[2020] JMCA Civ 63

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 26/2017

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE PUSEY JA (AG)

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

Ransford Braham QC and Miss Phylicia Williams instructed by Braham Legal for the appellant

Mrs Susan Reid-Jones instructed by the Director of State Proceedings for the respondents

18 July 2018 and 18 December 2020

MCDONALD-BISHOP JA

[1] Up to May 2014, the appellant, Sergeant Linton C Allen ("Sergeant Allen"), was, at all material times, a member of the Jamaica Constabulary Force ("the JCF") serving at the rank of Inspector. In July 2013, disciplinary proceedings were initiated against him by the 2nd respondent, the Police Service Commission ("the Commission"). At the end of those proceedings, Sergeant Allen was found guilty of the charges levelled against him and the Commission recommended to the 1st respondent, His Excellency,

the [Most] Honourable Sir Patrick Allen ("the Governor-General"), that Sergeant Allen's rank should be reduced from Inspector to Sergeant. Following a referral of the case to the Privy Council, the Governor-General, acting on the advice of the Privy Council, imposed on Sergeant Allen, the same penalty that was recommended by the Commission.

[2] Aggrieved by the outcome of those proceedings, Sergeant Allen applied to the Supreme Court for leave to bring a claim for judicial review of the decision of the respondents. He was successful in that application. On 14 December 2015, he commenced his claim for judicial review by way of fixed date claim form in which he sought, among other things, the following reliefs:

i. an order of certiorari to quash the decision of the Commission which found him guilty of misconduct and which resulted in him being reduced in rank from that of an Inspector to a Sergeant;

ii. an order of certiorari to quash the decision of the Governor-General, who, acting on the advice of the Privy Council, refused to overturn the Commission's decision;

iii. an order of certiorari quashing the finding of the Governor-General, who, acting on the advice of the Privy Council, concluded that a statement by Corporal Frazer was not material to his case and, therefore, would not have affected His decision as to penalty; or

iv. in the alternative, a declaration that the penalty which had been imposed, was unreasonable in all the circumstances; and

v. a declaration that he is still the lawful holder of the rank of Inspector.

[3] The claim was heard on 9 and 10 January 2017, by Straw J (as she then was) ("the learned judge"), and on 17 February 2017, she declined to grant the reliefs sought by Sergeant Allen in his fixed date claim form.

[4] Discontented with that decision, Sergeant Allen, on 30 March 2017, filed a notice of appeal in which he challenged on eight detailed grounds of appeal, several findings of fact and law that were made by the learned judge in disposing of his claim.

[5] When the grounds of appeal are stripped of much of the detail with which they have been formulated, it becomes evident that the resolution of the appeal depends entirely on this court's determination of two pivotal issues, which are:

i. whether prior to the Commission's recommendation of a penalty to the Governor-General, Sergeant Allen was entitled to a hearing in mitigation (grounds a, b, c, d, and e); and

ii. whether the Commission, Privy Council or Governor-General was required to give reasons for the decision to impose the penalty of reduction in rank (grounds f, g, and h).

[6] In an effort to promote a clearer understanding of these issues that fall to be resolved in this appeal, it is considered necessary to provide a brief overview of the relevant background facts and circumstances that led to the decision of the learned judge and this appeal from it.

The factual background

[7] Sergeant Allen was enlisted as a member of the JCF on 8 January 1979. Up to the initiation of the disciplinary proceedings against him, he had worked his way through the ranks to that of Inspector, with an unblemished disciplinary record. However, in June 2010, three charges of misconduct were laid against him for, "tending to undermine the good order of the [JCF] contrary to Codes 12 and 14 of Force Order No 2287, dated 4 April 1991". In summary, the particulars of those charges were that on two separate occasions (in April and May 2010), he wilfully disobeyed the lawful verbal command or order of a superior officer, and that on one of those occasions, he intentionally misrepresented facts that misled the same superior officer. It was averred that his conduct was unbecoming and undermined the discipline, good order and guidance of the force.

[8] Sergeant Allen denied all three charges, and as a consequence, on 2 July 2013, a court of enquiry was constituted by the Governor-General at the request of the Commission ("the court of enquiry") for a hearing to ensue, pursuant to regulation 47 of the Police Service Regulations ("the Regulations").

[9] After the conclusion of the hearing at the court of enquiry on 22 July 2013, Sergeant Allen was found guilty of misconduct on all three charges. A report of these findings were subsequently sent to the Commission by the court of enquiry. This report did not include any advice regarding the penalty to be imposed.

[10] At a meeting of the Commission on 20 September 2013, the report of the court of enquiry was considered and it was accepted that the charges had been proven and that the penalty of reduction in rank from that of Inspector to Sergeant should be imposed. These recommendations were subsequently submitted to the Governor-General for his attention and action.

[11] Upon receipt of the Commission's report, the Governor-General, acting in accordance with section 125(3) of the Constitution, advised Sergeant Allen of the Commission's recommendation and of his right to request a referral to the Privy Council for his case to be considered by it. Sergeant Allen invoked his constitutional right to have the matter referred to the Privy Council.

[12] In his referral to the Privy Council, Sergeant Allen contended in his petition that the disciplinary process was a miscarriage of justice as the verdict was not supported by the evidence. In addition, in ground seven of his appeal to the Privy Council, he complained that the sentence that was recommended by the Commission was, "harsh, disproportionate and manifestly excessive", having regard to matters he set out therein, which included his "good record".

[13] By way of letter dated 7 May 2014, issued from the office of the Commissioner of Police, Sergeant Allen was notified that the Governor-General, acting on the advice of the Privy Council, had ordered that his reference should be refused, the appeal denied and that the penalty of reduction in rank "imposed should stand". The letter also informed Sergeant Allen that he would be reduced to the rank of Sergeant with effect from the date the notice was served on him.

[14] On 22 July 2014, Sergeant Allen, again, petitioned the Privy Council, pursuant to regulation 42(2) of the Regulations on the basis that there had been material evidence, which was neither presented to the court of enquiry nor to the Privy Council in his first petition, which could have impacted the court of enquiry's decision as well as the review of his case by the Privy Council.

[15] In his affidavit in support of this renewed petition to the Privy Council sworn to on 22 July 2014, Sergeant Allen deposed, among other things, that he had hoped to present further evidence from a Corporal Kirk Frazer, which related to one of the charges brought against him. Attached to the affidavit was a statement from Corporal Frazer, sworn 30 June 2014, for the Privy Council's consideration. At paragraph 27 of his affidavit, Sergeant Allen deposed that Corporal Frazer's evidence was "most material" to his case, in the light of certain submissions made by counsel acting for the Commission at the court of enquiry (details of which he gave). He averred that the omission of that evidence was a breach of the rules of natural justice, in that, the evidence was material in nature and could have "exculpated [him] or reduced the severity of the penalty".

[16] With respect to the penalty that had been imposed on him, Sergeant Allen stated at paragraph 29 of his affidavit that had the evidence of Corporal Frazer been before the Privy Council at the hearing of the first petition, "the severity of the penalty imposed on [him] would in all likelihood not have been so severe as a reduction in rank". He then continued:

> "30. This is to be seen against the background that I have been in the JCF for the past 35 years and 6 months and as the President had acknowledged, I had to be of good character to have been there so long. My retirement from the JCF is due in the very near future and the penalty of a reduction in rank will severely affect my pension emoluments which will no doubt be a second penalty imposed on me albeit indirectly."

[17] Sergeant Allen subsequently received a letter from the secretary to the Governor-General and clerk to the Privy Council, dated 12 January 2015, in response to his second petition. The letter was to the effect that the Privy Council, having considered the new facts, found them to be of no materiality to the case and that they would not have affected its previous decision.

[18] Following that response, Sergeant Allen made written requests of the Governor-General for the reasons for the recommendation of the Commission and the decision of the Privy Council. The letter from the Governor-General's secretary was that the Governor-General was not in receipt of reasons. As a result, no reasons for the recommendation or decision were made available to Sergeant Allen. It is important to point out that it was by way of affidavit filed in response to Sergeant Allen's affidavit in the claim for judicial review that the Commission sought to proffer reasons for its

decision on the penalty to be imposed (see affidavit of Judith Cheese-Morris sworn to on 18 March 2016). However, up to the hearing of this appeal, no reason for the Privy Council's advice was made available neither to Sergeant Allen nor the court.

The judicial review proceedings

[19] In advancing his claim for judicial review, Sergeant Allen relied on the following grounds, which he contended were central to his application:

> "a. The [Commission and Governor-General] erred in applying the provisions of the Jamaica Constabulary Force orders/policies to the circumstances of the case.
>
> b. No reasonable tribunal addressing its mind to the facts and the orders/policies of the Jamaica Constabulary Force could have reached the same conclusion.
>
> c. The penalty imposed, namely the reduction in [his] rank from Inspector to Sergeant was harsh, disproportionate and manifestly excessive, and accordingly was unreasonable in the circumstances. Further, the penalty was imposed in breach of the rules of natural justice.
>
> d. The [Commission and Governor-General] have failed to provide [him] with reasons for their decision."

[20] By his affidavit sworn to on 11 December 2015, in support of the application for judicial review, Sergeant Allen deposed that in making his application he was handicapped, having not had the benefit of the reasons for the Governor-General's decision to uphold the Commission's recommendation relating to penalty. This failure, he explained, was significantly prejudicial as it meant he was unable to ascertain the rationale behind their decision. He further argued that he had not been afforded the

opportunity to be heard before the imposition of the reduction in rank, in that, he was not allowed to call character witnesses to speak on his behalf and was not given the opportunity to make submissions as to why a lesser penalty ought to have been imposed.

[21] Sergeant Allen's arguments in support of his application for judicial review rested primarily on three planks; these were (a) the sanction imposed was unreasonable and excessive; (b) he ought to have been heard in mitigation of sentence, prior to the imposition of penalty, in accordance with the dictates of natural justice; and (c) the Commission and the Privy Council were required to give reasons for their decisions so as to ensure accountability and transparency in the process of determination and judgment.

The learned judge's reasons for her decision

[22] The learned judge commenced her assessment into the merit of the claim by correctly outlining that the court's role was to exercise a supervisory jurisdiction in relation to inferior bodies or tribunals exercising judicial or quasi-judicial functions or who were making administrative decisions affecting the public. She further noted that she was primarily concerned with the decision-making process of the tribunal and not with the decision itself.

[23] Against this background, the learned judge reasoned that she was satisfied that there was no evidence on which she could properly find that there was either a breach

of natural justice, procedural irregularity or unreasonableness in the proceedings before the court of enquiry.

[24] The major aspects of her reasoning, findings and conclusions on the relevant issues for the purposes of this appeal are summarised below.

A. *Whether the penalty was harsh and oppressive*

[25] In addressing this complaint, the learned judge reminded herself that her function was primarily supervisory, and that she was required to exercise restraint so as not to substitute her own views into the matter under the guise of exercising her supervisory jurisdiction.

[26] In examining the penalty, she had regard to several matters at paragraphs [93] to [96], as follows:

i. the evidence which was before the court of enquiry and what was accepted by it as proven;

ii. the fact that Sergeant Allen was not given the ultimate sanction;

iii. the fact that Sergeant Allen had been found guilty following a hearing;

iv. previous decisions of the courts as to sanctions for similar offences; and

v. the gravity of the offending which should not be understated.

[27] These "same set of circumstances", she noted, would have been before the Privy Council in coming to its decision. The learned judge weighed all these factors against Sergeant Allen's previous unblemished record and concluded that there was no indication of the sentence being harsh and oppressive so as to warrant a declaration from the court that it was unreasonable. She also highlighted the necessity for judicial restraint, which, she said, is reinforced by the understanding that the primary decision maker is better placed than the court to evaluate these matters falling within its area of expertise.

B. *The need for a hearing prior to the imposition of the sentence*

[28] At paragraph [110] of her judgment, the learned judge reasoned that there was no rule, requirement or expected procedure for the Commission to have afforded Sergeant Allen a hearing prior to recommending the penalty. She opined, that to find that the Commission was required to give Sergeant Allen a hearing would amount to the court advocating for there to be a procedure allowing affected persons to have some input at the stage where penalty was first being considered.

[29] The appropriate question, the learned judge reasoned, was for the court to consider whether the procedure, when taken as a whole, was "objectively fair". She further opined that, even if the court were to have concluded that the process was not objectively fair, sections 125(3) and (4) of the Constitution made it abundantly clear that the Governor-General was not permitted to act on the advice of the Commission at the time of the recommendation of the penalty, as Sergeant Allen would have had a constitutional right (which he did utilise) to have his matter referred to the Privy

Council. This process, the learned judge found, was devised to allow the Governor-General to inform Sergeant Allen of the Commission's recommendation, prior to its implementation. Upon the matter being referred to the Privy Council for consideration, the Commission's recommendation would have been suspended. She further opined that once the referral to the Privy Council was completed, the Governor-General would have been constrained to act on the Privy Council's advice.

[30] The learned judge reasoned at paragraphs [115] to [123] of the judgment that, upon Sergeant Allen having been told of the findings of the court of enquiry and the recommendation by the Commission, his voice had been heard before the penalty was imposed. The Privy Council, she said, had Sergeant Allen's affidavits and the grounds of appeal filed on his behalf, which placed the issues regarding sentence before it. She reasoned that it was unquestionable that he was, in fact, heard (orally) before guilt was determined and (in writing) before the penalty was imposed. She concluded that fairness would not have required that Sergeant Allen should have been heard before the recommendation of the penalty by the Commission.

C. *No reasons given by the Commission and the Governor-General*

[31] The learned judge examined this issue in admirable detail between paragraphs [124] and [150] of her judgment. Having examined various authorities on the subject, she found that, in the light of the Commission's role, there would have been no necessity for reasons to be provided.

[32] She, however, recorded her concerns with respect to the lack of reasons from the Governor-General, acting on the Privy Council's advice. Notwithstanding this disquiet on her part, she concluded that the issue arising for her consideration in this regard was whether the lack of reasons for the penalty that had been recommended by the Commission was sufficient for her to exercise her discretion to either quash the proceedings in its entirety, or, to the limited extent, the penalty imposed. Her concerns were abated, she said, as the rationale for both the findings of guilt and the imposition of penalty could have been deduced from the contents of the transcript of evidence along with the court of enquiry's findings.

[33] In sum, the learned judge concluded that there was no statutory requirement for either the Commission or the Privy Council to provide reasons for their recommendations to the Governor-General. She considered that it was difficult to say that the failure by them to give reasons reflected that the decision was unreasonable or irrational. She opined that the balance of the factors in the case weighed more heavily towards not calling for reasons than calling for reasons.

[34] The core question now to be determined is whether the learned judge erred in her decision that there was no legitimate basis for her to disturb the penalty imposed by the Governor-General on Sergeant Allen. The examination of this question will be undertaken within the broad framework of the two core issues identified for resolution on this appeal.

Analysis and findings

Issue 1

Whether prior to the Commission's recommendation of a penalty to the Governor-General, Sergeant Allen was entitled to a hearing in mitigation (grounds a, b, c, d, and e)

(i) The statutory scheme

[35] The procedures to be adopted with respect to disciplinary proceedings against members of the JCF are outlined in regulations 46 and 47 of the Regulations. In so far as is relevant to this case, regulation 46 governs proceedings against members of or above the rank of Inspector for misconduct not so serious to warrant a dismissal, while regulation 47 governs proceedings in relation to members charged for misconduct, which in the opinion of the Commission warrant dismissal.

[36] Regulation 46 reads, in part, in so far as is immediately relevant:

> "46. – (1) Where –
>
> (a) it is represented to the Commission that a member of or above the rank of Inspector has been guilty of misconduct; and
>
> (b) the Commission is of opinion that the misconduct alleged is not so serious as to warrant proceedings under regulation 47 with a view to dismissal,
>
> the Commission may cause an investigation to be made into the matter in such manner as it may think proper; and if the Commission is of opinion that the allegation is proved it may recommend such punishment other than dismissal as may seem just.
>
> ...
>
> (3) **Where as a result of such investigation it is decided to charge the member with misconduct not**

warranting dismissal, the procedure to be followed shall be similar to that prescribed by regulation 47:

Provided that this paragraph shall not apply where any offence specified in Part I of the Second Schedule is dealt with summarily." (Emphasis added)

[37] It can be seen, therefore, that regulation 47 becomes relevant, as far as it prescribes the procedure to be adopted, when a decision is made to charge a member with misconduct. For present purposes, it is only necessary to set out regulation 47(2), which states as follows:

"47.- (1) ...

(2) The following procedure shall apply to an investigation with a view to the dismissal of a member-

(a) ...;

(b) if the member (being of or over the rank of Inspector) does not furnish such a statement within the time so specified or he fails to exculpate himself the Governor-General shall on the recommendation of the Commission appoint a court of enquiry consisting of one or more persons (who may include the Commissioner, or other Officer) to enquire into the matter; the members of the court shall be selected with due regard to the rank of the member concerned, and to the nature of the charges made against him;

(c) ...

(d) the court shall inform the member charged that on a day specified the court will enquire into the charges and that he will be permitted to appear before the court and defend himself;

(e) if witnesses are examined by the court the member shall be given an opportunity of being present and putting questions to the witnesses on his own behalf, and no documentary evidence shall be used against him unless he

has previously been supplied with a copy thereof or given access thereto;

(f) the court may in its discretion permit the member charged or the person or authority preferring the charges to be represented by another member or by a member of the public service or by a solicitor or counsel and may at any time, subject to such adjournment as in the circumstances may be necessary, withdraw such permission; so, however, that where the court permits the person or authority preferring the charges to be represented the member charged shall be given the like permission;

(g) ...

(h) ...

(i) The court shall furnish to the Commission a report of its findings (which may include a report on any relevant matters) together with a copy of the evidence and all material documents relating to the case; if the Commission is of opinion that the report should be amplified in any respect or that further enquiry is desirable, it may refer any matter back to the Court for further enquiry or report accordingly;

(j) If the Commission is of opinion that the member should be dismissed the Commission shall recommend to the Governor-General that an order be made accordingly;

(k) if the Commission is of opinion that the member deserves some punishment other than dismissal, it shall recommend to the Governor-General what other penalty should be imposed; ..."

[38] Regulation 47(2) sets out in detail the procedure to be adopted in conducting a hearing into an allegation of misconduct. However, of significant relevance in connection with the procedure under regulation 47(2) are the provisions made under regulation 52 for a member facing disciplinary charges not only to give evidence (or a statement) on his own behalf, but also to call witnesses to give evidence as to his

defence and character. Regulation 52(4), in particular, specifically states that, "[t]he member charged shall be given every facility as regards the obtaining of evidence of character from any Officer under whom he has served".

[39] It is after all these things have been done that the court of enquiry is required to furnish to the Commission a report of its findings together with a copy of the evidence and all material documents relating to the case. Upon receiving and reviewing the report, the Commission is then charged with recommending to the Governor-General the appropriate penalty for imposition.

[40] It is with respect to the stage where the Commission made the recommendation as to penalty to the Governor-General, that Sergeant Allen and counsel who appeared on his behalf, Mr Ransford Braham QC, have aired significant challenge regarding the fairness of the proceedings and the propriety of the sanction. I find, however, that this challenge is misplaced for several reasons that will now be outlined.

[41] It is undeniable that the Constitution and the Regulations, taken together, have provided a comprehensive scheme for the exercise of disciplinary control over members of the JCF. Inbuilt in the provisions of the mechanism are the recognition of the requirements of natural justice, in that, the provisions expressly secure to the affected member the right to be heard at different stages of the procedure. On a strict interpretation of the provisions of regulation 47, the affected member is entitled to a right to be heard at the stage of the court of enquiry. There is no right to be heard at

the point a report is made to the Commission. No one involved in the case has been given a right to a hearing, at that stage, within the statutory scheme.

[42] It goes without saying, therefore, that there is no statutory requirement for the Commission to give a member who is found guilty of misconduct the right to make submissions in mitigation of penalty or to make what could be regarded as a plea in mitigation to it before the recommendation is made to the Governor-General about the penalty to be imposed. Indeed, it is important to note that the statutory scheme does not allow for any communication between the Commission itself and the affected member at any time before the recommendation is made to the Governor-General or even after. The court of enquiry is the forum which is entitled to be in direct communication and interaction with the member and through which the member is to present his case in defence as well as character evidence, if he so desires. The Regulations provide that Sergeant Allen was to be given every facility to obtain such evidence, if he so desires. This is during the hearing by the court of enquiry and not at the stage the matter is being considered by the Commission.

[43] What is worthy of note, within this context, is that there was an issue raised during the course of the hearing at the court of enquiry concerning whether Sergeant Allen should have called a character witness. The sole enquirer took the view (wrongly it now appears) that it was not necessary for him to do so at that stage. He nevertheless stated that, in any event, Sergeant Allen must have been of good character for him to serve so long in the JCF. That having been said, counsel appearing for Sergeant Allen at the court of enquiry did not insist on calling any witness as to

character. Regulation 52(4) was never brought to the attention of the sole enquirer, where it should have been done, and the matter of a character witness was never raised again up to the point that the Commission made its recommendation to the Governor-General. There is no appeal arising from what had occurred at the court of enquiry and Sergeant Allen has accepted that the sole enquirer had acknowledged his good character. This was evident on the face of the transcript of the proceedings furnished to the Commission and to this court.

[44] I have undertaken this detailed examination of the Regulations to demonstrate that it was clearly intended by the legislature that any matter going to mitigation (which character evidence would be), should be presented at the stage of the court of enquiry. That evidence or information would then form part of the report forwarded to the Commission. It is only if the Commission was of the opinion that the report should be amplified in any respect or that further enquiry was desirable, that it would have had the power to refer the matter back to the court of enquiry for further enquiry or report (regulation 47(2)(h) and (i)). The Commission was not itself authorised by statute to hear directly from Sergeant Allen or any other party to the proceedings.

[45] An extensive examination of the provisions of the Regulations has served to establish beyond question, that Sergeant Allen had no statutory right to be heard at the stage of the Commission. He had the right to present character evidence at the stage of the court of enquiry, which, in the end, he did not do. The absence of evidence from a witness as to his good character cannot be placed at the feet of the Commission, which was not involved in the hearing and had no statutory right to invite evidence or

representations from Sergeant Allen or anyone else in the proceedings. From all indications, and in any event, Sergeant Allen did not seek to make representations to the Commission, even if he could have done so, and was denied the facility to do so.

[46] Mrs Susan Reid-Jones, counsel for the respondents, submitted that the learned judge could not have erred as the Regulations do not provide a procedure for affected persons to be given a hearing by the Commission, regarding mitigation, prior to the recommendation of a penalty and before its imposition by the Governor-General. She contended that the scheme that currently exists "does not admit or allow for a special 'plea in mitigation' or 'hearing before penalty'". As such, for there to have been an input with respect to mitigation by Sergeant Allen before the Commission, Parliament would be required to amend the law to so provide. I do accept these submissions as far as the procedure before the Commission was concerned.

[47] The learned judge was, therefore, correct in her conclusion that there was no rule, requirement or expected procedure for the Commission to have afforded Sergeant Allen a hearing before it, prior to recommending the penalty to the Governor-General. Sergeant Allen has criticised her as being wrong in law when she opined that for her to hold that he had a right to be heard in mitigation would have amounted to the court advocating for there to be a procedure allowing those affected to have some input at the stage where penalty was first being considered.

[48] I have no basis to declare the learned judge to be wrong in her opinion for the purpose of reversing her decision on the issue. She was correct to hold that the

statutory scheme did not impose on the Commission any duty or power to invite Sergeant Allen to make a plea in mitigation before recommending the sanction to the Governor-General. For this reason, there was no procedural impropriety or illegality at the stage of the Commission's consideration of the matter that would have warranted the intervention of the court.

(*ii) Common law- natural justice*

[49] Notwithstanding the clear and unambiguous provisions of the Regulations, and the finding of the learned judge on this issue, Mr Braham was unrelenting in his arguments that natural justice demanded that the Commission should have heard Sergeant Allen in mitigation. He maintained that for the proceedings to be deemed fair in their truest sense, Sergeant Allen ought to have been allowed to make representations to the Commission, prior to it submitting its report to the Governor-General.

[50] Queen's Counsel relied on the case of **Cooper v The Wandsworth Board of Works** (1863) 14 CB (NS) 180, in making the important point that where there are no positive words in a statute requiring a hearing, it is a fundamental rule of natural justice that the party likely to be affected shall be heard prior to the imposition of any decision which is adverse to him. He cited the statement of Byles J in that case that, "though the statute has not directly provided for it, the common law will supply the deficiency and will not allow a person to be punished without being heard".

[51] I have no reservation in holding that the rules of natural justice are designed to operate in the interests of fairness where Parliament may have omitted to speak concerning the right of an affected person to be heard before any decision adverse to his interest is made. Case law is replete with instances where the court, in its bid to ensure fairness and justice in administrative law cases, has held that an aggrieved party has the right to be heard, notwithstanding the absence of express statutory provisions conferring such a right. The question for present purposes is whether that principle should be brought to bear on this case to avail Sergeant Allen in his contention that the Commission should have heard him in mitigation.

[52] Langrin J in **R v Commissioner of Police, ex parte Keith A Pickering** (1995) 32 JLR 123, in discussing the requirements of the rules of natural justice, affirmed the following key principles:

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

> applicants and an opportunity afforded them to comment on it before the final decision was taken by the respondent."

[53] Similarly, in the case of **Leary v National Union of Vehicle Builders** [1971] Ch 34 ("**Leary**"), Megarry J highlighted what, in his view, are the rules of natural justice that should operate where the rights and liberty of an aggrieved person are at risk. He opined that they require, among other things, (a) a charge of some kind; (b) notice to the person affected when the matter is to be decided; (c) the right of the affected person to know the case against him; and (d) the right of that person to appear and defend himself as to his liability and then to be "heard in mitigation". The judge's statement of the right to be heard in mitigation of a penalty as part of the requirements of natural justice was strongly relied on by Mr Braham in advancing the argument that there was a breach of natural justice in this case.

[54] Queen's Counsel asked this court to consider, within this context, what he described as the mandatory wording of section 32(2) of the Constitution. The section reads:

> "32.- (1) ...
>
> (2) Where the Governor-General is directed to exercise any function on the recommendation of any person or authority, he shall exercise that function in accordance with such recommendation:
>
> Provided that-
>
> (a) before he acts in accordance therewith, he may, in his discretion, once refer that recommendation back for reconsideration by the person or authority concerned; and

> (b) if that person or authority, having reconsidered the original recommendation under the preceding paragraph, substitutes therefor a different recommendation, the provisions of this subsection shall apply to that different recommendation as they apply to the original recommendation."

[55] Mr Braham contended that the section infers that the Governor-General, subject to very limited circumstances (not applicable to the case in question), would have been required to act in accordance with the recommendation of the Commission. Therefore, notwithstanding the fact that the statute does not make provision for a hearing in mitigation, natural justice required that Sergeant Allen make representations before the Commission and not the Privy Council because the Commission's recommendation of a penalty was central to the process and would have clearly been taken into account by the Privy Council or the Governor-General in deciding what penalty to impose.

[56] With all due respect, Mr Braham's reliance on section 32 of the Constitution cannot take him very far in his effort to establish that the learned judge erred when she found that natural justice was not breached due to absence of a plea in mitigation before the Commission. This is so because when the Constitution is read as a whole (as it should be), it becomes evident that section 32(2) cannot be considered in isolation from sections 125 and 130. To do so would inaccurately convey the notion that the Governor-General would have been obliged to adopt the Commission's recommendation, without more. The relevant portions of section 125 read as follows:

> "125.-(1) Subject to the provisions of this Constitution, power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in any such offices is hereby vested in the Governor-

> General acting on the advice of the Public Service Commission.
>
> (2)...
>
> (3) **Before the Governor-General acts in accordance with the advice of the Public Service Commission that any public officer should be removed or that any penalty should be imposed on him by way of disciplinary control, he shall inform the officer of that advice and if the officer then applies for the case to be referred to the Privy Council, the Governor-General shall not act in accordance with the advice but shall refer the case to the Privy Council accordingly**:
>
> Provided that the Governor-General, acting on the advice of the Commission, may nevertheless suspend that officer from the exercise of his office pending the determination of the reference to the Privy Council.
>
> (4) **Where a reference is made to the Privy Council under the provisions of subsection (3) of this section, the Privy Council shall consider the case and shall advise the Governor-General what action should be taken in respect of the officer, and the Governor-General shall then act in accordance with such advice**." (Emphasis added)

[57] Section 125 is rendered applicable to police officers by virtue of section 130 of the Constitution, which reads:

> "Section 125 of this Constitution (with the substitution therein of the words "the Police Service Commission" for the words "the Public Service Commission" wherever the same occur and of the words "the Public Service Commission" for the words "the Police Service Commission" in subsection (2) thereof) shall apply in relation to police officers as it applies in relation to other public officers."

[58] It is seen that section 125 of the Constitution prescribes that once a recommendation is received from the Commission, and before any imposition of penalty, the Governor-General is required to inform the affected member of the recommendation. This is designed to afford the affected member the opportunity to request that his case be referred to the Privy Council for its consideration. There is no question that the procedure laid down by the Regulations and the Constitution was followed by the Commission and the Governor-General. Sergeant Allen was given an opportunity for the matter to be referred to the Privy Council for consideration, which he did utilise on two occasions. It was at the conclusion of this process that the penalty was imposed by the Governor-General based on the Privy Council's advice. The procedure before the Commission cannot be considered without reference to the law regarding the referral to the Privy Council.

[59] In strongly urging the court to find that there should have been an opportunity presented for a plea in mitigation at the stage of the Commission, notwithstanding the referral to the Privy Council, Mr Braham also placed heavy reliance on dicta from several other cases, which included, **Evan Rees and others v Richard Alfred Crane** [1994] 2 AC 173 ("**Rees v Crane**"); **R v Agricultural Dwelling-House Advisory Committee for Bedfordshire, Cambridgeshire and Northamptonshire, ex parte Brough** [1987] 1 EGLR 106 ("**ex parte Brough**"), and **Walter Annamunthodo v Oilfields Workers' Trade Union** [1961] AC 945 ("**Annamunthodo**"). All the cases have been duly considered even though not mentioned for present purposes, but two

have been selected for deeper analysis to the extent that they are relevant in disposing of the issue under review.

[60] In **Rees v Crane**, the Board addressed the question of the operation of natural justice at the preliminary stage of an enquiry. It found that there was breach of natural justice at the investigative stage of the proceedings, notwithstanding the fact that the applicant had a right to be heard later, at two other stages. The facts, in outline were as follows. The Chief Justice of Trinidad and Tobago decided not to include the respondent, a judge of the High Court, on the roster of judges who were to sit in court for the following term, after receiving complaints about him. The Judicial and Legal Service Commission, of which the Chief Justice was, *ex officio*, a member, agreed with that decision. The respondent was informed that it had been decided that he should cease to preside in court until further notice. Without notifying the respondent, the Commission met to decide whether to make a representation to the President that the question of his removal from office under the Constitution be investigated. The respondent was not informed of the complaints or given an opportunity to respond to them. The Commission made the representation to the President and an investigation to remove him was commenced by the President. He was suspended during the course of the investigations. The respondent brought an application for judicial review.

[61] An extract from the headnote will suffice to reflect the principle on which Sergeant Allen, partially, placed reliance. It reads:

> "... [N]otwithstanding that the procedure for removing a judge from office under section 137 had three stages only

> the first of which was before the commission and at the two later stages the judge had a right to know of and to answer the complaints made against him, the commission had a duty to act fairly in deciding whether a complaint had prima facie sufficient basis in fact and was serious enough to warrant making a representation to the President; that, in view of the seriousness of the allegations and the suspicions both for the present and the future raised by a decision to suspend a judge which a subsequent revocation of the suspension would not necessarily dissipate and in all the circumstances, the commission had not treated the respondent fairly in failing to inform him at that stage of the allegations made against him or to give him a chance to reply to them in such a way as was appropriate, albeit not necessarily by an oral hearing; and that, accordingly, the commission had acted in breach of the principles of natural justice and had contravened the respondent's right to the protection of the law..."

[62] It is on the strength of this authority that Mr Braham argued that it is irrelevant that Sergeant Allen had the right to be heard at the stage of the Privy Council because it was at the stage of the Commission that his rights were determined. For this reason, he said, the learned judge's finding on the issue was fundamentally flawed. I do not accept, however, as contended by Mr Braham that the learned judge was wrong to conclude that there was no breach of natural justice at the stage of the Commission that would have adversely affected the decision regarding penalty.

[63] Having given full consideration to the facts of **Rees v Crane** and the reasoning of their Lordships in arriving at their decision, I find that **Rees v Crane** is unhelpful to Sergeant Allen because the circumstances of the two cases are patently distinguishable and require different considerations. It is observed that in this case, the proceeding before the Commission was not the preliminary investigative phase. The preliminary phase was before the court of enquiry and Sergeant Allen was given the right of

hearing at that stage. Unlike the affected judge in **Rees v Crane**, he was informed of the complaints against him and given the right to be heard. At that stage, he participated fully and presented his defence. Admittedly, there was no affirmative evidence of his good character adduced at the court of enquiry but his good character was explicitly acknowledged by the sole enquirer. This acknowledgment is reflected on the transcript of the proceedings, which went before the Commission. Sergeant Allen was mindful of that because he did not insist on calling a character witness and, in his affidavit to the Privy Council, he did accept that his good record in the JCF was acknowledged by the sole enquirer.

[64] The proceedings against him did not end with the decision of the Commission and no adverse result flowed from the recommendation of the Commission as in the case of **Rees v Crane**, where the affected judge was suspended by the President following the report of the Commission, without him having been given a right of hearing. As already indicated, the law provided that before the Governor-General acted on the recommendation of the Commission, an opportunity was to have been presented to Sergeant Allen to have his matter considered by the Privy Council. He invoked that procedure twice. He was, therefore, given the right of audience at the stage of the Privy Council before the decision was made by the Governor-General, which adversely affected his interests.

[65] It is noteworthy that in Sergeant Allen's grounds of appeal and two affidavits in support of his petitions to the Privy Council, he made strong representations with respect to his good character and his view of the likely effects of the proposed penalty

on him. He put forward the following facts in his petitions and affidavits, which touched and concerned matters of mitigation and the appropriateness of the penalty:

i. the recommended sentence is harsh, disproportionate and manifestly excessive;

ii. there was no blatant wilful disobedience regarding the duties that were assigned to him (the subject matter of the charges);

iii. his apology to his superior who caused the charges to be laid against him;

iv. the assignment he was given by the senior superintendent to attend court (which Corporal Frazer's fresh evidence was intended to corroborate);

v. his 35 years and six months in the JCF with an unblemished record;

vi. the acknowledgment of the President of the court of enquiry of his good character;

vii. his retirement from the JCF "in the very near future";

viii. the penalty of a reduction in rank would severely affect his pension emoluments; and

ix. the penalty severely affecting his pension emoluments would "no doubt be a second penalty imposed on [him], albeit indirectly".

[66] In addition to those facts, Sergeant Allen also presented fresh evidence through the statement of Corporal Frazer, regarding the substance of one of the charges against him. He did not elect to present any character evidence from any third party, which he must have known he could have done, in the light of the fact that the issue of calling a character witness was raised at the court of enquiry and the sole enquirer had said that it was not necessary at that stage. Given that he was of the view that he was not heard in mitigation by the Commission, he was at liberty to present evidence of his character at the Privy Council stage just as he sought to present evidence from Corporal Frazer on an issue of fact. There is no evidence or anything on the record to suggest that he attempted to do so and was prevented by the Commission, the Governor-General or the Privy Council, none of which had any lawful authority to call character witnesses of their own motion.

[67] In view of all the circumstances, and the information that was made available by Sergeant Allen to the Privy Council, he was, in fact and law, afforded the opportunity to make representations, in mitigation, before penalty was imposed by the Governor-General. He availed himself of that opportunity, albeit that it was not by way of oral representations but in writing. Of significant relevance to my conclusion, in this regard, is the opinion of Panton JA (as he then was) in **Nyoka Segree v Police Service Commission** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 142/2001, judgment delivered 11 March 2005, that:

> "**It is surprising that at this stage of our jurisprudential development, it is being thought that to be heard means that evidence has to be taken viva**

> **voce. This Court has said on several occasions, for example in respect of disciplinary proceedings such as the instant matter as well as in relation to applications for licences, that the right to be heard is not confined or restricted to a viva voce hearing**. The management of public affairs in this regard would be too hamstrung if all proceedings of this nature had to be done completely viva voce. The unbridled fact is that the appellant was given ample information as to what was being alleged, and was given generous opportunities to respond." (Emphasis added)

[68] Sergeant Allen was, therefore, given an opportunity to be heard on penalty at the stage at which it would have mattered most, that is, before the tribunal on whose advice the Governor-General was obliged by law to act.

[69] Section 125(4) of the Constitution states that the Privy Council "**shall consider the case and shall advise the Governor-General what action should be taken in respect of the officer**", and the Governor-General "**shall then act in accordance with such advice**" (emphasis added). The Privy Council was, therefore, not exercising a function of review of the Commission's decision to see whether it was right or wrong. The Privy Council was obliged to consider the case in its own right, make its own independent decision and substitute its own opinion for that of the Commission. Its advice would have replaced that of the Commission because the Governor-General was no longer entitled by law to act on the Commission's recommendation, once the referral to the Privy Council was made. The Privy Council was obliged to consider all "the case" and advise the Governor-General on what should happen to Sergeant Allen (not what should happen to the decision of the Commission). The proceedings would, therefore, have been in the nature of a rehearing, rather than a review.

[70] Mr Braham had also cited **ex parte Brough** and **Annamunthodo** in his bid to persuade the court to the viewpoint that, notwithstanding the intervention of the Privy Council, the duty was still on the Commission to hear Sergeant Allen in mitigation of penalty, and so, the later hearing before the Privy Council could not cure that defect. Regrettably, neither case assists Sergeant Allen's case. To demonstrate this, it is only necessary to examine his contention by reference to **ex parte Brough** as the facts of **Annamunthudo** bear no appreciable resemblance to the circumstances that are under review in this case to make it applicable in any material way.

[71] In **ex parte Brough**, the applicant made an application for judicial review, challenging the report of the Agricultural Dwelling-House Advisory Committee for Bedfordshire, Cambridgeshire and Northamptonshire ("the advisory committee"). The Advisory Committee had submitted an advice to the South Bedfordshire District Council ("the Council") against his application for vacant possession of a cottage which was occupied by the applicant's former employee, the respondent in the proceedings. The Council had the duty under the statute to take full account of any advice tendered to it by the advisory committee as well as a statutory duty to give reasons for its decision if it found against the applicant. The competing parties were heard in the absence of each other. The applicant also contended that allegations were made against him without him having been afforded the opportunity to contest them. Consequently, the court decided to quash the advisory committee's report.

[72] Hodgson J's reasons, in granting the order for certiorari to quash the advisory committee's decision, are of relevance to this case. At page 108, he stated:

"In my judgment, particularly when one is considering the procedural impropriety or otherwise by which a decision of this nature - that is, one which is not finally determined - can be subject to judicial review, one has to pay great regard to a consideration which appears in a sentence of *de Smith* at p 234:

The degree of proximity between the investigation and an act or decision directly adverse to the interests of the person claiming entitlement to be heard may be important.

I think that is right. Merely because a decision to give advice, or the advice itself, is not finally determinative of a question is not in my view the determining factor. I think it is important to look at all the facts and see in general terms what part that subdecision, if I can coin a phrase, plays in the making of the decision as a whole.

If it is only a decision to give evidence one way or the other, then plainly it would not be subject to judicial review. **But where that advice is sought by the determining authority from a committee of whose decision the authority is required by statute to take full account, and where there is some evidence that in practice the advice is - to put it no higher - highly likely to be followed, then I think it would be wrong to allow the proceedings to go further and require the applicant to wait until the decision of the local authority is made against him, if it is, before attacking that decision on the basis that the material upon which it was based is flawed**.

That would seem to be a wholly unnecessary requirement, and I have no doubt on the facts of this case and within the context of this legislation that the court has power to interfere at this stage and that it is a power which it ought to exercise if it is satisfied that there has been a procedural impropriety. I am satisfied that there has been that procedural impropriety. I think that in my discretion I ought not to refuse the relief sought at this stage and the consequence of that is that this decision of the committee must be brought up to this court and quashed." (Emphasis added)

[73] This reasoning of Hodgson J highlights that one factor that may be considered in determining whether to quash an advisory decision, when the final determination rests with another body, is the degree of proximity between the investigation and the act or decision that is directly adverse to the interests of the affected person.

[74] On the basis of this principle extrapolated from **ex parte Brough**, it was open to the learned judge to examine the degree of proximity between the Commission's recommendation and the final decision of the Governor-General, acting on the advice of the Privy Council. There is every indication that she did so as reflected in her examination of the role of the Commission from paragraphs [100] to [114] of her judgment and her conclusion that the Commission's recommendation was suspended once the referral was made and the Governor-General "would have then been constrained to act on the advice of the Privy Council".

[75] In **ex parte Brough**, the evidence indicated that the Council was **required by statute to take full account of the advice** from the advisory committee, and there was evidence that established that the Council usually accepted that advice (for emphasis). Consequently, in such circumstances, the preliminary advice would have been closely connected to, and directly influential in, the final decision of the Council that could have adversely affected the interests of the applicant.

[76] In this case, the degree of proximity between the advice of the Commission on penalty and the decision of the Governor-General to impose the penalty he did, is far less than in **ex parte Brough**. This renders the case readily distinguishable. It is

obvious, as was noted by the learned judge, that in this case, subsections 125(3) and (4) of the Constitution stipulate that the Governor-General was not permitted by the Constitution to act on the Commission's recommendation regarding penalty, when it was received. This is so because Sergeant Allen had a constitutional right, which he did exercise, to request that the matter be referred to the Privy Council for its consideration. The learned judge correctly noted that once this referral had been made, any recommendations from the Commission would have been in a suspended state. In fact, at paragraph [113] of the judgment, she stated that the penalty recommended by the Commission "remained in the vein of an unactivated recommendation until Sergeant Allen could exercise his constitutional right to refer the matter to the Privy Council".

[77] In my view, although the learned judge regarded the recommendation as 'suspended', it was more than a suspension, once the referral to the Privy Council was invoked and pursued. The recommendation was no longer operable in the scheme of things as the views of the Privy Council would supersede and replace the views of the Commission in the decision making process. The advice of the Privy Council would have had to follow its independent consideration of the matter, because nowhere in the Constitution is it expressly stated (and there is nothing indicating an implication) that it should come to a decision, having regard to the recommendation of the Commission. On the wording of the constitutional provisions, it was not an appeal for the Privy Council to determine whether the Commission was right or wrong.

[78] The Governor-General was constitutionally bound to act on the advice of the Privy Council and not that of the Commission. The involvement of the Privy Council in

this case would, as a matter of law, have broken any causal nexus between the Commission's recommendation and the Governor-General's decision to impose the penalty in question. In such circumstances, the recommendation of the Commission was not sufficiently proximate, or indeed, proximate at all, to the final decision that was made regarding the penalty to be imposed because the Governor-General was not entitled to act on it. To borrow, the words of the learned judge, I would say that in such circumstances the Commission's recommendation, essentially, "remained in the vein of an unactivated recommendation". This is a fundamental difference between the procedure in **ex parte Brough** and the one followed in this case.

[79] Therefore, even if one were to find that there was a breach of natural justice at the Commission stage of the proceedings (which is not the finding), the control or influence of the Commission over the punishment of Sergeant Allen would have been irrevocably broken by the referral to the Privy Council.

[80] The Privy Council, having been entrusted with the task to consider the case and to advise the Governor-General on what action should be taken against Sergeant Allen, would have had to be cognizant of the suite of penalties from which it should chose the one that was most appropriate, in its view. Also, it should not be forgotten that no reason for the Commission's recommendation was forwarded to the Privy Council. It must, therefore, be presumed that it had independently considered the circumstances of the case, the personal circumstances of Sergeant Allen and the prescribed penalties available, in order to arrive at its decision to be communicated to the Governor-General as it was legally obliged to do. Therefore, the mere fact that it chose the same penalty

which was recommended by the Commission cannot, in the absence of clear evidence, be taken to mean that it acted on the advice of the Commission. The court must presume that it acted in accordance with lawful authority.

[81] Finally, in **ex parte Brough**, the learned judge noted that there was procedural impropriety in the preliminary stage of the investigation. There was no such procedural impropriety in the proceedings before the court of enquiry in the instant case. Sergeant Allen was given the opportunity to respond to the allegations brought against him and to advance his defence and make his representations before his guilt was determined. The fact that he would have been of good character was acknowledged by the sole enquirer and formed part of the record of the proceedings, which reached the Commission and later the Privy Council. Sergeant Allen himself also brought this acknowledgement of his good character to the attention of the Privy Council.

[82] On the basis of the statutory and administrative scheme within which the disciplinary proceedings were conducted, and the role of the Privy Council in the decision making process at the level of the Governor-General, there is nothing that would lead this court to find that the decision should have been quashed on the basis of breach of natural justice at the stage of the Commission.

[83] I am satisfied that natural justice would have operated at the stage of the proceedings before the Privy Council, being the body whose decision the Governor-General was legally bound to accept. Therefore, at this final stage, it was the advice of the Privy Council that was valid and effectual for all intents and purposes and not that

of the Commission. Sergeant Allen was afforded the opportunity at the critical stage before the Privy Council to depose to matters going to his personal mitigation and the effect the penalty would have had on him before the sanction was imposed by the Governor-General.

[84] I find that the learned judge's assessment, at paragraph [115] of her judgment, as to whether Sergeant Allen's right to natural justice was adhered to cannot be faulted. There, she agreed that natural justice required that Sergeant Allen be given "some such opportunity, not only because of the consequences resulting from the penalty imposed but also because it cannot be argued that there were any circumstances of urgency or administrative necessity to justify the abrogation of such a right". She however found, correctly in my view, that contrary to his assertions, his "voice was heard before the penalty was imposed". This, she noted at paragraphs [120] and [123] of the judgment:

> "[120] In relation to the issue of the character evidence, all empathy aside, I bear in mind the circumstances of this case and the fact that his good record was acknowledged, as admitted by Sergeant Allen. I bear in mind also that he was never prevented from presenting character evidence and that all other relevant factors were put before the Privy Council. Under those circumstances, it is difficult to accede to [Sergeant Allen's counsel's] submission that [he] was not given an opportunity to be heard.
>
> ...
>
> [123] In conclusion, it is therefore fair to say that Sergeant Allen had the opportunity to be heard (orally) before guilt was determined and to be heard (in writing) before the sentence was imposed. He has not shown this court that he has suffered any injustice in relation to these issues.[Counsel on behalf of Sergeant Allen] is therefore patently misguided

> and incorrect as far as a hearing before the Privy Council is concerned."

[85] Furthermore, at paragraph [110], the learned judge, before considering the role of the Privy Council, identified the question for her consideration to be, whether the proceeding before the Commission, taken as a whole, was objectively fair (Michael Fordham QC, Judicial Review Handbook, page 172, paragraph 16.5). She concluded that taken as whole, the process was "objectively fair". I would state that the entire process from the court of enquiry to the Privy Council is what ought to have been assessed with the overarching question being, whether the process was "objectively fair". When that question is considered, I find that it cannot be said that the whole process was not objectively fair.

[86] I conclude that the learned judge's refusal to quash the Governor-General's decision on the basis that Sergeant Allen was not allowed to make representations in mitigation of penalty, before the decision imposing the sanction was made, is justified. Her decision on this point is unassailable.

[87] I would hold that grounds of appeal a, b, c, d, and e are not of such potency to move this court to find that the learned judge erred in law when she refused the reliefs sought by Sergeant Allen in his fixed date claim form.

Issue 2

Whether the Commission, Privy Council or Governor-General was required to give reasons for the decision to impose the penalty of reduction in rank (grounds f, g, and h)

[88] Sergeant Allen remonstrates that in making his application for judicial review, he was significantly handicapped and prejudiced, having not had the benefit of the reasons for the decision of the Governor-General (acting on the advice of the Privy Council) "to uphold" the recommendation of the Commission. Mr Braham contended further, on Sergeant Allen's behalf, that although the Commission is only charged with giving its recommendation to the Governor-General, it may still be subject to judicial review. As such, Queen's Counsel argued, its failure to give an explanation for the penalty which was imposed was considerable because there was no basis to infer that Sergeant Allen's good character or exemplary service had been taken into account and if so, what weight was given to these factors. He further submitted that the learned judge's finding that no reasons were required because the rationale for the decision could be deduced from the contents of the transcript of evidence, along with the court of enquiry's findings, was clearly erroneous.

[89] Learned Queen's Counsel also contended, that an essential element of administrative law predicates that "justice ought to be seen to be manifestly and undoubtedly done". The giving of reasons, he submitted, is entrenched in the principle of the right to a fair hearing as was held in **Threlfall v General Optical Council** [2004] EWHC 2683 (Admin), where the court found that the three possible sources of an obligation to give reasons were, statute, the common law and article 6 of the European Convention on Human Rights. Furthermore, Queen's Counsel maintained that there is currently a trend towards an insistence on greater openness or transparency in the making of administrative decisions. Consequently, where an authority fails to give

reasons, as was done in this case, it was imperative that it demonstrated that the procedure adopted was not unfair (see **Regina v Secretary of State for the Home Department, Ex parte Doody** [1994] 1 AC 531).

[90] Drawing on dicta from such authorities as **Regina v Higher Education Funding Council ex parte Institute of Dental Surgery** [1994] 1 WLR 242 and **South Bucks District Council and another v Porter** [2004] UKHL 33, among others, Mr Braham argued that "the absence of reasons has put in doubt the fairness of the penalty exacted on [Sergeant Allen]".

[91] Mrs Reid-Jones, in her response on behalf of the respondents, submitted that the argument advanced by Mr Braham that "the duty to give reasons is now seen as an essential element of administrative law...", is pointing to what has occurred elsewhere and what Sergeant Allen and his counsel are advocating should occur in Jamaica. She maintained however, that, "it will be necessary for the Parliament of this nation to be moved in order to achieve an amendment to the Police Service Regulations in this regard...". She contended that as the law currently stands, the learned judge did not fall into error in this case.

[92] The learned judge gave consideration to those submissions and noted, in agreement, that there was no statutory requirement for the Commission or the Governor-General (acting on the advice of the Privy Council) to give reasons for their decision. She further held that "there [was] no issue that either the Commission or the Governor-General (acting on the advice of the Privy Council) acted outside the scope of

the Constitution or [the Regulations]" in not giving reasons. She, nevertheless, expressed the view at paragraph [151] of the judgment, that "...we are approaching a time, when the circumstances will demand that fairness has been breached by lack of reasons". She proceeded to endorse the views of Parnell J, made as far back as 1970 in **R v Licensing Authority for the Western Area ex parte L S Panton Ltd** (1970) 15 WIR 380, calling on Parliament to make provision for reasons for decisions to be given by administrative tribunals.

[93] Professor Eddy Ventose in his very informative text, Commonwealth Caribbean Administrative Law, has provided a most invaluable insight into the development in the law in the Commonwealth Caribbean courts, surrounding this question of the giving of reasons in administrative law cases. At the opening of chapter 14, at page 339, he usefully observed:

> "The debate as to whether the common law should provide a general right to reasons is also raging in the Commonwealth Caribbean. The UK courts have remained adamant that there is no such general right at common law for administrators to provide reasons for their decisions. The Commonwealth Caribbean courts have followed suit and have similarly held that no such right exists at common law. The courts have, nonetheless, approached the issue on a case-by-case basis and have avoided articulating principles that would lead to a general duty to state reasons."

[94] As pointed out by Professor Ventose, Barbados and Trinidad and Tobago are two countries in the Commonwealth Caribbean in which Parliament has intervened into this area, therefore, modifying the common law. It must be highlighted, however, that despite the change in the common law position in Barbados, there are some

proceedings that are still exempted from the statutory duty to give reasons. This proves, therefore, that it is an area that is not free from difficulty and the mere fact that there may be a trend towards that requirement, would not have been enough to bind the learned judge.

[95] In the absence of legislation, Sergeant Allen has brought no authority that would have been binding on the learned judge to hold that there was a legal obligation or duty on the Commission, Governor-General or Privy Council to give reasons for their decision.

[96] I endorse the view that there is no common law or statutory requirement for reasons for the decision to reduce Sergeant Allen's rank from Inspector to Sergeant to be furnished to him. I would only slightly depart from the learned judge's view that "we are approaching the time" when circumstances will demand that fairness has been breached by lack of reasons. I would say instead that the time has already come for the court to determine whether fairness is manifestly eroded by the absence of reasons so that an impugned decision ought not to be allowed to stand. Therefore, the mere fact that there is no legal requirement for reasons to be provided should not preclude the court from determining whether the decision should stand in the absence of reasons.

[97] Therefore, I would go further to say, as several authorities seem to have established, that the absence of a settled rule should not be a bar to the court quashing a decision in the absence of reasons being provided for it. In my view, the court should exercise its supervisory powers, if without reasons, a decision, in the light of all the

facts and circumstances disclosed to the court, is found to be irrational, aberrant or perverse. This would fall within the unreasonableness required for the court's interference with administrative decisions laid down in **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** [1948] 1 KB 223. This would apply to a decision that is "...so outrageous in its defiance of logic or of accepted moral standards that no sensible person who applied his mind to the question to be decided could have arrived at it... " (see also **Council of Civil Service Unions v Minister for the Civil Service** [1985] AC 374 at page 410 per Lord Diplock).

[98] Professor Ventose at page 339 of his text referenced the decision from this court in **Brian Alexander v Land Surveyors Board of Jamaica** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 13/2008, judgment delivered 2 July 2009. In that case**,** the appellant, a land surveyor, challenged the decision of the Disciplinary Committee of the Land Surveyors Board of Jamaica ("the Committee") to suspend him. The issue arose as to whether the Committee had failed to give adequate reasons for its decision. The court considered that there was no statutory requirement for the Committee or the Land Surveyors Board of Jamaica ("the Board") to give reasons for its decision. The court noted that, at common law, there seemed to be no general duty to give reasons for administrative or quasi-judicial decisions and that the mere fact that a decision-making process was held to be subject to the requirements of fairness did not automatically or naturally lead to the further conclusion that reasons must be given. The court stated, however, that fairness may require that a person aggrieved by a decision, and who had a right of appeal from that decision, be provided

with reasons for it. In such a case, it opined, a failure to give reasons might provide a basis for challenging an administrative decision. The court, however, did not consider the point in that case because the Committee and the Board provided reasons.

[99] In **R v Civil Service Appeal Board, ex parte Cunningham** [1991] 4 All ER 310 at page 316, Lord Donaldson of Lymington MR stated that:

> "The principles of public law will require that those affected by decisions are given the reasons for those decisions in some cases, but not in others. A classic example of the latter category is a decision not to appoint or not to promote an employee or office holder or to fail an examinee. **But, once the public law court has concluded that there is an arguable case that the decision is unlawful, the position is transformed. The applicant may still not be entitled to reasons, but the court is**." (Emphasis added)

[100] The learned judge obviously appreciated that despite the absence of statutory or common-law requirements for reasons to be given for the Governor-General's decision, she could not end her consideration of the issue on that point. Therefore, she did not base her decision merely on the fact that there is no requirement in law for reasons to be furnished for the decision and rightly so. It is seen that, as part of her analysis, she examined whether it could be said that the decision was illegal and concluded it was not because the Commission and the Governor-General did not act outside the Constitution or the Regulations. This court has no basis in law to disturb that finding.

[101] In considering the issue of irrationality, the following statement of Lord Keith of Kinkel, expressed in **R v Secretary of State for Trade and Industry, Ex parte Lonrho PLC**, [1989] 1 WLR 525 at 539-540, is instructive:

> "The absence of reasons for a decision where there is no duty to give them cannot of itself provide any support for the suggested irrationality of the decision. **The only significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision-maker, who has given no reasons, cannot complain if the court draws the inference that he had no rational reason for his decision**." (Emphasis added)

[102] The learned judge did consider the issues of fairness and irrationality, having concluded that there was no illegality to render the decision impeachable. She said it pellucidly at paragraphs [145] and [146] of her judgment in these terms:

> "[145] There is no issue that either the Commission or the Governor-General (acting on the advice of the Privy Council) acted outside the scope of the Constitution or the Police Service Regulations in this case. **However, in general there are increasingly compelling arguments for a duty to give reasons in such cases as these**. I am limiting this opinion however, to the Governor-General (acting on the advice of the Privy Council) as I have already indicated this court's position on the role of the Commission.
>
> [146] **Generally speaking, the basis of a court at this time finding that such a duty is necessary would be on the basis of a requirement to be fair, so that the parties can know the issues to which it addressed its mind and that it acted lawfully. In such a case a failure to give reasons as Fiadjoe opined, at page 54, could be analysed for illegality or irrationality**." (Emphasis added)

[103] The learned judge was correct to consider the issue of irrationality in analysing the effect of the absence of reasons on the decision of the Governor-General (acting on the advice of the Privy Council).

[104] Mr Braham made the point that the role of the Privy Council was merely one of review at that stage. With all due respect, I cannot agree for reasons already discussed above. As already noted, the role of the Privy Council was to "consider" the case (afresh in my respectful view) and to advise the Governor-General of what action was to be taken against Sergeant Allen. The Privy Council was, therefore, obliged to arrive at its own decision about what should happen to Sergeant Allen and advise the Governor-General accordingly. As such, the Commission's recommendation was not binding by law on the Governor-General or the Privy Council. In fact, section 125(3) states that the Governor-General was not entitled to act on the Commission's recommendation. That recommendation, therefore, no longer remains operable in law.

[105] Consequently, as already established during my analysis of the constitutional scheme within which Sergeant Allen's case was considered, the Commission was not the decision-maker and neither was it the 'proximate' adviser to the decision-maker. Thus, there was no legal or moral obligation on the Commission to provide reasons for its advice to the Governor-General, and the imperatives of fairness would not have demanded that it did so.

[106] I conclude that there is nothing unfair, prejudicial, aberrant, perverse, or otherwise irrational in the failure of the Commission to provide reasons to Sergeant Allen. The learned judge did not fall into error when she held that the Commission was not duty bound to give reasons for its decision so that the failure to do so should lead to the quashing of the decision.

[107] As far as the Governor-General is concerned, his reason for making his decision is obvious - he is constitutionally bound to accept the advice of the Privy Council. He would have had no other reason beyond that to give to Sergeant Allen. In fact, he did respond to the request from Sergeant Allen for the reasons for the decision, and indicated that he had not been provided with reasons by either the Commission or the Privy Council for their advice to him. The Governor-General cannot be blamed for providing no reason on his own behalf and his failure to do so cannot be said to have amounted to unfairness. This reasoning now leaves us with the decision of the Privy Council, which was the one that the Governor-General was duty bound to accept by virtue of the Constitution.

[108] Although the Privy Council had no legal obligation, at common law or by statute, to provide reasons for its advice to the Governor-General, the analysis cannot end there. This is in the light of highly persuasive authority that in the absence of reasons for the decision, it is open to the court to infer that there was no rational reason for the decision.

[109] In the light of this authoritative statement of the law in **R v Secretary of State for Trade and Industry, Ex parte Lonrho PLC**, the learned judge, in the absence of reasons for the decision, was entitled to have regard to "**other known facts and circumstances**" to determine whether there was anything on the record that would "**appear to point overwhelmingly in favour of a different decision**" (emphasis added). The irrationality or otherwise of the decision could have been inferred from the known facts and circumstances, which were before the learned judge. Accordingly,

contrary to the views of Mr Braham, the learned judge was entitled to have regard to the transcript of the proceedings at the court of enquiry and the findings of the sole enquirer in assessing whether the absence of reasons would support an inference that the Privy Council had no rational reason for its advice to the Governor-General.

[110] The learned judge, between paragraphs [124] and [147] of the judgment, conducted a very thorough examination of the relevant principles extracted from the various authorities cited to her by counsel on both sides. She then reasoned, in part, at paragraph [148], following on her observations at paragraphs [145] and [146] quoted above:

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

[111] After stating the portion of the dictum of Sedley J to which she had regard, she reasoned at paragraph [149] of her judgment:

> "When one examines all the circumstances of this case, it is difficult to conclude that the failure reflects that the decision was unreasoned and irrational. It is clear that illegality does not exist as the penalty could be legally imposed. As indicated previously, it is my opinion that the rationale for the penalty can be lifted from the findings of the Sole Enquirer whose reasoning clearly speaks to his assessment of Sergeant Allen's behaviour. The impact of this would have been clearly appreciated by the Privy Council who subsequently advised the Governor-General."

[112] She then concluded at paragraph [150]:

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

[113] The learned judge gave proper regard to all relevant considerations in determining whether the absence of reasons for the decision of the Governor-General, imposing the penalty of reduction in rank, should be quashed. It was not established before her (and, certainly, not before this court) that the known facts and circumstances disclosed on the record, including Sergeant Allen's good record, pointed "overwhelmingly in favour of a different decision". Accordingly, there was no basis for the learned judge to infer and conclude that there was no rational basis for the decision. In all the circumstances, she cannot be said to have fallen into error in refusing the relief sought by Sergeant Allen on the basis that no reason was provided to him for the decision.

[114] In the absence of statutory prescriptions to guide the learned judge, and in the light of the relevant authorities, this court would have no justifiable basis to disturb her conclusion that the absence of reasons for the decision was not fatal to the decision of the Governor-General (acting on the advice of the Privy Council). For these reasons, grounds f, g and h also fail.

Conclusion

[115] Sergeant Allen's case was adequately presented before the Privy Council on whose advice the Governor-General was bound by the Constitution to act in the circumstances of this case. He utilised the opportunity provided him by the referral to the Privy Council to present facts going to mitigation. The penalty was, ultimately, a reduction in rank and not the maximum and most draconian penalty of a dismissal. There is nothing on the face of the decision that indicates that his personal mitigating circumstances were not taken into account by the Privy Council in its determination of the appropriate penalty. His hitherto unblemished character had to be weighed against the fact that he had committed three separate and distinct infractions, which singly and collectively point to a serious case of insubordination on his part.

[116] Even in the absence of reasons, it cannot be said in the light of the serious allegations against Sergeant Allen, on the one hand, and his personal circumstances, on the other, that the decision would have been irrational to warrant interference by the judicial review court. The Privy Council, on whose advice the Governor-General acted, could have properly come to the conclusion it did that a reduction in rank was the most appropriate sanction to be imposed in the light of the charges brought against him and having regard to his previous good character and the likely effects of the penalty, which were placed before them by Sergeant Allen.

[117] Furthermore, the grant of the reliefs sought by Sergeant Allen was discretionary. The authorities are very clear that this court is constrained by law in its review of the exercise of the discretion of a judge at first instance. Having been guided by the oft-

quoted pronouncements of Lord Diplock in **Hadmor Productions Limited and others v Hamilton and others** [1982] 1 All ER 1042, regarding the standard of review by an appellate court in matters such as these, I find no justifiable basis on which to interfere with the exercise of the learned judge's discretion refusing to grant the reliefs sought by Sergeant Allen.

[118] The learned judge was cognizant of her role at the judicial review hearing, which she flawlessly carried out as evidenced in her reasoning. She considered, in commendable detail, the relevant law applicable to the facts of the case before her and correctly found that there was no illegality, procedural impropriety, breach of natural justice or irrationality at any stage or in any aspect of the disciplinary process. This court can discern no material error of fact or law in her conclusions that is potent enough to undermine her decision to refuse judicial review remedies.

[119] For all the foregoing reasons, it is my respectful view that the appeal should be dismissed and the decision of the learned judge affirmed.

[120] I would, however, propose that no order be made as to costs against Sergeant Allen, in keeping with rule 56.15(5) of the Civil Procedure Rules, 2002, although it is accepted that that provision is not binding on this court. I have proposed that this course be adopted because it seems fair to say that it was not unreasonable for Sergeant Allen to have pursued the appeal in the light of the issues raised for resolution by the court.

[121] Finally, it is incumbent on me to express regret for the delay in the delivery of this judgment. Despite strenuous efforts to dispose of the matter with reasonable promptitude, the delay could not be avoided.

SINCLAIR-HAYNES JA

[122] I have read in draft the judgment of McDonald-Bishop JA. I agree with her reasoning and conclusion and there is nothing that I could usefully add.

PUSEY JA (AG)

[123] I too have read in draft the judgment of McDonald-Bishop JA. I agree with her reasoning and conclusion with nothing useful to add.

MCDONALD-BISHOP JA

ORDER

i. The appeal is dismissed.

ii. The decision of Straw J (as she then was) made on 17 February 2017 is affirmed.

iii. There shall be no order as to costs of the appeal.