[2015] JMCA Civ 12

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 154/2012

BEFORE: **THE HON MR JUSTICE MORRISON JA**
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McINTOSH JA

BETWEEN	**JAMAICANS FOR JUSTICE**	**APPELLANT**
AND	**POLICE SERVICE COMMISSION**	**1st RESPONDENT**
AND	**THE ATTORNEY GENERAL**	**2nd RESPONDENT**

Richard Small, Miss Camille Lee and John Clark for the appellant

Miss Carlene Larmond and Miss Lisa White instructed by the Director of State Proceedings for the respondents

20, 21, 22, 23, 24 January 2014 and 26 February 2015

MORRISON JA

Introduction

[1] The appellant ('JFJ') is a citizens' rights, non-governmental organisation, with a particular interest in, among other things, the representation of vulnerable members of

society who complain that they have suffered human rights abuses at the hands of agents of the state.

[2] The 1st respondent ('the PSC') is established by section 129 of the Constitution of Jamaica ('the Constitution'). The PSC is one of two independent commissions established under chapter IX of the Constitution[1], under the general rubric, 'The Public Service'. Members of the PSC are appointed (for five year terms at a time) by the Governor-General, on the recommendation of the Prime Minister, after consultation with the Leader of the Opposition[2]. Salaries and allowances of the members of the PSC, which are fixed by law or by resolution of the House of Representatives, are a charge on the Consolidated Fund and may not be reduced during the members' continuance in office[3].

[3] In the performance of its functions, the PSC is governed by the provisions of the Police Service Regulations, 1961 ('the PSR') (made under section 87 of the Jamaica (Constitution) Order in Council, 1959 and preserved by section 2 of the Jamaica (Constitution) Order in Council, 1962). Pursuant to section 13(a) of the PSR, the PSC is required to make recommendations to the Governor-General with respect to, among other things, appointment, promotion, termination and discipline of members of the Jamaica Constabulary Force ('the JCF'). Of particular relevance to the present

---

[1] The other being the Public Service Commission
[2] Section 129(2) of the Constitution
[3] Section 129(7) and (8)

proceedings are sections 15 and 16, which set out the applicable principles of selection for promotion in the JCF.

[4] Section 15(1) establishes the basic principle, which is that, in considering the eligibility of members for promotion, the PSC "shall take into account not only his seniority, experience and educational qualifications but also his merit, ability and good conduct". Section 15(2) lists a number of specific factors which the PSC is required to take into account in respect of each member, as follows:

> "(a) his general fitness;
>
> (b) his seniority;
>
> (c) his basic educational qualifications and any special qualifications;
>
> (d) any special course of training that he may have undergone (whether at the expense of Government or otherwise);
>
> (e) markings and comments made in confidential reports by any officer under whom the member concerned worked during his service;
>
> (f) any letters of commendation in respect of any special work done by the member;
>
> (g) the duties of which he has had knowledge and experience;
>
> (h) the duties of the post for which he is a candidate;
>
> (i) any specific recommendation of the Commissioner for filling the particular posts;
>
> (j) any previous employment of his in the public service or the Force or otherwise;
>
> (k) any special reports for which the Commission may call."

[5] Section 15(3) enters a caveat, which is that, notwithstanding anything in section 15(1) and (2), "the Commission shall at all times give preference to members who have manifested superior intelligence and efficiency in the performance of their functions". And finally, section 16(1) provides that the procedure for making recommendations in relation to "[a]n acting appointment as a prelude to a substantive appointment shall be the same as that prescribed in regulation 15" (although, as section 16(2) makes clear, an acting appointment "arising from the absence from duty of an officer on leave may be made without strict regard being had to the provision of regulation 15").

[6] On 30 October 2012, B Morrison J refused an application by JFJ for orders of certiorari and mandamus directed to the PSC. The application was made in respect of the decision made by the PSC on 15 April 2011 to recommend to the Governor-General that Superintendent Delroy Hewitt ('SP Hewitt'), a member of the JCF, should be promoted to the rank of Senior Superintendent, with effect from 1 April 2011 ('the decision').

[7] By notice of appeal filed on 11 December 2011, JFJ appealed from the judge's decision. The main burden of JFJ's complaint on appeal is that the PSC, in considering the question of SP Hewitt's promotion, ought to have conducted or caused to be conducted an effective, thorough and impartial investigation into allegations of misconduct made against him by JFJ and others. In particular, JFJ contends, the PSC ought to have referred the matter to the Independent Commission on Investigations ('Indecom'), the special commission of Parliament established by the Independent Commission of Investigations Act, 2010 ('the ICIA'). For this and other reasons, JFJ now

seeks orders of certiorari and mandamus from this court (i) quashing the decision; and (ii) directing the PSC "to cause to be conducted an effective, thorough and impartial investigation into the allegations of misconduct made against [SP Hewitt] and directing the [PSC] to reconsider its decision in the light of such effective, thorough and impartial investigation".

[8] For its part, the PSC contends by way of counter-notice of appeal filed on 23 January 2012 that the judge's decision should be affirmed, not only for the reasons given in the judgment, but also on the ground that JFJ lacked a sufficient interest in the subject matter of the application to give it standing for judicial review.

[9] Broadly stated, the issues which arise on this appeal are therefore (i) whether, at the time of making the application for judicial review, JFJ had a sufficient interest in the subject matter, as required by rule 56.2(1) of the Civil Procedure Rules 2002 ('the CPR'); and (ii) whether, given the provisions of sections 15 and 16 of the PSR, and on the material before him, the judge ought to have made orders of certiorari and mandamus against the PSC.

[10] The evidence relied on by both parties was presented entirely by way of affidavit, two on each side. JFJ relied on the affidavits of David Silvera ('Mr Silvera'), a former chairperson of its Board of Directors, and Jennifer Carolyn Gomes ('Dr Gomes'), its Executive Director; while the PSC relied on the affidavits of Gordon Shirley ('Professor Shirley'), its chairman at the material time, and Granville Gauze ('ACP Gauze'), who was at the material time an Assistant Commissioner of Police in charge of

the Bureau of Special Investigations ('the BSI') of the JCF. As there were very few matters of fact in dispute between the parties, the summary of the evidence which follows is based on the uncontested information contained in all of the affidavits, without, save where necessary for clarity, specific attribution. However, because of the nature of JFJ's complaint against the PSC, it is regrettably necessary to recount the facts in somewhat greater detail than might ordinarily be the case.

SP Hewitt

[11] SP Hewitt is a career police officer. At the material time, he had had a total of almost 40 years' service in the JCF. Over that period, he had been promoted through the ranks of the JCF and was appointed Superintendent of Police with effect from 1 January 2006. For several years prior to 2009, SP Hewitt was stationed in the Kingston Western and St Andrew South Divisions of the Corporate Area. It is clear from the evidence that he was held in extremely high regard by the leadership of the JCF.

The roots of JFJ's discontent

[12] Among other things, JFJ provides legal advice and assistance to persons who complain of having family members who have been fatally shot or injured or subjected to abuse by members of the security forces. Whenever complaints of police misconduct are received, the complainants are usually referred by JFJ to the BSI, the Police Public Complaints Authority ('the PPCA') or, now, to Indecom.

[13] On JFJ's account, it had begun to receive complaints about the conduct of SP Hewitt and the men under his command from as early as 2000 and, in a letter to the

BSI dated 26 January 2009, JFJ advised that it was "continuously receiving disturbing complaints of victimization by the police, from persons in various communities under [SP] Hewitt's charge". In that letter, JFJ requested the BSI to provide "a list of matters with which [SP] Hewitt is implicated and/or in which allegations of misconduct have been made against him". BSI's response (in a letter mistakenly dated 21 January 2009) was that, because its mandate was "to investigate shootings by the police...complaints of allegations of misconduct in the nature that you have highlighted would not be within our jurisdiction". Accordingly, BSI indicated that JFJ should direct its request to either the Inspectorate of the Constabulary or the PPCA, and "strongly" suggested "that formal complaints be made of the allegations raised".

The complaint

[14] JFJ's concerns were first brought to the attention of the Commissioner of Police ('the Commissioner') at a meeting at his office on 1 June 2009. Then, on 29 July 2009, JFJ wrote to Professor Shirley to bring to his attention what it described as "a pattern of complaints that have been made to our organisation regarding the alleged misconduct of Superintendent Delroy Hewitt". The letter continued:

> "Over the past several years, JFJ has received approximately **thirteen (13)** complaints about the unprofessional conduct of Mr. Hewitt. The complaints received involve allegations of **two (2)** threats, **one (1)** injury shooting and **ten (10)** fatal shootings, the shootings committed by persons ostensibly under his direction and/or in his presence. Some complainants in the fatal shooting matters have dubbed Superintendent Hewitt and his team the 'death squad.'

> We have previously brought this matter to the attention of the Commissioner of Police in a document delivered to him on the 1st June, 2009 to which we have to date not had a response.
>
> Recently we received statistics from the Bureau of Special Investigations **(BSI)** showing a total of **eight (8)** fatal incidents recorded in the St. Andrew South Division for the period January to June, 2009. Of that figure, **six (6)** fatalities were recorded since Mr. Hewitt took charge of the division in May, 2009. Prior to Mr Hewitt's departure from Kingston Western, there were **five (5)** recorded fatal incidents during the period January to April 2009. Since he has left that division, there have been only **two (2)** recorded fatal incidents for the period May to June, 2009.
>
> Whilst we are not able to confirm the allegations nor are we in a position to provide evidence to substantiate the complaints, the circumstantial indicators are disturbing enough that as a human rights organisation, we feel compelled in the public interest to inform you of them.
>
> We look forward to your response to this information and to your continued co-operation in addressing matters concerning the relationship between citizens and the JCF." (Emphases in the original)

[15] On 5 August 2009, the PSC forwarded a copy of JFJ's letter to the Commissioner, with a request for a response to the allegations which it contained. On the direction of the Commissioner, ACP Gauze carried out an investigation into JFJ's allegations and made a report on his findings to the Commissioner, who responded to the PSC (by letter dated 7 September 2009) as follows:

> "COMPLAINTS AGAINST MR. DELROY HEWITT, SP
>
> Mr Hewitt is a very active police Superintendent who leads from the front. In the last several years he has been in command of two very tough policing divisions, St Andrew South and prior to that, Kingston West.

> Mr. Hewitt's style of personally leading his response team in a greater number of operations within his divisions places him at the locations of many police/criminal confrontations. For as many citizens who will condemn him, there are an equal number who will commend him.
>
> He is well aware of the complaints and the nature of the complaints against him. He is equally well aware of his support base.
>
> I have taken great pains more than once, to bring to Hewitt's attention the circumstantial indicators, to counsel and to warn him accordingly. Any and every report of wrongdoing by Hewitt or any other member of the police force will be thoroughly investigated and action taken as appropriate.
>
> I am copying this letter to Mr. Hewitt, for his further attention."

[16] It appears that the PSC did not send a copy of the Commissioner's response to JFJ. Rather, by letter dated 22 September 2009, it presented JFJ with a précis , in which it repeated the Commissioner's statement that "he has always brought reports of complaints made against Superintendent Hewitt to his attention, and has counselled and warned him accordingly". The PSC also conveyed to JFJ the Commissioner's assurance that "all reports of wrongdoing by [SP Hewitt]...will be thoroughly investigated and the appropriate action will be taken".

[17] Dissatisfied with this response, JFJ again wrote to the PSC on 29 September 2009, complaining that the Commissioner's response was "grossly inadequate", in that it did not "comprehensively address the grave allegations and concerns highlighted in ours to you of the 29th July, 2009". After expressing puzzlement at the thought that 'counselling' and 'warning' would be considered adequate in these circumstances, JFJ

commented that "[i]t may be that our misunderstanding emanates from a lack of sufficient understanding of the role of the [PSC] and its consequent powers".

[18] By letter dated 21 October 2009, the PSC advised the Commissioner that its letter to JFJ, in which it had conveyed the substance of his response to the complaint of 29 July 2009, "did not seem to meet the favour of the JFJ". Accordingly, the PSC advised, it had agreed that the Commissioner should "be asked to review the cases against Mr Hewitt and make recommendations as to the type(s) of action to be taken against him, so that a more comprehensive response may be sent to the JFJ". By letter of the same date, JFJ was also advised of this last development.

[19] By letter dated 13 January 2010, after reminders from JFJ to the PSC and from the PSC to the Commissioner, the chairman of the PSC informed JFJ that the then acting Commissioner had been asked for his report and had advised that "the matter is receiving immediate attention". A few days later, under cover of a letter dated 18 January 2010, the acting Commissioner forwarded to the PSC a report dated 20 December 2009, prepared by the BSI, on the allegations of misconduct against SP Hewitt ('the BSI report'). I cannot avoid setting out this report, which was authored by ACP Gauze, in full:

> "**Re: Allegations of misconduct against Superintendent Delroy Hewitt**
>
> I acknowledge receipt of your correspondence relating to the captioned matter. The concerns expressed by Dr. Carolyn Gomes, executive director of Jamaicans for Justice is unfortunate but must be viewed against the background that Superintendent Hewitt is operationally inclined. He has been

involved in a number of operations in which illegal firearms have been recovered and notorious criminals arrested or killed in confrontations with the police. He is always willing to lead these treacherous operations, a quality that is lacking among leaders within the Force.

It is a fact that some of the shootings arising from operations that he has led are questionable, however there is no evidence that he has been directly involved or conspired with the officers involved in these shootings. In fact, there are allegations of misconduct against him pertaining to incidents where he was not present at the scene. One must also be mindful that some of his detractors are themselves linked to criminality and therefore have an interest to serve in having him transferred.

Additionally, Superintendent Hewitt has been tasked with the unenviable responsibility of managing the Kingston Western and St. Andrew South Divisions which are two of the most volatile areas in the Island. The crime statistic has revealed that St. Andrew South Division in particular has been averaging over two hundred (200) murders for the past ten years. These divisions require firm and decisive leadership in order to meet the challenges that they pose. Invariably therefore, his style of leadership in these hostile communities may reflect the concerns raised. Information received from businessmen and ordinary citizens based on discrete enquiries made, has given him a passing grade as a hard working and an avid crime fighter. Noteworthy to mention is Mr. Junior Dabdoub who stated that he is very active in the community whose [sic] operational strategies are commendable.

These allegations of misconduct are however serious in nature and must be thoroughly investigated and the appropriate action taken against him. In this respect, the Police Public Complaint Authority (P.P.C.A.), the Public Defender and the Complaint Division are available to the public for these allegations to be thoroughly investigated.

I will provide close monitoring of this officer and if and when there is evidence of misconduct by him, the appropriate action will be taken as my hallmark is that no man is above the law."

[20] On 26 March 2010, the Commissioner (by that time Mr Owen Ellington) convened and chaired a meeting at his office with Dr Gomes and a party of persons from JFJ. ACP Gauze and a Deputy Commissioner of Police were also present. The meeting was about fatal shootings by the police and the relationship between the BSI and JFJ. ACP Gauze gave the following account[4] of what took place at that meeting:

> "13. ...Dr. Gomes commended me and the [BSI] for providing her with monthly updates on all incidents of fatal shootings, and an account of how many files were at the [DPP's] office and the number of matters in respect of which ballistic and forensic certificates were being awaited. That Dr. Carolyn Gomes also expressed in that meeting, her hope that with the change in the command of the [JCF], the relationship between myself and [JFJ] would remain unchanged. That Dr. Carolyn Gomes also took the opportunity to request information on some specific incidents and I provided her a report on those incidents at the said meeting.
>
> 14. That all parties left the meeting aforesaid with a common understanding that investigations will be done speedily in all cases and that members of the [JCF] would be reminded of the Use of Force Policy. Further...[the Commissioner] reiterated that he would be taking a zero tolerance approach to police excesses and that he expected all members of the Force to behave in a professional manner."

[21] In the aftermath of that – apparently successful – meeting, JFJ supplied a list of 28 fatal incident cases in which SP Hewitt was allegedly involved to the BSI. ACP Gauze considered that the information provided by JFJ "contained dates on which incidents allegedly occurred but had no names, no addresses and no locations associated with

---

[4] At paras 13 and 14 of his affidavit

these incidents"[5]. From his review of the BSI's files and the material supplied by JFJ, ACP Gauze conluded[6] that SP Hewitt "was not involved either directly or indirectly in some of the incidents; in some instances he acted in the capacity as Commanding Officer of the area in which the incidents occurred and that now [SP] Hewitt would have been notified of the incidents and would have visited the locations personally".

[22] It is clear that the BSI report was not forwarded to JFJ by the PSC. For, on 21 July 2010, JFJ wrote to the PSC again to complain that "[t]o date, we have not received any report or status update on the investigations conducted into the allegations made and the concerns raised about the conduct of [SP] Hewitt". The letter continued:

> "We do not understand why a full report of the investigation into our complaint has not been received. As you would appreciate, the allegations raised are grave and require a diligent and thorough investigation and quick action as needed.
>
> Jamaicans for Justice remains committed to ending the abuse of the rights of Jamaican citizens by agents of the State. We are mindful of the important role played by the [PSC] in that endeavour which is why we brought the allegations to your attention. In this regard, we urge your office to provide us with a response as to the status of the investigation into our complaint as soon as possible.
>
> We continue to eagerly await your response."

[23] In the interim, between 12 and 21 February 2010, the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

---

[5] Para. 16
[6] At para. 17

('the Special Rapporteur') and a team of observers had paid a visit to Jamaica. In his report dated 11 October 2010, the Special Rapporteur recounted (at pages 33-34) his experience on the occasion of his team's visit to the Hunt's Bay Police Station, where SP Hewitt was stationed, on 15 February 2010:

> "Most of the officers, above all [SP Hewitt], were very obstructive, uncooperative, aggressive, and openly threatened the Special Rapporteur's team during the visit...The Special Rapporteur's overall impression confirmed the extremely bad reputation of this police station. The Special Rapporteur strongly urges the Government to take disciplinary measures against [SP Hewitt] for having obstructed and aggressively threatened the Special Rapporteur and his team."

[24] Under cover of a letter dated 10 November 2010, JFJ brought the Special Rapporteur's report to the PSC's attention. JFJ also complained of SP Hewitt's "disrespect and unprofessional behaviour" and urged the PSC "to swiftly address and punish" his actions. By letter dated 17 November 2010, the PSC forwarded the JFJ's letter to the acting Commissioner and asked for a response. It does not appear that any response to this letter was received in writing from the Commissioner. However, Professor Shirley's evidence was that the PSC did receive a report from the Commissioner on the incident complained of by the Special Rapporteur, in which it was explained that there was "a breakdown in communication between [SP] Hewitt and the Special Rapporteur"[7].

---

[7] Para. 20 of Professor Shirley's affidavit

SP Hewitt recommended for promotion

[25] On 25 November 2010, the Commissioner wrote to the PSC, under the caption, 'Promotion to the rank of Senior Superintendent'. The Commissioner observed that there were 24 existing vacancies in the JCF (out of a total establishment of 38) in the rank of Senior Superintendent of Police. The Commissioner pointed out that there had been no promotion to this rank for over three years, "resulting in some critical posts being devoid of the required rank and authority". As a result, the Commissioner reported, a procedure for the selection of candidates for promotion in the JCF had taken place in June and July 2010. Those who made themselves available for the process were interviewed by a selection panel (comprising some non-JCF persons), as well as a newly established 'Ethics Committee'. In addition, the Commissioner himself chaired the 'Commissioner's Selection Board', comprising the Commissioner and all three Deputy Commissioners. In the result, after taking into account the most critical areas of need, the Commissioner's priorities, "the need for capable and competent leaders at Command levels", and other stated factors, it was decided to recommend 21 Superintendents, including SP Hewitt, and one Deputy Superintendent of Police for promotion to Senior Superintendent.

[26] In support of SP Hewitt's candidacy, the Commissioner said this:

> "**Mr. Delroy Hewitt**, Superintendent is a hard working dedicated officer who leads from the front. He has commanded several challenging divisions and has succeeded in reducing crime. St. Andrew South his current command which [sic] was viewed as the murder capital of Jamaica and since taking over, major crimes having being trending down.

> The figures show that major crimes are down by 19% and murder down by 33% or seventy one (71). The Human Rights lobby groups are recommending that he be removed from front line duties, however he is fearless and prepared to tackle the criminal elements in the society. The Jamaica Constabulary Force needs his experience to help in managing crime and violence. He is recommended for promotion to the rank of Senior Superintendent."

The PSC considers the recommendation

[27] The Commissioner's recommendations were first discussed by the PSC at its meeting of 14 December 2010. The Commissioner was present at this meeting and amplified in detail the rationale for the selection of the officers recommended and the process of appraisal (including integrity screening and polygraph testing) and selection undergone by each. According to Professor Shirley, the PSC had extensive discussions with the Commissioner "in respect of the composition of the Ethics Committee, the process employed in the interviews, the nature of the polygraph testing process and the integrity screening procedure" (para. 25). In accordance with what Professor Shirley described as its "policy and practice" (para. 28), the PSC also requested a 'fatal incident report' from the BSI on each of the officers recommended for promotion.

[28] The fatal incident reports were duly submitted to the PSC by the Commissioner on 20 December 2010. The fatal incident report in relation to SP Hewitt disclosed a total of 37 incidents, spanning the period August 2001 to June 2009. These incidents were distributed between the Kingston Western Division (20), St Andrew South (10), Kingston Central (three), Kingston Eastern (three) and St Thomas (one) divisions. In respect of five of these incidents, the Coroner's Court had recorded verdicts of

justifiable homicide, while a further seven remained pending in the Coroner's Court. In relation to six of the incidents, rulings were still awaited from the Director of Public Prosecutions ('the DPP'). The 19 remaining cases (some going back as far as 2006) were listed as "incomplete". Among the variety of reasons given were outstanding police statements, outstanding ballistic, forensic and post mortem reports and incomplete investigations. In one particular case, which involved a fatal incident on 29 June 2007, it was specifically indicated that statements were outstanding from SP Hewitt himself. But it is clear that statements from SP Hewitt must also have been included in at least the three other cases in which the report indicated that statements of "all police personnel involved are still outstanding".

[29] Armed with the fatal incident reports, the PSC met again on 23 December 2010 to continue their consideration of the Commissioner's recommendations for promotion. After considering all the reports, the PSC agreed to recommend the promotion of 14 of the 21 officers to the rank of Senior Superintendent. In respect of the remaining seven officers (including SP Hewitt), the PSC determined that additional information was required from the Commissioner and the BSI. The information requested included (i) the exact nature of the cases described in the fatal incident reports; (ii) the personal roles played by the officers in those incidents; and (iii) the proposed deployment of SP Hewitt. It was also decided that the seven officers should be interviewed individually by the PSC on 11 and 12 January 2011.

[30] In the interim, the Commissioner supplied two additional pieces of information as regards SP Hewitt. First, by letter dated 28 December 2010, the Commissioner advised

the PSC that it was proposed to assign SP Hewitt to the St Andrew South Division, which would be updated to be commanded by a senior superintendent. The Commissioner commented further that -

> "St. Andrew South is a particularly challenging division. His command responsibilities will involve him in leading a superintendent who will be in charge of operations and [a] specified number of deputy superintendents who will provide operational support to the crime fighting initiatives. Notwithstanding, his removal from frontline operational duties, his reassignment will draw on his experience to plan and provide leadership from a tactical level to tackle the criminal elements in the St. Andrew South Division."

[31] And second, under cover of a letter dated 7 January 2011, the Commissioner provided an "updated" fatal incident report. In respect of all 37 fatal incidents involving SP Hewitt previously reported, his role was now indicated to be that of "Team Leader". Additionally, in two of the incidents, both of which had resulted in coroner's verdicts of justifiable homicide, he was stated to be the "Actual Shooter". In all other respects, save one, the information remained as stated in paragraph [21] above. The single exception was that, in the 'incomplete' category of cases, the indication was that only one statement remained outstanding from SP Hewitt.

[32] SP Hewitt was interviewed by the PSC on 11 January 2011[8]. In what Professor Shirley described as "an exhaustive interview" (para. 37), SP Hewitt was asked to share his experiences as a crime fighter in the areas in which he had worked and his

---

[8] A transcript of the notes taken during the interview was produced by Professor Shirley, exhibited to his affidavit and marked 'GS 18' for identification.

approach to gang activities. Further, he was asked specifically about the several reports of fatal shootings involving him and his role in the various incidents listed in the fatal incident reports. And further still, he was also asked to give his account of the incident involving the Special Rapporteur.

[33] In response, SP Hewitt shared with the PSC what he considered to be his successes in managing to reduce the murder rate in the Kingston Western and St Andrew South Divisions. He also spoke of having reduced the gang related murder rate in the area by the use of what he described as "the community policing strategy". As regards the 37 incidents of fatal shootings involving him reported in the fatal incident report, SP Hewitt's comment was that, despite the fact that he had conducted many operations (11,000 in St Andrew South in 2010 alone), he had himself used deadly force on only three occasions. Some of the operations in which he had been involved as the senior police officer present had actually been joint military operations and sometimes it was not members of the JCF who had discharged their firearms. Asked about the incident in 2007 in respect of which his statement was reported to be still outstanding, SP Hewitt's response was that, as far as he was aware, the statements had been submitted. SP Hewitt also told the members of the PSC that, although he, like them, had heard of cases in which persons had been killed by the police in circumstances which did not involve any gunfight, whenever he led a police team, he "would brief them on human rights and use of force issues". It was not, he added, "an easy thing to kill a person".

[34] SP Hewitt was also tackled by the PSC on the Special Rapporteur's report/complaint. SP Hewitt's response was that he had taken objection when the driver of the vehicle which had transported the Special Rapporteur to the station tried to accompany the team into the cells and other sensitive areas of the station. The reason for his objection, according to SP Hewitt, was that the driver's name was not on the list given to him by the Special Rapporteur's team and he was concerned that exposing those areas to this person, who was a Jamaican resident, could pose a possible threat to the security of the facility.

[35] From Professor Shirley's account, SP Hewitt made a favourable impression on the PSC. As a result, it formed the view that he was "a fearless and effective police officer who was placed repeatedly in policing divisions accounting for the highest incidents of crime, particularly murders" (para. 37). In addition, the Commissioner informed the PSC, "under [SP] Hewitt's leadership the incidents of crime were reduced in the police divisions over which he had command".

[36] Upon the completion of the interviews on 12 January 2011, the PSC, after futher discussion, decided to recommend six of the remaining seven candidates for promotion. In the case of SP Hewitt, however, the PSC decided to appoint him to act as Senior Superintendent for a period of three months, pending receipt by the PSC of further information on specific issues raised in the interview. In particular, the PSC sought information from the Commissioner on outstanding statements to the BSI and whether any further reports had been received against the officers, including SP Hewitt, since the last report.

[37] Under cover of a letter dated 3 February 2011, a further fatal incident report was accordingly submitted to the PSC. The two significant differences between this report and the two which had preceded it were that (i) SP Hewitt was now stated to be, in all cases, "fully compliant in submitting his statement"; and (ii) under a new heading, 'Administrative Review', the report stated that, "Based on Admin Review Use of Force Justified."

[38] The matter was again considered by the PSC at its meeting of 2 March 2011. On this occasion, the Commissioner reasserted his confidence in SP Hewitt, lauding him for his courage, integrity and effectiveness as a crime fighter. The Commissioner told the PSC that, from his own review of the cases listed in the fatal incident reports, he was satisfied that SP Hewitt had always had justification for the use of force, whether as part of a team or as the person in command of an operation. The Commissioner considered that his promotion would be a morale booster for the members of the force working in difficult high crime divisions. But the PSC again decided to defer its decision on SP Hewitt's promotion for further consideration before the end of March 2011, which was when his acting appointment would expire.

[39] In the meantime, on 21 March 2011, concerned about media reports of a possibility that SP Hewitt was in line for promotion, JFJ wrote to Professor Shirley again, expressing concern "that your office has not responded to Jamaicans for Justice (JFJ) in regard to the grave issues and allegations of misconduct by Superintendent Delroy Hewitt that we brought to your attention on a number of occasions over the past 18 months". "Of equal concern", the letter continued, "is information in the news media

about the possible promotion of Superintendent Hewitt". JFJ accordingly requested a meeting with the PSC "as a matter of immediate priority", to enable it to outline the details of its concerns and to receive an update on the status of the PSC's investigation into its complaint. The letter ended with an expression of concern "about the ramifications of Superintendent Hewitt being promoted without the matters which we have identified being appropriately addressed".

[40] Responding to this letter on 29 March 2011, Professor Shirley advised JFJ that the PSC had raised the concerns expressed in its "various letters", in meetings with the Commissioner and SP Hewitt. Based on those discussions, Professor Shirley stated, the PSC was satisfied that it had enough information to make a decision on SP Hewitt's promotion. However, Professor Shirley did go on to suggest that any "factual information on the events cited in your letters" that was available to JFJ should be forwarded to him by 6 April 2011, "so that we may conduct further investigations".

[41] Also on 29 March 2011, the PSC again met to consider SP Hewitt's promotion. It was then decided to recommend that his acting appointment should be extended for a further period of one month, with effect from 1 April 2011. But it does not appear that there was any response to JFJ's letter of the following day, 30 March 2011, written as a result of what Mr Silvera described as "unconfirmed reports" that SP Hewitt may have been appointed to act in a higher rank, to enquire whether this was in fact the case (see Mr Silvera's affidavit, at para. 26).

[42] On 4 April 2011, Professor Shirley and his fellow PSC member, the Right Reverend Dr Robert Thompson, the Anglican Bishop of Kingston, attended a meeting with the DPP and other members of her team. According to Professor Shirley, the purpose of the meeting was "to ascertain whether there were any pending matters in which criminal or departmental charges were to be recommended against [SP] Hewitt" (para. 47). As subsequently confirmed in her letter dated 14 April 2011, the DPP's advice was that, upon a review of the outstanding matters involving SP Hewitt and the officers under his command, her office had made no recommendations that anyone should be departmentally or criminally charged.

[43] In a letter dated 6 April 2011, sent in response to Professor Shirley's letter of 29 March 2011, JFJ expressed concern at "the brevity" of his response, "after nearly two years of correspondence between our offices". In particular, JFJ expressed dismay at Professor Shirley's indication of the PSC's satisfaction that it had enough information to enable it to make a decision on SP Hewitt's promotion, even while he was at the same time requesting further factual information from JFJ. JFJ declared itself at a loss to understand precisely what was being asked of it, since it did not know what investigations had been carried out by the PSC. But this notwithstanding, "in the spirit of cooperation and concern", JFJ enclosed a 'Record of Complaints' received by it in relation to SP Hewitt and the men under his command during the period April 2000 to January 2011. Captioned "Re: Superintendent Delroy Hewitt and others ostensibly under his control", JFJ's list of 23 complaints consisted of cases of fatal shootings (22), non-fatal shootings (3), perversion of justice (1), assault and harrassment (2) and

threat (1). Also included in the list was the Special Rapporteur's report arising out of his visit to Hunt's Bay Police Lock Up on 15 February 2010. In its letter, JFJ also advised that it was in possession of sworn statements from the complainants in the matters set out in the record, as well as, in some cases, post mortem reports. However, JFJ observed, "you will understand our reluctance to breach our clients' confidentiality by enclosing this data in a letter".

[44] At a meeting held on 15 April 2011, the PSC finally decided to recommend the promotion of SP Hewitt to the position of Senior Superintendent, with effect from 1 April 2011. By letter dated 18 April 2011, Professor Shirley sought to assure JFJ that the PSC had taken into account "the cases and reports mentioned in your various letters" in its "consideration of the recommendation for promotion of [SP Hewitt] to the rank of senior Superintendent". He also indicated that the PSC looked forward to meeting with JFJ for "a hopefully useful exchange of thoughts and discussion of other matters of concern to your organization".

[45] But in the end the proposed meeting, although scheduled by mutual agreement for 24 June 2011, did not take place: it was overtaken by the order of D O McIntosh J, made on 3 June 2011, granting leave to JFJ to apply for judicial review of the decision.

The claim for judicial review

[46] JFJ's claim was for, firstly, an order of certiorari to quash the decision; and secondly, an order of mandamus –

"...directing the [PSC] to conduct an effective, thorough and impartial investigation into the twenty-eight allegations of misconduct made by the complainants against [SP Hewitt]; and directing the [PSC] to reconsider its decision in light of the credible and valid evidence of serious allegations of misconduct constituting allegations of criminal conduct raised by [JFJ] in initial correspondence dated 29 July 2009, and subsequently in further correspondence dated 6th April 2011."

[47] The grounds of the claim for judicial review were as follows:

"i. The 1st Defendant failed to address sufficiently, or at all, the issues raised by the Applicant within correspondence, namely, the 1st Defendant failed to conduct any, or any sufficient investigation to determine whether the facts outlined by the Applicant supported the allegations made by the twenty-eight complainants.

ii. Further that the 1st Defendant failed to consider sufficiently or at all, whether the allegations of misconduct were capable of being substantiated;

iii. The 1st Defendant failed to conduct an independent, effective, thorough and impartial investigation into the allegations of misconduct made by the Applicant, in consideration of its recommendation for the promotion of Superintendent Hewitt;

iv. The 1st Defendant erred in its exercise of its statutory jurisdiction by placing the burden and responsibility of providing substantive evidence to support the allegations of misconduct upon the Applicant and/or upon the Complainants;

v. The 1st Defendant erred in proceeding to consider whether Superintendent Hewitt could be promoted without first conducting an effective, thorough, and impartial investigation into the allegations of misconduct;

vi. The 1st Defendant failed to consider sufficiently, or at all the high degree of responsibility that the State has to conduct an effective, thorough, impartial and rigorous investigations [sic] where individual citizens have died,

and/or suffered serious injury as result of the actions of agents of the State;

vii. The 1st Defendant failed to consider sufficiently, or at all, the public interest in making a recommendation to promote Superintendent Hewitt, without a thorough and rigorous investigation and determination having been conducted of the twenty eight allegations of serious misconduct;

viii. The 1st Defendant failed to consider the likely effect of the promotion of the said Superintendent Delroy Hewitt on the public, more particularly, on the members of the public who have made complaints about the said Superintendent Delroy Hewitt;

ix. The 1st Defendant took into account irrelevant considerations and failed to take into account relevant considerations in making the decision to recommend the promotion of Superintendent Hewitt;

...

x. In all the circumstances the decision of the Police Service Commission is so unreasonable or irrational as to be perverse.

xi. The failure of the Police Service Commission to adequately respond or answer to the various issues raised in the Applicant's letter to it of the 6th April, 2011 is further evidence of the unreasonableness of the decision."

[48] Detailed particulars were given of ground ix, generally to the effect that the PSC had failed to examine and take into account relevant information supplied to it by JFJ and had acted *ultra vires* in exercising its power to make recommendations for the promotion of an officer without an independent and impartial investigation of the serious allegations of misconduct, involving breaches of constitutional rights, against him.

What the judge found

[49] B Morrison J considered (at para. [79] of the judgment[9]) that the claim gave rise to the following five issues:

> "1. Does the fact of receiving complaints from members of the public alleging misconduct, including human and fundamental rights violations ("the allegations"), against SP Hewitt, give to JFJ the requisite standing to be heard on Judicial Review of the PSC's decision in its consideration and subsequent recommendation for promotion (the consideration) of SP Hewitt? Is this, simply put, an employment procedural exercise between the PSC and SP Hewitt.
>
> 2. What are the powers and duties of the PSC, vis-à-vis the allegations and considerations?
>
> 3. Does the PSC have the autonomous independent investigative power or is it dependent on other bodies/entities insofar as the allegations are relevant to the considerations[?]
>
> 4. In arriving at its decision did the PSC engage a flawed process so as to render its decision **Wednesbury** unreasonable, that is to say, perverse.
>
> 5. Did the PSC, in arriving at its decision act on irrelevant matters and failed [sic] to act on relevant matters in its considerations of the allegations[?] In other words, did the Commission act within the ambit of its powers and duties?" (Emphasis in the original)

[50] After detailed consideration of these issues (taking issues 2 and 3 as one and issues 4 and 5 as one), the learned judge concluded that (i) JFJ had "the requisite

---

[9] The copy of the judgment which was made available to the court on the hearing of the appeal is still headed, curiously, "Draft", but nothing in particular appears to turn on this.

standing to be heard on judicial review"[10]; (ii) "the PSC did not have the structural apparatus to investigate complaints of misconduct"[11]; and (iii) the decision did not come within the generally accepted sense of unreasonableness, viz, "perversity; outrageous defiance of logic or morality; decision-maker taking leave of its senses; verging on an absurdity"[12]. The claim for judicial review was accordingly refused, with no order as to costs.

The grounds of appeal

[51] JFJ filed detailed grounds of appeal on 11 December 2012. The grounds, which follow closely the grounds of the claim for judicial review, are as follows:

> "i. the learned Judge erred in failing to address sufficiently or at all, the duty of the Public Service Commission (PSC) to ensure independent, thorough and impartial investigations are carried out into allegations of serious misconduct and possible breach of the constitutional rights of citizens by SP Hewitt prior to making recommendation for his promotion;
>
> ii. the learned Judge erred in failing to consider sufficiently or at all the PSC's duty to consider special reports in respect of a police officer who is being considered for promotion when considering that police officer's eligibility for promotion;
>
> iii. the learned Judge erred in equating the procedures and considerations established by the PSC Regulations 1961 for disciplinary proceedings to those procedures and considerations established by those regulations for the promotion of members of the Jamaica Constabulary Force.

---

[10] Para. [100]
[11] Para. [124]
[12] Para. [127]

iv. the learned Judge erred in failing to address sufficiently, or at all, the PSC's power to call any public officer to attend and give evidence before it and to produce any official documents relating to such matter or question;

v. The learned Judge erred in failing to acknowledge that the PSC failed to carry out an essential step in its statutory duty to ensure [sic] the several allegations of serious misconduct and possible breaches of the constitutional rights of citizens made against SP Hewitt are independently, thoroughly and impartially investigated prior to arriving at its decision to recommend the promotion of SP Hewitt;

vi. The learned Judge erred in relying on the Wednesbury unreasonableness principle as it does not arise in circumstances where the PSC failed to carry out an essential step in its statutory duty to cause allegations of serious misconduct and breach of citizen's [sic] constitutional rights to be investigated;

vii. The learned Judge erred in failing to have sufficient, or any, regard for the independent nature of the Police Public Complaints Authority and/or the Independent Commission of Investigation (INDECOM) in the conduct of investigations into allegations of police misconduct;

viii. The learned Judge erred in failing to have sufficient or any regard for the unique investigative role of the (INDECOM) into all allegations of police misconduct;

ix. The learned Judge erred in failing to address the PSC's failure to refer to and enquire of the Police Public Complaints Authority and/or INDECOM as to whether investigations were being carried out by them into allegations of misconduct against SP Hewitt;

x. The learned Judge erred in failing to recognize and/or address the INDECOM as a public body to which the PSC had recourse in its duty to investigate or cause to be investigated allegations of serious misconduct and breaches of the constitutional rights of citizens brought against a member of the JCF prior to its recommendation for promotion;

> xi. The learned Judge erred in failing to acknowledge that the PSC had a duty to cause to be investigated allegations of serious misconduct and breaches of citizen's [sic] constitutional rights by police officers brought to its attention;
>
> xii. The learned Judge erred in failing to take any or any sufficient consideration of the effect of the PSC's failure to cause to be investigated those allegations of serious misconduct and breaches of citizen's [sic] constitutional rights brought against SP Hewitt."

[52] And, in its counter-notice of appeal filed on 23 January 2013, the PSC, as I have already indicated, renewed its unsuccessful submission in the court below that "[JFJ] does not have a sufficient interest in the subject matter of the application to give it standing for judicial review".

[53] In organising JFJ's argument in the appeal, Mr Small very helpfully grouped the grounds of appeal under the following six heads:

> 1. Duty to ensure independent, thorough and impartial investigation where constitutional rights are allegedly breached (ground (i)).
>
> 2. Duty to consider special reports and to call public officers or any other persons (grounds (ii) and (iv)).
>
> 3. Duty to consider and refer to the special investigative powers of INDECOM (grounds (vii), (viii), (ix), (x) and (xi)).
>
> 4. Wednesbury unreasonableness (grounds (v) and (vi)).
>
> 5. Disciplinary process different from promotional process (grounds (iii) and (xi)).
>
> 6. Effect of the PSC's decision on the public (ground (xii)).

[54] In dealing with the issues raised by the appeal, I therefore propose, with gratitude, to adopt Mr Small's classification. However, since the PSC's contention that JFJ lacked standing to make a claim for judicial review obviously goes to the root of the matter, it will be convenient to deal with it, as the judge did, at the outset. I will therefore approach the matter under the following heads:

1. Locus standi.
2. The need to ensure an independent, thorough and impartial investigation.
3. The need for special reports.
4. The role of Indecom.
5. 'Wednesbury' unreasonableness.
6. The difference between the disciplinary and promotional processes
7. The public dimension of the decision.

Locus standi

[55] Rule 56.2(1) and (2) of the CPR provides as follows:

> "(1) An application for judicial review may be made by any person, group or body which has a sufficient interest in the subject matter of the application.
>
> (2) This includes –
>
> (a) any person who has been adversely affected by the decision which is the subject of the application;
>
> (b) any body or group acting at the request of a person or persons who would be entitled to apply under paragraph (a);

(c) any body or group that represents the views of its members who may have been adversely affected by the decision which is the subject of the application;

(d) any statutory body where the subject matters [sic] falls within its statutory remit;

(e) any body or group that can show that the matter is of public interest and that the body or group possesses expertise in the subject matter of the application; or

(f) any other person or body who has a right to be heard under the terms of any relevant enactment or the Constitution."

[56] In arriving at the conclusion that JFJ had satisfied the criterion of sufficient interest in this matter, B Morrison J considered a number of authorities, which led him to the view[13] that they established a "low threshold marker" for the test of standing. In challenging the judge's conclusion, Miss Larmond for the PSC made a number of points, which I would summarise – I hope fairly – in this way:

1. The requirement of 'sufficient interest' stated in rule 56.2(1) is in fact a codification of the common law principle that an applicant for judicial review must have locus standi.

2. In order to consider the question of standing, it is necesary to enquire into the relevant duty of the body against whom the order is sought, the complaint being made and the nature of the relief sought. Where, as in this case, one of the reliefs being sought is mandamus, the test of standing ought to be stricter,

[13] At para. [100]

particularly bearing in mind the fact that the PSR do not vest any investigative powers in the PSC.

3. The denial of standing to JFJ would not leave the various complainants of police misconduct without a remedy, as it was open to them to have recourse to the bodies statutorily appointed to investigate such complaints, or to initiate criminal prosecutions against the perpetrators, or private law actions against the government.

4. The matter of SP Hewitt's promotion was not of itself a matter of public interest in the sense contemplated by the authorities and the rules, in that the PSC's recommendation to the Governor-General related to SP Hewitt's employment in the JCF and did not affect the legal rights or liabilities of JFJ.

5. In any event, even if the matter were capable of satisfying the public interest criterion, JFJ had no expertise in the subject matter of the application, as section 56.2(1)(e) also requires.

6. JFJ's reliance on the Charter of Rights and Fundamental Freedoms was misplaced, as there is nothing in the Charter which is capable of conferring standing on any individual or public/civic organisation in judicial review proceedings.

[57] In response to these submissions, Mr Small for JFJ submitted that:

1. The learned judge had "fully and properly" considered the question of standing and had correctly concluded that JFJ had a sufficient interest to bring the application for judicial review.

2. JFJ fell within rule 56.2(2)(e) and (f) of the CPR, as (i) a "body or group that can show that the matter is of public interest and that [it] possesses expertise in the subject matter of the application"; and (ii) a "body who has the right to be heard under the terms of any relevant enactment or the constitution".

3. In interpreting rule 56.2, the court should adopt a modern and purposive approach, in accordance with which "the modern threshold for standing is set at a low level".

4. Allegations of misconduct which constitute allegations of criminal offences and/or of "disciplinary conduct", in particular allegations of the unlawful taking of life in breach of the right to life guaranteed by the Constitution, and the promotion of police officers against whom there are a number of such allegations, are matters of public interest.

[58] Against this backdrop, I come now to a brief consideration of the authorities. The starting point must be the seminal decision of the House of Lords (upon which both Miss Larmond and Mr Small rely) in **Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd**[14] ('the **Inland Revenue Commissioners**' case), in which Lord Wilberforce characterised the requirement of locus standi as "...an important safeguard against the courts being flooded and public bodies harrassed by irresponsible applications".

---

[14] [1982] AC 617, 630

[59] But it is important to note that, in making this statement, Lord Wilberforce was in fact considering what he described as "simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all, or no sufficient interest to support the application: then it would be quite correct at the threshold to refuse him leave to apply". For, the learned law lord continued -

> "...in other cases this will not be so. In these it will be necessary to consider the powers or the duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and to the breach of those said to have been committed. In other words, the question of sufficient interest can not, in such cases, be considered in the abstract, or as an isolated point: it must be taken together with the legal and factual context. The rule requires sufficient interest in the matter to which the application relates...As to this I would state two negative propositions. First, it does not remove the whole - and vitally important - question of locus standi into the realm of pure discretion. The matter is one for decision, a mixed decision of fact and law, which the court must decide on legal principles. Secondly, the fact that the same words are used to cover all the forms of remedy allowed by the rule does not mean that the test is the same in all cases. When Lord Parker C.J. said that in cases of mandamus the test may well be stricter (sc. than in certiorari) - the *Beaverbrook Newspapers case*...and in *Cook's case* ...'on a very strict basis,' he was not stating a technical rule - which can now be discarded - but a rule of common sense, reflecting the different character of the relief asked for. It would seem obvious enough that the interest of a person seeking to compel an authority to carry out a duty is different from that of a person complaining that a judicial or administrative body has, to his detriment, exceeded its powers. Whether one calls for a stricter rule than the other may be a linguistic point: they are certainly different and we should be unwise in our enthusiasm for liberation from procedural fetters to discard reasoned authorities which illustrate this. It is hardly necessary to add that recognition of the value of guiding authorities does not mean that the process of judicial review must stand still."

[60] In his luminous contribution to the discussion in the same case, Lord Diplock was at pains to show that the then still relatively new RSC Order 53, which came into effect on 11 January 1978, had liberated the procedural law of judicial review from what he described[15] as "those technical rules of locus standi to obtain the various forms of prerogative writs that were applied by the judges up to and during the first half of the present century, but which have been so greatly liberalised by judicial decision over the last 30 years". Thus, Lord Diplock invited the House[16] to take "judicial notice of the fact that the main purpose of the new Order 53 was to sweep away these procedural differences including, in particular, differences as to locus standi; to substitute for them a single simplified procedure for obtaining all forms of relief, and to leave to the court a wide discretion as to what interlocutory directions, including orders for discovery, were appropriate to the particular case". So although the requirement of standing remained extant, its purpose "is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived"[17]. Against this background, Lord Diplock accordingly concluded[18] that:

---

[15] At page 637
[16] At page 638
[17] Pages 642-643
[18] At page 644

> "It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."

[61] B Morrison J considered[19] that, by its unanimous decision in this case, "the House of Lords by way of judicial policy sought to give impetus to a new and liberal interpretation of the doctrine of standing". In support of this view, the learned judge referred to a number of later authorities in which the question was considered. I will mention three of them.

[62] The first is **R v Inspectorate of Pollution and another, ex parte Greenpeace Ltd (No 2)**[20] ('**ex parte Greenpeace**'), in which the applicant ('Greenpeace') was a campaigning environmental protection organisation with national and international standing. The unchallenged evidence was that it had nearly 5,000,000 supporters worldwide, over 400,000 of them in the United Kingdom and about 2,500 in the Cumbria region. A company which operated in the Cumbria region and was engaged in the reprocessing of spent nuclear fuel had been authorised by the respondents (who were the relevant government departments) to discharge liquid and gaseous radioactive waste from its premises. The company applied for new authorisations to include the proposed operation of a new thermal oxide reprocessing

---

[19] At para. [84]
[20] [1994] 4 All ER 329

plant. Pending the grant of the new authorisations, the company also applied for and was granted a variation of the existing authorisations to enable it to test the new plant before it became fully operational. Greenpeace was concerned about the levels of radioactive discharge from the site and applied for an order of certiorari to quash the respondents' decision to vary the existing authorisations and an injunction to stay the implementation of the varied authorisations and thus halt the proposed testing pending a decision on the main application. The company contested whether Greenpeace had a sufficient interest in the matter to which its application related.

[63] Otton J approached the matter "primarily as one of discretion...[taking] into account the nature of Greenpeace and the extent of its interest in the issues raised, the remedy Greenpeace seeks to achieve and the nature of the relief sought"[21]. Among other things, the learned judge was impressed by (i) the fact that Greenpeace was "an entirely responsible and respected body with a genuine concern for the environment"[22]; (ii) the extent of its membership (in particular the fact that 2,500 members were from the affected region itself); (iii) the fact that, if Greenpeace were to be denied standing, "those it represents might not have an effective way to bring the issues before the court"[23]; (iv) the nature of the relief sought (certiorari as opposed to mandamus); and (v) the fact that Greenpeace was treated as one of the consultees during the respondents' consultation process. In all the circumstances, the learned judge rejected

---

[21] Page 349
[22] Page 350
[23] Ibid

the company's argument that "Greenpeace is a 'mere' or 'meddlesome busybody'" and concluded that it was "eminently respectable and responsible and its genuine interest in the issues raised is sufficient for it to be granted locus standi"[24].

[64] The second is **R v Secretary of State for Foreign Affairs, ex parte World Development Movement Ltd**[25]. In that case, Rose LJ, in a judgment with which Scott Baker J agreed, considered that the authorities "indicate an increasingly liberal approach to standing on the part of the courts during the last 12 years". The court therefore had no difficulty in according standing to the applicant, a non-partisan pressure group concerned with the alleged misuse of British overseas aid funds, but otherwise having no direct personal interest in the funds, on the basis of sufficient interest.

[65] And the third is **R (Feakins) v Secretary of State for the Environment, Food and Rural Affairs**[26], in which Dyson LJ, delivering the leading judgment, observed that "[i]n recent years, there has unquestionably been a considerable liberalisation of what is required to found a sufficiency of interest for the purposes of standing". Counsel for the respondent's concession that "if the claimant had genuinely made the application in the public interest, the judge would have been right to hold that he had sufficient standing to proceed" was therefore regarded by the court as having been properly made.

---

[24] Page 351
[25] [1995] 1 All ER 611, 620
[26] [2003] EWCA 154, para 21

[66] Mr Small also referred us to a number of cases to make the same point. In **R v Secretary of State for the Home Department, ex parte Bulger**[27], for instance, Rose LJ acknowledged that "the threshold for standing in judicial review has generally been set by the courts at a low level...because of the importance in public law that someone should be able to call decision makers to account, lest the rule of law break down and private rights be denied by public bodies". However, in that case, in which a father, whose infant son who had been murdered in awful circumstances, sought permission to challenge the decision of the Lord Chief Justice fixing the tariff term to be served by those who had murdered him, the court considered that, given the nature of the proceedings, there was no need for a third party to seek to intervene to uphold the rule of law: "...the traditional and invariable parties to criminal proceedings, namely the Crown and the defendant, are both able to, and do, challenge those judicial decisions which are susceptible to judicial review..."

[67] In **R v Somerset County Council and ARC Southern Ltd**[28], Sedley J also highlighted (albeit in the context of an application for leave to apply for judicial review) the overriding importance in public law of affording a means by which abuses of public power can be brought to the attention of the court:

> "Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs – that is to say misuses of public power; and the courts have also been alive to the fact that a person or

---

[27] [2001] EWHC Admin 119, para. 20
[28] [1998] Env LR 111, 121

> organisation with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well placed to call the attention of the court to an apparent misuse of public power."

[68] Reflecting a similar approach in a case involving a constitutional dimension, in **Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society and another**[29] ('**the Downtown Sex Workers case**'), Cromwell J, speaking for the unanimous Supreme Court of Canada, said this:

> "[1] This appeal is concerned with the law of public interest standing in constitutional cases. The law of standing answers the question of who is entitled to bring a case to court for a decision. Of course it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter. Limitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere 'busybody' litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government: *Finlay v Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, at p. 631. The traditional approach was to limit standing to persons whose private rights were at stake or who were specially affected by the issue. In public law cases, however, Canadian courts have relaxed these limitations on standing and have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations.
>
> [2] In exercising their discretion with respect to standing, the courts weigh three factors in light of these underlying purposes and of the particular circumstances. The courts consider whether the case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard

[29] [2012] 2 SCR 524, paras [1]-[3]

> to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court: *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, at p. 253. The courts exercise this discretion to grant or refuse standing in a 'liberal and generous manner' (p. 253).
>
> [3] In this case, the respondents the Downtown Eastside Sex Workers United Against Violence Society, whose objects include improving working conditions for female sex workers, and Ms. Kiselbach, have launched a broad constitutional challenge to the prostitution provisions of the Criminal Code, R.S.C. 1985, c. C-46. The British Columbia Court of Appeal found that they should be granted public interest standing to pursue this challenge; the Attorney General of Canada appeals. The appeal raises one main question: whether the three factors which courts are to consider in deciding the standing issue are to be treated as a rigid checklist or as considerations to be taken into account and weighed in exercising judicial discretion in a way that serves the underlying purposes of the law of standing. In my view, the latter approach is the right one. Applying it here, my view is that the Society and Ms. Kiselbach should be granted public interest standing. I would therefore dismiss the appeal."

[69] In the same vein, Mr Small drew particular attention to the recent decision of the Court of Appeal of Malaysia in **Manoharan a/l Malayalam and another v Dato' Seri Najib Bin Tun Haji Abdul Razak and others**[30], in which it was held that "...where the complaint of the plaintiff is that the Federal Government or its agent has violated the Federal Constitution by its action or legislation, he has the locus to bring an action to declare the action of the Federal Government or its agent as being unconstitutional, without the necessity of showing that his personal interest or some

[30] Civil Appeal No W-01 (NCVC)(W)-308-07/2012

special interest of his has been adversely affected". The court then went on to adopt the following passage from the decision of the High Court of Tanzania in **Rev Christopher Mtikila v The Attorney General**[31]:

> "The notion of personal interest, personal injury or sufficient interest over and above the interest of the general public has more to do with private law as distinct from public law. In matters of public interest litigation this court will not deny standing to a genuine and bona fide litigant even where he has no personal interest in the matter...Given all these and other circumstances, if there should spring up a public-spirited individual and seek the courts [sic] intervention against legislation or actions that prevent [sic] the Constitution, the court's [sic], as guardian and trustee of the Government and what it stands for, is under an obligation to rise up to the occasion and grant him standing. The present petitioner is such an individual."

[70] In my view, this unbroken line of authority, springing from various parts of the common law world in a variety of circumstances, amply validates B Morrison J's felicitous reference[32] to "the benevolent advance of a liberal approach to standing". The requirement in rule 56.2(1) that an applicant for judicial review should have a sufficient interest in the subject matter of the application must therefore be read in the context of the developed law of standing, without recourse to what Lord Diplock dismissed in the **Inland Revenue Commissioners** case (in 1981)[33] as "technical restrictions on locus standi...that were current 30 years ago or more". Although the requirement of standing remains (since, as Cromwell J explained in the **Downtown Sex Workers** case, "it

---

[31] Civil Case No 5 of 1993
[32] At para. [90]
[33] At page 641

would be intolerable if everyone had standing to sue for everything"), its role in the modern law is, in the first place (most usually at the stage of the application for leave to apply for judicial review), to insulate the courts against misguided or trivial complaints of administrative error by busybody litigants, while protecting public bodies from gratuitous and burdensome distraction. At the stage of a full hearing of the claim for judicial review, while the question of standing is obviously still relevant (and the court may even at that stage, upon full consideration, revise the provisional view taken by the judge at the leave hearing), it then falls to be considered, as Lord Wilberforce indicated in the **Inland Revenue Commissioners** case, against the backdrop of the legal and factual context of the case. At that stage, the question of standing "cannot be considered in the abstract or as an isolated point..."[34]

[71] As the cases show, the liberal approach to standing has been at its most pronounced in cases with a public interest in preserving the rule of law or, where applicable, a constitutional dimension. In such cases, it seems to me, the courts have been less concerned with the right which a particular applicant seeks to protect than with the nature of the interest which it is sought to vindicate. The decision of the United Kingdom Supreme Court in **AXA General Insurance Ltd and others v The Lord Advocate and others**[35] makes the point, if I may say so respectfully, particularly well. In that case, the court was concerned with the circumstances in which, in judicial

---

[34] Judicial Review Proceedings - a Practitioner's Guide, 3rd edn, by Jonathan Manning, Sarah Salmon and Robert Brown, para. 4.4
[35] [2011] UKSC 46

review proceedings in Scotland, a person may be granted leave to take part in the proceedings as a person "directly affected by any issue raised", which is the equivalent test of standing in that jurisdiction[36]. To Lord Hope's observation[37] that "[a] personal interest need not be shown if the individual is acting in the public interest and can genuinely say that the issue directly affects the section of the public that he seeks to represent", Lord Reed added the following[38]:

> "There is thus a public interest involved in judicial review proceedings, whether or not private rights may also be affected. A public authority can violate the rule of law without infringing the rights of any individual: if, for example, the duty which it fails to perform is not owed to any specific person, or the powers which it exceeds do not trespass upon property or other private rights. A rights-based approach to standing is therefore incompatible with the performance of the courts' function of preserving the rule of law, so far as that function requires the court to go beyond the protection of private rights: in particular, so far as it requires the courts to exercise a supervisory jurisdiction. The exercise of that jurisdiction necessarily requires a different approach to standing...such an approach cannot be based upon the concept of rights, and must instead be based upon the concept of interests. A requirement that the applicant demonstrate an interest in the matter complained of will not however operate satisfactorily if it is applied in the same way in all contexts. In some contexts, it is appropriate to require an applicant for judicial review to demonstrate that he has a particular interest in the matter complained of: the type of interest which is relevant, and therefore required in order to have standing, will depend upon the particular context. In other situations, such as where the excess or misuse of power affects the public generally, insistence upon a particular

---

[36] Rule 58.8(2) of the Rules of the Court of Session 1994
[37] At para. [63]
[38] At paras [169]-[170]

> interest could prevent the matter being brought before the court, and that in turn might disable the court from performing its function to protect the rule of law. I say 'might', because the protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court, any more than it requires that every allegation of criminal conduct must be prosecuted. Even in a context of that kind, there must be considerations which lead the court to treat the applicant as having an interest which is sufficient to justify his bringing the application before the court. What is to be regarded as sufficient interest to justify a particular applicant's bringing a particular application before the court, and thus as conferring standing, depends therefore upon the context, and in particular upon what will best serve the purposes of judicial review in that context."

[72] With all these considerations in mind, I would approach the question of the sufficiency of JFJ's interest by taking into account, first, the nature of JFJ and the extent of its interest in the issues raised; second, the powers and/or the duties in law of the PSC; third, whether, if JFJ were to be denied standing, those persons it represents would have any effective way to bring the issues before the court; and fourth, the nature of the relief sought.

[73] First, as to the nature of JFJ and the extent of its interest in the issues raised, I should say at once that nothing was put forward to suggest that it was anything other than it purports to be; that is, a non-governmental, non-partisan human rights organisation concerned with, among other things, the representation of vulnerable members of society who have suffered human rights abuses at the hands of state agents. Neither Mr Silvera's nor Dr Gomes' characterisation of the organisation in these terms was challenged in any way. Indeed, after a long course of correspondence,

Professor Shirley even found it necessary to assure JFJ that the PSC had taken its complaints into account in its consideration of the recommendation of SP Hewitt's promotion. This was, it seems to me, an implicit acknowledgment and recognition of JFJ's bona fides and stature as a human rights pressure group with a legitimate interest in the matters of concern that it had brought forward. And so too was Professor Shirley's expression of hope that a meeting between the parties might provide a "useful exchange of thoughts and discussion of other matters of concern" to JFJ[39]. At all events, it seems to me to be impossible to dismiss JFJ as a busybody or a crank.

[74] Second, as regards the PSC, its duty is, as I have already indicated, to make recommendations to the Governor-General with respect to, among other things, appointments and promotions of members of the JCF. In her skeleton argument on behalf of the PSC, Miss Larmond appeared to dismiss JFJ's interest in the promotion of SP Hewitt as something of interest solely for the purpose of "gratifying curiosity or a love of information or amusement"[40]. For my own part, I find it impossible to do so. Viewed in the light of JFJ's outstanding complaints to the PSC against SP Hewitt's conduct as a senior police officer, the PSC's recommendation that he be elevated to even higher reaches of the JCF may be something in which, in my view, there could be a legitimate and substantial public interest, if only to ensure that the stated criteria for promotion in the PSR are adhered to in letter and spirit.

---

[39] See para. [41] above. See also ACP Gauze's account of the meeting between Dr Gomes et al and the Commissioner on 26 March 2010, at which the parties arrived at "a common understanding" on the use of force by members of the JCF – para. [20] above.

[40] Per Campbell CJ in **R v Bedfordshire** 24 LJQB 84, quoted in Stroud's Judicial Dictionary, 5th edn, vol 4, para. 2090

[75] As regards the third consideration, Miss Larmond states the obvious: that it is possible for criminal prosecutions to be brought against the perpetrators of violence against JFJ's constituents and/or for civil action to be brought by them or on their behalf against the state. But in the context of 19 fatal incident cases (some several years old) still listed in the BSI files as "incomplete" in 2011, I am strongly inclined to regard this as a wholly unrealistic suggestion. The clear inference from the evidence, it seems to me, is that the necessity for reports such as that made by JFJ to the PSC in the first place arose because of either the unavailability of evidence or the unresponsiveness of other agencies to the complaints made to it by members of the public. I would therefore not consider the possibility urged by Miss Larmond as a factor that disqualifies JFJ from seeking to mount the complaints on their behalf.

[76] And lastly, in relation to the fourth consideration, which is the nature of the relief sought, it is clear from the authorities that, as Miss Larmond quite properly reminded us, the question of standing may demand more anxious consideration in relation to the relief of mandamus than in respect of other kinds of relief in judicial review. As Lord Wilberforce observed in the **Inland Revenue Commissioners** case[41], "this is not a technical rule - which can now be discarded - but a rule of common sense". In considering standing, it is therefore legitimate for the court to examine the position of a person who asks for an order compelling a public body to perform a duty entrusted to it by law even more closely than in the case of a complaint of misuse of power.

---

[41] See para. [59] above

[77] But, that having been said, it must be remembered that in this case JFJ founded its claims for mandamus and certiorari on the same set of circumstances. So it seems to me to be more sensible – and certainly more practical – for any reservations that the court might have on the question of JFJ's standing for mandamus, as distinct from certiorari, to be reflected in the ultimate order of the court, rather than as some kind of abstraction at the threshold.

[78] For all of these reasons, I have come to the clear conclusion that B Morrison J was correct to hold that JFJ had a sufficient interest in the matter to which this application relates. If it were necessary to fit JFJ's interest into one of the listed categories of interest in rule 56.2(2), I would also consider that JFJ is, as Mr Small contended, a "body or group that can show that the matter is of public interest and that the body or group possesses expertise in the subject matter of the application". In this regard, it seems to me that JFJ's history of dealing with complaints such as the one it put forward in this case amply qualifies it by experience as a body with expertise in the subject matter of the application. But in any event, it further seems to me, the use of the word "includes" in introducing the list of the kinds of interest that can qualify as sufficient for the purposes of rule 56.2(1) plainly indicates that the framers of the rule intended it to be an indicative rather than an exhaustive list.

The need for an independent, thorough and impartial investigation

[79] JFJ's complaint that the PSC failed in its duty to ensure an independent, thorough and impartial investigation into allegations of serious misconduct and possible

breach of the constitutional rights of citizens by SP Hewitt, prior to making a recommendation for his promotion, lies at the heart of its discontent in this matter. Indeed, as has already been seen, the mandamus which JFJ now seeks from this court is an order directing the PSC to cause such an investigation to be conducted and to reconsider the decision to recommend SP Hewitt's promotion in the light of the outcome of that investigation.

[80] Mr Small's opening submission on this issue was that the PSC "is a public authority empowered by statute to carry out specific duties and to act on behalf of the state"[42]. In order to emphasise the special nature of and the role played by the PSC in the consitutional scheme as a whole, we were referred to the well-known decision of the Privy Council in **Thomas v Attorney-General of Trinidad & Tobago**[43], in which Lord Diplock explained the purpose of the equivalent chapter VIII of the 1962 Constitution of Trinidad & Tobago in this way[44]:

> "The whole purpose of chapter VIII of the Constitution which bears the rubric 'The Public Service' is to insulate members of the civil service, the teaching service and the police service in Trinidad and Tobago from political influence exercised directly upon them by the government of the day. The means adopted for doing this was to vest in autonomous commissions, to the exclusion of any other person or authority, power to make appointments to the relevant service, promotions and transfers within the service and power to remove and exercise disciplinary control over members of the service."

---

[42] JFJ's amended skeleton arguments, para. 18
[43] [1982] AC 113
[44] At page 124

[81] Next, Mr Small referred us to section 13(2)(a) of the Constitution[45], which guarantees to all persons in Jamaica, among other fundamental rights and freedoms, "...the right to life, liberty and security of the person and the right not to be deprived thereof except in the execution of the sentence of a court in respect of a criminal offence of which the person has been convicted"[46]. On this basis, Mr Small submitted that there is an increased duty on the state to ensure that independent, impartial and effective investigations are carried out in cases where agents of the state have been responsible for the death of its citizens. To make this point, we were referred to **McCann and Others v United Kingdom**[47] ('**McCann**'), **Jordan v United Kingdom**[48] ('**Jordan**') (both decisions of the European Court of Human Rights) and **Abboud v Secretary-General of the United Nations**[49] ('**Abboud**') (a decision of the United Nations Dispute Tribunal).

[82] In **McCann**, the United Kingdom ('UK'), Spanish and Gibraltar authorities recevied intelligence that the Provisional Irish Republican Army ('the IRA') were planning a terrorist attack on Gibraltar. Soldiers from the UK Special Air Service ('SAS') were sent in to assist the Gibraltar authorities to arrest the IRA active service unit and the three suspects were subsequently shot and killed by members of the SAS. The applicants complained that the killings violated Article 2 of the European Convention on

---

[45] As amended by The Charter of Rights and Fundamental Freedoms (Constitutional Amendment) Act 2011 ('the Charter')
[46] Section 13(3)(a)
[47] (1996) 21 EHRR 97
[48] (2003) 37 EHRR 2
[49] Case No UNDT/NY/2009/055/JAB/2008/104 (Judgment No UNDT/2010/001)

Human Rights ('the Convention'), which, in terms not dissimilar to section 13(2)(a) of the Constitution, gives protection to everyone's right to life, save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. Deprivation of life will otherwise only be justified when it results from the use of force which is no more than absolutely necessary (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained; and (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

[83] The court considered[50] that, in the light of the language of this article, the situations where deprivation of life may be justified are exhaustive and must be narrowly interpreted, "guided by the recognition that it is one of the most important rights in the Convention, from which no derogation is possible". It was accordingly held that the use of force which has resulted in a deprivation of life must be shown to have been "absolutely necessary" for one of the purposes set out in Article 2 and that "the test of necessity includes an assessment as to whether the interference with the Convention right in question was proportionate to the legitimate aim pursued".

[84] In **Jordan**, the applicant's complaint was that his unarmed son had been unjustifiably shot and killed by an officer of the Royal Ulster Constabulary and that there had been no effective investigation into, or redress for, his death. In a unanimous ruling, the court held that there had been a violation of Article 2 of the Convention in

---

[50] At paras 181-182

respect of the investigative procedures concerning the death of the applicant's son. The court considered[51] that, in the light of the fundamental importance of the protection afforded by Article 2, it was necessary to "subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances". Further[52]:

> "105. The obligation to protect the right to life under Art. 2 [of the Convention], read in conjunction with the State's general duty under Art. 1 [of the Convention] to 'secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention', also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention...
>
> 106. For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence.
>
> 107. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of

[51] At para. 103
[52] At para. 105-106

> means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including inter alia eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard."

[85] And in **Abboud**, Judge Adams sitting in the United States Dispute Tribunal was concerned with the nature of the enquiry required of an official in the face of an allegation of misconduct on the part of a staff member. The relevant regulation called for a determination of whether "there is reason to believe...[that the staff member] has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed". In his ruling made on 6 January 2010, Judge Adams said this:[53]

> "Whether there is 'reason to believe' the relevant matter is an objective question of judgment and, if there is, the official has no residual discretion to refuse to conduct a preliminary investigation. The official does not ask, 'Do I have reason to believe?', let alone, 'Do I believe?' He or she must ask, 'Is there material that would give an objective and reasonable decision-maker reason to believe?' It is not necessary that the official actually believes that the particular impugned conduct occurred or that it amounts to misconduct. The necessary and sufficient criterion is simply whether there is reason to believe that conduct amounting to misconduct occurred."

---

[53] At para. 4

[86] Mr Small also referred us to the decision of the Full Court of the Supreme Court in **Gerville Williams et al v The Commissioner of the Independent Commission of Investigations**[54] ('**Gerville Williams**'), in which Sykes J observed that:

> "As part of the international community of civilized nations, Jamaica is obliged to have a fair, impartial, independent and rigorous system of investigation whenever an allegation of impropriety is alleged against the Security Forces. This is all the more important when the allegation involves the death of a person; the right to life must surely rank among the top tier of rights."

[87] And finally on this point, Mr Small referred us to section 13(2)(b) of the Constitution, which provides that "no organ of the State shall take any action which abrogates, abridges or infringes those rights"; and to De Smith's Judicial Review[55], in which the learned authors make the point that, "[u]nder ECHR law, [core public authorities] are bound to respect Convention rights in all aspects of their activities". Accordingly, it was submitted, it was incumbent on the PSC, as an organ of the State deriving its jurisdiction and power from the Constitution, and thus obliged to respect the rights guaranteed by the Constitution, to ensure that impartial, independent and thorough investigations were conducted into allegations of misconduct amounting to breaches of the right to life.

---

[54] Claim No 2011 HCV-6344, judgment delivered 25 May 2012, para. [226]
[55] 6th edn, para. 3-071

[88] In response to these submissions, Miss Larmond submitted that, on a review of the constitutional framework under which the PSC operates, there are no investigative powers or resources reserved to the PSC to enable it to carry out investigations into allegations of misconduct. We were referred to Part V of the PSR, which deals with the subject of discipline, in particular to section 31(1) ("in dealing with disciplinary proceedings against members [the PSC] shall take into consideration reports from the Commissioner"; section 31(5) (mandating the PSC to obtain advice from the the DPP or the Clerk of the Courts for the relevant parish "as to whether criminal proceedings ought to be instituted against the member concerned"); and section 32(1) ("[a]ny report of misconduct on the part of a member shall be made to the Commissioner and dealt with under this Part as soon as possible thereafter"). Acting in accordance with these provisions, Miss Larmond submitted, the PSC, on receiving JFJ's complaint against SP Hewitt, had brought it to the attention of the Commissioner, whose reports it had considered. Thereafter, the PSC had lawfully exercised its discretion not to recommend the institution of disciplinary proceedings against SP Hewitt to the Governor-General, pursuant to section 31(2), which empowers the PSC, where it is of the opinion that disciplinary proceedings ought to be instituted against a member above the rank of Inspector, to make such a recommendation. In all the circumstances, Miss Larmond submitted, B Morrison J had been correct to find that the PSC did not have investigative powers and was not equipped structurally to carry out its own investigations into allegations of misconduct by SP Hewitt.

[89] No one would gainsay, I think (certainly I do not), that the right to life is in the "top tier" of the rights guaranteed to all persons in Jamaica by the Constitution. In this regard, it cannot be without significance that the framers of section 13(3)(a), which, in its present form, was inserted into the Constitution by the Charter in 2011, chose to place that right ahead of all others in the list of fundamental rights to which protection is afforded by that section. It is also no doubt for this reason that the unjustified loss of life at the hands of criminals is justly regarded as among the most egregious ills that beset the society. And no less so (and indeed, some may argue, even more so) is the unjustified loss of life at the hands of members of the security forces, including the JCF, whose core mandate it is, after all, among other things, "to keep watch by day and night, to preserve the peace, [and] to detect crime..."[56]. And, given that all organs of the State are specifically enjoined by the Constitution to take no action which "abrogates, abridges or infringes those rights", it must surely be equally uncontroversial to insist that all such organs are bound to respect and seek to protect the fundamental rights and freedoms guaranteed by the Constitution in all aspects of their activities.

[90] Nor would anyone doubt, it seems to me, that, as a concomitant of the State's obligation to protect the right to life, there should be some form of independent and effective investigation into all the circumstances when individuals are killed as a result of the use of force by the members of the security forces. Indeed, as Mr Small pointed

---

[56] The Constabulary Force Act, section 13

out, B Morrison J's ready conclusion from the authorities (from which there has been no appeal) was that[57] –

> "...all that these cases shows [sic] is that fundamental rights and obligations are of permanent [sic] consideration especially when it comes to the life of a citizen. Accordingly, where the state is involved in the breach of those fundamental rights, investigations are to be considered in a special way: 'impartially, independently and thoroughly'."

[91] So the only question that remains is whether, notwithstanding this implied obligation on the State in respect of a constitutional issue of first importance, the learned judge was right in concluding[58] that the PSC could not be faulted for not having carried out or caused to be carried out such an investigation because "[it] is not equipped structurally to carry out on its own those investigations"?

[92] For my own part, I cannot fault the judge's conclusion. In this regard, I have been struck by two matters in particular. Firstly, despite the PSC's overall responsibility to make recommendations to the Governor-General in relation to promotions, it is clear that, in the ordinary course of things, the PSC must be substantially dependent operationally on the Commissioner for the kind of information which section 15(2) of the PSR states to be relevant to the consideration of the suitability of members for promotion. So among the matters which the PSR is required to take into account in relation to any member are, for instance, "(d) any special course of training that he may have undergone..."; "(e) markings and comments made in confidential reports by

---

[57] At para. [121]
[58] Ibid

any officer under whom the member concerned worked during his service"; "(f) any letters of commendation in respect of any special work done by the member"; "(g) the duties of which he has had knowledge and experience"; "(i) any special recommendation of the Commissioner for filling the particular posts"; and "(k) any special reports for which the Commission may call"[59]. Further, section 15(3) specifically mandates the PSC, notwithstanding the member's ranking with respect to any of the criteria set out in section 15(1) and (2), to "give preference to members who have manifested superior intelligence and efficiency in the performance of their functions". Again, by its very nature, it seems to me, this is a judgment which, although ultimately one for the PSC to make, would ordinarily be the culmination of a process of consideration initiated by a recommendation from the Commissioner.

[93] Secondly, and in similar vein, there are section 31(1) and (2) and section 32(1). I readily recognise that these sections relate to the question of discipline and not to the matter of appointments and promotions. However, in my view, they plainly reinforce the clear impression that it was the intention of the framers of the PSR that, while required to bring its own independent judgment to bear on the matters under consideration, the PSC should be entitled to refer to and rely on reports furnished by the Commissioner as the operational head of the JCF. It accordingly seems to me that, as Miss Larmond submitted, the PSC acted entirely in accordance with its mandate in bringing JFJ's complaint against SP Hewitt to the attention of the Commissioner and

---

[59] But, as to 'special reports', see further below at paras [96]-[117]

thereafter taking these reports into consideration in determining whether to recommend the institution of disciplinary proceedings against him or his promotion to the rank of Senior Superintendent.

[94] Leaving aside for the moment the possibility of calling for a 'special report' from an outside agency (such as Indecom), to which I will shortly come, B Morrison J was in my judgment clearly correct in concluding that the PSC is not equipped structurally to carry out the kind of investigation for which JFJ has consistently contended in this matter. Nor is the situation improved, it seems to me, by recasting the supposed obligation on the PSC as being an obligation to "cause" such an investigation to be conducted, since the PSC has no authority to order any other body or person to carry out such an investigation.

[95] This conclusion does not in my view involve any diminishment of or derogation from the right to life. Rather, it simply acknowledges the reality that, while all organs of the State are undoubtedly bound to respect the fundamental rights and freedoms of persons in Jamaica, each is nevertheless limited by its own constitutive structure and particular remit. In the case of the PSC, the requirement of the Constitution and the PSR is that it will bring its independent and best judgment to bear on the matters entrusted to it for determination, *viz*, questions relating to the appointment, promotion, termination and discipline of members of the JCF. Naturally, I must also shortly come to the question of the reasonableness of the PSC's decision to recommend SP Hewitt's promotion in the light of all the information that was available when it was made. However, it suffices to say at this stage that, in my view, JFJ's contention that the judge

erred in failing to decide that the PSC was under a duty to conduct or cause to be conducted an independent, impartial and effective investigation into the allegations regarding SP Hewitt's conduct has not been made good.

The need for special reports/the role of Indecom

[96] As has been seen, section 15(2)(k) specifically provides that, among the matters to be taken into account by the PSC in considering the suitability of a member of the JCF for promotion are "any special reports for which...[it] may call". Perhaps because JFJ in its fixed date claim form did not specifically complain about a failure by the PSC to call for any special reports in considering SP Hewitt's promotion, the learned judge did not make any finding on this point. However, it is clear that this was a matter of concern to JFJ from the outset and Dr Gomes in her affidavit did point out that[60] there was "no record that any enquiries were made by the [PSC], of any other agency apart from the BSI". Specifically, Dr Gomes observed, there was no record of "contact having been made with the PPCA/INDECOM, the Public Defender or the Professional Standards Branch, despite the [PSC] having been informed that complaints had been lodged with [these] agencies".

[97] Mr Small also drew attention to sections 9 and 10 of the PSR. Section 9 permits the PSC, in considering any matter or question, to "consult with any such public officer or other person as the [PSC] may consider proper and desirable and may require any public officer to attend and give evidence before it and to produce any official

[60] At para. 28

documents relating to such matter or question". This section is supplemented by section 10, which deems it a breach of discipline for any public officer to fail, without reasonable cause, to appear before the PSC when required to do so.

[98] On the basis of these provisions, Mr Small submitted that (i) where relevant factors are specified in the regulations, it is for the court to determine whether they are factors to which the public body is compelled to have regard; and (ii) in circumstances where members of the public have made complaints of misconduct against an officer being considered for promotion, the PSC is under a duty to consult with any public officers or other persons (including the complainants themselves) who may properly hold information relevant to the complaints.

[99] But Mr Small's major complaint was that the PSC was under a duty to refer the matter of the allegations against SP Hewitt to Indecom, as the body established by statute and given unique powers to investigate allegations of police misconduct. In this regard, heavy reliance was placed on **Gerville Williams**, in which the court was concerned with the constitutionality of certain sections of the ICIA and in which all three judges in the Full Court spoke to the background and purpose of Indecom.

[100] Lawrence-Beswick J said this[61]:

> "The Indecom Act is relatively recent having come into operation on April 15, 2010. It was expected to fill the perceived need to have an independent body which would

[61] At paras [115]-[119]

> investigate killings, injuries, and abuses caused by the Security Forces.
>
> Investigations by the police of such killings were being stymied by the 'squaddie' approach where one security officer would not give information that might have implicated another officer in a crime.
>
> The concept of Caesar investigating Caesar led to the public reposing no confidence in the State's ability to engage in fair and impartial investigations with the objective of eventually having a fair trial wherever members of the security forces were involved. Without investigations of that calibre it was feared that, extra judicial killings, injuries and abuses would continue as the probability of the perpetrator being brought to justice when they did occur was very slim.
>
> The Indecom Act provides for the creation of a Commission headed by an independent Commissioner who has judicial and administrative roles. The Act also gives him powers of investigation. This necessitates obtaining as accurate information as is possible, within the parameters of the Indecom Act and the Constitution."

[101] Next, in a passage on which Mr Small placed particular emphasis, Sykes J gave the following account of the background to the formation of Indecom and the mischief which it sought to address [62]:

> "Jamaica has had a long-standing problem with the investigation of the circumstances in which persons have either been killed or mistreated by members of the security force, particularly the Jamaica Constabulary Force (JCF). The view has developed, rightly or wrongly, that members of the security forces, the police in particular, are involved in too many shooting incidents which have led to the death or serious injury of citizens. Others have been injured or killed while in the custody of the state. Over the years, successive government administrations have sought to address the

[62] At paras [130]-[132]

problem. A major attempt to address the problem and to reduce public cynicism was the establishment of a statutory body known as the Police Public Complaints Authority (PPCA). It functioned for a number of years. It was felt that this body despite its best effort did not accomplish the task satisfactorily. The statutory provisions were said to be inadequate. In the eyes of some, the PPCA was ineffective. Another significant effort saw the establishment of the Bureau of Special Investigations (BSI). This body, whatever the objective evidence may be, did not appear to command public confidence largely because it was established within and operated by the JCF, the very institution which was under a cloud of suspicion when it came to allegations of serious abuse and misconduct. Persons felt that it would not be able to conduct fair and impartial investigations into members of the force. In one sense the BSI was even weaker than the PPCA because it did not have any statutory powers to conduct effective investigations.

Successive administrations, for years, have been heavily criticized by human rights groups, domestic and international, for not doing enough to investigate thoroughly, professionally and independently incidents of complaints against the security forces. The criticisms were relentless. The government decided to scrap the PPCA and replace it with Indecom. In effect the perception was that the PPCA and BSI failed to do an adequate job. There is little to suggest that the population at large had confidence in their work.

A brief reference to some statistics provided by Indecom appointed under the ICIA gives an insight into the scale of the problem. It makes sober reading. Indecom stated, in one of its affidavit filed in this claim, that between 1999 to 2010 - a mere eleven years - 2257 persons were killed by the police. This figure came from the police – the BSI. By any measure this is indeed a high rate of killings, whether justified or not. The high rate of killings by the police and the perception that the police were unaccountable led the public to conclude that the cases were not being properly investigated. The PPCA body and the BSI were seen to be ineffective, underfunded and lacking in statutory authority to conduct investigations that met acceptable standards. This was the context of the passage of the legislation."

[102] And lastly, F Williams J added[63] that –

> "The Act...seeks to upend a long-standing status quo of ineffective investigations into questionable shootings and allegations of excesses by agents of the state, and to address certain controversial societal concerns. It was meant to represent a paradigm shift from what obtained before."

[103] And so Indecom was established, with effect from 15 April 2010, to undertake investigations concerning actions by members of the security forces and other agents of the State that result in death or injury to persons or the abuse of the rights of persons. Although Indecom replaced the PPCA, transitional provisions in the ICIA provided for any complaint which was pending before the PPCA immediately before its commencement date to be continued by Indecom[64].

[104] Indecom is given wide powers of investigation for the purposes of the ICIA and may, among other things, require the security forces "to furnish information relating to any matter specified in the request"[65]. Its independence is guaranteed by the fact that, subject only to the provisions of the Constitution, it "shall not be subject to the direction or control of any person or authority"[66]. Complaints may be made to Indecom by persons who allege that the conduct of members of the security forces has resulted in, among other things, "the death of or injury to any persons or was intended or likely to

---

[63] At para. [329]
[64] Section 40(1)(b), Independent Commission of Investigations Act (Act 12 of 2010)
[65] Section 4(2)(b)
[66] Section 5(1)

result in such death or injury"[67]. Reports of incidents involving conduct that resulted in the death of or injury to any person may also be made to Indecom by the head of the relevant security force or an officer in charge of a relevant public body[68]; and Indecom itself, where it is satisfied that "an incident is of such an exceptional nature, that it is likely to have a significant impact on public confidence in the Security Forces or a public body", may, of its own motion, require the relevant force or the relevant public body to make a report of that incident to Indecom[69]. An investigation under the ICIA may also be undertaken by Indecom of its own initiative[70]. Indecom may seek to resolve complaints informally[71]; and/or by way of mediation or other dispute resolution mechanism[72]; and, where a complaint is not resolved by either of these methods, by way of a formal investigation[73]. At the conclusion of any such formal investigation, a report must be prepared and a copy furnished to the complainant and, among others (where the complaint involves a member of the JCF or related force), the PSC[74].

[105] Against this background, Mr Small submitted, section 15(2)(k) of the PSR falls to be read as including a requirement for the PSC to refer allegations of police misconduct to Indecom, as the statutory organ of the State which has been given full powers to

---

[67] Section 10(1)(a)
[68] Section 11(1)
[69] Section 12
[70] Section 13
[71] Section 15
[72] Section 16
[73] Section 17(1)
[74] Section 17(9)

investigate, independently and impartially, allegations of conduct involving infringement of constitutional rights.

[106] As regards section 9 of the PSR, Miss Larmond's submission was that the PSC was given the power, but was not obliged to consult with any other public officer before coming to a decision on SP Hewitt's promotion. In any event, it was submitted, the evidence was that in its deliberations on the matter the PSC did consult as it considered proper and desirable and exercised its own discretion in recommending SP Hewitt for promotion.

[107] In respect of "special reports", Miss Larmond submitted that the PSC has neither the authority nor the jurisdiction to call for or request a report from Indecom for the purpose of determining whether or not a member of the JCF should be recommended for promotion. It was further submitted that the PSC is not bound by the ICIA and there is no requirement for it to refer allegations of police misconduct to Indecom. Further still, it was submitted, the scheme of the ICIA is such that it does not permit of the procedure contended for by JFJ, in that the Act provides for investigations to be launched either upon a complaint by a person after a determination that such complaint cannot be resolved by informal resolution or by dispute resolution, or by Indecom on its own initiative. Miss Larmond also pointed out that, having regard to the transitional provision in section 40(1)(b) of the ICIA, as at January 2011 a total of 11 of JFJ's 28 complaints would have been within the remit of Indecom to be dealt with in its discretion. Accordingly, Miss Larmond submitted, given the statutory framework

governing Indecom, section 15(2)(k) of the PSR cannot be read as requiring the PSC to call on Indecom for a special report as contemplated by that section.

[108] The first question that arises is the true nature of the power given to the PSC by section 9 of the PSR to "consult with any such public officer or other person". In this regard, Mr Small referred us to the old leading case of **Julius v Lord Bishop of Oxford**[75], in which the House of Lords held that the words "it shall be lawful" in a statute merely conferred a faculty or a power. But, as Lord Cairns LC went on to explain[76] -

> "...there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so."[77]

[109] So there is, as Lord Reid observed in the later case of **Padfield and others v Minister of Agriculture, Fisheries and Food and others**[78], "ample authority for going behind the words which confer the power to the general scope and objects of the Act in order to find what was intended". But in the instant case, even given the strong sanction provided in section 10 for failing without reasonable cause to appear in answer to a summons by the PSC to do so, I am unable to discern anything in the nature of the

---

[75] (1880) 5 App Cas 214
[76] At page 222-223
[77] See, to the same effect, Lord Penzance at page 229 and Lord Selborne at page 235
[78] [1968] 1 All ER 694, 702

power to require the attendance of witnesses, in the context in which it is given, or in the object of giving such a power, which would make it the affirmative duty of the PSC to exercise the power. The PSC is in no sense an investigative or fact finding body. Its mandate is to consider the suitability of members of the JCF for appointment and promotion and to make recommendations accordingly. While allegations of conduct amounting to constitutional breaches against members might naturally be expected to attract particularly anxious scrutiny of their candidacy for promotion, there is nothing in either the Constitution or the PSR to suggest that that mandate is enhanced or amplified in relation to such members. As an aid to the proper consideration of the matters falling within the PSC's remit, section 9 empowers it to require the attendance of public officers before it. But whether or not to exercise the power in a particular case is a matter left by the section to the discretion of the PSC.

[110] Turning now to the question of special reports, it will be recalled that this is the last-mentioned item in the list of factors which, in the prefatory words of section 15(2), the PSC "shall take into account" in considering eligibility of members for promotion. On the face of it, the use of the word 'shall' appears to make it clear that all of the listed factors must be considered. However, taking each factor individually, it seems to me to be equally clear that even the mandatory 'shall' must in this context be qualified by the words 'where applicable'. So factors such as general fitness (a); seniority (b); educational qualifications (c); the duties of which the candidate has knowledge (g); and the duties of the post for which the officer is a candidate (h), must obviously apply in respect of every candidate for promotion. But factors such as any special course of

training undergone by the candidate (d); markings and comments in confidential reports in respect of the candidate (e); any letters of commendation (f); any specific recommendation of the Commissioner (i); any previous employment (j); and any special reports for which the PSC "may call" (k), can only be applicable where they exist.

[111] In support of the submission that, by virtue of section 15(2)(k), the PSC was under a duty to call for and consider special reports in this case, JFJ referred in its skeleton arguments to the decision of the House of Lords in **Yorkshire Copper Works Ltd v Registrar of Trade Marks**[79]. That was a case concerned with the refusal by the Registrar of an application to register a trademark. Section 9(3) of the Trade Marks Act, 1938 provided that, for certain purposes, "...the tribunal may have regard to" two listed factors, '(a)' and '(b)'. One of the questions which arose in the case was whether the word 'may' in that context meant 'must'. In Lord Simons LC's view[80], it was not necessary "to discuss whether the word 'may' means 'must', for I cannot conceive that as a practical matter the registrar could ignore either of the factors (a) or (b)". And, in Lord Asquith's view[81], "...'may' here means 'must' or the subsection is nugatory".

[112] So in some cases 'may' has been interpreted to mean 'must'. But there can be no doubt that 'may' generally falls to be regarded as permissive or enabling and that this is the sense in which it will ordinarily be interpreted unless there is a sufficiently clearly

---

[79] [1954] 1 WLR 554
[80] At pages 556-557
[81] At page 560

expressed intention to the contrary[82]; or unless, as in **Yorkshire Copper Works Ltd v Registrar of Trade Marks**, the contrary intention can be derived from the context.

[113] In my view, there is nothing in either the language or context of section 15(2)(k) to suggest that the PSC is under a duty to call for one or more special reports. To the contrary, the words "may call" plainly suggest that, as in the case of the power given by section 9, the decision whether or not to call for such reports is one purely for the discretion of the PSC, to be exercised in the light of all the circumstances of the particular matter being considered by it.

[114] Which brings me then to JFJ's contention that, even if the PSC is not itself equipped to conduct investigations of the type that the issue of SP Hewitt's promotion demanded, it was under a duty to refer it to Indecom. There can be no doubt that, against the background and for the reasons so eloquently articulated by the Full Court in **Gerville Williams**, the establishment of Indecom has opened a significant new avenue of recourse to complainants of abuse at the hands of the security forces. Among the major advances brought about by ICIA has been the achievement of an independent investigative body charged with the responsibility and equipped with the tools to investigate and to make reports on allegations of death or injury to members of the public, or of abuse of rights, by members of the security forces. In addition, certainly from JFJ's standpoint, it was a fortuitous coincidence that, while JFJ's formal complaint to the PSC and the question of SP Hewitt's promotion remained pending,

---

[82] See Words and Phrases Legally Defined, 2nd edn, volume 3, pages 227-229

Indecom was brought into being in April 2010 to fill the gap in the previous arrangements for the investigation of allegations of police misconduct identified by the Full Court in **Gerville Williams**. It is primarily for these reasons that during the hearing of this appeal, and for some considerable time afterwards, I was strongly attracted to the view that this was a case in which the PSC might have sought a report from Indecom on the matter of the allegations of misconduct involving SP Hewitt.

[115] But I must remind myself that what JFJ asks the court to do in this case is to make an order quashing the decision on the ground that the PSC was under a duty to refer the allegations against SP Hewitt to, and to call for a special report from, Indecom on the matter. In other words, the way in which the argument is put, under this head of complaint at any rate, is that the PSC ought to have adopted this course as a matter of obligation and not as a matter of discretion. For a number of reasons, which are in essence those advanced by Miss Larmond[83], I have come to the conclusion that this contention has not been made out. Firstly, there is no requirement in the PSR that the PSC should, in considering the eligibility of a member of the JCF for promotion, refer any matter under consideration by it, including allegations of misconduct on the part of the member, to Indecom. Secondly, the PSC has no authority to call for or request a report of any kind, or for any purpose, from Indecom. Thirdly, the ICIA does not contemplate the initiation of an investigation at the behest of the PSC. And fourthly, even if this were possible, the PSC would in no way be bound by the conclusion of any

---

[83] See para. [107] above

such investigation, as it is the duty of the PSC to bring its own independent judgment to bear on the question of the eligibility of any member for promotion.

[116] It could well be (and I make no judgment on this) that the ability of the PSC to carry out its mandate to make recommendations in respect of the promotion of members of the JCF might be strengthened by a formal linkage of some kind with Indecom. However, it seems to me that that is a matter for consideration and action by the legislature, and not by the courts, given the current state of the PSR and the ICIA.

Wednesbury unreasonableness

[117] As is well known, the concept of 'Wednesbury unreasonableness' derives from the decision of the Court of Appeal of England in **Associated Provincial Picture Houses Ltd v Wednesbury Corporation**[84] ('**Wednesbury**'). In that case, a local authority which had statutory power to grant licences for cinematograph performances was also given power to allow a licensed cinema to be open and used on Sundays, "subject to such conditions as the authority think fit to impose". The authority granted leave to the plaintiff, which was the owner of a licensed cinema, to give performances on Sundays, subject to the condition that no children under 15 years of age should be admitted to such performances, whether accompanied by an adult or not. The plaintiff sued for a declaration that the condition was ultra vires and unreasonable.

---

[84] [1948] 1 KB 223

[118] The action failed, both at first instance and on appeal, on the basis that the local authority had not acted unreasonably or ultra vires in imposing the condition which it did. In a judgment with which the other two members of the court agreed, Lord Greene MR summarised the applicable principles in this way[85]:

> "The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them."

[119] In the later case of **Council of Civil Service Unions and others v Minister for The Civil Service**[86] ('**CCSU**'), after famously classifying the grounds upon which administrative action might be subject to judicial review under the three heads of 'illegality', 'irrationality' and 'procedural impropriety', Lord Diplock added that the notion of irrationality denoted "a decision which is so outrageous in its defiance of logic or of

---

[85] At pages 233-234
[86] [1984] 3 All ER 935, 951

accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".

[120] It is common ground between the parties that these are the principles generally applicable to a challenge to an administrative decision on the ground of Wednesbury unreasonableness or irrationality. But, on appeal, JFJ also drew attention to an additional passage from Lord Greene's judgment in **Wednesbury**[87]:

> "When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case. As I have said, it must always be remembered that the court is not a court of appeal. When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such a discretion must be a real exercise of the discretion. **If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters**." (JFJ's emphasis)

[121] On this basis, JFJ submitted that B Morrison J erred in relying on the Wednesbury unreasonableness principle, in that it did not arise in circumstances where the PSC, in its consideration of SP Hewitt's eligibility for promotion, failed to carry out

---

[87] At page 228

an essential step in its statutory duty to cause allegations of serious misconduct and breach of citizens' constitutional rights to be investigated. Further, it was submitted that, where human rights and fundamental rights are in issue, there should be "deeper scrutiny" of the decision under review and that it is for the PSC to justify its decision. In this regard, we were referred to the decision of the Queen's Bench Divisional Court in **R v Ministry of Defence, ex parte Smith and other applications**[88], in particular Simon Brown LJ's statement[89] as to the proper approach to the review of a ministerial decision in a case in which fundamental human rights are being restricted:

> "…the minister on judicial review will need to show that there is an important competing public interest which he could reasonably judge sufficient to justify the restriction and he must expect his reasons to be closely scrutinised. Even that approach, therefore, involves a more intensive review process and a greater readiness to intervene than would ordinarily characterise a judicial review challenge."

[122] Reliance was also placed on the judgment of Campbell J in **R v Byron Johnson et al**[90], in which the supremacy of the Constitution was reiterated:

> "The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, which came into effect after 'wide public consultation and due deliberation', purports to provide a 'more comprehensive and effective protection for the fundamental rights and freedoms of all persons in Jamaica.' The Constitution is the supreme law of the land, and the courts are the guardians of the Constitution."

---

[88] [1995] 4 All ER 400. The decision was upheld on appeal – see [1996] 1 All ER 257.
[89] At page 445
[90] HCC 20/04, judgment delivered 30 November 2011, para. (12)

[123] In response to these submissions, Miss Larmond pointed out that the challenge to the decision in the court below was on the ground of irrationality. Accordingly, it was submitted, this court should restrict itself to the question whether, applying ordinary **Wednesbury** principles, the decision of the PSC was one which no reasonable commission could have reached. On this basis, it was submitted that the evidence before the judge supported his conclusion that the PSC's decision to recommend SP Hewitt's promotion was not Wednesbury unreasonable.

[124] It is clear that, at the hearing before B Morrison J, JFJ's contention was that, in all the circumstances, "the decision of the Police Service Commission is so unreasonable or irrational as to be perverse"[91]. This was a challenge on pure **Wednesbury** grounds. Accordingly, in rejecting this contention, the learned judge applied standard **Wednesbury** principles, observing in the penultimate paragraph[92] of his judgment that, "[v]arious epithets have been used to explain unreasonableness: perversity, outrageous defiance of logic or morality; decision-maker taking leave of its senses; verging on an absurdity". It seems to me, therefore, that the complaint on appeal that the judge "erred in relying on the Wednesbury unreasonableness principle as it does not arise [in this case]"[93] is, so far as it goes, without foundation.

[125] Be that as it may, I have already expressed the view that the PSC was under no obligation, whether expressly or by implication, to conduct or cause to be conducted an

---

[91] Ground x of the fixed date claim form, para. [47] above
[92] Para. [127]
[93] Ground of appeal vi, para. [51] above

independent investigation, and/or to call for a special report from Indecom, before making a recommendation as regards SP Hewitt's promotion. In my judgment, therefore, JFJ's current complaint of a failure by the judge to acknowledge that the PSC had failed to carry out an essential step in this regard must necessarily fall away.

[126] But it is still necessary to consider, as JFJ also invites us to do, whether the judge's conclusion that the PSC's decision was not Wednesbury unreasonable can be supported. For this purpose, I cannot avoid rehearsing briefly the events leading up to the decision. After discussing in detail the Commissioner's recommendations for promotion at its meeting of 14 December 2010, the PSC's first step was to request a 'fatal incident report' from the BSI on each of the officers recommended for promotion. The report disclosed a total of 37 incidents in which SP Hewitt had been involved in some way, including five cases in which the Coroner's Court had entered verdicts of justifiable homicide, seven which remained pending in the Coroner's Court, six in respect of which rulings were awaited from the the DPP. Nineteen cases were listed as "incomplete" and, in respect of at least one of them, the report indicated that statements were outstanding from SP Hewitt himself. At its meeting of 23 December 2010, the PSC agreed to endorse the Commissioner's recommendation in respect of 14 of the 21 officers put forward by him for promotion. However its decision on SP Hewitt was deferred, pending receipt of further information from the Commissioner and the BSI. Upon receipt of the further information, including an updated fatal incident report, the PSC interviewed SP Hewitt at length on 11 January 2011. SP Hewitt obviously made a favourable impression at the interview. But on 12 January 2011, after deciding to

recommend the promotion of six of the remaining seven officers, the PSC decided to recommend SP Hewitt's acting appointment for a three month period only, pending receipt by the PSC of further information from the Commissioner/BSI. When received, that further information showed SP Hewitt to be "fully compliant" with regard to statements outstanding from him.

[127] The matter was again considered by the PSC at its meeting of 2 March 2011. On this occasion, the Commissioner restated his confidence in SP Hewitt, lauding him for his courage, integrity and effectiveness as a crime fighter. The Commissioner told the PSC that, from his own review of the cases listed in the fatal incident reports, he was satisfied that SP Hewitt had always had justification for the use of force, whether as part of a team or as the person in command of the operation. The Commissioner considered that his promotion would be a morale booster for the members of the force working in difficult high crime divisions. But, again, the PSC decided to defer a decision on SP Hewitt's promotion for further consideration before the end of March 2011, which was when his acting appointment would expire. And at its meeting of 29 March 2011, the PSC recommended the extension of SP Hewitt's acting appointment for another month, with effect from 1 April 2011. By letter dated 14 April 2011, the DPP confirmed her earlier advice (sought by the PSC) that no recommendations for criminal prosecution or departmental charges had been made in any of the outstanding matters in her office involving SP Hewitt and the officers under his command. On 15 April 2011, the PSC made the decision to recommend the promotion of SP Hewitt to the position of Senior Superintendent, with effect from 1 April 2011.

[128] In my view, even this abridged account of the evidence amply demonstrates that the PSC went to great lengths, taking all reasonable steps at its disposal, to satisfy itself of SP Hewitt's eligibility for promotion. While it does appear that the PSC may have acted in breach of section 16(1) of the PSR by recommending that SP Hewitt should be appointed to act before it had completed its deliberations on his suitability for substantive appointment, nothing turns on this: JFJ's complaint relates to the decision to recommend him for substantive appointment to the position of Senior Superintendent.

[129] I do not discount JFJ's contention, praying in aid Simon Brown LJ's dictum in **R v Ministry of Defence**[94], for more intensive scrutiny on review in cases in which issues of fundamental rights are involved. Naturally, I do not doubt the validity of the principle. However, it is important to keep in mind, I think, that unlike that case (which was a challenge by four homosexual members of the armed forces to the decision to discharge them by reason of their sexual orientation), the instant case is not an application for review of a decision which directly infringes the fundamental human rights of the applicants themselves. Despite the fact that JFJ raises, sincerely and in good faith (as I accept without reservation) the hugely important matter of fundamental human rights, this case is essentially about whether the PSC's decision to recommend SP Hewitt's promotion was irrational, in the light of the PSC's general mandate, the provisions of the PSR and the evidence.

---

[94] Para [121] above

[130] In all the circumstances, therefore, approaching the case on what Simon Brown LJ described[95] as "the conventional Wednesbury basis", I consider that the learned judge was in my view fully entitled on the evidence to conclude that the decision was not irrational, in the sense of being one which was "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it"[96].

The difference between the disciplinary and promotional processes

[131] As has been seen, B Morrison J concluded that the PSC "is not equipped structurally" to carry out on its own the investigations for which JFJ contended[97]. In that context, the learned judge's comment was that, "[w]here, as here, an administrative body is required by statute to perform a duty, as per regulation 31(1) which is subject to 31(5), then that body exercise [sic] a judgment". JFJ pointed out in its skeleton arguments[98] that sections 30-40 fall under Part III of the PSR, dealing with the subject of discipline. Accordingly, it was submitted, it appeared that the learned judge, when assessing the PSC's duties in connection with appointments and promotions, "failed to differentiate between what is required for [the] promotional process and what is required for the disciplinary process". For the PSC, Miss Larmond was content to submit that, having received allegations of misconduct against SP

---

[95] At page 447
[96] Per Lord Diplock in **CCSU** – footnote 87 above
[97] See para. [91] above
[98] At paras 60-61

Hewitt, the PSC was obliged to bring them to the attention of the Commissioner and, if necessary, to deal with them in accordance with the disciplinary procedures.

[132] It is clear that there is a difference between Part III of the PSR, which deals with appointments and promotions, and Part V, which deals with discipline. But all that I understand the learned judge to have been indicating in the passage of which complaint is made was that, in either case, the PSC has no investigative capacity and is therefore obliged to "exercise a judgment" based on the material provided to it. Looked at this way, I cannot say that the judge was in any way confused as to the distinct roles of the PSC in relation to the promotional and disciplinary processes.

[133] But JFJ also complains under this head that the judge erred in considering that the PSC "was entitled to rely on the absence of any criminal or disciplinary charge or charges against [SP Hewitt]" as evidence that the complaints against him "were not proven"[99]. This could not, it was submitted, "form the foundation to support the proposition that an independent impartial and thorough investigation had been completed as there was no information available". It was submitted on behalf of the PSC, on the other hand, that the learned judge having found that the 28 allegations of misconduct were investigated, it was proper for him to have found that PSC could rely on the absence of any criminal or disciplinary charges against SP Hewitt that the allegations had not been proved.

---

[99] See para. [79] of the judgment

[134] On this point, I am strongly inclined to agree with JFJ. If the issue in the case were whether an independent, impartial and thorough investigation had in fact been carried out, I would certainly expect any judicial conclusion to be based on something more substantial than the absence of any criminal or disciplinary charges against the person or persons under investigation. But, as I have already attempted to explain, there is, in my view, no obligation on the PSC to commission an investigation of the kind contended for. Rather, it seems to me that what this case is concerned with is whether, in the light of the provisions of the PSR and the material that was available to it for the purpose, the PSC gave proper consideration to the Commissioner's recommendation for SP Hewitt's promotion.

The public dimension of the decision

[135] JFJ's final complaint[100] was that the learned judge erred in failing to consider sufficiently or at all the failure of the PSC, a public body, to consider the likely effect of its decision to recommend SP Hewitt's promotion on the public, in particular those members of the public with unresolved complaints against him. In this regard, we were again referred to **Gerville Williams** and the background to Indecom, to make the point that there was a resulting lack of trust in the JCF, which had undermined the rule

[100] At para. 63 of the skeleton arguments

of law in Jamaica. We were also referred to the 'Report on the Situation of Human Rights in Jamaica'[101], in which the authors observed that –

> "Persistent levels of deadly violence and impunity, in addition to the lack of accountability for police abuses, results [sic] in an environment of fear and intimidation among all sectors of the population, causing individuals to refrain from pursuing legal remedies before the courts."

[136] I fully accept that no one in Jamaica can take pride in this sobering assessment of our contemporary reality by a respected international body committed to the promotion of human rights. But redress of this situation cannot, in my respectful view, be a matter for the PSC. The obligation of the PSC is to perform its constitutional functions, underpinned by the PSR, independently and without regard for public perception.

Conclusion

[137] I have not found this to be an easy case. For, on the one hand, I cannot doubt for a moment the critical importance of the fundamental rights and freedoms guaranteed to all persons in Jamaica by the Constitution, the supreme law of the land, as well as the central role of the courts as the guardians of the Constitution. Nor, on the other hand, do I minimise in any way the critical importance of the PSC, as an independent body established by the Constitution, in ensuring that the JCF is staffed and led by men and women qualified for the positions which they are expected to

---

[101] The Inter-American Commission on Human Rights Report on the Situation of Human Rights in Jamaica, 10 August 2012, para 147

occupy and regardful of those fundamental rights and freedoms. The admirable submissions of which we have had the benefit from both sides in this appeal have caused us to range widely over many aspects of these twin imperatives. My conclusion that, at the end of the day, JFJ's challenge to the correctness of B Morrison J's decision has not been made good is in no way intended to detract from either of these imperatives, or to suggest that they should not live together.

Disposal

[138] I would therefore propose that both the appeal and the counter-notice of appeal should be dismissed. In making no order for costs in the court below, the learned judge no doubt had in mind rule 56.15(5) of the CPR, which states that –

> "The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application."

[139] This rule is not one of those made applicable to appeals to this court by virtue of rule 1.1(10) of the Court of Appeal Rules, 2002. However, I would also propose that, in keeping with the spirit of rule 56.15(5), there should be no order as to the costs of the appeal.

[140] I cannot leave this matter without apologising to the parties and their counsel for the long delay in rendering this judgment. Although the reasons for the delay are substantially beyond the court's power to remedy, it is nonetheless a matter for deep regret.

PHILLIPS JA

[141] I have had the opportunity of reading in draft the thorough and comprehensive reasons for judgment of my learned brother Morrison JA. I agree with his reasoning and conclusions and will only add a few words of my own.

[143] There is no question that the appellant, which, as described by my learned brother, is "a non governmental organization which represents vulnerable members in the society who have suffered human rights abuses at the hands of the agents of the State", and which had received complaints from members of the public alleging misconduct, including human and fundamental rights violations against SP Hewitt, had "locus standi" to be heard in the judicial review of the PSC's decision to recommend his promotion. I reject the respondents' contention that the matter of recommendation for promotion in the circumstances of this case is itself not a matter of public interest as contemplated by the test relative to standing for judicial review, as set out in part 56 of the CPR. The fact that the recommendation is referable to SP Hewitt's employment in the police force and does not affect the legal rights of the appellant is relevant but is not determinative of the issue of standing in respect of the appellant. I am of the view that this aspect of the appeal and the counter notice is really impatient of debate.

[144] I am also of the view that, in spite of the onerous responsibilities placed on the PSC, it does not have any duty in law to conduct or cause to be conducted independent, impartial and effective investigations into the allegations of SP Hewitt's

conduct. There is certainly no provision in the Constitution or otherwise for the PSC to obtain special reports, for instance, from bodies such as Indecom.

[145] Additionally, I am of the view, bearing in mind that this is an appeal in respect of a matter concerning the review of a decision of an administrative body, that it cannot be said that the trial judge was incorrect in concluding that the decision of the PSC was not so unreasonable, in defiance of logic or perverse to warrant the interference of the court.

[146] In the final analysis, I am of the opinion that the learned trial judge was correct in refusing the orders sought in the fixed date claim form and the appeal must therefore be dismissed. In relation to costs I would agree, on the basis indicated by my learned brother, that there should be no order as to costs.

MCINTOSH JA

[147] As indicated by my brother Morrison JA in paragraph [137] of his judgment, the draft of which I have had the opportunity to peruse, this was indeed a challenging case. It required very careful and thorough analysis of the issues which, in my humble opinion, he has very ably accomplished and I agree with his reasoning and conclusions. At the end of the day, I see absolutely nothing useful for me to add.

MORRISON JA

ORDER

Appeal and counter-notice of appeal dismissed. No order as to costs.