[2014] JMCA Civ 35

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 96/2007

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN **THE POLICE SERVICE COMMISSION**

THE COMMISSIONER OF POLICE

THE SERVICES COMMISSION **APPELLANTS**

AND **DONOVAN O'CONNOR** **RESPONDENT**

Miss Carlene Larmond instructed by the Director of State Proceedings for the appellants

Bert Samuels instructed by Knight, Junor & Samuels for the respondent

4, 5, 8 March 2013 and 17 October 2014

MORRISON JA

Introduction

[1] At the conclusion of the hearing of this appeal on 5 March 2013, the court reserved its judgment until 8 March 2013. On the latter date, the court announced that the appeal would be dismissed, with costs to the respondent to be agreed or taxed.

However, the court ordered that the costs awarded to the respondent should be limited to the costs of preparation and presentation of the appeal on the actual hearing dates of 4, 5 and 8 March 2013. These are the promised reasons for that decision, with profuse apologies for the inordinate delay in providing them.

[2] The respondent joined the Jamaica Constabulary Force ('the JCF') as a constable on 21 July 1980. On 1 August 1990, he was promoted to the rank of corporal and, on 1 November 1996, he was further promoted to the rank of inspector. Following a recommendation by the first named appellant ('the Commission'), approval was granted for the respondent to be retired from the JCF in the public interest, pursuant to regulation 26 of the Police Service Regulations 1961 ('the regulations'). His retirement was to take effect from the expiration of any pre-retirement leave to which he was eligible as from 1 December 2005.

[3] On 24 November 2005, P Williams J granted leave to the respondent to apply for judicial review of the Commission's decision to retire him in the public interest. The learned judge also ordered that the grant of leave should operate as a stay of the decision. By a fixed date claim form filed on 6 December 2005, the respondent sought (i) a declaration that the Commission's decision was made *ultra vires*; and (ii) a writ of certiorari to quash the decision. By his judgment given on 31 July 2007, D McIntosh J granted both orders and quashed the decision accordingly. This is an appeal from that judgment.

The applicable regulations

[4] The concept of retirement in the public interest is enshrined in regulation 26, which provides as follows:

> "26**.** – (1) Notwithstanding the provisions of regulation 46 or regulation 47 where it is represented to the Commission or the Commission considers it desirable in the public interest that any member ought to be required to retire from the Force on grounds which cannot suitably be dealt with by the procedure prescribed by regulation 46 or regulation 47 it shall require the Commissioner to submit a full report.
>
> (2) If after considering the report of the Commissioner and giving the member an opportunity of submitting a reply to the grounds on which his retirement is contemplated, and having regard to the conditions of the Force, the usefulness of the member thereto, and all the other circumstances of the case, the Commission is satisfied that it is desirable in the public interest so to do, it shall recommend to the Governor-General that the member be required to retire on such date as the Commission may recommend."

[5] Regulation 26 explicitly invites reference to regulations 46-47. Regulation 46 deals with proceedings against a member of the JCF for misconduct not warranting dismissal:

> "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.
>
> (2) Where –
>
> (a) it is represented that a member below the rank of Inspector has been guilty of misconduct; and
>
> (b) the authorized officer is of the opinion that the misconduct alleged is not so serious as to warrant proceedings under regulation 7 with a view to dismissal,
>
> the authorized officer may make or cause to be made an investigation into the matter in such manner as he may think proper; and if after such investigation the authorized officer thinks that the charge ought not to be proceeded with he may in his discretion dismiss the charge, but if he thinks that the charge ought to be proceeded with he shall if he is not the Commissioner, report the member to the Commissioner or in the case of any minor offence specified in Part I of the Second Schedule may deal with the case summarily, and may impose a penalty on the member in accordance with these Regulations.
>
> (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."

[6] Regulation 47, on the other hand, deals with proceedings for dismissal. Regulation 47(1) provides that "a member may be dismissed only in accordance with the procedure prescribed by this regulation". For present purposes, it is only necessary to set out regulation 47(2)(a) and (b), which states as follows:

> "(2) The following procedure shall apply to an investigation with a view to the dismissal of a member-
>
> (a) the Commission or, in relation to a member below the rank of Inspector, the Commissioner (after consultation with the Attorney-General if necessary) shall cause the member concerned to be notified in writing of the charges and to be called upon to state in writing before a specified day (which day shall allow a reasonable interval for the purpose) any grounds upon which he relies to exculpate himself;
>
> (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."

[7] Regulation 47(2)(d)-(i) sets out in detail the procedure for the conduct of a court of enquiry and regulation 47(2)(i) requires the court of enquiry to furnish a report of its findings at the end of the process.

The factual background

[8] By letter dated 26 January 2005, the Commission advised the respondent that, following reports of his "unprofessional conduct" by the Commissioner of Police ('the Commissioner'), the Commission had agreed that steps should be taken to retire him from the JCF, in accorance with regulation 26 of the regulations. A statement setting out the grounds on which the respondent's retirement was contemplated was enclosed

with the letter, to which the respondent was invited to reply within 14 days of receiving it. The statement was in the following terms:

"STATEMENT IN CONNECTION WITH

THE RETIREMENT OF

DETECTIVE INSPECTOR D.A. O'CONNOR

IN THE PUBLIC INTEREST

PURSUANT TO

REGULATION 26 OF THE POLICE SERVICE REGULATIONS, 1961

Enlisted in the Jamaica Constabulary Force on July 21, 1980

It has been reported:

(1) That you behaved in an unprofessional manner when on Tuesday, December 4, 2001, at 5:45 pm. along Spanish Town Road, heading [sic] the direction of Three Miles round-about, you caused a minor collision, whilst driving a Mark II motor car registered 2189 with Mr. Derrick Thompson who was driving a left hand drive Nissan Vannette, Registration No. 1724 CC along Spanish Town Road.

(2) That you came out of your vehicle and said 'what about mi vehicle.'

(3) That Mr. Thompson came out of his vehicle where he observed that there was only a ….. rub on the end of the bumper, and proceeded back into his vehicle.

(4) That whilst in his vehicle, you approached Mr Thompson at his side of the door and asked him 'what happen to his [sic] vehicle' and he indicated to you by saying 'brethren a yuh fi a talk to me about di scratch pon mi vehicle.'

(5) That immediately you used your right fist to 'thump' Mr. Thompson on his mouth breaking two of his teeth in the process.

(6) Further, that on the 24th day of January, 2002, about some minutes after 5:00 pm., whilst a search was being conducted at the home of Miss Ann-Marie Smith, situated at 60 Crescent Road, Kingston, you assaulted her by pushing her through the gate when she attempted to enter her house, as well as slapped her on the back of her neck.

(7) That whilst under your command Miss Ann-Marie Smith's mattress was overturned and in the process her bedside lamp was broken.

(8) That you threatened Ms. Smith when you told her that 'if she was a man she would see what you would have done to her and that something like this will happen again and she would see what you would do to her.'

(9) That you further stated to Ms. Smith that 'you would let her see her yard and have to run from it and if she thinks that is only gunman can make people run from their house.'

(10) That the police personnel, who were under your command and in your presence, accused Ms. Smith of allowing the man that was being pursued to escape and of shielding gunmen in the community. Additionally, Ms. Smith was verbally abused and told indecent language by these said police personnel, as well as was informed how lucky she was, and they stated that 'something like this would happen again, and she would see what will happen to her.'

(11) That you threatened to take her to the Remand Centre and have her locked up, and persons had to intercede on her behalf.

(12) That finally, during the period of the 5th day of May 1988 to the 24th day of January, 2003 there has [sic] been approximately thirty-three complaints lodged against you and accordingly, various agencies have receive these complaints against you namely, Jamaicans for Justice, Bureau of Special Investigations and the Police Public Complaints Authority.

> Your actions have led to a loss of confidence in your ability to discharge your function as a Police Officer to Serve and Protect and further that your usefulness to the Police force has been considerably impaired.
>
> Under the circumstances, the Police Service Commission, having considered the report and your usefulness to the Police Force, has agreed to initiate steps towards your retirement from the Jamaica Constabulary Force, in the public's interest, in accordance with the provisions of Regulation 26 of the Police Service Regulations, 1961.
>
> **TAKE NOTICE** that you have fourteen (14) days from the receipt hereof in which to reply to this Notice, setting out the grounds (if you so wish) on which you intend to rely to exculpate yourself."

[9] By letter dated 7 February 2005, the respondent's attorney-at-law replied on his behalf to the Commission's letter and the statement. With regard to the alleged incident on 4 December 2001, the attorney-at-law pointed out that the matter, which was over four years old, had already been the subject of a referral to the office of the Director of Public Prosecutions ('the DPP') and the Police Public Complaints Authority. Further, that as a result of investigations carried out by those two bodies, no criminal charges had been instituted against the respondent and, by letter dated 23 January 2004, the DPP had directed that the matter should be referred to the Commission "with a view to determine whether disciplinary charges should be preferred against [the respondent]". No disciplinary charges were in fact preferred against the respondent arising out of this incident. On behalf of the respondent, the attorney-at-law concluded, "We categorically refute the allegations of any wrongdoing...resulting from this incident." In relation to the incident of 24 January 2002, the attorney-at-law advised the Commission that this

matter had also been the subject of a referral to the DPP's office and that the DPP had advised that departmental action shouid be taken against the respondent. However, no such action had been taken, despite the passage of time since the incident was alleged to have taken place.

[10] Turning finally to the statement that, during the period 5 May 1988 to 24 January 2003, there had been approximately 33 complaints lodged against him, the respondent's attorney-at-law protested that:

> "These undocumented so called '***thirty three complaints made against***' our client, are most difficult to respond to. It is unacceptable that the mere grouping of unknown complaints for a given period of time could ever ground [as severe a] penalty as retiring an Inspector of Police promoted from the rank of Sergeant ***during this very period (year 2000)***. This flies in the face of the principles of the rule of Law and does not allow for the formulation of a response of any kind. We therefore ask that these unknown complaints be retracted in the interest of justice." (Emphasis in the original)

[11] The attorney-at-law then went on to extol the respondent's virtues in general, emphasising his reputation as a "known crime-fighter", and highlighting the fact that he had been "the recipient of fourteen (14) commendations during his twenty four (24) years of service". The letter ended on this note:

> "We rely on the Commissioner's commitment to the principles of natural justice and fairness in general so that our client will be vindicated of all innuendos and scurrilous attempts to have him leave the force without due cause. We are open to be heard on any of the matters raised herein."

[12] The attorney-at-law's letter was brought to the attention of the Commissioner, who provided a response to the Commission by way of a letter dated 17 February 2005. Having considered the response made on behalf of the respondent, the Commissioner advised, "I find no basis on which to recommend a rescission of the decision to retire him in the public interest". The Commissioner asserted that the respondent had failed to cooperate with the investigation of the 4 December 2001 incident and that he had not challenged the allegations respecting the 24 January 2002 incident, choosing to rely instead "on the age of the complaint as grounds for exoneration". This led the Commissioner to observe that "[t]he passage of time...does not render irrelevant a conduct which is inimical to the interest of the public", and to conclude that:

> "The number of complaints against Det/Inspr. O'Connor have [sic] established a pattern of behaviour not befitting a member of the [JCF] especially at his rank. Although he was in fact promoted on 1st September 2000, there are subsequent incidents reflecting no change in his conduct."

[13] This material was duly considered by the Commission at its meeting of 1 March 2005 and, in the result, it was decided to recommend to the Governor-General that the respondent be retired in the public interest, pursuant to regulation 26. In further representations made to the Governor-General, by way of an appeal to the Privy Council, the respondent challenged the Commission's decision on the following grounds:

> "1. That the circumstances/grounds upon which the Commission has sought to retire the Appellant under section 26 of the Police Service Regulations (hereinafter called 'The Regulations') in the Public Interest are

contrary to the provisions of the said regulations in that the matters relied on in support of his retirement are matters which ought properly to be bought [sic] under sections 46 and 47 of the said Regulations.

2. That the allegations relied on by the said Commission are not proven to be true and no charges were laid against the Appellant to afford him an opportunity to be heard and to defend the allegations notwithstanding, these untested matters, have been relied on to support the decision to retire the Appellant.

3. That the Commission deliberated on the Appellant's response to the grounds upon which he is being retired and came to a decision adverse to the Appellant without affording him a hearing before it contrary to the principles of natural justice.

4. That the Commission considered and relied on an alleged thirty three (33) complaints lodged against the Appellant when these complaints are unknown to the Appellant making it impossible for him to defend himself against them resulting in an injustice and unfairness towards the Appellant.

5. That the allegations raised in the grounds for retirement at items one (1) through to eleven (11) are in their nature matters which are deemed to be minor offences and which ought to be dealt with summarily in accordance with section 46 and the second schedule thereto of the Regulations."

[14] In due course, by letter dated 24 October 2005, the respondent was advised that the Privy Council, having considered his appeal against the Commission's recommendation, had agreed to advise the Governor-General that his application "lacked merit" and that he should be retired in the public interest in accordance with regulation 26, "at the expiration of any pre-retirement leave for which you may be eligible as from December 1, 2005".

The judicial review

[15] In the fixed date claim form dated 6 December 2005, the respondent challenged the Commission's decision to retire him in the public interest on five grounds:

> "(a) That the Respondents [took] into consideration extraneous matters in coming to its [sic] decision to retire the Applicant.
>
> (b) That the Respondents in coming to their decision to retire the Applicant relied on Thirty-Five (35) complaints against him whilst only serving him with the particulars that is, the name of his accuser, the date of the incident and the nature of the complaint with respect to two (2) of his thirty five complaints.
>
> (c) That the Applicant was not charged for neither was he convicted departmentally or in a Court of Law for any of the complaints made against him at (b).
>
> (d) That the Applicant was denied an opportunity to be heard on the charges made against him in the complaints relied on in retiring him from the Jamaica Constabulary Force.
>
> (e) That the Applicant was therefore denied his right to a fair hearing in breach of the principles of natural justice."

[16] In his reasons for judgment (at page 30), D McIntosh J was strongly critical of the Commission's decision to pursue proceedings against the respondent under regulation 26, rather than in accordance wth regulations 46-47, given what he perceived to be the absence from the former of the procedural safeguards provided by the latter:

> "The Commissioner of Police brought proceedings against the applicant under Regulations [sic] 26 of the Police Services [sic] Regulations. This section does not provide the procedure for Disciplinary Proceedings for misconduct not warranting dismissal.
>
> It is a [sic] given that this section does not provide for Viva Voce evidence and the party impugned by the Commissioner does not have the right to appear and defend himself nor face his accusers, nor question them as would be required by sections 46 and 47 of the Regulations.
>
> The use of section 26 must have been carefully orchestrated to avoid the normal quosi [sic] judicial hearings and to allow for the anticipated rush to judgment; which flowed.
>
> No consideration seem [sic] to have been given to the section, save those mentioned above. It is abundantly clear that no consideration was given to the [sic] that is:
>
> > 'There must be grounds which cannot be suitably dealt with by the procedure described by Regulations 46 and 47'.
>
> Further, when section [sic] 26 is used, the Commissioner must submit a Full Report.
>
> There are no grounds submitted by the Commissioner which made the proceeding brought by the Commissioner unsuitable to be dealt with under Regulations 46 or 47."

[17] The learned judge accordingly considered (at page 31) that, in bringing the proceedings under regulation 26, the Commission acted "procedurally ultra vires or induced [the Commissioner] so to do by failing to follow the procedure laid down by law". The learned judge also noted (at page 32) that the "two particularized charges" against the respondent had not been proven, either in a court of law or in "a court of Enquiry"; making the further comment (at page 33) that "[t]he Commissioner never

ordered disciplinary proceedings which could mean that he was of the same view as the DPP that the allegations were at 'Best Suspect'".

[18] Next, as regards the 33 additional "charges" to which reference has already been made, D McIntosh J said this (at pages 33-34):

> "In an effort to sweeten the pot, the Commissioner placed before the Commission 'No Evidence'. This he did by asserting that there were 33 other complaints against the applicant.
>
> The effect of this assertion would be to create insidious bias against the applicant and would have resulted in:
>
> (a) Breach of the procedural requirements designed to achieve Fairness in the decision-making process.
> (b) A Breach of the Rules of Fair Hearing.
> (c) A Breach of the Rules against Bias
> (d) An abuse of discretion
> (e) Fettering of the Discretion of the Commission
>
> It is an Error of Law and Fair [sic] to base a decision on "No Evidence'. The Authority [Commission] must make its determination based on acceptable evidence [not 33 other complaints causing concern]. If it does not, the decision will be regarded as arbitrary, capricious and absolutely unauthorized."

[19] Finally, the judge considered (at page 35) that the bias thus created was "vividly demonstrated" by the fact that reference had been made to the 33 other complaints on the airwaves by a radio talk show host, on the day on which the decision of the court was published, in terms which expressed "disbelief, disgust, approbation and incredulity that any court could have granted [the respondent's] application in light of the 35 complaints". Further, because of the Commissioner's failure to put before the Commission evidence of the respondent's "exemplary service", the Commission "must

have taken into consideration irrelevant matters and neglected to consider relevant matters". In the result, the learned judge concluded that the decision to retire the respondent was made *ultra vires*, due to, among other things, breaches of the rules of natural justice and legitimate expectation; and that the order for certiorari should be made accordingly.

The grounds of appeal

[20] In their amended notice of appeal filed on 4 June 2010, the appellants relied on six grounds of appeal:

> "1. The Learned Trial Judge erred in finding that the Respondent was not afforded a fair hearing prior to [sic] decision to retire him in the public's interest.
>
> 2. The Learned Trial Judge erred in finding that [sic] decision to retire the Respondent was *Wednesbury* unreasonable.
>
> 3. The Learned Trial Judge erred in finding that the decision to retire the Respondent amounted to disproportionate punishment.
>
> 4. The Learned Trial Judge erred when he found that the Commissioner of police acted ultra vires when he submitted his report for consideration under Regulation 26 of the Police Service Regulations, 1961.
>
> 5. The Learned Trial Judge erred when he concluded that the Commissioner of Police placed no evidence before the Police Service Commission for its consideration.
>
> 6. The Learned Trial Judge erred when he concluded that the Police Service Commission was tainted with bias in arriving at its decision."

[21] For the appellants, Miss Larmond supplemented her detailed skeleton arguments and written submissions in oral argument before us. First, taking grounds one, four and six together, it was submitted that a fair hearing does not necessarily mean that there must be an opportunity to be heard orally; that on the true interpretation of regulation 26, as settled by authority, the Commissioner was fully entitled to submit his report to the Commission in a case in which he contemplated having a member of the JCF retired from the force in the public interest; and that there was "not one iota of evidence" to support the complaint that the Commission, in arriving at its decision to retire the respondent in the public interest, was tainted by bias. Second, as regards ground two and five, while accepting that the judge had not referred to the Commission's decision as being *Wednesbury unreasonable* (**Associated Provincial Picture Houses Ltd v Wednesbury Corporation** [1948] KB 223), Miss Larmond nevertheless submitted that this was the effect of the judge's finding that there was no evidence to support the Commission's conclusion. To the contrary, Miss Larmond submitted, there was evidence to support the Commission's conclusion and she pointed out that, as the Commissioner had stated, the respondent had failed to cooperate in the investigation of the 4 December 2001 incident and had not denied the allegations regarding the 24 January 2002 incident. The Commission's decision could therefore not be described as one to which no reasonable authority could have come. And third, on ground three, it was submitted that proportionality is not a distinct head of judicial review.

[22] In his skeleton arguments, Mr Samuels, who has represented the respondent at every stage of the proceedings, provided a response to each of the grounds of appeal.

Based on his compact oral submissions to the court, I would summarise Mr Samuels' argument (I hope without injustice) in the following way. First, the learned judge did not, as the appellants' submissions implied, base his finding that the respondent had not been afforded a fair hearing on the fact that he had not been given an opportunity to make oral submissions to the Commission: upon a proper reading of his judgment, the judge based his decision on the fact that the Commissioner had put before the Commission 33 unspecified and unparticularised complaints, thus depriving the respondent of his constitutional right to defend himself against those complaints and therefore of a fair hearing. Second, the judge did not make a finding that the decision to retire the respondent in the public interest was either *Wednesbury unreasonable* or constituted disproportionate punishment. Third, the judge's finding that the Commissioner did not make full, open and proper disclosure in his report to the Commission related to the 33 unspecified complaints, the prejudicial effect of which clearly outweighed their probative value, as well as the failure to put before the Commission the respondent's "exemplary service record". Fourth, and similarly, the judge's finding that the Commissioner had placed "no evidence" before the Commission for its consideration also related to the 33 unsupported complaints. Fifth, the judge was correct in concluding that the Commission was tainted by bias in arriving at its conclusion, in that the fair minded observer would have so concluded in the face of the 33 unspecified complaints. And sixth, the judge was entirely correct to quash the decision of the Commission on the ground of procedural *ultra vires*.

The issues

[23] The principal issues which arise on this appeal are whether (i) the Commissioner acted correctly in initiating proceedings to retire the respondent in the public interest under regulation 26, instead of pursuing disciplinary proceedings against him under regulations 46-47; (ii) the learned judge erred in finding that (a) the respondent was not afforded a fair hearing by the Commission in all the circumstances of the case; and (b) the Commission's decision was tainted by bias; and (iii) whether there was evidence upon which it was open to the Commission to conclude that this was a fit case in which to retire the respondent in the public interest.

[24] At the close of the submissions on both sides, it was clear that, irrespective of whether the judge had in fact made a specific finding on the point or not, the question of whether the Commission's decision was *Wednesbury unreasonable* could be subsumed under issue (iii) above. However, the issue of proportionality simply did not arise, since, despite expressing "sympathy" for the respondent's "plea of disproportionality" (at page 32 of the judgment), the judge did not base any element of his conclusion on this point.

Issue (i) – was it appropriate for the Commissioner to proceed under regulation 26?

[25] Miss Larmond very helpfully referred us to the decisions of this court in **Nyoka Segree v Police Service Commission** (SCCA No 142/2001, judgment delivered 11 March 2005) and **Kenyouth Handel Smith v Police Service Commission and**

Another (SCCA No 60/2005, judgment delivered 10 November 2006). In both cases, the question of the relationship between regulation 26, on the one hand, and regulations 46-47, on the other, was extensively canvassed.

[26] In **Nyoka Segree**, the appellant, who had been retired on the advice of the Commission in the public interest pursuant to regulation 26, sought to quash the decision on the ground that she had not been afforded a fair hearing. The circumstances were that, following reports that the appellant (an inspector of police) was involved in drug-trafficking, the Commissioner made a report to the Commission in support of his recommendation that she be retired in the public interest. In due course, a notice was sent by the Commission to the appellant, in which the nature of the complaint against her was summarised and to which she was given 14 days within which to reply. A reply was sent on the appellant's behalf by her attorneys-at-law, who complained that, among other things, "…we feel strongly that the provisions of Regulation 26(1) should only be used where the public interest would be adversely affected by a hearing under Regulation 47…"

[27] The appellant's complaint failed. Downer JA said this (at page 9):

> "Regulation 26 provides the appropriate procedure where a prior decision has been taken that it is desirable for an officer to be retired in the public interest. It is applicable where the matter requires a speedy disposal in the public interest.
>
> Furthermore by according the officer an 'opportunity of submitting a reply' the Regulations satisfy the test of 'procedural fairness' acceptable to the Courts…

> The notice forwarded to Inspector Segree was worded with sufficient particulars to enable [her] to set out the grounds (if she so wished) on which she intended to rely, so as to exculpate herself."

[28] Panton JA (as he then was) observed (at page 23) that counsel's submissions –

> "…were predicated on the right of the appellant to determine the procedure to be adopted in dealing with her miscreant behaviour. Neither attorney-at-law was able to refer to any authority which gives the appellant such a right. That they were not so able to do was not surprising as there is none."

[29] And, after summarising the provisions of regulation 26, Clarke JA (Ag) said (at page 38):

> "…by requiring that the member be given an opportunity of submitting a reply to the grounds on which that member's retirement is contemplated Regulation 26 provides expressly for the requirement **audi alteram partem**. The Regulation does not however, stipulate that as a pre-condition for proceedings to be taken thereunder the Commission must show that the allegations cannot suitably be dealt with under Regulation 47. And in any event there is no requirement for reasons to be given for so concluding." (Emphasis as in original)

[30] In **Kenyouth Handel Smith**, the appellant was a detective sergeant of police who had been retired in the public interest. On appeal to this court, he took the point that the Commission had "unlawfully circumvented" the provisions of regulation 31(5) of the regulations, which directs that disciplinary proceedings shall not be initiated before the determination of criminal proceedings, in the event that such latter proceedings have been initiated. After pointing out (at para. 5) that regulations 31, 46

and 47 "provide a framework for the conduct of disciplinary proceedings against a member of the [JCF]", Cooke JA went on to observe that "these regulations are not all embracing". Then, having drawn attention to regulation 26 and to what this court said in **Nyoka Segree**, Cooke JA concluded (at para. 6) that:

> "The unlawful circumvention to which this ground speaks is the non-utilization of Regulations 46 and 47. As it was in **Segree**, so it is now, that this ground fails. Further, there is no merits [sic] in the alternative ground of appeal that:
>
> > 'the recourse by the 1st Respondent to the provisions of Regulation 26 were (sic) clearly inappropriate having regard to all the circumstances of the Appellant's case'.
>
> Here was a member of the [JCF] whose behaviour was wholly reprehensible – confidence in his ability to discharge his duty as a police officer in an honest and professional manner had been lost."

[31] These authoritative dicta make the clear point that it is a matter for the Commission to determine in a particular case whether to initiate disciplinary proceedings under regulations 31 and 46-47, or to seek to retire a member of the force in the public interest, under regulation 26. The Commission is not required to demonstrate, as a pre-condition to proceeding under regulation 26, that the allegations against the member cannot suitably be dealt with under regulations 46-47; nor is the Commission required to give reasons for adopting one course in preference to the other. And, as Cooke JA also observed in **Kenyouth Handel Smith** (at para. 7), "[i]t would be unwise to attempt to exhaustively categorise" the grounds which the Commission might consider unsuitable to be dealt with under the procedure laid down

by regulations 46-47 (though, as the learned judge also went on to say, "the need for expedition would be a consideration"). In any event, the imperative of procedural fairness is fully protected under the regulation 26 procedure by the fact that the Commission is required to give the member an opportunity to reply to the report of the Commissioner.

[32] With the greatest of respect, therefore, it seems to me that D McIntosh J's conclusion that, in pursuing proceedings against the respondent under regulation 26, the Commission acted "procedurally ultra vires or induced [the Commissioner] so to do", is unsustainable as a matter of law.

Issue (ii)(a) – was the respondent afforded a fair hearing by the Commission?

[33] In this case, it is clear that, at any rate in the formal sense, the procedure laid down by regulation 26 was scrupulously adhered to by the Commissioner: the Commissioner's report was brought to the respondent's attention and the respondent was given an opportunity to - and did - reply to it. Nor could there be any complaint about the fact that the respondent was not afforded an oral hearing by the Commission. D McIntosh J considered it (at page 30) to be "a given that [regulation 26] does not provide for Viva Voce evidence" and, in **Nyoka Segree**, Panton JA expressed surprise (at pages 24-25) at the submission made on behalf of the appellant that, there having been no *viva voce* hearing, she had not been given a hearing:

> "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."

[34] But at the heart of the respondent's challenge before the judicial review court was the fact that the Commission had had for consideration the further 33 complaints to which the Commissioner had referred in his report. It is common ground that neither particulars nor the evidence in support of these complaints was provided to the respondent – or indeed, to the Commission. In these circumstances, it seems to me to be completely unarguable that the respondent would have found it, as his attorneys-at-law put it (somewhat euphemistically, in my view) in their first response to the statement from the Commission setting out the grounds on which the respondent's retirement was contemplated, "most difficult to respond" to these further complaints.

[35] Discussing the requirements of the rules of natural justice in **Lloyd and Others v McMahon** [1987] 1 All ER 1118, 1161, Lord Bridge of Harwich said this:

> "My Lords the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it

> operates. In particular, it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

[36] In the instant case, the respondent was, as regulation 26 required, given notice by the Commission of the 33 additional complaints against him. In keeping with the regulation, he was also given an opportunity to reply to them. In point of form, therefore, regulation 26 was complied with. But it seems to me that, in order to be effective, the notice that is required to be given to a member by regulation 26 must be such as to afford him what the Privy Council characterised, in the well-known older case of **Annamunthodo v Oilfields Workers' Trade Union** (1961) 4 WIR 117, 120, as "a fair opportunity of meeting" the case against him. In the context of regulation 26, therefore, the requirements of fairness demand that the notice of the complaints supplied to the member must be sufficiently particularised and, depending on the nature of the complaints, accompanied by a summary or some other indication of the evidence in support of it, so as to enable the member to respond meaningfully to them. In my view, the notice served on the respondent in this case, relating to 33 complaints that had been lodged with "various agencies" against him over a nearly 15 year period (5 May 1988 - 24 January 2003), was palpably insufficient for this purpose.

[37] While Miss Larmond did not seriously contend otherwise, she nevertheless submitted that the evidence in support of the 4 December 2001 and 24 January 2002

incidents was sufficient to justify the Commission's decision to retire the respondent in the public interest. The problem with this submission, it seems to me, is that it ignores the fact that, in his response to the respondent's attorney-at-law's letter refuting the allegations against him in respect of those incidents, the Commissioner expressly invited the Commission to approach the case against the respondent on the basis of the "number of complaints" against him, which, the Commissioner said, had "established a pattern of behaviour not befitting a member of the [JCF] especially at his rank" (see para. [12] above). In other words, the Commissioner relied on the entire history of the conduct alleged against the respondent as justifying his loss of confidence in the respondent's ability to discharge his functions as a police officer.

[38] Against this background, I find it impossible to say that the Commission would have been been able to disaggregate the two complaints of which particulars were given to the respondent from the 33 additional complaints. I therefore consider that the process by which the Commission came to its decision to retire the respondent in the public interest was, as the learned judge found, in breach of his entitlement to a fair hearing. In this regard, it is also clearly relevant to bear in mind that this is, as Mr Samuels was careful to remind us, a constitutionally protected right (see section 20(2) of the Constitution, as amended by the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2010).

Issue (ii)(b) - was the Commission's decision tainted by bias?

[39] The basis of D McIntosh J's finding that the Commission's decision to retire the respondent in the public interest was tainted by bias was that the effect of the Commissioner's assertion that there were 33 other complaints against the respondent "would be to create insidious bias against [him]". In other words, the judge held, bias was created simply by the fact that the Commission was exposed to purely prejudicial material.

[40] In my view, the modern authorities on bias all indicate that what the courts have had to grapple with in such cases is the effect of allegations of bias on the part of the decision-maker, flowing from some fact or set of facts (external to the case itself) concerning the decision-maker. A few examples suffice to make the point. In **R v Gough** [1993] AC 646, the issue was whether the fact that a member of the jury turned out to be the next door neighbour of the appellant's brother gave rise to a perception of bias. In **R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 2)** [1999] 1 All ER 577, the issue – famously – was whether, Amnesty International having been granted leave to intervene in the proceedings, the fact that one of the Law Lords was chairman of Amnesty International Charity Ltd created a perception of bias in extradition proceedings against the applicant, who was alleged to have been knowingly responsible for various crimes against humanity in Chile. In **Porter v Magill** [2002] 2 AC 357, the question was whether the fact that an auditor, who was appointed under statutory powers to conduct an audit of the accounts of a local authority, had made a public statement expressing his

provisional views in strong terms before the conclusion of the audit process created a perception of bias that vitiated his conclusion. And in **Meerabux v Attorney General of Belize** [2005] UKPC 12, the issue was whether the fact that the chairman of a tribunal established to investigate allegations of misconduct brought against a sitting judge by the Bar Association of Belize was himself a member of the association created a danger of bias.

[41] In such cases, it is now well established that the applicable test is that set out in **Porter v Magill** (per Lord Hope at para. 103) and confirmed in **Meerabux v Attorney General of Belize** (per Lord Hope at para. 22), that is, whether the fair-minded and informed observer, having considered the facts, would consider that there was a real possibility that the tribunal was biased.

[42] Miss Larmond submitted that, in this case, the judge's conclusion that the Commission's decision was tainted by bias was unsupportable because of the complete absence of any evidence in support of it. I entirely agree. It is clear that all that the judge relied on for his conclusion was the fact that the Commission had been invited by the Commissioner to consider the 33 unparticularised complaints. It strikes me that, if the learned trial judge were correct in deducing bias from this fact alone, then it would surely mean that every tribunal such as the Commission which is exposed to evidence of that kind would be susceptible to an allegation of bias. It could well be, of course, that what the judge had in mind was, to borrow a formulation more commonly associated with the law of criminal evidence, that the probative value of the evidence of the 33 complaints was far outweighed by its prejudicial effect. With that view, I would

certainly be inclined to agree. But that is not how the learned judge put it and I am therefore bound to conclude that his finding that the Commission's decision was tainted by bias cannot be sustained.

Issue (iii) - was there evidence upon which it was open to the Commission to conclude that this was a fit case in which to retire the respondent in the public interest?

[43] We were referred by Miss Larmond to **Attorney General v Jamaica Civil Service Association** (SCCA No 56/2002, judgment delivered 19 December 2003, page 13), in which P Harrison JA (as he then was) pointed out that –

> "Proceedings before a review court are supervisory and not by way of an appeal. Such proceedings are concerned with the propriety of the method by which the decision is arrived at, as distinct from the substance of the decision itself."

[44] I naturally accept this dictum without reservation as an accurate summary of the correct approach to be adopted by the judicial review court (see also the judgment of Carey JA in **Hotel Four Seasons v National Workers Union** (1985) 22 JLR 201, 204). However, it seems to me to be clear that, in this case, the learned judge did not attempt to, in effect, second-guess the Commission by way of a reconsideration of the material that was before it. To the contrary, the burden of his judgment, as I read it, was directed at what he described (at page 35) as "the devastating effect of the statement about the 33 other complaints". The judge therefore concentrated on the question of the process by which the Commission came to its decision (that is, whether the respondent was given a fair hearing), rather than the substance of the allegations

against him. In my view, he was entitled to do so and, given my conclusion on issue (ii)(a), nothing more need be said on this issue.

Conclusion

[45] In the result, the appellant succeeded on issues (i) and (ii)(b). However, the respondent succeeded on issue (ii)(a), which was the critical question of whether the learned judge's conclusion that he had not had a fair hearing from the Commission was correct. In the overall circumstances of the case, that was, in my view, sufficiently fundamental to require that the appeal be disposed of in the respondent's favour, in the manner set out at para. [1] of this judgment.

DUKHARAN JA

[46] I have read, in draft, the reasons for judgment of my brother Morrison JA and agree.

PHILLIPS JA

[47] I too have read the draft reasons for judgment of Morrison JA. I agree with his reasoning and have nothing to add.