to Section 4(3) of the Independent Commission of Investigation Act. This was accompanied by seven notices dated 21st December, 2015. These were issued pursuant to Section 21 of the said Act. These notices required members of the JDF to attend upon the Commissioner of Investigations, on 19th January, 2016, for questioning on oath.

[202] In an effort to resist the perceived clear and present danger of the Warrant and Notices, the 1st Claimant by Notice of Application for Court Orders filed on January 8, 2016 and the 2nd Claimant, by Notice of Application for Court Orders filed on 13th January, 2016, sought inter alia leave to apply for judicial review and certain orders, as reflected in the subsequent fixed date claim form filed herein, having before, advised INDECOM that national security issues and protocol was a bar to the disclosures.

[203] It appears that it is with the threat of the execution of the Warrant and the giving of effect to the Notices and the anticipated Hearing of the application for leave to apply for judicial review, that, on January 13, 2016, the Minister of National Security, Mr. Peter Bunting (then also a member of the Jamaica Defence Board) formally issued a certificate claiming public interest immunity in respect of certain stipulated documents and information falling within the categories requested by the Defendants.

[204] On the 20th January 2016, following a contested hearing, Sykes, J. granted leave for judicial review to both Claimants. Upon the grant of leave, INDECOM gave an undertaking through its counsel, that, it would not seek to execute the Warrant or

seek to give effect to the Notices until the determination of the Fixed Date Claim Form.

The Correspondence

[205] A series of letters between the JDF and INDECOM were exhibited, (without objection), to the 1st affidavit of Mr. Bunting filed on the 29th January 2011. These letters provide a chronology of the information requested by INDECOM and the information provided by the JDF. Through the letters it is garnered that:

(i) On the 15th of September 2011 INDECOM wrote to the 1st claimant indicating that they were conducting an investigation into the fatalities that occurred in Western Kingston during the State of Emergency in 2010. It attached terms of reference which provided the framework for their investigations.

[206] The Terms of Reference are as follows:

1. To enquire into:

a. The situation in Western Kingston and related areas in May 2010 prior to the attempt to execute a provisional warrant in extradition proceedings relating to Christopher "Dudus" Coke, and the reasons and circumstances surrounding the declaration of a State of Emergency in that month;

b. Whether, and if so under what circumstances, state officials and law enforcement officers came under gunfire attacks during May 2010 in incidents connected to the attempts by law enforcement officers of Jamaica to arrest Christopher "Dudus" Coke;

c. circumstances under which, and by whom, several Police Station and other state property (including police or military vehicles) were attacked and damaged or destroyed by firebombs, gunfire or other means during or around the period of the State of Emergency declared in May 2010;

d. the conduct of operations by the security forces of Jamaica in Tivoli Gardens and related areas during the State of Emergency in the month of May 2010;

e. the allegations that persons were especially armed to repel any law enforcement effort to capture the fugitive Christopher "Dudus" Coke and, if so by whom;

f. what were the circumstances under which, and by whom, embattlements and barriers were set up in Tivoli Gardens, and whether efforts were made, and by whom, to restrict ingress and egress of law enforcement officers or to prevent the arrest of Christopher "Dudus" Coke;

g. what arrangements were made, and what precautions were taken, to protect citizens of Tivoli Gardens and other affected areas from unnecessary injury or property damage during the law enforcement action in the state of emergency, and the adequacy and appropriateness of those arrangements and precautions in the prevailing circumstances;

h. whether, and if so under what circumstances, civilians, police officers and soldiers of the Jamaica Defence Force were shot or injured during May 2010 in connection with the security forces seeking to effect the arrest of Christopher "Dudus" Coke on a provisional warrant in extradition proceedings;

i. the circumstances under which, and by whom, private property was damaged or destroyed during or around the period of the State of Emergency declared in May 2010;

j. The commission may hold public and private hearings, in such manner and locations, as may be necessary and convenient.

The letters also highlighted that:

[207] INDECOM is satisfied that the incident is of an exceptional nature and that it is likely to have a significant impact on public confidence in the Security Forces unless there is an impartial investigation. In this regard it was outlined that the JDF is required to furnish the commission with a Report touching on:

a. The activities of members of the force

b. The command structure that exist from time to time

c. An account of persons whose lives were lost including their names, when, where, and how they were killed.

d. A copy of any debriefing notes, statements, diary entries, records and other documents collected, received or held by the force concerning these matters.

e. A list of all personnel who took the life of a citizen together with the date, time, and place that the life was taken; the name of the deceased and the circumstances under which the deceased died.

[208] The report was required to be submitted by the 31st October 2011. Following no response to the letter dated 15th September 2011, on the 10th January 2012,

INDECOM renewed its request by way of a further letter and in that letter, sought assistance/intervention from the 1st Claimant to have Lieutenant Colonel Patrick Cole and Captain Crooks, comply with its requests. Lieutenant Colonel Patrick Cole's and Captain Crook's assistance was sought on the basis that oral discussions were had with them and they had made promises to forward the information but had not done so. On the 9th February 2012, Lieutenant Colonel Patrick Cole, wrote to INDECOM on behalf of the 1st Claimant. This letter provided an apology for the delay in responding and attached a report "pertaining to the JDF activities during the State of Emergency in West Kingston in May 2010". The response was in relation to the initial request headed "A list of personnel who took the life of a citizen and the circumstances regarding the same".

The report read as follows:

> *"On the Sunday 30/5/10 at approximately 1325 hours at the Blood Bank, Kingston, Mr. Sheldon Davis was shot by a JDF personnel acting in defence of a colleague after Mr. Davis grabbed away his rifle and pointed it at him causing him to run for cover. Mr. Davis was subsequently pronounced dead at the Kingston Public Hospital. The soldiers who fired at him were Private Winston Richards, Private Gavonnie Phipps".*

[209] In response by letter dated the 13th June 2012, INDECOM outlined that the report of the 9th of February 2012 stated that it could only speak to two fatalities and that the information presented referenced one fatality. The thrust of the position taken by INDECOM was to ask, that since time had passed, whether they were now able "to speak on any other fatalities that occurred as a result of the military action in West Kingston". They also reminded the 1st claimant that their request for a report was in relation to five areas and that only three were addressed. They therefore asked for the additional information that was previously requested as well as new information, in light of the "recent revelations". The additional information requested is set out below:

a. *Was there any attempt to have your weapons checked in the forensic lab?"*

b. *Did you provide a statement to the Bureau of Special Investigations (B S U).*

c. *Did the JDF do an internal investigation arising out of the allegations of abuse by residents of Tivoli Gardens?*

d. *What was the intended impact zone of mortars?*

e. *Did any rounds fall short or were outside of the intended impact zone?*

This information was to be submitted by 11th July 2012.

The Warrant

[210] The warrant and notices were issued by INDECOM as a method of continuing, its investigations, into the use of the role of the JDF in the operation in West Kingston in May, 2010. The warrant sought to gain access, make enquiries and inspect documents, records, information and property pertaining to the Joint JDF/JCF Operation in West Kingston in May 2010 particularly those which indicate:

a. *The Jamaica Defence Force doctrines, rules or protocols that were in force in May 2010 concerning the firing of mortar rounds.*

b. *The issue of mortar rounds during or before May 2010 for use in Tivoli Gardens and its environs during the State of Emergency in May 2010.*

c. *The return of used or unexploded mortar rounds that had been issued during or before May 2010 for use in Tivoli Gardens and its environs during the State of Emergency in May 2010.*

d. *The type, calibre, description, place of manufacture and batch of mortar rounds issued during or before May 2010 for use in Tivoli Gardens and its environs during the State of Emergency in May 2010.*

e. *The operational orders to fire mortar rounds into Tivoli Gardens and its environs during the State of Emergency in May 2010.*

f. *Debriefings records, After Action reports, and any other review or report on the execution of the order to fire mortar into Tivoli Gardens and its environs during the State of Emergency in May 2010.*

g. *The names, ranks and function of the members of the JDF who were responsible for, participated in, the decision to fire mortar rounds into Tivoli Gardens and its environs during the State of Emergency in May 2010.*

h. *The names, ranks and function of the members of the JDF who participated in the execution of the order to fire mortar rounds into Tivoli Gardens and its environs during the State of Emergency in May 2010. This included mortar Fire Control Officer(s), mortar line personnel and observers.*

[211] On the 8th January 2016, Mrs. Nicole Foster Pusey Q.C on behalf of the Defence Board wrote to INDECOM pertaining to the warrant it had obtained and its threat to execute it at the Jamaica Defence Force's premises at 9:30 am on Thursday January 12, 2016. In this letter, she indicated she objected to the warrant on more or less the same grounds as those asserted by Mr. Bunting in his affidavit. She also indicated that a public interest immunity claim had been made in the proceedings at the West Kingston Commission on Enquiry and advised INDECOM that it would be appropriate to consider the postponement of their investigations until the outcome of the enquiry, having regard to the overlap between that application and the issues forming the subject matter of this fixed date claim. On these premises she sought from them, a stay of execution of the warrant. From there on Livingston Alexander Levy was instructed to represent the defendant and the Attorney General Chambers also stood ready for litigation. By its letter of 12th January 2016, Attorney-at-law Tana'ania Small, on behalf of Livingston Alexander Levy indicated that the warrant although headed 'search warrant' was not in fact one which involved a search and the purpose of the warrant was to gain access to the Head Quarters of the Jamaica Defence Force and to inspect and take away records that are relevant to the investigation. She indicated that INDECOM had no intention to carry out a search of the JDF Head Quarters but expected to be given access to the records and other items for inspection and copying as considered necessary and pertinent. She also indicated that the objective of the Official Secrets Act in criminalizing disclosure of secret and confidential information did not apply to these circumstances.

The Fixed Date Claim Form

[212] The Claimants by the Fixed Date Claim form filed on the 29th January 2016, sought the following reliefs:

1. An Order of Certiorari quashing the Warrant dated December 22, 2015 issued by a Justice of the Peace on an application by the Independent Commission of Investigations pursuant to section 4(3) of the

Independent Commission of Investigations Act and directed to the 1st Claimant (hereinafter called the "Warrant").

2. An Order of Certiorari quashing all Notices to persons unnamed issued pursuant to section 21 of the Independent Commission of Investigations Act and dated December 21, 2015 (hereinafter called "The Notices").

3. An Order of Prohibition to prevent the Independent Commission of Investigations whether by itself, its servants and/or agents or otherwise howsoever, from executing at the premises of the Jamaica Defence Force, the Warrant.

4. An Order of Prohibition prohibiting the Independent Commission of Investigations and its servants and/or agents, or otherwise howsoever from commencing a search, enquiring about, inspecting, coping by any means whatsoever, uplifting , seizing, detaining, or any means whatsoever interfering or interacting with the documents, records, property, and information in whatsoever format it may be recorded, as requested in the Warrant.

5. An Order of Prohibition, prohibiting the Independent Commission of Investigations whether by itself, its servant and/or agents from seeking to take evidence on oath from any person pursuant to the Notices.

6. A declaration that some of the documents, records, property, and information in whatsoever format they may be recorded, requested in the Warrant and as set out in the Certificate of The Minister of National Security dated 13 January, 2016 are protected by Public Interest Immunity to the extent claimed in the Certificate of The Minister of National Security on behalf of The Defence Board, and to such further extent as this Honourable Court deems fit.

7. A declaration that the "JDF doctrines rules or protocols that were in force in May 2010 concerning the firing of Mortar rounds" requested at Item 1(a) of the Warrant does not and has never existed.

8. A declaration that notwithstanding the provisions of the Independent Commission of Investigation Act, the Jamaica Defence Force is restricted from allowing access to and/or is entitled to prevent access to or disclosure of the documents or information requested by the Independent Commission of Investigations at items A, D, E and F of the Warrant pursuant to the Official Secrets Acts 1911 and 1920 and in particular, sections 2 (1) and 2 (1A) of the Official Secrets Acts 1911.

9. A declaration that notwithstanding the provisions of the Independent Commission of Investigations Act and the issue of the Notices to

persons unnamed, members of the Jamaica Defence Force are restricted from providing evidence on oath which reveals or discloses documents or information in breach of the Official Secrets Act and in particular sections 2(1) and 2(1A) of the Official Secrets Act 1911.

10. A declaration that the pursuits of Investigations by the Independent Commission of Investigations including the application for the Warrant is, in the particular circumstances, an unreasonable exercise of power.

11. A declaration that the execution of the Warrant on the Jamaica Defence Force's premises is likely to be prejudicial to the interest of the State including Jamaica's interest of national security, defence and international relations.

12. Such further and other orders as this Court deems just to ensure that documents, records, property, and information in whatsoever format it may be recorded over which it is alleged that the Public's Interest Immunity attaches are safeguarded and not disclosed without further determination and/or Order of this Honourable Court.

13. Alternatively, an Order that the Independent Commission of Investigations whether by its self or its servants and/or agents or otherwise howsoever be permanently restrained from executing the Warrant and /or from enquiring about, inspecting, coping by any means whatsoever, uplifting, seizing, detaining, or any means whatsoever interfering or interacting with the documents, records, property, and information in whatsoever format it may be recorded, requested in the Warrant.

14. Cost; and

15. Any such further and/or other relief as this Honourable Courts deems fit.

[213] The primary grounds on which the orders were sought are that:

i. The Jamaica Defence Force (JDF) is the repository of secret and top secret documents related to the secret, defence and international relations of Jamaica as well as information communicated in confidence to the Government of Jamaica by and on behalf of foreign governments.

ii. Certain information, documents and records including those relating to arms and ammunition are held at the premises of the JDF at Up Park Camp. These documents held at the JDF premises are covered by the Official Secrets Acts.

iii. The Official Secrets Act prohibits unauthorized disclosure of information or documents kept in prohibited places of any purpose or in any manner which is prejudicial to the safety or interest of the State.

iv. The Official Secrets Act obliges the confidentiality and non-disclosure of certain documents and information requested in the search warrant.

v. The JDF and its members are bound by the Official Secrets Act and therefore cannot allow and/or facilitate the access to its premises in breach of the said Act or enquiring into and inspection of the information and confidential documents.

vi. The entry of a person onto the premises of the JDF in order to search, have access, make enquiries, collect, record, obtain and inspect documents, records and information and property is highly likely to and will prejudice and damage the safety and interest of Jamaica as well as its international partners who will no longer feel safe in having the nation retain top secret and confidential documents and material at Jamaica's established repository for such a purpose.

vii. The aforementioned entry and execution of the Warrant will damage the international relations of Jamaica and Jamaica's own national security.

[214] The Claimants' challenge is firstly to INDECOM's jurisdiction to investigate the joint Operation and therefore its authority to issue the Warrant and Notices. They further raise immunity as set out in the Minister's Certificate (a) granting immunity to the officers and rank from "action, suit prosecution or other proceeding" and (b) Public Interest Immunity.

[215] INDECOM oppose the judicial review claim mainly on the following bases:

a. Judicial Review is not Appropriate ("Alternative Remedies");

b. The Court has no power to review the decision of INDECOM to investigate ("No Reviewable Decision or Action").

c. The Act has retrospective effect

d. Public Interest Immunity does not attach to the requested information and in the event it did, this does not preclude it being disclosed to INDECOM

Whether INDECOM has Jurisdiction to Investigate the Events of the Joint Security Forces Tivoli Operation/Whether the Act has Retrospective application in relation to the JDF

[216] The jurisdictional challenge raised by the 1st Claimant and adopted by the 2nd, is that the powers which INDECOM purports to exercise in relation to the matters complained of did not exist prior to INDECOM's creation on 16th August 2010. As

such they argue, it cannot now be exercising jurisdiction in relation to matters which happened before its inception. That is, that the INDECOM Act does not grant retrospective application of INDECOM's powers in respect to the JDF. The 1st Claimant further contends that the powers of INDECOM is derived from statute and that it has no residuary common law power to investigate the JDF, and he concedes that INDECOM does not purport to act by way of a common law power but under the umbrella of the INDECOM Act, pursuant to which, it has issued the warrant and notices.

[217] It is INDECOM's contention that in relation to the issue of retrospective effect raised by the Claimants, the general rule prohibiting retrospective effect of legislation only applies 'to provisions that change the character of past actions, for e.g. to alter established rights or penalise what before had not been subject to a penalty". They argue that this prohibition is inapplicable as it relates to the INDECOM Act as there are no such provisions within it. It is their position that the relevant provisions are procedural and as such there is a presumption that they may be applied to events that occurred prior to the enactment so long as existing rights are not affected.

[218] There is no dispute between the parties that INDECOM has no common law power to investigate the JDF and that any such authority must come from the INDECOM Act or some other statutory power. INDECOM contends that existing rights have not been affected in that the JDF was subject to investigation by the JCF and other bodies before the commencement of the Act and they did not previously enjoy a right against investigation. Thus the procedural change in granting IDECOM jurisdiction, contained in sections 4, 12 and 21 of the Act does not affect any existing rights or penalise what before had not been subject to a penalty. There is, they say, no provision at all, of this nature in the Act.

The Unfairness of applying the Act retrospectively

[219] Additionally, the Claimants contend that to apply retrospective effect to the Act in relation to the JDF would prove to be unfair to its members. They submit that the mischief that Parliament intended to cure was to set up an independent body to investigate complainants made by the members of the Jamaica Constabulary Force (JCF) as the Police Public Complaints Authority (PPCA) was inadequate in addressing these complaints. It is only as a result of this that this body, INDECOM, "was somehow incidentally" (my words), "given the powers to investigate complaints against the JDF and correctional officers as no such body existed before." So in other words, INDECOM came about out of a need for complaints against the police to be more fulsomely addressed. JDF and the correctional officers were merely appended, without more.

[220] The Respondent submitted that "if the power to investigate complaints arising out of incidents involving the security forces on a date prior to the establishment of INDECOM is presumed to have retroactive application of the Act affecting established rights, then the Court must consider the following: at the heart of it, the presumption against retrospective application is to prevent unfairness". They consider that it would be fair as the Act is intended to deal with the inadequacy of investigations in respect of incidents involving the police forces resulting in death or injury or abuse to members of the public as was highlighted in the report from the Inter-American Commission on Human Rights (IACHR) in **Michael Gayle v Jamaica**, report, Case No.12.418, Report No.92/05.

Analysis

Whether the INDECOM ACT has retrospective effect in relation to the JDF

[221] It is without doubt, that in considering whether a statute has retrospective effect, it is necessary for the Court to apply the rules of statutory construction. Retrospective legislation is primarily defined as legislation which "takes away or impairs any vested rights acquired under existing laws, or creates a new

obligation or imposes a new duty, or attaches a new disability in respect to transactions or consideration already past." **Craies on Legislation, 9th edition, p432, n136.** It is also true that retrospective laws are often unjust and it is for this reason that a Court will not interpret a law as having retrospective or any other effect, unless this is unambiguous and clear.

> *"...in statutes dealing with ordinary people in their everyday lives, the language is presumed to be used in its primary ordinary sense, unless this stultifies the purpose of the statute, or otherwise produces some injustice, absurdity, anomaly or contradiction, in which case some secondary ordinary sense may be preferred, so as to obviate the injustice, absurdity, anomaly or contradiction, or fulfil the purpose of the statute".* ***Lord Simon of Glaisdale in Maunsell v Olins [1975] AC 373 at 391****.*

[222] **In Powys V Powys (1971) 3 ALL ER 116 at 124 (e);** Brandon J suggested the following approach to statutory interpretation:

> *"The true principles to apply are in my view these: that the first and most important consideration in construing an Act is the ordinary and natural meaning of the words used; that if such meaning is plain, effect should be given to it; and that it is only if such meaning is not plain, but obscure or equivocal, that resort should be had to presumptions or other means of explaining it".*

[223] The above authorities indicate that the Court's first step is to give a statute its ordinary and natural meaning. At common law, a statute will be presumed not to have retrospective operation, unless it is clearly stated and unambiguously expressed. In the case of the criminal law, this presumption is usually strong, due to the likely injustice that comes with the imposition of a penalty for an action that was lawful when it was done; and in our jurisdiction section 20 (7) of the Constitution makes retrospective application generally unconstitutional in the criminal context. Retrospective laws can make it difficult or impossible for, one to choose, whether to, avoid conduct that will attract criminal sanction/penalty as at the time of acting, the sanction would not have existed and so could not have been known and so lead to unfairness.

[224] It can be gleaned from the authorities that a retrospective operation is not to be given to a statute so as to impair existing rights or obligations, otherwise than as regard matters of procedure unless that effect cannot be avoided without it being

clearly contrary to the intention of its framers. **Mahendra Budek v State of Chhattisgarh and Ors**. - 2009(4) MPHT10(CG); before applying a statute retrospectively the Court has to be satisfied that the statute is in fact clearly intended to be retrospective. **Campbell v Robinson** (1939) 3 JLR 173 and **Yew Bon Tew v Kenderaan Bas Mara** [1983] AC 553.

[225] There is a strong presumption against retrospective application where if a statute is given retrospective effect it affects vested rights or makes illegal, transactions or conduct which was previously legal. This presumption is also strong where retrospective application would result in the imposition of a new duty or attach new disability in respect of past transactions. In addition, it has been judicially stated that a statute is not properly called a retrospective statute 'because a part of the requisites for its action is drawn from a time antecedent to its passing'; **L'Office Cherifien des Phosphates v Yamashita – Shinnion Steamship Co.** Ltd (1994) 1 ALLER 20.

[226] Furthermore, in construing a statute, its purpose, ambit and the remedy sought to be applied must be considered in the context of the previous state of the law and what was contemplated; **Brown v Brown** [2010] 3 JJC 2602. It is also obvious and clear from these authorities, that even if the provision(s) is not explicitly expressed as being retrospective, this interpretation can sometimes be gleaned from implication upon a proper construction of the statute. The question is whether on a proper construction the legislature may be said to have so expressed its intention. A procedural statute is presumed to apply immediately to past, current and future facts. Ultimately the question is one of fairness.

[227] The relevant provisions of the Act under which INDECOM has sought to subject the JDF to investigation by virtue of the issue of Notices and a Warrant are sections 4, 12 and 21 of the INDECOM Act. The functions of INDECOM are contained within the parameters of section 4 (1) (a) – (c) of the INDECOM Act and provides as follows:

"Subject to the provisions of this Act, the functions of the Commission shall be to -

a. conduct investigations, for the purposes of this Act;

b. carry out in furtherance of an investigation and as the Commission considers necessary or desirable-

i. inspection of a relevant public body or relevant Force, including records, weapons and buildings;

ii. periodic reviews of the disciplinary procedures applicable to the Security Forces and the specified officials

c. take such steps as are necessary to ensure that the responsible heads and responsible officers submit to the Commission reports of incidents and complaints concerning the conduct of members of the Security Forces and specified officials."

In carrying out its functions, INDECOM is empowered by the provisions of Section 4 (2) (3) (4) and Section 21 of the INDECOM Act-

Section 4 (2) (3) (4) reads:

"(2) In the exercise of its functions under subsections (1) the Commission shall be entitled to-

d. have access to all reports, documents or other information regarding all incidents and all other evidence relating thereto, including any weapons, photographs and forensic data;

e. require the Security Forces and specified officials to furnish information relating to any matter specified in the request; or

f. make such recommendations as it considers necessary or desirable for-

i. the review and reform of any relevant laws and procedures;

ii. the protection of complainants against reprisal, discrimination and intimidation: or

iii. ensuring that the system of making complaints is accessible to members of the public, the Security Forces and specified officials;

(d) take change of and preserve the scene of any incident.

(3) For the purpose of the discharge of its functions under this Act, the Commission shall, subject to the provision of this Act, be entitled-

a. Upon the authority of a warrant issued in that behalf by a Justice of the Peace-

i. to have access to all records, documents or other information relevant to any complaint or other matter being investigated under this Act;

ii. to have access to any premises or other location where the Commission has reason to believe that there may be found any records, documents or other information referred to in sub-paragraph (i) or any property which is relevant to an investigation under this Act; and

iii. to enter any premises occupied by any person in order to make such enquires or to inspect the document, records, information or property as the Commission considers relevant to any matter being investigated under this Act; and

(b) To retain any records, documents or other property if, and for so long as, its retention is reasonably necessary for the purposes of this Act.

(4) For the purposes of subsection (3), the Commission shall have power to require any person to furnish in the manner and such times as may be specified by the Commission, information which, in the opinion of the Commission, relevant to any matter being investigated under this Act."

[228] Furthermore, by Section 21-

(1) Subject to subsection (5), the Commission may at any time require any member of the Security Forces, a specified official or any other person who, in its opinion, is able to give assistance in relation to an investigation under this Act, to furnish a statement of such information and produce any document or thing in connection with the investigation that may be in the possession or under the control of that member, official or other person.

(2) The statements referred to in subsection (1) shall be signed before a Justice of the Peace.

(3) Subject to subsection (4), the Commission may summon before it and examine on oath-

(a) any complainant; or

(b) any member of the Security Forces, any specified official or any other person who, in the opinion of the Commission, is able to furnish information relating to the investigating.

(4) For the purposes of investigation under this Act, the Commission shall have same powers as a Judge of the Supreme Court in respect of the attendance and examination of witnesses and the production of documents.

(5) A person shall not, for the purpose of an investigation, be compelled to give any evidence or produce any document or thing which he could not be compelled to give or produce in proceedings in any court of law.

[229] The 1st claimant relies on two main authorities in support of their contention, that the Act should not be applied retrospectively. These are (i) **Phillips v Eyre**

(1870) CR 6 QB 123 and (ii) **Annette Brown v Orphiel Brown** [2010] 3 JMCA Civ 12. Willes J in **Phillips v Eyre** said that retrospective legislation "is contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, ought not to change the character of past transactions carried on upon the faith of the then existing law" – In this case, the defendant was the Governor of Jamaica. In the course of putting down a rebellion, he arrested and imprisoned the claimant. These actions would have amounted to battery and false imprisonment under Jamaican law, as well as English law, but for the fact that the Jamaican legislature subsequently passed an Act of Indemnity which had the effect of making the defendant's acts lawful retrospectively. As a result, he could not be sued in Jamaica. This case provides guidance provided by the general principle outlined in the quotation above. There is no indication expressed or otherwise that the sections of the Act relied on for jurisdiction by INDECOM has 'changed the character of past transactions'. Moreover, in **Eyre**, legislation was passed which changed the character of the actions of the Defendant; making lawful, that which was unlawful. The significant distinction here is that in Eyre, it was the Defendant who obtained an advantage and his past action was now lawful. If fairness is at the heart of the interpretation, then clearly it would have been unfair to have denied the Defendant the advantage he would have gained, albeit retrospectively.

[230] The 1st Claimant contends that in **Annette Brown v Orphiel Brown**, the Court of Appeal ruled that the Property Right of Spouses Act (PROSA) had retrospective effect for specific reasons. These are (i) the language of the Act read as a whole implied it as it seemed to speak of matters which could have taken place in the past and (ii) it was necessary to give efficacy to PROSA as this Act replaced the Married Women Property Act and therefore it was necessary to give Retrospective effect to PROSA so that the Court could deal with matrimonial property that would otherwise have been dealt with under that Act. Consequently, the 1st Claimant submits that these principles do not apply to the case at bar and

that the Court should conclude that INDECOM Act does not have retrospective effect in relation to the JDF.

[231] He also relies on Morrison J.A.'s (as he then was), statements of principles governing statutory interpretation in this regard, encapsulated in **Annette Brown** and essentially captured at paragraph 69 of the judgment as follows:

> *"Based on this brief survey of the authorities, it appears to me that the proper approach to the question posed by this appeal is to be found in the following principle:*
>
> *i. The determination of the question of whether an Act of Parliament was intended by the legislature to have retrospective effect is primarily one of construction of the language of the particular statute, having regard to the relevant background (which includes the particular mischief which it was sought by Parliament to correct).*
>
> *ii. In constructing an Act, the first and most important consideration is the natural and ordinary meaning of the words used by the legislature. If there is an indication in the Act in clear and unmistakable terms that it was intended to have retrospective effect or operation, then it is the duty of the court to give effect to the plain meaning of the Act accordingly.*
>
> *iii. Even where the language of the Act does not reveal in clear and express terms what parliament intended, an implication of retrospection may nevertheless be derived from a reading of the Acts as a whole (such as, for example, where it is necessary to give reasonable efficacy to the Act).*
>
> *iv. Unless it appears plainly or unavoidably from the language of the Act, or by necessary implication, that it was intended to have retrospective effect, there is at common law a prima facie rule of construction against retrospectivity, that is to say that the court is required to approach questions of statutory interpretation with a disposition, in some cases a very strong disposition, to assume that a statute is not intended to have retrospective effect.*
>
> *v. The prima facie rule of construction is based on simple fairness, thus giving rise, whenever questions of retrospectivity arise, to a single indivisible questions, which is would the consequences of applying Act retrospectively be so unfair that Parliament could not have intended it to be applied in this way."*

Not only are these clear principles consistent with the foregoing authorities, paragraph 69 (iii) is worthy of special note, as Morrison J.A. made it clear that *"an*

implication of retrospectivity may nevertheless be derived from a reading of the Act as a whole (such as, for example, where it is necessary to give reasonable efficacy to the Act.). Furthermore, paragraph 69 (v) is also instructive where His Lordship made it clear that whenever questions of retrospection arise" … this gives rise to "a single indivisible question, which is would retrospective application **be so unfair** that Parliament could not have intended it to be applied in this way? The fairness of any interpretation giving retrospective effect is considered further below, but at this juncture, it is useful to state that fairness also involves, in these circumstances, a balancing of any prejudice to the JDF or its members against that of any aggrieved citizen that the Act seeks to address.

[232] In applying the **Annette Brown** case to the present case, the 1st Claimant submits that the mischief that Parliament intended to cure was to set up an independent body to investigate complainants made by the members of the Jamaica Constabulary Force (JCF) as the Police Public Complaints Authority (PPCA) was inadequate in addressing these complaints. It is only as a result of this that this body, INDECOM, was "given the powers to investigate complaints against the JDF and correctional officers as no such body existed before."

[233] In using the cannons of construction the 1st Claimant firstly considered whether there were express words in the Act providing for retrospective application of INDECOM'S powers and concluded that there was none. In this event it was therefore necessary to consider the existence of the power only in the context of it arising presumptively or inferentially. He argues that there is no ambiguity that requires interpretation and that retrospective application is not required to give reasonable efficacy to the Act. This is primarily as the functions and powers under the Act are new and are not delegation of existing powers to continue what was already in existence in some other form. He therefore opines that if the Court were to adopt the reasoning of Morrison J.A. (now President), it must come to the conclusion that there must be "a very strong disposition, to assume that a statute is not intended to have retrospective effect."

Procedural or Substantive?

[234] From the foregoing authorities, it becomes obvious that the following three principles of statutory interpretation are likely to be of relevance in considering the issue of whether the provisions of the INDECOM Act apply retrospectively or prospectively. The first of these principles is that the legislature is presumed not to intend legislation to change the legal character or consequences of actions that occurred before its enactment. The second is that the legislature is presumed not to intend to interfere with vested rights and the third is that there is a presumption that the legislature intends an enactment dealing with exclusively procedural matters, to apply immediately to all proceedings, whether commenced before or after the enactment comes into force. In this context this would include, complaints and or incidents occurring before the INDECOM Act came into force. A fundamental question in the case at bar, is whether the new legislative provisions at issue are procedural or substantive. This assists, as a starting point, in deciding which interpretative presumption applies. However, it is worthy of note that presumptions, are no more than tools, which assist the court in interpreting a statute. Ultimately, it is the true intention of the legislature which has to be determined and not merely, whether a statute is substantive or procedural

[235] In ***Yew Bon Tew v. Kenderaan Bas Mara*****,** [1983] 1 A.C. 553 (P.C.), Lord Bingham indicated that although at common law the rule is that a statute should not be interpreted retrospectively so as to impair existing rights and obligations there are exceptions in the case of a statute which is purely procedural "because no person has a vested right in any particular course of procedure..." Similarly, Professor Sullivan, in **Statutory Interpretation, (Concord, ON: Irwin Law, 1997) at 186-87,** confirms that it is the case, that neither the presumption against retroactive application of new law nor the presumption that new law is not intended to interfere with vested rights apply to procedural provisions. As a result such provisions are presumed to have immediate application to both pending and future facts. She puts it this way:

> *1. Persons do not have a vested right in procedure;*
>
> *2. The effect of a procedural change is deemed to be beneficial for all;*
>
> *3. Procedural provisions are an exception to the presumption against retroactivity; and*
>
> *4. Procedural provisions are ordinarily intended to have an immediate effect*

[236] However, not all provisions dealing with procedure will have retrospective effect. Procedural provisions may, in their application, affect substantive rights. If they do, they are not purely procedural and do not apply immediately **(P.-A. Côté, in** collaboration with **S. Beaulac and M. Devinat; *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 191).** It might therefore not just be a simple task of labelling a provision 'procedural' or 'substantive'. It is also important to assess whether the provisions affect substantive rights. There is therefore an imperative, in cases where the Court is called upon to consider whether a Statute or particular provisions, have retrospective application, that in cases where this is not expressly stated by Parliament; in construing or interpreting the statute by the use of presumptions and the other mechanics, employed for this purpose, that it firstly comes to a determination as to whether the statute or the provision is procedural in nature, or whether it is substantive; and whether although procedural it affects substantive rights and is therefore not merely procedural. This is important, as some authorities, speak of 'procedural legislation' only in the sense of procedure leading to trial, such as civil and criminal procedure and in so doing deals with cases where substantive rights are almost never engaged and so allows for the statement, without qualification, that, "there is no presumption against retrospective application of procedural statutes". However, this statement is, open to qualification where substantive rights are also affected.

[237] According to Professor Sullivan, **Ibid at p544-45**, a statute is procedural if it:

> *governs the methods by which facts are proven and legal consequences are established in any type of proceedings...it must be determined in the circumstances of each case. A provision may be procedural as applied to one set of facts, but substantive as applied to another. To be considered procedural in*

> *the circumstances of a case, a provision must be exclusively procedural; that is, its application to the facts in question must not interfere with any substantive rights or liabilities of the parties or produce unjust results.*

It follows therefore that if the INDECOM Act, and in particular, the questioned provisions in this case, simply governs the collection of information to establish facts and establish legal consequences for any effort to hinder it in this process and no more; the Act, would not interfere with any substantive rights or liabilities of the members of the JDF or affect them unjustly. Consequently, it would be solely procedural in nature.

[238] For emphasis, it is valuable to restate that the first rule of construction requires the Court to consider the expressed and stated intentions of Parliament; that is to seek the meaning of the words that Parliament used. This is an objective assessment**. Black-Clawson International Ltd v Papierwerke Waldorf-Aschaffenburg** [1975] AC 591. Consequently, before applying a statute retrospectively the Court has to be satisfied that the statute is in fact clearly intended to be retrospective. In so doing, the Court firstly, have to look at the words actually used by the Legislators and by so doing, find, the literal meaning unless the context suggests otherwise.

> *"One must first read the words in the context of the Act read as a whole, but one is entitled to go beyond that. The general rule in construing any document is that one should put oneself 'in the shoes' of the maker or makers and take into account relevant facts known to them when the document was made. The same must apply to Acts of Parliament subject to one qualification. An Act is addressed to all the lieges and it would seem wrong to take into account anything that was not public knowledge at the time. That may be common knowledge at the time or it may be some published information which Parliament can be presumed to have, had in mind."* ***Lord Reid in Black-Clawson at page 613 – 614.***

[239] Ultimately, if the words used in a statute are clear, then it should be given that clear meaning and no other. A consideration of section 4 and section 21, reveal that there are no express words of intention of retrospective application in relation to the JDF. This is also true of sections 12 & 13. In considering whether any such intention of retrospective effect is implied, by necessary implication or otherwise, it is convenient to assess, using Professor Sullivan's criteria above, whether the questioned provisions are procedural or substantive in nature and

whether although apparently procedural, it affects substantive rights. A court does not classify a provision as substantive or procedural by looking simply at its form, but also at its function and effect: **Yew Bon Tew,** at p. 563**.**

[240] An analysis of section 4 of the INDECOM Act~~,~~ reveals that INDECOM has been given the power to investigate the security forces (section 4 (1)); and that in the exercise of its functions in relation thereto, it is entitled by Section 4 (2) (a) to access relevant documents and all other relevant evidence and potential exhibits. It has by subsection (b) the power to collect relevant information/evidence from identified sources. This is clearly in aid of the investigation, with the view of coming to a decision as to whether to present the case for prosecution and or by subsection (c) and or make recommendations. They may by subsection (d) even take charge of and protect a crime scene should they consider this to be warranted. By section 4 (3), they are empowered to access documents/information, potential exhibits and records relevant to the investigation, Section 4 (3)(a)(i); by way of a warrant issued by a Justice of the Peace, Section 4 (3) (a)(ii); as well as by way too, of a warrant, access to any premises or location where the Commission believes such documents or records or other information or other property may be found, Section 3 (a)(iii); to enter, again by way of the said warrant, any premises occupied by any person in order to make such inquiries or to inspect documents, records, information or property considered relevant to the investigation. By virtue of Section 4 (3)(b) the Commission is empowered to retain records, documents or other property for as long as is reasonably necessary and by Section 4(4), "for the purposes of subsection (3), the Commission shall have power to require any person to furnish in the manner and such times as may be specified by the Commission, information which, in the opinion of the Commission, relevant to any matter being investigated under this Act."

[241] It is abundantly clear that Section 4 is not substantive in nature but merely procedural. It tells persons at large including, the Security Forces and INDECOM, the powers that have been vested in INDECOM and the procedure they may

employ, to achieve the objective of the Act, which the preamble suggests, is to investigate complaints and or incidents resulting in death or injury or the abuse of individuals in relation to members of the Security Forces and other State Agents, vis`-a-vis` members of the public and to collect evidence, relevant thereto.

[242] By Section 12:

> *"Where the Commission is satisfied that an incident is of such an exceptional nature, that it is likely to have a significant impact on public confidence in the Security Forces or a 'public body, the Commission shall require the relevant Force or the relevant public body to make a report of that incident to the Commission, in the form and containing such particulars as the Commission may specify'"*

and by Section 13:

> *"An investigation under this Act may be undertaken by the Commission on its own initiative."*

Sections 12 & 13 merely dictate the powers of INDECOM in relation to incidents the Commission consider is of an exceptional nature and likely to have significant impact on public confidence. INDECOM can request that the relevant security force furnish a report of the incident and by section 13, it may undertake an investigation on its own initiative. Sections 12 and 13 have been engaged by INDECOM in the case at bar. These provisions appear to be also procedural in nature and not substantive.

[243] Another provision of the Act, engaged by the circumstances of the case at bar, is section 21. By subsection (1) subject to subsection (5), INDECOM is empowered to request members of the JDF (and others), who, it believe is able to assist with an investigation to provide a statement and produce any document or thing in their possession, or control and that is relevant to the investigation. These statements are to be signed by a Justice of the Peace. Of particular relevance to the case at bar, is subsection 3, which, subject to subsection, (4), empowers INDECOM to summon any complainant or any member of the JDF(and others), who it believes is able to give information relevant to the investigation and examine any such person on oath. By subsection 4, INDECOM has the "same

powers as a Judge of the Supreme Court in respect of the attendance and examination of witnesses and the production of documents". **And by subsection (5), INDECOM cannot compel anyone for the purpose of its investigation to give evidence or produce any document or thing, if that person could not be similarly compelled to do so in a court of law.** (emphasis supplied). The highlighted text is of some relevance to the second main issue of 'public interest immunity' and which will be considered below. What is evident from all of these provisions is that they are procedural in nature and not substantive, and that even the requirement to produce documents/records/information or give evidence on oath is still subject to the safe guard, implicit in subsection 5, against self-incrimination and the other safeguards to which one is entitled in a court of law and the general administration of justice. Hence, a further safeguard is that the persons permitted to be questioned are not accused. The Act sets out procedures available to INDECOM, which it may employ to effectively investigate the situations therein described.

[244] Section 33 of the Act, provides legal consequences for failing to comply with the efforts of INDECOM to use its statutory powers under the Act to aid its' investigation. It provides for an offence where a person wilfully makes a false statement to mislead or attempt to mislead IDECOM; or without lawful justification or excuse, obstructs, hinders or resists it in the exercise of its functions; fails to comply with any of its lawful requirement whilst carrying out its functions under the Act etc. Any such breach subjects the person liable, on summary conviction, in a Parish Court to a fine not exceeding three million dollars or to imprisonment for a term not exceeding three years or to both.

[245] These provisions 'govern the methods' by which an investigation can be conducted by INDECOM, and by seeking to establish facts/evidence, employ procedures as part of its enquiry and to obtain information. These are necessary tools for any investigative body or agency. Further section 33, provides legal consequences and these are in relation not for actions past but actions following the enquiry or request of INDECOM, which must necessarily take place after the

commencement of the Act. When the provisions are applied to these proceedings, it is pellucid that they do not interfere with any 'substantive rights or liabilities' of any of the member of the JDF, nor do they 'produce unjust results'. The impugned provisions have none of the characteristics of substantive provisions. They do not attach new consequences to past act; nor do they change the existence or content of a right. There is no new offence other than offences for not complying with certain requests under the Act and these are in relation to requests made after the Act and so prospective in nature only. The provisions do not make conduct unlawful that was lawful at the time it occurred. It therefore follows that they are procedural and that there is no presumption against retrospective application. Instead, there is a presumption that, unless, the legislative intent is shown to be otherwise, procedural law is presumed to operate from the moment of its enactment, regardless of the timing of the facts underlying a particular case: **Wright v Hale** (1860), 6 H. & N. 227, 158 E.R. 94.

[246] A persuasive Canadian case which provides guidance in relation to the temporal application of procedural statutes is **Howard Smith Paper Mills Ltd et al v R**, [1957] SCR 403; In this case, the Court had to determine whether an amended provision of the Combines Investigation Act applied in a prosecution for a conspiracy alleged to have been completed before the amendment came into force. It was held that the provisions were procedural and as such could be applied to a trial held after the Act came into force in relation to allegations arising prior to the commencement of the Act.

> *"While [the provision] makes a revolutionary change in the law of evidence, it creates no offence, it takes away no defence, it does not render criminal any course of conduct which was not already so declared before its enactment, it does not alter the character or legal effect of any transaction already entered into; it deals with a matter of evidence only . . ."* ***(emphasis added)*** *Cartwright J. at p.420.*

[247] Similarly, while the provisions of the INDECOM Act empower the Commissioner and his investigators to request documents and other relevant information or exhibits; to be aided by a search warrant in certain circumstances and to require persons to provide statements or give evidence on oath, it "*does not render*

criminal any course of conduct which was not already so declared before its enactment, it does not alter the character or legal effect of any transaction already entered into...". It deals with a matter of investigating and obtaining evidence/reports in relation to complaints or incidents involving the security forces and other state agencies.

[248] Further guidance as to the presumption of retrospective effect of procedural legislation can be found in another Canadian case**, In Application under s. 83.28 of the Criminal Code (Re), 2004 SCC 42**, where the question for the Court was whether new provisions of the Criminal Code which allowed for judicial investigative hearings, under which a person could be ordered to attend and compelled to answer questions, (in a similar way to that which is accorded to the Commissioner under the INDECOM Act), could be invoked in relation to events that occurred prior to the enactment. The Court concluded that the provisions did apply because they were exclusively procedural in nature (para. 61**). Lacobucci and Arbour JJ. at para. 60,** made it clear that "*while the judicial investigative hearing may generate information pertaining to an offence . . . the hearing itself remains procedural....*" In other words, the appellant did not have a substantive right not to be examined in accordance with this procedure (para. 66). Similarly, the JDF officers do not have a substantive right not to be examined by the procedure allowed for under section 21 of the INDECOM Act and the provision is merely procedural.

[249] By virtue of the authorities, it is then safe to assume that the intent of the legislature is that the INDECOM Act being purely procedural in nature should take immediate effect and so relate to past, continuous and future facts, unless, the context or language suggests otherwise. It is prudent to put this assumption to the test.

[250] In doing so, it is necessary to consider this in light of the following: "As the INDECOM Act does not expressly state that it has retrospective application, and there is no presumption against retrospective application, the question then

becomes, is the presumption of immediate application, to past events, rebutted by clear legislative intent to the contrary?" In order to answer this question, it is necessary to consider another; that is, "what is the "mischief and defect" that the Act has set out to remedy?" The court is here not concerned with its own view of the purpose of the Act, but in giving its purpose as a result of the intention of parliament which is gleaned from the reading and interpretation of it. With the fear of repetition, but for the value of emphasis, it must again be stated that the reading and interpreting of any statute to find Parliament's intention must be in the context of the statute as a whole and the mischief it seeks to address. The Baron of the Court of Exchequer in **Heydon's Case** [1584] EWCH Exch J 36 endorsed this and so declared that "…for the sure and true interpretation of all statutes in general, four things are to be discerned and considered:

> 1. *What was the common law before the making of the Act?*
>
> 2. *What was the mischief and defect for which the common law did not provide?*
>
> 3. *What remedy did Parliament resolved and appointed to cure the disease...?*
>
> 4. *The true reason for the remedy; and then the office of the judge is always to make such construction or shall suppress subtle inventions and evasions for continuance of the mischief ... and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico.*

This system of relying on external sources such as the common law in determining the true intention of parliament is part of the purposive approach. Herein, the task of the judge is to give effect to the legislative purpose of the statute in question and as such requires a contextual approach to interpretation. In line with the propositions outlined in Heydens Case, I turn to consider:

What was the common law before the commencement of the Act?

[251] As Mr. Williams indicated in his affidavit filed 29 January 2016, "Prior to the establishment of INDECOM there was a statutory body known as the Police Public Complaints Authority (PPCA). The PPCA had no authority to investigate

the JDF although the JDF would often act in support of the JCF in internal operations". Hence it is clear that this is a newly created function which came about on the establishment of INDECOM. Against this backdrop, it must be remembered that the police have always enjoyed common law powers of investigation after a report of suspected criminal activity or they otherwise become aware of such activity, but before an arrest is made. The police will, investigate whether a crime has occurred and whether an arrest should be made. If they determine that the evidence uncovered during the investigation reveals that a crime was committed and a suspect is identified, they may arrest and charge the suspect and present the results of their investigation to the Office of the Director of Public Prosecution or the Clerk of Court, whichever is appropriate, for the further prosecution of the now accused, by placing the matter before the Court, for the issue of guilt to be resolved. Alternatively, after an investigation, the police may determine that there is insufficient evidence to pursue the matter, and no arrest is made. These powers are applied generally and JDF officers have never been exempted from the exercise of these powers by the police. It should also be remembered, as has been admitted by the Claimants, that BSI was able to investigate allegations of criminal conduct or abuse by individual soldiers but not against the JDF as a body. Hence, the common law position was that members of the JDF were investigated only by the police or and or by their internal mechanisms in relation to incidents which resulted in allegations of criminal conduct. It is, however somewhat true, that JDF as a body was not required to furnish reports/evidence to external agencies in relation to its operations and procedures, which might come under scrutiny, except of course as an example, to a Commission of Enquiry. However, it is my view that this does not warrant a resistance to retrospective application of the Act as the JDF as a body has no right in the application of procedural rules which places a greater burden on them to give account but does not affect the substantive rights of its members.

(ii) & (iii) It is convenient to pose and answer questions 2 & 3 together: What was the mischief and defect for which the common law did not provide and what remedy did Parliament resolved and appointed to cure the disease...?

[252] The preamble of the INDECOM Act gives assistance in answering these questions. It gives reasons for the Act as: "An Act to repeal the Police Complaints Act, to make provision for the establishment of a Commission of Parliament to be known as the Independent Commission of Investigations to undertake investigations concerning actions by members of the Security Forces and other agents of the state that result in death or injury to persons or the abuse of the rights of persons; and for connected matters." This Act captures all of the security forces, including the JDF and is indeed, recognition that they too required focused and sustained investigations in relation to incidents involving members of the public, resulting in death or injury or the abuse of the rights of individuals. Sykes J. partially articulated the answers to these questions in a succinct way in the following passage in relation to the JCF:

> *"Jamaica has had a long-standing problem with the investigation of the circumstances in which persons have either been killed or mistreated by members of the security force, particularly the Jamaica Constabulary Force (JCF). The view has developed, rightly or wrongly, that members of the security forces, the police in particular, are involved in too many shooting incidents which have led to the death or serious injury of citizens. Others have been injured or killed while in the custody of the state. Over the years, successive government administrations have sought to address the problem.* ***A major attempt to address the problem and to reduce public cynicism was the establishment of a statutory body known as the Police Public Complaints Authority (PPCA)****. It functioned for a number of years. It was felt that this body despite its best efforts did not accomplish the task satisfactorily. The statutory provisions were said to be inadequate. In the eyes of some, the PPCA was ineffective.* ***Another significant effort saw the establishment of the Bureau of Special Investigations (BSI).*** *This body, whatever the objective evidence may be, did not appear to command public confidence largely because it was established within and operated by the JCF, the very institution which was under a cloud of suspicion when it came to allegations of serious abuse and misconduct. Persons felt that it would not be able to conduct fair and impartial investigations into members of the force. In one sense the BSI was even weaker than the PPCA because it did not have any statutory powers to conduct effective investigations. [131] Successive administrations, for years, have been heavily criticised by human rights groups, domestic and international, for not doing enough to investigate thoroughly, professionally and independently incidents of complaints*

> *against the security forces. The criticisms were relentless. The government decided to scrap the PPCA and replace it with Indecom. In effect the perception was that the PPCA and BSI failed to do an adequate job. There is little to suggest that the population at large had confidence in their work. [132] A brief reference to some statistics provided by Indecom appointed under the ICIA gives an insight into the scale of the problem. It makes sober reading. Indecom stated, in one of its affidavits filed in this claim, that between1999 to 2010 - a mere eleven years - 2257 persons were killed by the police. This figure came from the police - the BSI. By any measure this is indeed a high rate of killings, whether justified or not. The high rate of killings by the police and the perception that the police were unaccountable led the public to conclude that the cases were not being properly investigated. The PPCA body and the BSI were seen to be ineffective, underfunded and lacking in statutory authority to conduct investigations that met acceptable standards. This was the context of the passage of the legislation." Sykes. J at para. 131-132.* ***Gerville Williams & Others v The Commissioner of the Independent Commission Investigations; [2012] JMFC Full 1***

I would add that the poor state of affairs also existed in relation to the JDF as they too were often the subject of complaints which were inadequately addressed. Consequently, they were embraced by the INDECOM Act; a 'remedy' appointed by Parliament as 'providing the cure'.

> **(iv) The true reason for the remedy; and then the office of the judge is always to make such construction or shall suppress subtle inventions and evasions for continuance of the mischief ... and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico.**

[253] As submitted by the Respondent, "The INDECOM Act of 2010 replaced the Police Public Complaints Act that established an internal mechanism to investigate the actions of the police that result in death or injury or the abuse of the rights of persons. Despite the work of the Police Public Complaints Authority, the Bureau of Special Investigations and the results of several interventions at the legislative and policy levels, Jamaica continued to experience record levels of police violence and homicide as well as fatal shootings of police officers by hardened criminals". Hence, by all accounts, 'the true remedy' that the legislature sought to provide is the INDECOM Act and its relevant provisions in relation to more effective investigations of incidents and complaints against the security forces. It is therefore for the Court to give effect to this and to thwart any effort, subtle or otherwise, to continue the mischief, the Act is designed to remedy. In so doing, it must bear in mind that the BSI had been investigating the

Tivoli joint security force operation and that this was handed over to INDECOM in June 2012. Similarly the Office of the Public Defender handed over its investigations into the said incident in April 2014. INDECOM commenced its investigation prior to the 'handing over' in September 2011. Would these investigations carried on by INDECOM, be of any real effect if the JDF was excluded? Would it make sense for INDECOM to investigate members of the police and not members of the JDF, when the two forces were in a 'joint operation'? Could the Act have intended this? The answers to these questions are clearly a resounding 'no'. It is also clear that it could not have been the intention of Parliament that there should be a difference in treatment between the JCF and JDF by INDECOM. This Court has to give effect to this.

[254] Furthermore, the issues that arose from the joint military operation were of the very type that the Act had in mind. It was one of public importance. There is up to this point from looking at the provisions, purpose and intent of the Act, the mischief that was perceived and that it intended to address, an implicit intention of retrospective application, regardless of whether the Act is construed to be substantive or procedural. However, it is in my view, procedural and so the presumption of retrospective application is more easily applied. In line with the principles of interpretation, and those outlined by the **Baron of the Court of Exchequer in Heydon's Case (1854),** when the Act is viewed in context, and the mischief which it seeks to address contextualised, the clear presumptive legislative intention of its framers is that the Act, should have retrospective application. This has not been rebutted.

[255] The Claimants submit that if Parliament intended the specified provisions to have retrospective application it would have stated so in clear expressed language as it did in section 40 of the Act where it clearly empowers INDECOM to take over and continue complaints that were being handled by the now defunct, Police Complaints authority and as it did in section 10(4) where it provided a time period by which complaints should be made. Hence, it is their contention that even if it could be said that INDECOM can exercise its powers retrospectively this could

only arise by implication after reading the Act as a whole. Consequently, he argues that, Sections 40 (1) (b) and 40 (2) makes it clear that Parliament contemplated the preservation of the privileges of the public which existed prior to the creation of INDECOM jurisdiction over those complaints which existed before the PPCA prior to the creation of INDECOM. The section refers to complaints specifically against the JCF and therefore gives retrospective effect only in this regard. He argues that where it might appear that some retrospective jurisdiction was intended by the legislator, then, there is in such instances a rule whereby any presumption of retrospection should be kept to as narrow a compass as will accord with the legislative intention. They rely on **Skinner v Cooper** [1979] 1 WLR 666 and **Lauri v Renad** [1892] CH 403 where Justice Lindley stated at pages 420 -421 that –

> *It certainly requires very clear and unmistakable language in a subsequent Act of Parliament to revive or recreate an expired right. It is a fundamental rule of English Law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction; and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary. The International Copyright Act of 1886 must be construed according to these well-settled rules.*

[256] Therefore, Counsel contended that Parliament covered the issue of retrospection in a specified and limited way as it related to the Jamaica Constabulary Force, and did not see the need for any retrospective application at all in relation to the Jamaica Defence Force. In fact, had parliament so intended, it would have provided for it, just as it did in section 40, in relation to the Jamaica Defence Force. Section 40 of the Act provides that.: Section 40 of the INDECOM Act states:

> *"40. – (1) Notwithstanding the repeal of the Public Complaints Act (thereinafter referred to as the "repealed Act")*
>
> *(a) Any property purchased by, belonging to or vested in the Public Police Complaints Authority under the repealed Act and all interests, rights and easement into or out of that property shall, without any conveyances, assignment or transfer, belong to and be vested in the Commission of Parliament established under this Act, subject to all and any trusts and to all debts, liabilities and obligations affecting the same and to any enactment*

regulating the management, maintenance, control, supervision and dealing with the property;

(b) Any complaint which immediately before the date of commencement of this Act, is pending before or otherwise being dealt with by the Authority, may as from that date be continued by the Commission.

(2) In this section "complaint has the meaning assigned to be under the repealed Act."

[257] It is true that in instances where the Court finds that there is a presumption of retrospective application that this should be narrowly delineated and kept within the strict bounds of actual legislative intent. This court finds that the scope of the provisions of the Act, are sufficiently limited and narrow and that its interpretation accord with legislative intention, circumscribed by its provisions. The fact that the Act speaks specifically to complaints made prior to its inception in relation to the JCF does not indicate that the legislature intends that only those complaints should be considered in this way. That is not the spirit and thrust of the Act. The Act is designed to address complaints and incidents in relation to the security Forces. The singling out for mention of the complaints in existence in relation to the JCF, prior to the inception of INDECOM, was a mere recognition of the fact that there was a mechanism before for these complaints and that the process by which they should now be addressed would have to be contemplated and explicitly provided for in the Act otherwise there would have been a lacuna or confusion. Of course investigations into incidents many years before the Act's inception would be subject to the principles of 'fairness, reasonableness and abuse of process', which acts as a measure of control on the powers of INDECOM, that can be judicially reviewed and circumscribed. This, in my view, is a separate issue from that of whether the Act is retrospective.

[258] In the final analysis, there is no indication that the presumption of retrospective application does not apply. The Act is procedural, in that it confers jurisdiction on INDECOM in relation to investigative powers, and so can be applied retrospectively; and although it is a new enactment, it does not take away any rights possessed by any member of the JDF, or increase their liability, or attach new legal consequences to their past conduct. The JDF have never had any right

to be free from investigation and or to behave unlawfully (if they did), without being brought to Justice; or to behave improperly without any repercussions. The behaviour of the JDF has never been above reproach and any unlawful killing or injury to civilians caused by any of its members, even while on duty, have always carried criminal penalties, and therefore at all times, they have been subjected to the criminal law. It therefore follows, that, it cannot be said that the INDECOM Act ever created any new legal consequences or impaired any existing rights. In fact, the JDF soldiers have never had a right to protection from investigation of alleged, illegal behaviour, as this is the only way in which such an allegation can be scrutinised, examined and evaluated to assess whether it should be the subject of a criminal charge; ultimately leading to a determination of culpability. The INDECOM Act does not impair any vested rights and has merely given INDECOM jurisdiction for investigation of either Force as a body as well as individual members; and as such provides a more narrowly drawn and focused, specialist organ, in the hope of meeting the legislature's policy objective of specifically addressing conduct, procedure and reports of extra-judicial killings and civilian abuse by the Security Forces and the resultant cries for justice.

[259] In my view, the provisions under review meet all of the tests enunciated in the authorities, for determining whether a provision is procedural and they have none of the characteristics of provisions which are properly characterized as substantive. The provisions do not "render criminal any course of conduct which was not already so declared before [their] enactment" ***(*Howard Smith, at p. 420**); they regulate the type of steps that can be taken in the course of an investigation to obtain information/evidence. These provisions promote the mode of procedure in the conduct of an investigation into the security forces or relevant state agent. They contain the characteristics of procedural and not substantive provisions. They do not attach new consequences to past acts or change the existence or content of a right. They do not make conduct unlawful that was lawful at the time it occurred. As they are purely procedural, they have immediate application and so govern past, present and future facts and the legislature is

presumed to have known this at the time, of the enactment and would have indicated, if it had intended otherwise. The provisions are subject to the presumption of immediate application and there are no words expressed, implied, or otherwise which rebut this presumption. There, is no indication that the legislature did not intend the Act to apply to the fact of this occurrence which took place only a few months prior to its commencement. There is nothing to indicate that the Legislature did not intend that the Act should not apply to past incidents that had not been investigated and resolved. In other words, the presumption has not been rebutted.

The component of fairness

[260] The Courts have indeed been moving to a new approach; that of making the issue of fairness the most significant determinant of its interpretation of the statute as to whether the intent of the legislature was for it to operate with retroactive effect or prospectively. Underlying this approach is the presumption that the Legislature intends to be fair. **Staughton LJ in *Secretary of State for Social Security and another v Tunnicliffe*** [1991] 2 All ER 712 in support of this position stated (at 724):

> *[T]he true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree – the greater the unfairness, the more it is expected that Parliament will make it clear if that is intended.*

Further support for this approach can be found by dicta of Lord Mustill in ***L'Office Chefifien Des Phosphates and another v Yamashita-Shinnihon Steamship Co Ltd*** [1994] 1 AC at 525 -526 and Morrison J.A in **Annette Brown v Orphiel Brown.**

[261] In considering the issue of "fairness" in giving retrospective application to an Act, the Claimants submit that a great deal of unfairness and injustice would be done to the Jamaica Defence Force and members of the Jamaica Defence Force if the

INDECOM Act was interpreted to have retrospective application against the Jamaica Defence Force. It appears that the Claimants may have failed to appreciate that the feature of the Act engaged in these proceedings as it relates to the issue of retrospective application, is that in relation to investigations being conducted in relation to incidents which occurred before the Act but for which the investigations had begun shortly after the coming into force of the Act. In fact, the Act came into force some 3 months after the 'incident' being investigated. If the question of fairness is considered in this context, then it is difficult to see "a great deal of unfairness and injustice" being done to the Jamaica Defence Force. It is Counsel's view "that the fact that prior to the creation of the INDECOM Act, complaints internally was by way of Court Marshal or otherwise, or if there was some action which prima facie gave rise to criminal sanctions the Jamaica Constabulary Force could have investigated it, means that neither the Jamaica Defence Force or an individual member would have had in its contemplation on 24/5/2010 (the date of firing of mortars) that apart from the Jamaica Defence Force there was any other body which could investigate its actions and compel the giving of evidence under pain of criminal sanctions, and the Jamaica Defence Force would have taken actions with this state of the law in mind." Investigating powers have also been given to INDECOM. How can it be said that the Jamaica Defence Force and its members have been prejudiced as a result? The Jamaica Defence Force and its members have never enjoyed a right against being investigated; albeit by themselves or the police. Being subjected to investigation has always had with it, the right of the investigator to ask questions; request statements and other documents or exhibits and to obtain warrants to obtain what is considered relevant documents or exhibits. The INDECOM Act has given the Commissioner and his investigators these powers and moreover, has maintained implicitly, by section 21 (5), the right against self-incrimination and legal professional privilege by expressly providing that:

> *. (5) A person shall not, for the purpose of an investigation, be compelled to give any evidence or produce any document or thing which he could not be compelled to give or produce in proceedings in any court of law.*

[262] The position of the Claimants in this regard, amounts to one of "splitting hairs". It would have been clear to the Jamaica Defence Force and its members that if incidents occurred which involved them and which required investigations, these could be carried out by personnel empowered so to do. This knowledge it is hoped, assisted them to behave within the parameters of the law or within the bounds of acceptable professional behaviour. In any event, no one is entitled to behave illegally and the fact that past behaviour is being investigated in this context cannot truly be said to be outside of the contemplation of JDF officers at the time. This is similar to a situation where gunfire is involved in an incident, with allegations that JDF officers were firing and an unarmed civilian was killed. Would it not have been in the contemplation of the JDF Officers that there could be an investigation into their conduct during the incident, either by the JDF itself or the police? As such, it is immaterial that the investigating authority now includes INDECOM. There is nothing unfair about this. Hence, the submission at paragraph 43 of the 1st Claimant's submissions, that "a reasonable and practical person is expected to act in accordance with the law as it exists at the time action is taken, and not as to what it might be. This is exactly what the Jamaica Defence Force did in May 2010," is wholly without merit. The law then and the law now as it relates to the behaviour of the Security Forces, including the JDF, is the same following the commencement of the Statute on 16/8/2010 as it was before and made them subject to investigation and possible criminal charges should this be supported by the evidence gathered. The INDECOM Act has introduced no new offence, whereby actions at the time of the Joint military operation may have been lawful, but may now be found to be unlawful. There are no new consequences for the past action of any of the JDF soldiers.

[263] Additionally, the 1st Claimant cites the **Director of Public Prosecutions v Mark Thwaites & Ors** consolidated with **The Attorney General v Mark Thwaites & Ors** [2012] JMCA Civ 38, in support of his contention that though no new offences are created by the INDECOM Act, the liberty of members of the Jamaica Defence Force would be threatened if an adverse finding is made by

INDECOM and that it would be grossly unfair to permit this to take place retrospectively and would be a breach of their constitutional rights. It is very clear that the liberty of members of the Jamaica Defence Force would have been threatened before the INDECOM Act, if an adverse finding was made against them by the Jamaica Constabulary Force or by internal investigators of the Jamaica Defence Force. As INDECOM submits, there is an additional body for these purposes; but the same peril, rights, obligations and liabilities exist now as it did prior to the said enactment. The additional body with investigative power does not provide any new threat to the liberty of JDF members as a result of a possible adverse finding. The 1st Claimant also submits that BSI was able to investigate allegations of criminal conduct or abuse by individual soldiers but not against the JDF as a body and that the Act had introduced something new. What difference in fact does this make? Are the investigations being conducted by INDECOM, which are the subject of this claim, an investigation into JDF as a body and if so, what does this mean in practical terms? It is my view that, the body consists of its individual members, and the information sought from the JDF ultimately turns on investigations into individual officers of the JDF and the procedures in place, as well as those giving particular orders. The JDF having to now provide reports to INDECOM does not in my view affect substantive rights of individuals, in fact not even JDF as a body. These are merely new procedural steps, designed to assist in achieving the objective of the Act. Even if I am wrong on this, the position would nevertheless, remain the same. The intention of the legislature is for the Act to have retrospective effect.

[264] In any event, retrospective laws may sometimes be justified on the grounds that other public interests outweigh the inconvenience and detriment suffered by a particular individual or group as they may well serve justified policy objectives. In "**The Morality of Law", (Yale University Press, 2nd ed. 1972**) **53,** Lon L Fuller said that, "while laws should generally be prospective, situations can arise in which granting retroactive effect to legal rules not only becomes tolerable, but may actually be essential to advance the cause of legality … It is when things go

wrong that the retroactive statute often becomes indispensable as a curative measure; though the proper movement of law is forward in time, we sometimes have to stop and turn about to pick up the pieces". Similarly in **George Hudson Ltd v Australian Timber Workers Union (**1923) 32 CLR 413, 434, Isaacs J**,** acknowledged that while laws should generally not be retrospective, there are circumstances where retrospective laws are justified. Hence, after referring to the presumption against retrospective operation, His Lordship stated: "That is the universal touchstone for the Court to apply to any given case. But its application is not sure unless the whole circumstances are considered, that is to say, the whole of the circumstances which the Legislature may be assumed to have had before it. What may seem unjust when regarded from the standpoint of one person affected may be absolutely just when a broad view is taken of all who are affected ... when contemplated in its total effect justice may be overwhelmingly on the other side". Thus, even in the event that the INDECOM Act in its current form is not merely procedural, retrospective application would nevertheless have been the intent of Parliament and this would be judicially tolerable to cure the mischief which was perceived. Any inconvenience or detriment (except making unlawful, past conduct which was lawful at the time), suffered by the JDF or its members would be justified on the grounds that it would be outweighed by other public interests and the need to sometimes 'stop and turn about to pick up the pieces." In my view, this is another test of 'fairness' and the INDECOM Act uses this method and achieves this objective.

[265] Before leaving this issue, it is apt to note that it is due to the Claimants' view that the Act is prospective and that INDECOM is giving the legislation retrospective application and therefore acting ultra vires, that they have asked this Court to review INDECOM's decision to apply the particular provisions of the Act in relation to an occurrence which took place before its commencement. It is not as INDECOM appear to have suggested, a judicial review, (which they say cannot be done), of their decision to investigate. Judicial review is apt in the circumstances.

[266] In conclusion, I find there is a presumption of retroactive application. This presumption is of course subject to the issue of fairness which really ought to be a determinant factor. If this presumption led to unfairness, then it is likely the presumption would have been rebutted as Parliament is unlikely to have intended unfairness. The issue of fairness is balanced against the position taken by the Claimant. The INDECOM Act is procedural and applies to past, present and future facts, limited by the 12month period for the reporting of complaints, subject to the discretion of the Commissioner to enlarge time in a particular case and of course limited by 'reasonableness' in cases where the Act provides no limitation period. INDECOM is empowered to retrospectively exercise its powers against the Jamaica Defence Force and its members in relation to the May 2010, Western Kingston Internal Security operation. As such the warrant and Notices are not issued in excess of the jurisdiction of INDECOM. They are not ultra vires and ought not to be quashed on the basis of the Act being prospective in nature.

The Issue of Waiver

[267] This issue relates to the contention by INDECOM by way of an alternative argument that in the event that the court agrees that there is no retrospective effect; in any event, the Jamaica Defence Force has succumbed to its jurisdiction. Mr. Terence Williams Commissioner of INDECOM at paragraph 65 of his first affidavit took the view that the Jamaica Defence Force has waived the right to object to the jurisdiction of INDECOM as the Jamaica Defence Force has co-operated with INDECOM during its investigations without objection.

[268] The first affidavit of Mayor Anthony Anderson, sought to rebut this allegation at paragraph 49, and stated that this co-operation was "purely as a matter of courtesy and in the interest of transparency answered such questions of INDECOM as the Jamaica Defence Force deemed fit and has declined to answer questions we do not deem fit to answer without fear of consequence or compulsion." This is an issue which does not detain me, due to the foregoing conclusions.

Public Interest Immunity

[269] In their Fixed Date Claim Form filed on the 29th of January 2016, the Claimants sought, inter alia, several orders specific to the doctrine of public interest immunity and the Official secret Acts. These orders are noted as iii, iv, v, vi, viii, ix, xi and xii in the Fixed Date Claim Form, and read as follows:

1. An order of prohibition prohibiting the Independent Commission of Investigations and its servants and/or agents, or otherwise howsoever from commencing a search, enquiring about, inspecting, copying by any means whatsoever, uplifting, seizing, detaining, or any means whatsoever interfering or interacting with the documents, records, property, and information in whatsoever format it may be recorded, as requested by the warrant.

2. An Order of Prohibition prohibiting the Independent Commission of Investigations whether by itself, its servants and/or agents from seeking to take evidence on oath from any person pursuant to the Notices.

3. A declaration that some of the documents, records, property, and information in whatsoever format they may be recorded, requested in the Warrant and as set out in the Certificate of the Minister of National Security dated 13 January, 2016 are protected by Public Interest Immunity to the extent claimed in the Certificate of the Minister of National Security on behalf of the Defence Board, and to such further extent as this Honourable Court deems just.

4. A declaration that notwithstanding the provisions of the Independent Commission of Investigation Act, the Jamaica Defence Force is restricted from allowing access to and/or is entitled to prevent access to or disclosure of the documents or information requested by the Independent Commission of Investigations at items A, D, E and F of the

Warrant pursuant to the Official Secrets Acts 1911 and 1920 and in particular, section 2(1) and 2 (1A) of the Official Secrets Act 1911.

5. A Declaration that notwithstanding the provisions of the Independent Commission of Investigations Act and the issue of the Notices to persons unnamed, members of the Jamaica Defence Force are restricted from providing evidence on oath which reveals or discloses documents or information in breach of the Official Secrets Act and in particular sections 2(1) and 2(1A) of the Official Secrets Act 1911.

6. A Declaration that the execution of the warrant on the Jamaica Defence Force's premises is likely to be prejudicial to the interests of the state including Jamaica's interests of national security, defence and international relations.

7. Such further and orders as this Honourable Court deems just to ensure that documents, records, property and information in whatsoever format it may be recorded over which it is alleged that Public Interest Immunity attaches are safeguarded and not disclosed without further determination and/or Order of this Honourable Court.

[270] Counsel appearing for the Defendant, Ms. Tana'ania Small Davis, Ms. Yanique Taylor and Mr. Mikhail Jackson outlined in their written submissions that a claim to public interest immunity does not arise in the claim at bar. They further stated that the doctrine of public interest immunity is not a suitable ground for judicial review. In their view, these two positions were premised on the fact that the Claimants have wrongly utilised a specialized area of administrative law to conduct what is essentially a discovery claim. They highlighted that a Discovery claim is made pursuant to rule 28.15 of the Civil Procedure Rules, and that in circumstances where such an application is made, the court will examine the documents and determine the issue. It was opined that simply making such a

claim is not conclusive against disclosure as it is the right and duty of the court to make a determination as to whether or not disclosure should be ordered.

[271] The question that flows from the above submission is whether or not the court ought to refuse all declarations and reliefs sought pursuant to the doctrine of public interest immunity as the Claimants had an alternative remedy, that is, the application should have been made pursuant to rule 28.15 of the Civil Procedure Rules?

[272] It is trite that judicial review is a remedy of last resort and the courts in their discretion will not normally grant this remedy in circumstances where an alternative remedy is available. In essence, alternative remedies should be exhausted first. Undoubtedly, should it be established that the alternative remedies available are ineffective or inappropriate to address the substance of the issue in question; an applicant may proceed directly with an application for judicial review. See: **Glencore Energy UK Limited v Commissioners of HMRC** [2017] EWHC 1476.

[273] An examination of the Civil Procedure Rules reveals that rule 28.15 speaks to a claim of right to withhold disclosure or inspection of document. This rule accentuates the fact that an applicant may make an application to the court for an order absolving him or her from disclosing the existence of a document on the ground that should the document be disclosed, there would be damage to the public's interest. The section reads -

> *(1) A person who claims a right to withhold disclosure or inspection of a document, class of document or part of a document must –*
>
> *(a) make such claim for the document; and*
>
> *(b) state the grounds on which such a right is claimed, in the list or otherwise in writing to the person wishing to inspect the document.*
>
> *(2) A person may however apply to the court, without notice, for an order permitting that person not to disclose the existence of a document on the ground that disclosure of the existence of the document would damage the public interest.*

(3) A person who applies under paragraph (2) must –

(a) identify the document, documents or parts of documents for which a right to withhold disclosure is claimed; and

(b) give evidence on affidavit showing –

(i) that the applicant has a right or duty to withhold disclosure; and

(ii) the grounds on which such right or duty is claimed.

[274] It is true that rule 28.15 provides an avenue for a determination of whether a document or information should be withheld from disclosure on the ground of public interest immunity. However, it is my view that, this Rule is in relation to discovery in civil proceedings before the Court. The proper procedure in an application of this nature, should this not be by way of judicial review by a litigant objecting to the decision of grant of immunity, would be by way of a claim for a declaration as to the nature of the information being withheld from disclosure and the power, if any, of the Respondent to receive it. However, if this is an incorrect position, I have, as an alternative, considered this issue in light of the Respondent's position. In so doing, the question for determination would then be, whether an application pursuant to rule 28.15 would be ineffective and inappropriate to address the substance of the public interest immunity claim, herein?

[275] The fundamental question that the subject issue deals with is, whether or not INDECOM, in the course of an investigation, has the authority to enter the premises of the JDF with a view to examine documents that may contain highly classified information, or in fact, whether they are entitled to the disclosure of documents classified by the 2nd Defendant as attracting public interest immunity; or whether such actions are ultra vires to INDECOM's investigative powers over the JDF? This question gives rise to issues of national security and the implications that may stem from the disclosure of classified information, not only from a domestic standpoint but as the evidence disclose, also 'from an international standpoint, as the JDF is the repository of Secret and Top Secret Documents of Jamaica; including documents relating to the security, defence,

international relations of Jamaica as well as information communicated in confidence to the Government of Jamaica by and on behalf of foreign governments'. Given the alleged delicate nature of the documents in question, the implications that disclosure may have and the jurisdictional challenges brought by the JDF, an application pursuant to rule 28.15 would indeed be ineffective and inappropriate to address the substance of the issues in question as they require a more in-depth and systematic scrutiny than that which is allowed for under rule 28.15. On this premise, this is a matter that would in any event, fall within the precincts of one that is appropriate for judicial review, in the context of this claim. This is particularly so, where as in this instance, the respondent asserts that it is entitled to all documents/information that it seeks in the warrant, regardless of whether they attract public interest immunity.

[276] It is to be noted that traditionally a number of subject areas have been regarded as falling outside the scope of judicial review, and these include decisions relating to national security. Thus the position above, that the subject matter in question gives rise to issues of national security and are so delicate in nature that a more systematic scrutiny is required than which is provided for in rule 28.15, may prima facie appear to be contrary to the traditional approach. However, the jurisdictional issues relating to the alleged ultra vires actions of the respondent, raised by the Claimants, are vastly intertwined with issues relating to INDECOM's powers of investigation vis a vis national security, and as such, it would be imprudent to separate them.

[277] There are authorities that posit that the executive branch of Government should be tasked with the duty of determining whether national security is in jeopardy. These authorities suggest that the judiciary has no role to play in this determination. However, on the contrary, there are authorities, that provide that there is a balancing exercise that the courts ought to carry out when dealing with issues concerning national security and public interest immunity and which necessarily involves the Judge being the arbiter.

[278] Counsel for the Respondent in their written submissions outlined that the Claimants' public interest immunity claim is premature because the object of claiming immunity is because public disclosure would be damaging to the public interest. They opined that disclosure is not being sought by the Respondent for use in criminal or other proceedings, but, that this is an investigation with stated Terms of Reference. It was outlined that the subjects of the investigation are not on trial and that, the ultimate conclusion of the investigation may not necessarily result in any charge being laid against any member of the JDF. This submission by the Respondent questions the justiciability or non-justiciability of the relief sought by the Claimants. Essentially, it is the Respondent's contention that they are conducting a mere investigation, as such, the state of affairs as they now exist, does not and cannot amount to a matter that can be adjudicated on by a court, therefore, it is non-justiciable. However, although the Respondent is merely seeking to conduct an investigation, the doctrine of public interest immunity is a live issue. The fundamental concern is whether the Respondent should be granted access to the documents listed in the warrant. So as to come to a decision, the public interest of withholding the documents and that of ensuring that justice is properly administered to the residents of Tivoli Gardens must be sufficiently balanced by the court. See: **Conway v Rimmer** [1968] AC 910. This balancing exercise is an act that is appropriate and suitable for adjudication by a court. Therefore, though the Respondent is merely conducting an investigation, the investigation, came about from a decision, considered by the Claimant's to be ultra vires and also one, the exercise of which, it is claimed, runs counter to the Official Secrets Acts and the principles of public interest immunity and is therefore unreasonable.

[279] It must be remembered that as was said in **CCSU v Minister of Civil Service** [1984] 3 ALL ER 937 para. (e) Administrative action is subject to control by judicial review under three heads: (1) illegality, where the decision making authority has been guilty of an error of law, e.g purporting to exercise a power it does not possess; (2) irrationality, where the decision making authority has acted

so unreasonably that no reasonable authority would have made the decision; (3) procedural impropriety, where the decision making has failed in its duty to act properly. It is clear from the claim, particulars and reliefs sought that the Claimants are relying on all three heads.

[280] Additionally, and for completeness, it should also be noted that what is currently before this court is the hearing of the substantial issues for which leave has been granted. As such, all arguments relating to the suitability of this matter for judicial review would have been sufficiently ventilated at the hearing of the application for permission to apply for judicial review. The fact that we are now at this stage is evidence of the fact that this issue was already decided on, and the hearing judge at that time was satisfied that this was indeed an appropriate case for judicial review. This brings us back to the substantial issue, where the questions to be answered are as follows –

1. Whether the Certificate issued by the Minister of National Security, without more, precludes the Respondent from entering and inspecting the documents listed in its warrant.

2. Whether the documents listed in the Defendant's warrant should be disclosed?

3. Whether or not Section 2 of the Official Secret Act 1911, restricts the investigative powers granted to INDECOM under Section 4 and 12 of the INDECOM Act, as well as those powers granted under Section 21?

4. Whether or not the Minister's Certificate dated the 7th January 2016 renders the warrant and notices issued by the Respondent null and void and an unreasonable exercise of power?

Whether the Certificate issued by the Minister of National Security, without more, precludes the Respondent from entering and inspecting the documents listed in its warrant.

[281] Counsel appearing for the 1st Claimant Mr. Walter Scott Q.C. and Mr. Matthieu Beckford in their written submissions outlined that where, as occurred in the case at bar, there is a Minister's Certificate claiming Public Interest Immunity, on the basis of national security interests the case of **Balfour v Foreign and Commonwealth Minister** [1994] 2 All ER 588 is not only good law but ought to be followed by this Honourable Court. They stated that the Honourable Minister having issued his Certificate claiming Public Interest Immunity for the classes of documents set out therein, at its highest, INDECOM is barred from receiving or examining the documents and at its lowest, it could only do so if this court found that Public Interest Immunity does not attach to the documents.

[282] Throughout the years the courts have been cautious in their approach when dealing with this area of the law. As such, for a proper determination of the issue at hand, the following cases must be examined with scrutiny: **Duncan v Cammell Laird & Co., Ltd.** [1942] 1 All ER, **Conway v Rimmer and Another** [1968] 1 All ER, **Balfour v Foreign and Commonwealth Office** [1994] 2 All ER 588 and **Council of Civil Service Unions and others v Minister for the Civil Service** [1984] 3 All ER 935

[283] The question to be determined under this issue is whether the public interest immunity claim, ought to be accepted as conclusive in total reliance on the Minister's categorisation. If so, then it is the Claimants' position that the, Respondent should as a consequence not seek to pursue the information sought and that in doing so, demonstrates an unreasonable exercise of power. The Respondent contends otherwise. It contends that (i) it is for the Court to ultimately make such a determination as the Minister's decision is not conclusive and is open to review (ii) that INDECOM is a body designed to also be privy to documents subject to public interest immunity. Hence its officers have to take an oath of secrecy and will commit an offence should they disclose information gleaned during the course of their duties. These offences are provided for in section 33 of the Act.

[284] In **Duncan v Cammell Laird**, the main contention was whether or not the court should inspect the documents in order to satisfy itself that the claim of privilege was rightly made. The appellants asked for an order for the production of certain documents. The First Lord of the Admiralty had made an affidavit in which he stated that such production would be contrary to the public interest. Some of the documents had already been produced before a tribunal of inquiry into the loss of one of His Majesty's ships and reference was made to parts of them in the report issued on command paper. It was contended that the court should have the document produced and exercise its judgment upon the matter. It was thereafter held that an order for production ought to be refused. Documents otherwise relevant and liable to production need not be produced if, owing to their actual contents, or to the class of documents to which they belong, the public interest requires that they should be withheld. An objection to the production of documents duly taken by the head of a government department should be treated by the court as conclusive. At page 593 - 594, Viscount Simon had this to say-

> *The remaining question is whether, when objection has been duly taken, the judge should treat it as conclusive. There are cases in the books where the view has been expressed that the judge might properly probe the objection by himself examining the documents. For example, Field J., said in Hennessy v Wright (18), at p.515:*
>
> *… I should consider myself entitled to examine privately the documents to the production of which he [the head of the department] objected, and to endeavour by this means and that of questions addressed to him, to ascertain whether the fear of injury to the public service was the real motive in objecting.*
>
> *In Asiatic Petroleum Co., Ltd v Anglo-Persian Co., Ltd.(20), Scrutton J when sitting in Chambers, looked at the documents (see p. 826). And so did Macnagten,J., in* ***Spigelman v Hocken*** *(15).* ***On the other hand, it has been several times laid down that the court ought to regard the objection, when validly and formally taken, as conclusive.*** *Thus, in Beatson v Skene (16), Pollock, C.B., observed, at pp.853, 854:*
>
> *We are of opinion that, if the documents of a State paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a court of justice; and the question then arises, how is this to be determined?*
>
> *It is manifest it must be determined either by the presiding judge, or by the responsible servant of the Crown in whose custody the paper is. The judge would*

> *be unable to determine it without ascertaining what the document was, and why the publication of it would be injurious to the public service – an inquiry which cannot take place in private, and which taking place in public may do all the mischief which it is proposed to guard against.*
>
> *It appears to us, therefore, that the question whether the production of the documents would be injurious to the public service must be determined, not by the judge but by the head of the department having the custody of the paper; and if he is in attendance and states that in his opinion the production of the document would be injurious to the public service, we think the judge ought not to compel the production of it.* ***The administration of justice is only a part of the general conduct of the affairs of any State or nation, and we think is (with respect to the production or non-production of a state paper in a court of justice) subordinate to the general welfare of the community. (emphasis added).***

[285] This case was decided in 1942. Although it does seem to object to the production on the grounds that the Court could not look at these documents in private and to do so in public would defeat the assertion of public interest immunity, without more, as this in itself would be disclosure; the historical context must be borne in mind; not only because at that time there may have been more faith in the bona fides of the executive but also in relation to the legal framework at the time. Prior to 1947 in the UK, discovery in civil proceedings was by way of the common law and this, provided that discovery of documents could not be ordered against the Crown in proceedings to which it was a party. See: Attorney-General v. Newcastle-upon-Tyne 1897 2 Q.B. 384 (C,A.) and In re La Societe Les Affreteurs Reunis [1921] 2K.B. 1 (C.A.). The **Duncan v Cammel** Laird decision was in 1942. So at this time there was a clear bias or privilege in favour of the Crown in relation to general discovery. This rule was abolished by Section 28 of the Crown Proceedings Act 1947. Consequently, the court could require the Crown to make discovery of documents, produce documents for inspection and answer interrogatories. However, section 28(2) of this Act provided a proviso by which public interest immunity not only continued to be protected but the faith in the executive was evidently still extant and the bias and privilege in favour of the Crown/Executive maintained although in a reduced form. It provided that:

> *(2) Without prejudice to the proviso to the preceding subsection, any rules made for the purposes of this section shall be such as to secure that the existence of a document will not be disclosed if, in the opinion of a Minister of the Crown, it would be injurious to the public interest to disclose the existence thereof.*

[286] This proviso specifically provides for the prevention of disclosure if a Minister was of the view that disclosure would be injurious to the public interest. It is to be noted that the Jamaican Crown Proceedings Act of 1959 contains at section 23 the same provisions and proviso as its UK counterpart. This Act too is in relation to civil proceedings and allows for proceedings to be taken against the Crown and makes the Crown subject to orders of discovery and interrogatories. The decision in **Duncan v Cammell Laird** amounts to whether the Crown was a party in a case or not, documents otherwise relevant and liable to production should not be produced if the Minister or permanent Head determined that public interest required that they should be withheld. What is particularly disturbing about this decision is the carte blanche given to a Minister to exclusively decide the issue of public interest immunity. The House of Lords unanimously agreed that a court could never question a claim of public interest immunity made in the proper form regardless of the nature of the documents to which it referred. As far as their Lordships were concerned the executive were to be the sole arbiters of the public interest and if objection to the production of a document were taken in the proper manner and form by a Minister after personal scrutiny, or by the permanent head of the department in the minister's absence, the certificate or affidavit stating that its production would be against the public interest had to be accepted by the court as conclusive. Happily, this decision has been somewhat watered down, distinguished and overruled by some subsequent authorities, as with the advent of greater social awareness, perceived human rights violations and excessive abuse by the state, a court’s impotence in always accepting as conclusive, the decision of the minister, without review, would defy the cries for justice, transparency and fairness; and ultimately an undermining of the rule of law. The case of **Conway v Rimmer** is one of the most noteworthy of cases which subsequently overruled, or perhaps more appropriately, undermined, **Duncan v Cammell Laird**.

[287] Although the court in **Duncan v Cammell** had reposed full confidence in the executive/ head of the department having custody of the documents in question,

the Court in **Conway v Rimmer** formed a new disposition. This disposition came in the form of the court performing a balancing exercise between any competing public interests, therefore vesting it with the ability to review the categorisation of the Minister. This disposition was accepted by Counsel representing the 2nd Claimant. The House of Lords in **Conway v Rimmer** outlined that it was the court that has jurisdiction to order the disclosure of documents for which public interest immunity/Crown privilege is claimed, as it is the right and duty of the court to hold the balance between the interests of the public in ensuring the proper administration of justice and the public interest in the withholding of documents whose disclosure would be contrary to the national interest. Accordingly, a Minister's certificate that disclosure of a class of documents (or the contents of particular documents) would be injurious to the public interest is not conclusive.

[288] It is with the danger of the pitfalls readily identifiable from the decision in **Duncan v Cammell Laird** in mind that in **Conway v Rimmer** [1968] AC 910, Lord Pearce opined that:

> *Any department quite naturally and reasonably wishes, as any private business or any semi-State board must also wish, that its documents or correspondence should never be seen by any outside eye. If it can obtain this result by putting forward a general vague claim for protection on the ground of candour it can hardly be blamed for doing so. "It is not surprising" it has been said (Professor Wade, Administrative Law (2nd edn.) at p. 285) "that the Crown, having been given a blank cheque, yielded to the temptation to overdraw". Moreover the defect of such an argument is that 5 HL Deb vol 197 c.742-3 6.6.1956 6 Research Paper 96/25 discrimination and relaxation of the claim could not be acknowledged by the Crown lest it jeopardise the claim of the whole class of documents and of other classes of document. No weighing of the injury done to particular litigants (and thereby to the public at large) by a resulting denial of justice can be made. The ministry puts forward the rigid general claim. The court accepts it. The litigant ruefully leaves the lists, a victim of an injustice, great or small. In some cases this injustice is a necessary evil for the public good, in others it is unnecessary. Yet the court has not weighed the balance or considered whether the public interest in the well-being or routine of the ministry or the public interest in the fair administration of justice should have prevailed in that particular case.*

[289] This is also true in the case at bar and is overwhelmingly endorsed by me. The case at bar involves investigations which may result in criminal sanctions. There

have been individuals who have been killed or injured. It is therefore natural and reasonable that the Claimants might put 'forward a general vague claim for protection". In taking the approach as in **Duncan v Cammell Laird**, there could be no balancing of the injury done to particular litigants or the public against the claim for public interest immunity. So in other words, there would be no assessment of the justice of the case and the genuineness of any claim to public interest immunity. This is of particular significance in this instance, where INDECOM has been given the mandate to investigate the JDF. This must in my view, involve sight of records that might attract public interest immunity. The question is, to what extent and are there significant/substantial national security risks involved if disclosure is made. Justice demands that the court weigh in the balance not just whether the documents attract public interest immunity but also whether it is to the extent that this must prevail. Of course this statement is qualified by the nature of the documents. Disclosure of some documents are so clearly against the interest of National Security, that the Court need not inspect nor call for their production as they speak for themselves and it is in these situations that the Court will give way to the view of the Minister, without more. The Minister is in these circumstances is the best person to assess and categorise the information. However, there are other situations which are not as clear cut.

[290] **Lord Reid** delivering the leading judgment, in **Conway v Rimmer,** in his own style, gave support to the position taken by Lord Pearce, and said this at page 879 –

> *I have no doubt that the case of **Duncan v Cammell Laird & Co**., (1) was rightly decided. The plaintiff sought a discovery of documents relating to the submarine Thetis including a contract for the hull and machinery and plans and specifications. The First Lord of the Admiralty had stated that "it would be injurious to the public interest that any of the said documents should be disclosed in person". ..**I find it difficult to believe that his speech would have been the same if the case had related, as the present case does, to discovery of routine reports on a probationer constable***

At page 885 Lord Reid outlined that –

The last important case before Duncan's case (26) was Robinson v State of South Australia (No.2) (27). The state government had assumed the function of acquiring and marketing all wheat grown in the state and distributing the proceeds to the growers. A number of actions was brought alleging negligence in carrying out this function. The Australian courts had upheld objections by the state to discovery of a mass of documents in their possession. For reasons into which I need not enter, the Privy Council could not finally decide the matter. What they did was (28):

> *"…**to remit the case to the Supreme Court of South Australia with a direction that it is a proper one for exercise by the court of its power of itself inspecting the documents for which privilege is set up in order to see whether the claim is justified**…"*

In examining a plethora of cases at page 887 his Lordship stated that –

*These cases open up a new field which must be kept in view when considering whether a Minister's certificate is to be regarded as conclusive. I don't doubt that it is proper to prevent the use of any documents, wherever it comes from, if disclosure of its contents would really injure the national interest, and I do not doubt that it is proper to prevent any witness, whoever he may be, from disclosing facts which in the national interest ought to be disclosed**. Moreover, it is the duty of the court to do this without the intervention of any Minister if possible serious injury to the national interest is readily apparent. In this field, however, it is more than ever necessary that in a doubtful case the alleged public interest in concealment should be balanced against the public interest that the administration of justice should not be frustrated. If the Minister, who has no duty to balance these conflicting public interests, says no more than that in his opinion the public interest requires concealment, and if that is to be accepted as conclusive in the field as well as with regard to documents in his possession, it seems to me not only that very serious injustice may be done to the parties, but also that the due administration of justice may be gravely impaired for quite inadequate reasons.***

*It **cannot be said that there would be any constitutional impropriety in enabling the court to overrule a Minister's objection**. That is already the law in Scotland. In commonwealth jurisdictions from which there is an appeal to the Privy Council the courts generally follow Robinson's case (42), and, where they do not, they follow Duncan's case (43) with reluctance; and a limited citation of authority from the United States seems to indicate the same trend. I observe that in **United Staes v Reynolds** (44), Vinson, C.J., in delivering the opinion of the Supreme Court said:*

*"Regardless of how it is articulated, some like formula of compromise must be applied here. **Judicial Control over the evidence in a case cannot be abdicated to the caprice of executive officers**. Yet we will go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not*

> *jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone in chambers.*

His Lordship outlined at page 888 that –

> ***I would therefore propose that the House ought now to decide that courts have and are entitled to exercise power and duty to hold a balance between the public interest, as expressed by a Minister, to withhold certain documents or other evidence, and the public interest in ensuring the proper administration of justice. That does not mean that a court would reject a Minister's view: full weight must be given to it in every case, and if the Minister's reasons are of a character which judicial experience is not competent to weigh then the Minister's view must prevail; but experience has shown that reasons given for withholding whole classes of documents are often not of that character.*** *For example a court is perfectly well able to assess the likelihood that, if the writer of a certain class of document knew that there was a chance that his report might be produced in legal proceedings, he would make a less full and candid report than he would otherwise have done.* ***(emphasis added).***

As indicated above Lord Reid's views encompass a balancing exercise, whereby a balance is struck between withholding a document in a bid to protect the public's interest, rather than allowing disclosure of the document, even though disclosure may prove advantageous to an individual litigant's case. The court is required in certain circumstances, to look beyond a minister's certificate and an analysis is required as to whether disclosure would be more detrimental to the interest of the public, than whatever advantages a litigant stand to gain. This was an exercise that His Lordship believed should be conducted by a court with sufficient credence given to the categorisation of the Minister. It is in this bold spirit that Lord Reid said at pg. 952, ***"In my judgment in considering what is "proper" for a court to do we must have regard to the need shown by 25 years of experience since Duncan's case, that the courts should balance the public interest in the proper administration of justice against the public interest in with holding any evidence which the Minister considers ought to be withheld. I would therefore propose that the House ought now to decide that courts have and are entitled to exercise a power and duty to hold a balance between the public interest as expressed by a Minister, to withhold certain documents or other evidence, and the public interest in the proper***

administration of justice". These statements I endorse as being applicable to the case at bar.

[291] **In Glasgow Corporation v Central Land Board** [1956 S.C. (H.L.)], this position was established in Scotland some 12 years earlier. In this case it was held that the court could go behind a minister's certificate and, after weighing private interests against public ones decide whether or not a particular piece of material should attract immunity on public interest grounds.

The Court Examining the Documents

[292] In support of Counsel's contention that this court should not ordinarily, look beyond a certificate from the minister, as stated earlier, they rely on the 1994 case of **Balfour v Foreign and Commonwealth Minister** [1994] **2 All ER 588** and as noted this case came some almost 30 years after **Conway v Rimmer**. In **Balfour**, it was held that although the courts had to always be vigilant to ensure that public interest immunity of whatever kind was raised only in appropriate circumstances and with appropriate particularity, once there was an actual or potential risk to national security demonstrated by an appropriate certificate issued by a minister the court should not exercise its right to inspect the documents. It was the view of the judges of the UK Court of Appeal that since the industrial tribunal had correctly recognised the constraints placed upon it by the terms of the certificates the appeal would be dismissed. In coming to its decision the court of appeal made reference to the 1984 case of **Council of Civil Service Unions and others v Minister for the Civil Service** [1984] 3 All ER 935, to which I will soon return.

[293] It is apparent that the reasoning in Balfour does not in fact support the claimants as much as they contend as it expressly provides that the "court had always to be vigilant to ensure that public interest immunity of whatever kind was raised only in appropriate circumstances'. This requires an assessment of the circumstances. How then could the court be 'vigilant' and how then could it

decide whether it is satisfied that the circumstances in which public interest immunity is being raised, is indeed appropriate? It is my view that **Balfour** and **Conway** can and should work 'hand in hand'. They are not inconsistent with each other. In Balfour, the relevance of the documents came under question as the offence against the Appellant was made out on the primary facts and was sufficient to justify dismissal "***Counsel for the Appellant never came anywhere near explaining how matters involving National Security could or might impinge*** **upon the findings of the tribunal which resulted in his dismissal**". So there was an issue of material relevance.

[294] Additionally, **Balfour** presented that the court is not entitled to reject the Minister's view and that "full weight must be given to it in every case, and if the Minister's reasons are of a character which judicial experience is not competent enough to weigh then the Minister's views must prevail...I do not doubt that there are certain classes of documents which ought not to be disclosed whatever their content may be", Lord Reid at pg 952. So here, His Lordship is not saying the Minister's certificate is always conclusive but that they may be in certain circumstances.

In Balfour, the court was of the view that the public interest certificates containing the particulars of the nature and content of the material attracting immunity was such that a court could not require them to be disclosed – so not only were these irrelevant in relation to the findings of the tribunal, the documents contained what appears to be substantial information relating to the security and intelligence service and ultimately undisputed significant national security risks if they were to be disclosed. Hence at page 596 – Lord Russell delivering the leading judgment said at page 596,

> *"In this case the court* ***has not abdicated its responsibility****, but it has recognised the constraints placed upon it by the terms of the certificate issued by the executive. There must always be vigilance by the courts to ensure that public interest immunity of whatever kind is raised only in appropriate circumstances and with appropriate particularity, but once there is* ***an actual or potential ris****k to National Security demonstrated by an appropriate certificate the court should not exercise its right to inspect".*

[295] There were 3 certificates in Balfour's case. All 3 were in similar terms. "Each raised objection to the production of an evidence documentary or otherwise, about the organization of the security and intelligence services, their theatres of operation or their methods. Express reference was made to foreign powers and terrorist organizations and the threat to National security of disclosure. It has not been suggested that the certificates lacked particularity, either as to the nature and contents of the material which attracted immunity or as to the reason for the claim" – Lord Russell at paragraph (e)- page 592.

[296] It is to be noted that the facts in the case involved an appellant who worked in the diplomatic service. A part of the facts was that in 1985 whilst posted in Syria he issued a Visa to a man to enter the U.K. This man was a terrorist. Subsequently, following granting a fraudulent Visa to another man in 1989, in Dubai, the appellant was recalled to London which he did the following day and was arrested and interrogated and detained pursuant to the prevention of terrorism (Temporary provisions) Act 1984. Although no criminal proceedings were brought against him disciplinary proceedings were. What is evident from the facts is that National Security would have been a very live issue and hence, their Lordships decision which the head notes indicate was as follows:

> *"Although the courts always had to be vigilant to ensure that public interest immunity of whatever kind was raised only in appropriate circumstances and with appropriate particularity, once there was an actual or potential risk to national security demonstrated by an appropriate certificate issued by a Minister the Court should not exercise its right to inspect the documents.".*

[297] This decision in the circumstances cannot be faulted and although appears to be in conflict with **Conway v Rimmer** is in fact not. The court in Balfour admits to having the right to inspect- but it says it should not do so in certain circumstances, where clearly from the facts and particulars, an actual or potential risk to National Security was indeed a serious possibility/ or perhaps a reality.

[298] The facts of **Council of Civil Service Unions and others v Minister for the Civil Service** are as follows: Government Communications Headquarters

(GCHQ) was a branch of the civil service whose main functions were to ensure the security of the United Kingdom military and official communications and to provide signals intelligence for the government. All the staff at GCHQ had a long standing right, originating when GCHQ was formed in 1947, to belong to national trade unions, and most of them did so. On seven occasions between 1979 and 1981 industrial action was taken at GCHQ causing disruption. Attempts by the government to dissuade union officials from action which would adversely affect operations at GCHQ failed. The Minister for the Civil Service issued an oral instruction to the effect that the terms and conditions of civil servants at GCHQ would be revised so as to exclude membership of any trade union other than a departmental staff association approved by the director of GCHQ. That instruction was issued without prior consultation with the staff at GCHQ. Judicial review of the Minister's instruction was applied for, seeking inter alia, a declaration that it was invalid because the minister had acted unfairly in removing their fundamental right to belong to a trade union without consultation. The judge granted the application on the ground that the minister ought to have consulted the staff before issuing the instruction. The minister appealed to the Court of Appeal contending inter alia that the requirements of national security overrode any duty which the minister otherwise had to consult the staff. Affidavit evidence was filed on behalf of the minister to the effect that in her view there had been a real risk that prior consultation would occasion the sort of disruption at GCHQ which threatened national security and which was the very thing the instruction was intended to avoid. The Court of appeal allowed the minister's appeal on the grounds of national security. The appellants thereafter appealed to the House of Lords.

[299] The House of Lords held that although where the government sought to rely on reasons of national security to justify a decision or action the courts would not accept a mere assertion to that effect but would require evidence that the decision or action was taken for reasons of national security. The question whether the decision or action was in fact necessitated by the requirements of

national security was non-justiciable since the executive was the sole judge of what national security required and alone had access to the information that enabled the judgment to be made as to what was required. Once the minister produced evidence that her decision not to consult the staff before withdrawing the right to trade union membership was taken for reasons of national security, that overrode any right to judicial review which the appellants had arising out of the denial of their legitimate expectation of consultation. As such the appeal was dismissed.

[300] Lord Fraser in handing down his judgment stated at page 944 that –

> *…if no question of national security arose, the decision-making process in this case would have been in unfair. The respondent's case is that she deliberately made the decision without prior consultation because prior consultation would involve a real risk that it would occasion the very kind of disruption [at GCHQ] which was a threat to national security and which it was intended to avoid.*

His Lordship went on to say that –

> *The question is one of evidence. The decision on whether the requirements of national security outweigh the duty of fairness in any particular case is for the government and not for the courts; the government alone has access to the necessary information, and in any event the judicial process is unsuitable for reaching decisions on national security. But if the decision is successfully challenged, on the ground that it has been reached by a process which is unfair, then the government is under an obligation to produce evidence that the decision was in fact based on grounds of national security. Authority for both these points is found in The Zamora [1916] 2 AC 77. The former point is dealt with in the well-known passage from the advice of the Judicial Committee delivered by Lord Parker (at 107):*
>
> > *"Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of law or otherwise discussed in public."*

[301] In **Council of Civil Service Unions and others v Minister for the Civil Service,** although**,** the House of Lords appear to have diverted from the position held in **Conway v Rimmer** in 1968, this again is not so. The facts and reasoning in **Council of Civil Service Unions,** are clearly distinguishable and were peculiar to that particular case. It must be borne in mind that the decision in **Conway v Rimmer** concerned the disclosure of a certain class of documents

concerning litigation whilst in **Council of Civil Service Unions and others v Minister for the Civil Service,** the Minister for the Civil Service had failed to inform the civil servants at GCHQ that they would no longer be permitted to be admitted as members of a trade union, other than a departmental staff association. At the time, the Minister failed to inform the civil servants of the changes; she used the history and pass behaviour of the staff to come to that decision; she was privy to that history and the national security risks posed by their potential behaviour had they been consulted. The matter was not before a court for adjudication and as such, there can be no question as to whether the judiciary or a minister should have assessed whether or not the information should have been revealed to the civil servants. In that stead, the minister had appropriately done her own assessment as she was privy to the culture of the workers and knew their natural inclination to take industrial action. This being the type of disruption, the ministry was trying to prevent, a reasonable, court could not have faulted the Minister for her actions. The circumstances as they existed echoed sentiments of non-justiciability. Thus in this case the court rightly ruled that the minister had the authority to assess whether the information should be withheld on the basis of public interest immunity. However, in circumstances where a matter echoes sentiments of justiciability, then it is in the remit of the court to undergo the balancing exercise advanced by **Conway v Rimmer.**

[302] I am of the view that the certificates of public interest immunity issued by the Minister in the context and circumstances of this claim require the Court to inspect the relevant documents. There is in my view insufficient particularity; the issue involved is that of the investigation of the JDF and its members in relation to an incident involving the death of approximately 73 persons and allegations of mortar fire. In these circumstances, it behoves the court to consider the nature of the documents and to ensure that their nature reflects the concerns raised by the Minister. As highlighted above the investigation being conducted by the respondent has given rise to an issue that requires the court’s intervention. The court’s role being to balance the public interest of withholding the documents and

that of ensuring that justice is properly administered to the residents of Tivoli Gardens, as such it becomes pellucid that the certificate issued by the Minister of National Security, by itself, does not preclude the Respondent from entering the premises of the JDF and or inspecting the documents outlined in the warrant or requiring particular officers to give evidence in relation to the operations. It is the duty of this court to assess whether or not public interest immunity, in the form of national security risks, outweighing the public interests in facilitating the investigation, attach to these documents/information.

Balancing the Competing Public Interests

[303] It has long been the view that the party that asserts a claim of public interest immunity, bears the burden of establishing that there is a risk that production would be injurious to the public interest, as was done in the case at bar, this is usually proved by way of a certificate from a Minister or other appropriate official setting out the grounds of the claim. If the State has successfully established that there is a relevant public interest in favour of non-production, the burden shifts to the party seeking production of the document. This party must establish that there is a competing public interest in favour of production. If the party seeking disclosure successfully does this, the court has a duty to perform a balancing exercise to evaluate which public interest claim should be sustained.

[304] In performing this balancing exercise, low-level policy communications and reports will intrinsically be treated differently from documents and information concerning national security and defence, as well as those dealing with international relations and state papers that involve high-level government policy. Undoubtedly, this is attributed to the varying degrees of harm that may be caused by disclosure from each class of document. It follows that where the claim for public interest immunity involves documents of less pressing importance it is unlikely that the claim will succeed. As Lord Bingham of Cornhill said in ***R v Shayler*** [2003] 1 AC 247, para 33:

> *"the court's willingness to intervene will very much depend on the nature of the material which it is sought to disclose. If the issue concerns the disclosure of documents bearing a high security classification and there is apparently credible unchallenged evidence that disclosure is liable to lead to the identification of agents or the compromise of informers, the court may very well be unwilling to intervene. If, at the other end of the spectrum, it appears that while disclosure of the material may cause embarrassment or arouse criticism, it will not damage any security or intelligence interest, the court's reaction is likely to be very different."*

[305] As was discussed in **Conway v Rimmer** above – and done in the case at bar- the court may inspect the documents in issue with a view to determine whether the documents are likely to assist the other party's case. If it is found that disclosure is necessary for the fair disposal of a matter, the balance of public interests in most cases will favour disclosure, unless there is a real, potential risk of national security interests being compromised. This point was reiterated in **Regina (Mohamed) v Secretary of State for Foreign v Commonwealth Affairs (No. 2) (Guardian News and Media Ltd and others intervening)** [2011] QB 218 where at paragraphs 131 to 133 it was stated that -

> ***131*** *While the question whether to give effect to the certificate is ultimately a matter for the court, it seems to me that, on grounds of both principle and practicality, it would require cogent reasons for a judge to differ from an assessment of this nature made by the Foreign Secretary. National security, which includes the functioning of the intelligence services and the prevention of terrorism, is absolutely central to the fundamental roles of the Government, namely the defence of the realm and the maintenance of law and order, indeed, ultimately, to the survival, of the state. As a matter of principle, decisions in connection with national security are primarily entrusted to the executive, ultimately to Government ministers, and not to the judiciary. That is inherent in the doctrine of the separation of powers, as explained by Lord Hoffmann in Secretary of State for the Home Department v Rehman [2003] 1 AC 153, paras 50-53. In practical terms the Foreign Secretary has unrestricted access to full and open advice from his experienced advisers, both in the Foreign Office and the intelligence services. He is accordingly far better informed, as well as having far more relevant experience, than any judge for the purpose of assessing the likely attitude and actions of foreign intelligence services as a result of the publication of the redacted paragraphs, and the consequences of any such actions so far as the prevention of terrorism in this country is concerned.*
>
> ***132*** *None the less, the ultimate decision whether to include the redacted paragraphs into the open version of the first judgment is a matter for judicial, not executive, determination**. Ever since the decision of the House of Lords in Conway v Rimmer [1968] AC 910 it has been clear that the question whether a document should be exempted from disclosure in legal proceedings on the ground that disclosure would damage the public interest should ultimately be decided by the court.*** *That is because it is ultimately for a judge, not a minister, to decide whether a document must be*

> *disclosed, and whether it can be referred to, in open court. That decision is for a judge not a minister, not least because it concerns what goes on in court, and because* ***a judge is better able to carry out the balancing exercise:*** *see per Lord Woolf in R v Chief Constable of West Midlands Police, Ex p Wiley [1995] 1 AC 274, 289C-G, citing Lord Pearson's observations in the Conway case [1968] AC 910, 985.* ***Furthermore, practically any decision of the executive is subject to judicial review, and it would seem to follow that a minister's opinion that a document should not be disclosed in the national interest is in principle reviewable by a court.***

[306] It is my respectful view that transparency, civil liberties, the constitution and ultimately the administration of justice requires maximum possible disclosure, whether this is to provide protection to a defendant or to legitimately advance the interests of an arm of the state (and thereby the public), in bringing a person, or persons to justice or in the enabling of investigations in order to so do; or to improve protocols or procedures in advancing the best ends of justice. It is significant to note that even in **Duncan v Cammell Laird**, it was recognised that different considerations and emphasis might apply in criminal actions. At page 633-634, Viscount Simon L.C. said: ***"The judgment of the House in the present case is limited to civil actions and I am sure the practice, as applied in criminal trials where an individual's life or liberty may be at stake, is not necessarily the same."*** Similarly in **R v Governor of Brixton Prison ex parte Osman** (1991) 93 Cr App. R 202, **Lord Justice Mann,** acknowledged **"that the application of the public immunity doctrine in criminal proceedings will involve a different balancing exercise to that in civil proceedings."** These sentiments appear to have been expressed in favour of a defendant in criminal proceedings. But they are, in my view applicable, in circumstances where persons are under investigation and the investigator seeks material which is claimed to be subject to public interest immunity. The balancing exercise in such circumstances must involve a different and more nuanced approach. The Court in my view is required to be vigilant in seeing that justice is done. This is more than just the protection of an accused, potential accused or witness but ultimately to advance the interests of the ends of justice.

[307] This process includes assessing whether or not the disclosure of the subject documents is restricted by public interest immunity based on substantial national

security risks, and whether they are relevant and required to assist INDECOM with its mandate of investigating the series of events as they unfolded in May of 2010 and or to provide recommendation for the future and to improve the conduct of the members of the JDF

[308] The case of Regina **(Mohamed) v Secretary of State** for **Foreign v Commonwealth Affairs (No. 2) (Guardian News and Media Ltd and others intervening)**, highlights the court's approach when conducting this balancing exercise. The claimant applied for judicial review, seeking an order for the disclosure of the information in confidence to his United States lawyers on the ground that the United Kingdom security services had facilitated his alleged ill-treatment. The Divisional Court of the Queen's Bench Division handed down its first open judgment in which it held that the Security Service had facilitated arguable wrongdoing and that an order for disclosure would be made, subject to any public interest immunity claim by the Foreign Secretary. At the request of the Foreign Secretary, pending further argument the court redacted from the open judgment seven short paragraphs which summarised reports by the United States Government to the United Kingdom security and intelligence services concerning the claimant's treatment by United States officials while held incommunicado in Pakistan, in the knowledge of which the United Kingdom Security Service had continued to supply information and questions to United States officials for use in interrogations of the claimant. The information sought by the claimant was subsequently made available to his United States lawyers in habeas corpus proceedings in the United States, leaving as the only issue outstanding in the judicial review claim the question of the redacted paragraphs. The Foreign Secretary continued to oppose their restoration to the judgment for reasons set out in two public interest immunity certificates, which asserted that the position of the United States Government was that, in the event of their publication, it would re-evaluate its intelligence sharing relationship with the United Kingdom, which would seriously prejudice the national security of the United Kingdom. On the question whether the redacted paragraphs should be

restored, the court held in its fourth open judgment that, balancing the considerable public interest in the redacted paragraphs being made public against the public interest in their non-disclosure, there was in the circumstances no basis on which the Foreign Secretary's assessment could be questioned, and thus the paragraphs would not be restored to the first open judgment. On the claimant's subsequent application for the fourth judgment to be reopened and reconsidered on the basis that the evidence of the Foreign Secretary had been inaccurate and incomplete, the court decided to reopen the judgment and, in its fifth open judgment, ordered that the redacted paragraphs should be restored, holding that the principle that intelligence information received by one state from another would not be released into the public domain without the supplying state's consent ("the control principle") was not absolute and was outweighed by the public interest in publication in the circumstances, and finding that subsequent evidence from the United States Government and statements from the United States Secretary of State were insufficient to establish a real risk of harm to national security if publication went ahead.

[309] On appeal by the Foreign Secretary, it was held that the principle of open justice, to which freedom of expression, democratic accountability and the rule of law were integral, required that the court should publish the reasons for its decision, especially where the issue involved the mistreatment of detainees and revealed involvement of the United Kingdom intelligence services in the mistreatment of a United Kingdom resident; that only in rare and extreme circumstances should the reasoning in the judgment which led the court to its conclusion be redacted.

[310] The Divisional court, in accepting that the overall issue was a novel one, which required balancing the public interest in national security with the public interest in open justice, the rule of law and democratic accountability, outlined that at paragraph 229 that in applying the balancing test the Divisional Court properly addressed four questions which were (See Paragraph 229):

> *(i) is there a public interest in bringing the redacted paragraphs into the public domain? (ii) Will disclosure bring about a real risk of serious harm*

> *to an important public interest, and if so, which interest? (iii) Can the real risk of serious harm to national security and international relations be protected by other methods or more limited disclosure? (iv) If the alternatives are insufficient, where does the balance of the public interest lie?*

[311] As regards the first three headings it was accepted as a matter of common law and of obligation under articles 6 and 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms that courts must do justice in public unless it can be shown that justice could not otherwise be done or there are other good reasons for privacy. The Divisional court also considered the public interest in keeping the information out of the public domain for reasons of national security and international relations. The Foreign Secretary's public interest immunity certificates made it clear that the US Government's position was that, if the redacted paragraphs were made public, then the US would re-evaluate its intelligence sharing relationship with the United Kingdom with the real risk that it would reduce the intelligence provided. It was and remained (so far as the court was aware) the judgment of the Foreign Secretary that the US Government might carry that threat out and this would seriously prejudice the national security of the United Kingdom. The court dismissed this and decided that the public interest in open justice far outweighed the national security concerns raised. In fact, their Lordship's formed this view after considering the government's public interest immunity certificates and the evidence in support thereof. The national security concerns were not of a level to outweigh the public's interest in open justice.

[312] The facts of **Regina (Mohamed) v Secretary of State** for **Foreign v Commonwealth Affairs (No 2) (Guardian News and Media Ltd and others intervening)** are manifestly different from the case at bar, this is to the extent that it concerns paragraphs redacted from a judgment whilst the case at bar concerns the JDF's refusal to disclose the contents of certain documents to INDECOM. It is nevertheless applicable as fundamentally both cases concern whether or not the information contained in a document should be disclosed despite the existence of a Minister's certificate claiming public interest immunity. This case is of critical importance as it highlights the factors that the court may

consider when balancing an extant competing interest and the weight of importance that each factor is given. It highlights the fact that the fundamental rights of all individuals are of paramount importance, and in cases concerning the violation of a citizen's rights, the scales will predominantly be tipped in favour of disclosure unless cogent reasons are provided outlining why this should not be so.

The Right to Life

[313] The case of **McCann and others v United Kingdom** [1995] ECHR 18984/91is also instructive in this regard as it also highlights the fact that a citizen's fundamental right – in this case, the right to life – is of paramount importance, as such, in times of war or whilst executing any of its operations, the security forces should be astute in limiting their use of force to that which is absolutely necessary. The facts of **McCann** are as follows: a claim was made against SAS soldiers who had been sent to Gibraltar to arrest three members of the Irish Republican Army (IRA) who were terrorist suspects. During the course of the operation the three suspects were shot and killed by the SAS soldiers. A claim was made by the representatives of the deceased. The claimants were of the view that there had been a violation of Article 2 of the European Convention on Human Rights (ECHR) and they wanted just satisfaction. Before March 1998, groups in Gibraltar, Spain and the United Kingdom were planning a terrorist attack in Gibraltar. Based on the information received, it appeared that the attack involved detonating a car bomb and would take place at the assembly area where the Royal Anglican Regiment assembled to carry out the changing of the guard.

[314] The SAS was called to assist with the apprehension of the terrorist suspects. Rules of engagement were laid down. This included rules governing when shots could be fired. The three IRA suspects were shot by the SAS soldiers who believed that they were reaching for a detonator to activate the bomb. An inquest over the shootings was held with representation from the families of the

deceased, the SAS soldiers and the British government. The jury's verdict was that the killings were lawful. Dissatisfied with this verdict, the families of the victims commenced proceedings in the High Court of Justice in Northern Ireland against the Ministry of Defence. However, these proceedings were subsequently struck out. The Applicants thereafter lodged an application with the Commission on the grounds that the deaths of the three suspects by members of the SAS were in violation of Article 2 of the ECHR. The Commission ruled by majority that there was no violation of Article 2.

[315] Finally, a submission was made to the European Court of Human Rights (ECHR). The Court considered the interpretation of Article 2 and the circumstances when deprivation of life may be justified under the exceptions of Article 2(2) and stated that the use of force must be no more than 'absolutely necessary' and 'strictly proportionate' to achieving a legitimate aim. The Court ruled that there had been a proper investigation of the case which satisfied the state's duty under Article 2. The Court stated that there had been a violation of Article 2, and that, apart from the action of the SAS soldiers it was necessary to judge the actions of those in charge of the whole operation. The Court accepted that the soldiers' belief of having to shoot the suspects to stop them from detonating a bomb was genuine, and therefore their actions were not in violation of Article 2. However, the Court found that there was a violation of Article 2 in the control and planning of the operation; it stated that the soldiers' reflex actions were due to lack of proper instruction and care on the part of the authorities. The Court ruled that the authorities had failed in two further ways: (a) they did not stop the suspects from entering Gibraltar, and (b) they did not consider whether the information as to the suspects having a remote control detonation device might be wrong. However, an award of damages was not made as the court was satisfied that the deceased were planning a terrorist attack and as such any compensation awarded in these circumstances would have been inappropriate.

[316] As is apparent, although it was pellucid that the three suspects were indeed terrorists, the court was not casual in the manner with which it dealt with the

matter. The Applicants' claim was not summarily dismissed on the basis that the three individuals were terrorists and as such were less than savoury members of the society. The court's approach indicates that even in circumstances where the actions of one party are such that the consequences which flow therefrom, may lead to irreparable damage such as the loss of a life or the loss of many lives, the security forces do not have an unabated right to end the lives of these individuals despite their depravity or decadence. An individual's right to life is sacred and may only be abrogated where life is loss under circumstances where the force used was absolutely necessary and a proportionate response at the time.

[317] It follows therefore that in balancing the competing public interest in this case, close attention must be paid to whether there may have been any human rights violations, and if it appears so, whether these violations were of such a nature that they outweighed whatever national security interest, if any that may exist. This must be against the backdrop of INDECOM's mandate. It must be borne in mind, that INDECOM's intention is also to make an assessment of whether the force used by the JDF was no more than was necessary and that whether given the circumstances it was proportionate. Undoubtedly, an assessment of these factors will gravely assist INDECOM, in its bid to effectively and efficiently execute its mandate of providing recommendation to improve the JDF's future conduct or in bringing charges against any particular individual. How does it make this assessment without the relevant information?

[318] Special note must be made of paragraphs 150 and 151 of **McCann and others,** where in considering the planning and supervision of the operation, the court assessed the training, instruction and briefing of those agents who utilised force in determining whether there had been a breach of the right to life. Here the court outlined that-

> *150. In keeping with the importance of this provision [article 2] in a democratic society, the court must in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking*

> *into consideration not only the actions of the agents of the State who actually administer force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination.*
>
> *151. The applicants submitted under this head that Article 2(1) of the Convention imposed a positive duty on States to "protect" life. In particular, the national law must strictly control and limit the circumstances in which a person may be deprived of his life by agents of the State. The State must also give appropriate training, instructions and briefings to its soldiers and other agents who may use force and exercise strict control over any operations which may involve the use of lethal force.*

[319] Chapter III of the Jamaica Constitution – The Charter of Fundamental Rights and Freedom- Section 13(2) stipulates that-

> *(2) Subject to sections 18 and 49, and to subsections (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society*
>
> *(a) this Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17; and*
>
> *(b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights.*
>
> *(3) The rights and freedoms referred to in subsection (2) are as follows (a) the right to life, liberty and security of the person and the right not to be deprived thereof except in the execution of the sentence of a court in respect of a criminal offence of which the person has been convicted.*

[320] The first right mentioned in the Charter of Rights and Fundamental Freedom is the "right to life" this factor echoes the fact that a State's obligation to protect the right to life is its most important and fundamental obligation. This sentiment was persuasively expressed by Sykes J (as he then was) in the case of **Gerville Williams v Others v The Commissioner of the Independent Commission of Investigations and Others** [2012] JMFC Full 1 at paragraph 226, where he stated that-

> *The state has a responsibility to all persons within its borders, citizen and non-citizens alike, to protect the right to life of these persons. Surely, no reasonable person could contend that it is not a legitimate function of the state to make every effort to find out how, when, where and by what means a person died or was injured, especially if the incident is alleged to have taken place at the hands of the security forces of the state. This is nothing more than the minimum required of all civilized nations. As part of the international community of civilized nations, Jamaica is obliged to have a fair, impartial, independent and rigorous system of investigation whenever an allegation of impropriety alleged is against the Security Forces. This is all the more important when the allegation involves the death of a person; the right to life surely must rank among the top tier of rights.*

[321] Article 2 of the European Convention on Human Rights speaks to the Right to Life. It reads as follows-

> *1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*
>
> *2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:*
>
> *(a) in defence of any person from unlawful violence;*
>
> *(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
>
> *(c) in action lawfully taken for the purpose of quelling a riot or insurrection.*

[322] When Section 13(3) of the Jamaican Charter of Rights and Fundamental Freedoms is juxtaposed with Article 2 of the European Convention of Human Rights, it is manifest that the right to life is a protected right that can only be departed from in circumstances where an individual has been convicted of a crime and a court so orders. The ECHR is judicious in outlining that this right is not contravened when it results from force which is no more than "absolutely necessary". This is a provision that was not included in the Jamaican Charter of Rights and Fundamental Freedom. However, it is synonymous to the basic principles of self-defence outlined in **Palmer v R** [1971] AC 814 where it was held that-

> *'It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but only do, what is reasonably necessary.'*

[323] The law dictates that a person may use such force as is reasonable in the circumstances for the purposes of self-defence, defence of another, defence of property and prevention of a crime. In this regard, where forced is used, the threshold that must be adhered to in this jurisdiction is "force which is reasonably necessary". The test of reasonableness being, that the individual had an honest belief that he was being attacked or that a crime was being committed, and that

the force used was necessary to protect himself or to prevent the crime. (See: **R v Williams (Gladstone)** [1984] 78 Cr App R 276 at page 281).

[324] The aftermath of the Tivoli incursion was that approximately 73 citizens lost their lives and it is believed that at least one person – Carl Henry- died as a result of the JDF's use of mortar rounds. These facts as they exist amount to a challenge of the hallowed principle of the sacredness of human life, and that a state should do all that is necessary in safeguarding its citizens right to life. It is the duty of this court to ensure that those charged with the duty of monitoring the actions of our security forces are equipped with the necessary tools or information that may aid in their decision making processes whether it be that charges should be laid on the basis that the force used was more than that which was absolutely necessary or reasonably justifiable; or that recommendations should be made that will improve the security forces future conduct. In this regard, there is merit to the submissions as presented by Mr. Williams that the overwhelming interest of the public to have a proper and complete investigation into the circumstances whereby lives were lost, injury was sustained and the rights of citizens were abused far outweighs any un-particularised threat to the nation and national security. Therefore, I am of the view that although public interest immunity certificates have been issued in relation to some of the subject documents, the scales have been tipped in favour of disclosure as in my view, the Claimants have failed to establish any substantial (or perhaps even real) risks to National Security if the information requested was in fact disclosed and the Respondent has shown that the public interest lies in favour of disclosure.

Whether the documents listed in the Defendant's warrant should be disclosed?

[325] The Warrant dated the 22nd December 2015 outlined that the Respondent is authorized to have access, make enquiries and inspect documents, records and property that record or evince:

a. The JDF doctrines rules or protocols that were in force in May 2010 concerning the firing of Mortar rounds.

b. The issue of mortar rounds during or before May 2010 for use in Tivoli Gardens and its environs during the state of emergency in May 2010.

c. The return of unused or unexploded mortar rounds that had been issued during or before May 2010 for use in Tivoli Gardens and its environs during the state of Emergency in May 2010.

d. The type Calibre, description, place of manufacture and batch of mortar rounds issued during or before May 2010 for use in Tivoli Gardens and its environs during the state of Emergency in May 2010.

e. The operational orders to fire mortar rounds into Tivoli Gardens and its environs during the State of Emergency in May 2010.

f. Debriefing records, after action reports, and any other review or report on the execution of the order to fire mortar rounds into Tivoli Gardens and its environs during the state of Emergency in May 2010.

g. The names ranks and functions of the members of the JDF who were responsible for, or participated in, the decision to fire mortar rounds into Tivoli Gardens and its environs during the state of Emergency in May 2010.

h. The names ranks and functions of the members of the JDF who participated in the execution of the order to fire mortar rounds into Tivoli Gardens and its environs during the state of Emergency in May 2010. This includes Mortar Fire Control officer(s), mortar line personnel and observers.

[326] As regard Item **A** - The JDF doctrines rules or protocols that were in force in May 2010 concerning the firing of Mortar rounds - the Minister opined that there are and have never been any such documents in existence. However, it is the evidence of Mr. Terrence Williams that the existence of this document was

admitted at the West Kingston Commission of Enquiry and that parts of these documents have been exhibited at the said forum during the cross-examination of the mortar expert, Chris Cobb Smith, by the attorney that represented the JDF.

[327] The following items were disclosed -

- **C** - The return of unused or unexploded mortar rounds that had been issued during or before May 2010 for use in Tivoli Gardens and its environs during the state of Emergency in May 2010. (In a redacted form to protect National security interest).

- **G**- The names, ranks and functions of the members of the JDF who were responsible for, or participated in, the decision to fire mortar rounds into Tivoli Gardens and its environs during the state of Emergency in May 2010.

- **H** - The names ranks and functions of the members of the JDF who participated in the execution of the order to fire mortar rounds into Tivoli Gardens and its environs during the state of Emergency in May 2010. This includes Mortar Fire Control officer(s), mortar line personnel and observers.

[328] The Following items were not disclosed in the Public's Interest based on national security-

- **B** - The issue of mortar rounds during or before May 2010 for use in Tivoli Gardens and its environs during the state of emergency in May 2010

- **E** - The operational orders to fire mortar rounds into Tivoli Gardens and its environs during the State of Emergency in May 2010.

- **D** - The type Calibre, description, place of manufacture and batch of mortar rounds issued during or before May 2010 for use in Tivoli Gardens and its environs during the state of Emergency in May 2010.

- **F** – After action reports. It was outlined that items such as Debriefing Records, as well as any other review or report on the execution of the order to fire mortar rounds into Tivoli Gardens and its environs during the State of Emergency have never been in existence.

Analysis

Item A - The JDF doctrines rules or protocols that were in force in May 2010 concerning the firing of Mortar rounds

[329] Upon carefully considering Mr. Williams' Affidavit evidence, I have noted that documents provided to the court in its bundle, supports his contention of the existence of some such documents and that evidence of these were given at the West Kingston Commission of Enquiry. The documents are not described as that of the JDF, although perhaps used by the JDF. If the Respondent is speaking of doctrines, rules and Protocols, used by the JDF, rather than those of the JDF, then I belief it may be necessary to use a description which reflects this. There is insufficient evidence to make a declaration, particularly as the Court did not embark on a fact finding exercise in relation to this issue. Insufficient evidence was brought to support its existence and also in support of its non-existence.

Item B - **The issue of mortar rounds during or before May 2010 for use in Tivoli Gardens and its environs during the state of emergency in May 2010**.

[330] The wording of this item appears to be vague, however, when considered, it appears that INDECOM is seeking to ascertain the number of mortar rounds that were issued during the relevant period. Undoubtedly, this information would assist in verifying whether or not there is truth to the citizens claim as to the amount of mortar round fired; as not only has INDECOM requested information as to the number of rounds issued but they have also requested the amount of rounds returned.

[331] Inspection has revealed that the documents containing most of the information requested are contained in documents labelled, Annex B, C, D and E and contains varying amount of information ranging from the number of mortar rounds that were issued, the number that was in stock during the relevant periods and to whom they were issued. These documents, prima facie appears to be covered by public interest immunity, but analysis reveals that issues of national security are not significant. Consequently, by reasons of the alleged contravention of the Tivoli residents right to life, the right to withhold this information is outweighed by the public interest in INDECOM carrying out its mandate to investigate incidents of this nature and or to provide recommendations for the future and to improve the overall conduct of members of the JDF.

Item E - **The operational orders to fire mortar rounds into Tivoli Gardens and its environs during the State of Emergency in May 2010.**

[332] Upon reviewing the operational orders, in my view most of the information contained therein does not particularly assist INDECOM with its investigation. In fact, the parts that actually do, is information that would have already been disclosed under items G and H above. I must add that the parts that do not assist INDECOM raise security concerns of a sufficient kind that may substantiate the claim to Public Interest Immunity and do not appear to be of any significance to INDECOM for their purposes as it relates to the May 2010 incident. Therefore, there is no need to disclose the operational orders.

Item D - The type Calibre, description, place of manufacture and batch of mortar rounds issued during or before May 2010 for use in Tivoli Gardens and its environs during the state of Emergency in May 2010.

[333] The Minister has failed to advance a reason for the claim of Public Interest Immunity in respect of this item. Inspection has revealed that the documents presented as containing this information, contains information relating to

ammunition and explosive records that were taken in and out of stock; ordered and shipped just prior to the operation in may 2010. I do not agree that disclosure of this information to INDECOM creates any substantial national security risks, if any, at all. This information/document should be disclosed to INDECOM.

Item F – After action reports. It was outlined that items such as Debriefing Records, as well as any other review or report on the execution of the order to fire mortar rounds into Tivoli Gardens and its environs during the State of Emergency have never been in existence

[334] In my view the after action report shown to us was extremely relevant. Only one was provided. This report was contemporaneous to the event. Any national security risk is very low, if any. The JDF is not at liberty to withhold this report as it is relevant to the Investigations and may be useful in assisting INDECOM to determine whether the decision to use mortars were reasonably justifiable and whether the benefit of using these mortars were proportionate to the dangers the mortars presented and whether international standards were met.This document will also assist INDECOM in assessing whether the members of the JDF were being truthful in stating that the mortar rounds were fired in an open field. This information is relevant when making recommendations for any of the JDF's policies to be revised or whether new policies should be created. On this basis, again the public interest favours disclosure of all the available information requested under this head.

[335] I have considered the submissions of the Claimants against disclosure and the noted reasons on the certificate, including that "some of the sensitive materials and confirmations are standard and will be used again in future operations of the JDF. This includes codes and signals used in the radio communications, the strategies employed, and the synchronisation between the units. Western Kingston still remains volatile and the details of the operations specific to that location would be reused in the event that the JDF has to carry out future operation in that area. Such details include the analysis of threat forces in the

area and the location of supplies." I find these reasons spurious and generally unsubstantiated on the face of the documents provided as being those which contain the information requested by INDECOM, with perhaps the document described as 'operational orders', for which I have not ordered disclosure. The assertion that debriefing records as well as any other review or report on the execution of the order to fire mortar rounds into Tivoli Gardens and its environs during the State of Emergency have never been in existence is surprising. None was produced for our inspection other than an after action report and one document described as 'operational orders'.

[336] To conclude, we have looked at the documents in relation to the request that were made. Having looked at these documents, I find that these documents would be classified generally as documents, (with the exception perhaps, of the operational orders), which present low, if any, national security risk, if disclosed to INDECOM. The Legislature must have had as part of its intention, as expressly provided for, that INDECOM, is entitled to documents from the security forces, at its request, to aid investigations. Of course, highly classified national security documents might be an exception. However, disclosure in these circumstances can be made without causing any real detriment to national security whilst at the same time providing great benefit to the investigation, particularly as it relates to suspected mortar shrapnel injury to Carl Henry and improving the JDF's policy, written or otherwise in relation to the use of mortar fire in situations such as that which occurred in Tivoli Gardens.

Whether or not Section 2 of the Official Secret Act 1911, restricts the investigative powers granted to INDECOM under Section 4 and 12 of the INDECOM Act, as well as those powers granted under Section 21?

[337] The Official Secrets Act primarily protects against espionage and the unauthorised disclosure of information. The 2nd Claimant in its submissions outlined that despite the provisions of the warrant, the execution of the warrant by the Defendant, on the premises of the Jamaica Defence Force would be

contrary to certain provision of the Official Secrets Act 1911, (which was duly amended by the Official Secrets Act of 1920) and would therefore be unlawful. The sections of the Official Secrets Act that reference is made to is Section 2(1), 2(1A) and Section 2(2). These sections read –

Section 2(1)

> *If any person having in his possession or control [any secret official code word or pass word or] any sketch, plan.model article note, document or information which relates to or is used in a prohibited place, or anything in such a place, or which has been made or obtained in contravention of this Act, or which has been entrusted in confidence to him by any person holding office under His Majesty or which he has obtained in contravention of this Act, or which has been entrusted in confidence to him by any person holding office under His Majesty or which he has obtained in contravention of this Act, or which has been entrusted in confidence to him by any person holding office under His Majesty or which he has obtained [or to which he has had access] owing to his position as a person who hold or has held a contract made on behalf of His Majesty, or a person who has been employed under a person who holds or has held such an office or contract –*
>
> *(a) Communicates the [code word, pass word], sketch plan, model, article, note, document or information to any person, other than a person to whom he is authorised to communicate it, or a person to whom it is in he interest of the State his duty to communicate it, or*
>
> *(b) Uses the information in his possession for the benefit of any foreign power or in any other manner prejudicial to the safety or interest of the State]…*
>
> *That person shall be guilty of a misdeameanour*

Section 2(1A) provides that-

> *If any person having in his possession or control any sketch, plan, model, article, note, document or information which relates to munitions of war, communicates it directly or indirectly to any foreign power, or in any other manner prejudicial to the safety or interests of the State, that person shall be guilty of a misdeameanour*

As per Section 2(2) –

> *If any person receives any secret code word or password or sketch, plan, model, article, note, document or information knowing or having reasonable ground to believe, at the time when he receives it, that the [code word, pass word] sketch plan, model, article, note, document or information is communicated to him in contravention of this Act, he shall be guilty of a misdeameanour, unless he proves that the communication to him of the [code word, pass word] sketch, plan model, article, note document, or information was contrary to his desire.*

[338] As was earlier highlighted, Sections 4 and 21 of the INDECOM Act adeptly highlights the Functions of INDECOM as well as the powers that have been vested in it. For ease of reference, these sections will once again be outlined. The sections read-

Section 4(1)

> *4 (1) Subject to the provisions of this Act, the functions of the Commission shall be to –*
>
> *(a) conduct investigations, for the purposes of this Act;*
>
> *(b) carry out in furtherance of an investigation and as the Commission considers necessary or desirable-*
>
> *(i) inspection of a relevant public body or relevant Force, including records, weapons and buildings;*
>
> *(ii) periodic reviews of the disciplinary procedures applicable to the Security Forces and the specified officials;*
>
> *(c) take such steps as are necessary to ensure that the responsible heads and responsible officers submit to the Commission, reports of incidents and complaints concerning the conduct of members of the Security Forces and specified officials.*

Section 4(2)

> *(2) In the exercise of its functions under subsection (1) the Commission shall be entitled to*
>
> *(a) have access to all reports, documents or other information regarding all incidents and all other evidence relating thereto, including any weapons, photographs and forensic data;*
>
> *(b) require the security Forces and specified officials to furnish information relating to any matter specified in the request; or*
>
> *(c) make such recommendations as it considers necessary or desirable for-.*
>
> *(i) the review and reform of any relevant laws and procedures;*
>
> *(ii) the protection of complainants against reprisal, discrimination and intimidation; or*
>
> *(iii) ensuring that the system of making complaints is accessible to members of the public, the Security Forces and specified officials;*
>
> *(d) take charge of and preserve the scene of any incident.*

Section 4(3)

(3) For the purpose of the discharge of its functions under this Act, the Commission shall, subject to the provision of this Act, be entitled-

a. Upon the authority of a warrant issued in that behalf by a Justice of the Peace-

iv. to have access to all records, documents or other information relevant to any complaint or other matter being investigated under this Act;

v. to have access to any premises or other location where the Commission has reason to believe that there may be found any records, documents or other information referred to in sub-paragraph (i) or any property which is relevant to an investigation under this Act; and

vi. to enter any premises occupied by any person in order to make such enquires or to inspect the document, records, information or property as the Commission considers relevant to any matter being investigated under this Act; and

(b) To retain any records, documents or other property if, and for so long as, its retention is reasonably necessary for the purposes of this Act.

(4) For the purposes of subsection (3), the Commission shall have power to require any person to furnish in the manner and such times as may be specified by the Commission, information which, in the opinion of the Commission, relevant to any matter being investigated under this Act."

Section 12 –

Where the Commission is satisfied that an incident is of such an exceptional nature, that it is likely to have a significant impact on public confidence in the Security Forces or a 'public body, the commission shall require the relevant Force or the relevant public body to make a report of that incident to the Commission, in the form and containing such particulars as the Commission may specify.

Section 21 -

(1) Subject to subsection (5), the Commission may at any time require any member of the Security Forces, a specified official or any other person who, in its opinion, is able to give assistance in relation to an investigation under this Act, to furnish a statement of such information and produce any document or thing in connection with the investigation that may be in the possession or under the control of that member, official or other person.

(2) The statements referred to in subsection (1) shall be signed before a Justice of the Peace.

(3) Subject to subsection (4), the Commission may summon before it and examine on oath-

> *(c) any complainant; or*
>
> *(d) any member of the Security Forces, any specified official or any other person who, in the opinion of the Commission, is able to furnish information relating to the investigating.*
>
> *(4) For the purposes of investigation under this Act, the Commission shall have same powers as a Judge of the Supreme Court in respect of the attendance and examination of witnesses and the production of documents.*
>
> *(5) A person shall not, for the purpose of an investigation, be compelled to give any evidence or produce any document or thing which he could not be compelled to give or produce in proceedings in any court of law.*

[339] Mr. Bunting in his Affidavit evidence outlined that the premises of the JDF are prohibited places within the meaning of the Official Secrets Act and that certain information, documents and records including those relating to arms and ammunition held at the JDF are covered by the Official Secrets Act. In this regard Counsel for the 2nd Claimant submitted that Up Park Camp falls within the definition of a prohibited place and that documents and information held by the Jamaica Defence Force may be described as documents and information related to the munition of war. Counsel stated that by virtue of the foregoing provisions of the Official Secret Act, that it is a misdemeanour for any person to communicate to an unauthorized person or person to whom it is not in the interest of the State his duty to communicate inter alia any document or information relating to or used at Up Park Camp or which has been entrusted to him in confidence by a person employed by the Government. Counsel stated that, the first offence under section 2(1)(a) of the Official Secrets Act 1911 will arise from mere unauthorized disclosure. It does not require the existence of prejudice or injury to the public interest. Counsel further contended that an offence under section 2(1)(a) may alternatively be committed if disclosure is made to a person other than a person to whom it is, in the State's interest, the duty of the communicator to communicate. In this regard, Counsel concluded that it is therefore apparent that compliance with the Warrant would, in the absence of authorization, which has in fact been withheld on national security and other public interest immunity grounds, result in the commission of offences under the Official Secrets Act. It is significant to note, that the warrant was taken out pursuant to the INDECOM Act,

which also provides for INDECOM to enter premises, including that of the JDF. It would seem that on this basis the warrant acts as authorisation.

[340] It was further submitted that the disclosure and entry which appear to be generally authorized under the 2010 INDECOM Act are nevertheless specifically prohibited under the older Official Secrets Act and that the prohibition under the Official Secret Act must prevail. Reliance was placed on the generalia specialibus non derogant principle of statutory interpretation. Essentially, this maxim of interpretation dictates that the provisions of a general statute must yield to those of a special one. See **R v Secretary of State for the Home Department, ex p Hickey (No1)** 1995 QB 43 at 56 and **Seward v The Vera Cruz (owners)**, (1884) 10 App Case 59 at 68. Section 88 of Bennion on Statutory Interpretation, it reads-

> *Where the literal meaning of a general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one. Accordingly the earlier specific provision is not treated as impliedly repealed.*

[341] It was Counsel's submission that the special provisions in the Official Secrets Act of 1911 and 1920 are applicable in relation to the confidentiality and disclosure of information and that the general terms contained in the INDECOM Act cannot derogate from the special provisions of the Official Secrets Act. In this regard, the Court's attention was directed to **The Independent Commission of Investigations v Digicel (Jamaica) Limited** [2015] JMCA Civ 32. In this case, the main issue for determination by the Court of Appeal was whether INDECOM had the authority to compel a telecommunications service provider to supply it with information which the Telecommunications Act (Telecoms Act) and the Interception of Communications Act (Intercept Act) required the provider to keep secret and confidential. Digicel (Jamaica) Limited (Digicel), one of the island's telecommunications providers, raised that question, among others, by way of a fixed date claim in the Supreme Court. Digicel contended that the provider was

not compellable. INDECOM opposed that position. Upon the hearing of the Claim, Mangatal J ruled that the provider was not compellable.

[342] Brooks JA outlined that there was no dispute in that appeal that Digicel is subject to the powers afforded INDECOM by virtue of section 21(4). The dispute is whether INDECOM can compel disclosure by Digicel and whether Digicel would be immune from criminal sanction or civil liability if it were to provide some of the information that INDECOM requires. His Lordship outlined that the major reasons for properly objecting or refusing to provide evidence to a court are the protection against self-incrimination, attorney/client privilege, without prejudice communications and public interest immunity. He highlighted that these reasons did not apply to the case before the court and that it was a case concerning statutory prohibition.

[343] His Lordship highlighted that on the point of statutory prohibition against disclosure Mangatal J's emphasis was on the fact that section 47(1) of the Telecoms Act mandates secrecy by telecommunications providers and that in concluding that a provider was not compellable to produce information of the type required by INDECOM's notice in this case, the learned judge relied on three main factors. The first factor was the restriction provided for by section 21(5) of the INDECOM Act. The second was the principle, used in statutory interpretation, known by the Latin term "generalia specialibus non derogant". The third factor was the result of a comparison between section 21 of the INDECOM Act and section 18 of the Contractor-General Act. He highlighted that she held that as the Contractor-General Act (passed 1983) was an older statute than the INDECOM Act (passed 2010), it would have been open to Parliament, if it intended for such an exemption to apply, to have included in section 21 of the INDECOM Act, a provision similar to section 18(4) of the Contractor-General Act.

[344] In approving the analysis of Mangatal J, he had this to say at paragraph 40-

> *[40] The learned judge is correct in her reasoning in respect of these matters. Firstly, section 21(5) of the INDECOM Act speaks for itself. It addresses those*

bases, briefly identified above, where a witness may avoid giving testimony. Secondly, where there is a statutory prohibition against revealing information, that prohibition cannot be undermined by general terms in another statute. The learned judge cited The "Vera Cruz" (1884) 10 AC 59 where Earle of Selborne LC, at page 68, stated:

> *"Now if anything be certain, it is this. That where there are general words in a later Act, capable of reasonable and sensible application without extending them to subjects specifically dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so..." (Emphasis supplied)*

[345] Like in **The Independent Commission of Investigations v Digicel (Jamaica) Limited,** the case at bar is one that concerns a statutory prohibition. In this regard Counsel submitted that in the absence of a provision in the INDECOM Act to the contrary, the Official Secrets Acts remain applicable to the unauthorised disclosure or disclosure prejudicial to the safety or interest of the state of any relevant information held by the JDF in relation to munitions of war.

[346] Counsel appearing for the Respondent submitted that it is manifest that section 2(1)(a) of the Official Secrets Act dictates that a breach only occurs when disclosure is made to a person who is not authorized to receive the information or when information is made to a person to whom there is no duty to disclose it. Counsel contended that the Respondent is a person who is authorized to receive the information and documents. This it was stated is pursuant to section 4(1)(b) and 4(2)(a) and (b) of the Act. It was highlighted that these provisions give efficacy to the powers bestowed by INDECOM as a Commission of Parliament. Counsel opined that if the 1st Claimant was at liberty to invoke the Official Secrets Act in order to prevent disclosure of information and documents etc. and inspection of weapons these sections of the Act would be meaningless and the Respondent would be rendered impotent to properly investigate the JDF. Counsel submitted that it cannot be accepted that Parliament intended that its Commission could be frustrated in this manner.

[347] It was highlighted by Counsel that INDECOM is an authority to whom it is in the interests of the State the Claimants' duty to communicate the information

concerning the conduct of the operation. Counsel averred that pursuant to Section 11 and Section 12 of the INDECOM Act, the members of the security forces have a duty to make full report to INDECOM for the purposes of an investigation. It was submitted that notwithstanding the absence of an express provision permitting the right to require disclosure of information which may be protected by the Official Secrets Act, the extensive investigative powers granted to INDECOM for the purpose of investigating the security forces including the JDF, dictates that the court's power to override the Official Secrets Act in this case is required by "very, very, necessary implications". In support of this point, the case of **Commissioner of INDECOM v Commissioner for the JCF** [2016] JMSC Civ 20 was commended to the court.

Analysis

[348] The case of **The Commissioner of the Independent Commission of Investigations v The Commissioner of the Jamaica Constabulary Force and the Attorney General of Jamaica [**2016] JMSC Civ 20 has provided guidance with this issue, as adeptly stated by Sykes J "*wide power is not a synonym for unlimited power*." Therefore, the powers granted to INDECOM are limited by the provisions of the Official Secrets Act. As has been the tenor of this discourse, where the item to be disclosed contain information that may be prejudicial to the interest of the state, the item ought not be disclosed. Indeed, the statutory maxim generalia specialibus non derogant is applicable to the circumstances as they exist. It is not all documents held by the JDF that falls into the category of being prejudicial to the interest of the state if disclosed. Furthermore, the prohibition is for these purposes, against communication of inter alia, document or information to any person, other than a person to whom one is authorised to communicate it, or a person to whom it is in the interest of the State his duty to communicate it. INDECOM can be provided with information held by the JDF on any of these limbs. The issue is whether it is entitled to documents that are highly classified and so presumably subject to substantial national security risks.

[349] It is important to note that there are qualifications to the limitations under the Official Secrets Act, although the precincts of the JDF is prima facie a prohibited place as defined in the Official Secrets Act, when one considers INDECOM's mandate and the powers vested in it, it becomes pellucid that it could have never been parliament's intention that the Respondent would have no authority to enter the precincts of the JDF to examine documents pursuant to an investigation, in a situation where request for those documents have not been heeded. In fact, section 1 of the 1911 Act, speaks **of "if any person for any purpose prejudicial to the safety or interests of the State…enters any prohibited place...".** By section 2**, 'purpose prejudicial'** can be deemed not just from a particular act but by the circumstances. It is my view that any entry by INDECOM in these circumstances cannot be considered 'prejudicial to the interest of the state'.

[350] Therefore, should INDECOM seek to enter by a warrant as they are entitled to, it is then for the Claimants, if they believe that for whatever reason, INDECOM is not entitled to the documents to make an application to the Court for an injunction and to adjudicate as it has done in this case. Again a protocol is recommended to guide the procedure in these circumstances. As has already been highlighted Section 4 of the INDECOM Act authorizes the Defendant to conduct investigations pertaining to acts by members of the security forces that result in death or injury to persons or the abuse of the rights of persons. The Act defined security forces to include the JDF. It therefore follows that the powers vested in the Respondent although may be curtailed by hallowed and sanctified doctrines of law, in appropriate circumstances, such as for example some documents subject to Public Interest Immunity and Legal Professional Privilege, it is within INDECOM's purview to enter the premises of the JDF to conduct their investigation. This would not in my view, be 'prejudicial to the interest of the State'. In fact, it might be very well, the opposite.

[351] The Official Secrets Act dictates that any person, that has in his possession or control any document or information which relates to or is used in a prohibited

place is guilty of a misdemeanour. The Act also stipulates that any person that communicates this information to any person, other than a person to whom he is authorised to communicate it, or a person to whom it is in the interest of the State his duty to communicate it or so uses it in any other manner prejudicial to the safety or interest of the State also commits a misdemeanour. Whilst the INDECOM Act gives the Respondent autonomy to investigate acts committed by members of the JCF, the fact that the INDECOM Act has equipped the it with the power to investigate the members of the JDF, makes it manifestly clear that the inescapable inference to be drawn by very necessary implication, is that it was the intention of Parliament that the Defendant would automatically fall within the realm of an "authorized person" under the Official Secrets Act. Unless this was so, these powers over the JDF would be of no consequence, as the Official Secrets Act would preclude it from acting altogether. As averred by Counsel appearing for the Respondent, it cannot be accepted that Parliament intended that its Commission could be frustrated in this manner. That does not preclude the Claimants in appropriate instances, from resisting disclosure and raise the issue for the decision of the Court.

[352] In order to bolster the argument that the Respondent falls within the realms of an "authorized person" under the Official Secrets Act, one may look to the provisions of Section 9 of the INDECOM Act, which speaks to the Oath of Secrecy to be taken by the Commission as well as the Staff at INDECOM, the section reads –

> *The Commissioner and every person appointed to the staff of the commission shall, before he performs 'any function assigned to him under or by virtue of this, Act, take and subscribe an oath in the form set out in the Third Schedule to be administered-*
>
> *(a) in the case of the Commissioner, by the Governor-General;*
>
> *(b) in the case of all other employees, by the commissioner.*

Pursuant to the Third Schedule, the Oath to be taken by persons appointed to staff of the Commission, reads as follows –

> *I …… do swear that I will faithfully perform any functions assigned to me under the Independent Commission of investigations Act, and I will not, on any account, at any time whatsoever, except in so far as provisions of this Act authorize, directly or indirectly reveal any information or the nature or contents of any documents communicated to me in the performance of any functions assigned to me by virtue of this Act.*

[353] The signing of this Oath suggests that Parliament had envisioned that in the course of executing its mandate, there was a genuine possibility that the Defendant would or may cross paths with information that may be deemed to be confidential or secret, as such, the signing of this Oath safeguards against the unwarranted disclosure of any information received during the course of its duty, whether it be information received whilst investigating the conduct of member of the JCF, JDF or any other agent of the state. The inference is clear that documents protected by the Official Secrets Act was reasonably contemplated by Parliament at the time of the drafting of the INDECOM Act. The Defendant's mandate and the jurisdiction to obtain a warrant, coupled with the signing of the Oath gives them the authority to enter the precincts of the JDF. Section 28 of the INDECOM Act is instructive in this regard, the section reads –

> *The Commissioner and every person concerned with the administration of this Act shall regard as secret and confidential all documents, information and things disclosed to them in the execution of any of the provisions of, this Act, except that no disclosure-*
>
> *(a) made by the Commissioner or any such person in proceedings for an offence under section 33 of this Act or a under the Perjury Act by virtue of section 21(3) of this Act; or*
>
> *(b) which the Commissioner or any such person thinks necessary to make in the discharge of their functions, and which would not prejudice the security, defence or international relations of Jamaica, shall be deemed inconsistent with any duty imposed by this section.*
>
> *(2) Neither the Commissioner nor any of the persons aforesaid shall be called upon to give evidence in respect of, or produce any such document, information or thing in any proceedings, other than proceedings, other than proceedings mentioned in subsection (1) or section 25.*

[354] Explicit in this section is the fact that the defendant has a duty to keep all information disclosed to it secret and confidential, the exception being those where a false statement has been made or information that is deemed necessary

to be disclosed as long as the disclosure does not prejudice the security, defence or international relations of Jamaica.

In relation to the warrant, INDECOM, has the right to enter the JDF premises for these documents unless they are provided by the Claimants. It is recommended that INDECOM and the 2nd Claimant develop a protocol, which allows for the preservation of material believed to be subject to public interest immunity/national security concerns and allow a procedure for these to be sealed by the parties until a Judge decide the issue as there will be occasions where different competing interests will have to be weighed and balanced. It is my view that INDECOM prima facie has the right by way of a warrant to enter the premises of the JDF and that it also prima facie has the right to request and inspect, copy and take away documents. They are in my view "authorised to enter and to receive information." This is similar to the police entering a lawyer's office for seizure and search. Although they may enter by authorisation pursuant to a warrant, issues may arise about documents subject to legal professional privilege, which in many jurisdictions is safeguarded by protocols pending resolution of any dispute. I believe these concerns are likely to again arise between INDECOM and the JDF as to alleged substantial security risks as such a protocol will be necessary. In fact, one, should be put in place before the execution of any warrant. My decision as to what should be disclosed should not necessitate INDECOM executing the warrant although legally it has a right to use a warrant to enforce co-operation. The majority decision in this case is that items B, D, and F as listed in the warrant ought to be disclosed. It is only in the event that the JDF does not comply within a reasonable time, following this judgment, should, INDECOM attempt to execute the warrant and even then it will be only in relation to those specific documents. It is expected that good sense will prevail on both sides.

In conclusion, it is my view that the warrant assists INDECOM in enforcing its requests and is a deliberate tool provided by the Act to do just that. Hence, should disclosure not be given by the Claimants, INDECOM, is entitled to

exercise its rights under the warrant, in respect for the information sought, with the exception of ‘operational orders’, which is protected by way of public interest immunity.

Notices

[355] The Claimants have raised the issue of names not being provided in the Notices. The evidence from the Commissioner is that the names in relation to the notices were provided in the form of a letter. Properly the notices should contain the names of the soldiers that INDECOM is seeking to examine. However, I do not believe that this failure makes the notices incurably bad. The requirement for the name to be inserted is to make it clear and precise that these are the specific persons required for the examination. A letter indicating those names in my view, achieves that result and therefore the notices are not invalid for want of the insertion of the names. The persons to whom the Notices are directed are identifiable from the letter.

[356] The INDECOM Act clearly provides at section 21 for INDECOM to exercise a right to question appropriate/ relevant persons, including members of the security forces. As the Act is retrospective, it follows that the Commissioner can exercise these powers in relation to the May 2010, joint operation. Section 21 (5), referred to above, provides protection to those being examined. Any objections regarding the right against self – incrimination, public interest immunity/ national security concerns, official secrets and legal professional privilege can and should be raised at the time of the question. I am not of the view that this court should grant a blanket declaration at this stage that JDF soldiers should not be required to answer questions that would require answers subject to the Official Secrets Act. Any objections should be made at the time of the question and if there is any dispute as to whether a particular question should be answered then it will require adjudication. In fact, it is my view that INDECOM is authorised to receive information. Sometimes the Court might have to do a balancing act between the

competing public interests in relation to INDECOM having information in the context of its' mandate and where substantial security risks are involved.

[357] The Official Secrets Act is not absolute in its declaration as to the non-communication of information and it can be seen from the reading of Sections 2(1) and 2 (1) (a) of the 1911 Act that there are qualifications to the general prohibition. It is my view that to grant such an order at this stage would be quite pre-mature. Although I readily admit that generally authentic 'Official Secrets' under the Act are generally un-disclosable and in most instances an adjudicator is likely to rule that the particular JDF officer is not required to answer, where there are substantial national security concerns; but this has to be considered against the backdrop, that INDECOM is authorised for the purpose of the Official Secrets Act. In addition, Section 21 (5) of the Act has to be borne in mind. It is my view, that INDECOM is 'authorised' to receive the information but that there may be limits to this information in instances of substantial security concerns or where it is deemed, 'prejudicial to the interests of the state'.

Immunity from Prosecution

[358] On the 7th January 2016, the then Minister of National Security issued a Certificate granting immunity to those members of the JDF who took part in the JDF/JCF operation in West Kingston. This certificate was issued pursuant to Regulation 45 of the Emergency Powers (No.2) Regulations 2010. The terms of the Certificate issued by the Minister were as follows-

> *No action, suit, prosecution or other proceedings shall be brought or instituted against any Officers or Ranks of the Jamaica Defence Force in respect of the orders to and the firing of mortar rounds during the emergency period as defined and interpreted in Regulations 45(4) of the Emergency Powers (No.2) Regulations 2010.*

Counsel for the Respondent has however made the pivotal point that the grant of immunity is premature as no action, suit prosecution or proceedings have been brought or instituted and that Regulation 45 is not applicable to the conduct of an investigation. It is Counsel's submission that the Respondent's investigation may

not culminate in an action, suit, prosecution or proceeding. There is indeed merit to counsel's submissions. The Respondent is seeking to conduct an investigation, as such, the issue of prosecution, action, suit or proceedings, is not under this court's purview, and only becomes a live issue if criminal charges are laid and hence prosecution begun or other actions, suits or proceedings. In this regard, it is not necessary to further comment on this issue.

[359] The Orders I make are as follows:

1. An Order of Certiorari quashing the Warrant dated December 22, 2015 issued by a Justice of the Peace on an application by the Independent Commission of Investigations pursuant to section 4(3) of the Independent Commission of Investigations Act and directed to the 1st Claimant (hereinafter called the "Warrant") is denied.

2. An Order of Certiorari quashing all Notices to persons unnamed issued pursuant to section 21 of the Independent Commission of Investigations Act and dated December 21, 2015 (hereinafter called "The Notices") is denied.

3. An Order of Prohibition to prevent the Independent Commission of Investigations whether by itself, its servants and/or agents or otherwise howsoever, from executing at the premises of the Jamaica Defence Force, the Warrant is denied.

4. An Order of Prohibition prohibiting the Independent Commission of Investigations and its servants and/or agents, or otherwise howsoever from commencing a search, enquiring about, inspecting, copying by any means whatsoever, uplifting, seizing, detaining, or any means whatsoever interfering or interacting with the documents, records, property, and information in whatsoever format it may be recorded, as requested in the Warrant is granted in relation to 'operational orders' only.

5. An Order of Prohibition, prohibiting the Independent Commission of Investigations whether by itself, its servant and/or agents from seeking to take evidence on oath from any person pursuant to the Notices is denied.

6. A declaration that some of the documents, records, property, and information in whatsoever format they may be recorded, requested in the Warrant and as set out in the Certificate of The Minister of National Security dated 13 January, 2016 are protected by Public Interest Immunity to the extent claimed in the Certificate of The Minister of National Security on behalf of The Defence Board, and to such further extent as this Honourable Court deems fit is granted in respect to 'operational orders' only.

7. A declaration that the "JDF doctrines rules or protocols that were in force in May 2010 concerning the firing of Mortar rounds" requested at Item 1(a) of the Warrant does not and has never existed is denied.

8. A declaration that notwithstanding the provisions of the Independent Commission of Investigation Act, the Jamaica Defence Force is restricted from allowing access to and/or is entitled to prevent access to or disclosure of the documents or information requested by the Independent Commission of Investigations at items, A, D & F of the Warrant pursuant to the Official Secrets Acts 1911 and 1920 and in particular, sections 2 (1) and 2 (1A) of the Official Secrets Acts 1911 is denied. In relation to item E the declaration is granted.

9. A declaration that notwithstanding the provisions of the Independent Commission of Investigations Act and the issue of the Notices to persons unnamed, members of the Jamaica Defence Force are restricted from providing evidence on oath which reveals or discloses documents or information in breach of the Official Secrets Act and in particular sections 2(1) and 2(1A) of the Official Secrets Act 1911 is denied.

10. A declaration that the pursuits of Investigations by the Independent Commission of Investigations including the application for the Warrant is, in the particular circumstances, an unreasonable exercise of power is denied.

11. A declaration that the execution of the Warrant on the Jamaica Defence Force's premises is likely to be prejudicial to the interest of the State including Jamaica's interest of national security, defence and international relations is denied.

12. Such further and other orders as this Court deems just to ensure that documents, records, property, and information in whatsoever format it may be recorded over which it is alleged that the Public's Interest Immunity attaches are safeguarded and not disclosed without further determination and/or Order of this Honourable Court. No further orders made.

13. An Order that the Independent Commission of Investigations whether by its self or its servants and/or agents or otherwise howsoever be permanently restrained from executing the Warrant and /or from enquiring about, inspecting, coping by any means whatsoever, uplifting, seizing, detaining, or any means whatsoever interfering or interacting with the documents, records, property, and information in whatsoever format it may be recorded, requested in the Warrant is denied.

14. No order as to costs

DISPOSAL

LAWRENCE- BESWICK, J

ORDERS OF THE COURT

[360] Orders made on Fixed Date Claim Form filed 29 January, 2016 in terms of:

Paragraph 1

1. An Order of Certiorari to quash the warrant dated December 22, 2015 is refused by majority (Lawrence-Beswick J dissenting).

Paragraph 2

2. An Order of Certiorari to quash all Notices to persons unnamed is refused by majority (Lawrence-Beswick J dissenting).

Paragraph 3

3. An Order of Prohibition to prevent INDECOM from executing the Warrant at the premises of the JDF is refused by majority (Lawrence-Beswick J dissenting).

Paragraph 4

4. An Order of Prohibition to prohibit INDECOM from commencing a search is refused by majority (Lawrence-Beswick J dissenting).

Paragraph 5

5. An Order of Prohibition to prohibit INDECOM from seeking to take evidence on oath from any person is refused by majority (Lawrence-Beswick J dissenting).

Paragraph 6

6. A declaration that information relating only to the operational orders requested in the Warrant as set out in the Certificate of the Minister of National Security dated 13 January 2016 is protected by Public Interest Immunity is granted unanimously. (Lawrence – Beswick J grants this declaration as it pertains to all information)

Paragraph 7

7. A declaration that the “JDF doctrines rules or protocols that were in force in May 2010 concerning the firing of mortar rounds” requested at item 1(a) of the Warrant does not and has never existed is refused unanimously.

Paragraph 8

8. A declaration that the JDF is restricted from allowing access to the information requested relating to item E of the Warrant (operational orders) is granted unanimously. As relating to items A, D and F the declaration is refused by the majority (Daye and George JJ), (Lawrence-Beswick J dissenting).

Paragraph 9

9. A declaration that members of the JDF are restricted from providing evidence on oath which reveals information in breach of the Official Secrets Act is refused by majority (Lawrence-Beswick J dissenting).

Paragraph 10

10. A declaration that the pursuit of investigations by INDECOM in the particular circumstances is an unreasonable exercise of power is refused unanimously.

Paragraph 11

11. A declaration that the execution of the Warrant on the JDF’s premises is likely to be prejudicial to the interests of the State is refused by majority (Lawrence-Beswick J dissenting).

Paragraph 13

12. An Order that INDECOM be permanently restrained from executing the Warrant is refused by majority (Lawrence-Beswick J dissenting).

Paragraph 12

13. By majority no further and other orders are deemed just in the circumstances (Daye J dissenting).

COSTS

14. No order as to costs.