152.

Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

MISCELLANEOUS

SUIT NO. M16/93

BEFORE: THE HON. MR. JUSTICE PATTERSON
THE HON. MR. JUSTICE ELLIS
THE HON. MR. JUSTICE JAMES (G.G.)

R.V. Commissioner of Police
ExParte GLENROY CLARKE

Chester Stamp for the Applicant

Lackston Robinson for the Respondent

June 16 & 17, & November 25, 1994

PATTERSON, J.

On the 17th June, 1994 we dismissed the motion of the applicant Glenroy Clarke, seeking an order of certiorari to quash the decision of the respondent, the Commissioner of Police, (the Commissioner) refusing his application for re-enlistment in the Jamaica Constabulary Force. In keeping with our promise, I now put my reasons in writing.

The applicant was granted leave to apply for an order of certiorari to bring up and quash "an Order of 16th November, 1993, by the Commissioner of Police evidenced in Force Orders No. 2424 dated 18th November, 1993, discharging the applicant from the Jamaica Constabulary Force."

The Order listed in the Force Orders reads as follows:-

"4. Discharges

Clarendon. 5039 Cpl. G. Clarke.
Not permitted to re-enlist with effect
from 19.11.93, with pay to 18.11.93.
(A19/C818)".

The applicant was enlisted as a constable in the Jamaica Constabulary Force on the 20th November, 1978, for a term of five years, in accordance with the provisions of S.5 of the Constabulary Force Act. He was re-enlisted for further terms of five years on

the 20th November, 1983 and on the 20th November, 1988.

He was appointed a Corporal of Police on the 10th December, 1992 and as such, he enjoyed the rank of sub-officer.

The rule governing the procedure to be followed when applying for re-enlistment is clearly set out in what is known to all members of the Jamaica Constabulary Force ("The Force") as "The Book of Rules". These rules were made by the Minister of National Security, pursuant to the provisions of Sec.26 of The Constabulary Force Act, for the guidance and general direction of the members of the Force, and are intended to prevent neglect and abuse, and to render the Force efficient in the discharge of its duties. The relevant rule reads as follows:-

> "1 10(ii) Sub-officers and Constables desiring to be re-enlisted for a further term of five (5) years must make an application at least fourteen (14) weeks before the expiration of the current term and must be medically examined at least twelve (12) weeks before the current term expires."

The applicant did not apply to be re-enlisted within the prescribed time, nor was there evidence that he had been medically examined. However, no issue was made of those facts. Indeed, Mr. Stamp submitted that those requirements were not mandatory but only directory. He expressed the view that generally speaking, time is not of the essence and that in any event, the applicant substantially complied with the requirements of the Book of Rules. The point was not argued and since it was not germane to my decision, I will reserve my views. Had the applicant followed the procedure laid down, then his application for re-enlistment should have been made to the Commissioner not later than about the middle of August, 1993. The Commissioner has "the sole command and superintendence of the Force" (Sec. 3(2)(a) of the Constabulary Force Act) and it is he who is given the power to enlist sub-officers and constables of the force. This he may do for a term of five years, or he may enlist sub-officers and constables without prescribing a term (Sec.5).

The sequence of events leading up to the Commissioner's decision form the background to this application.

On the 6th September, 1993 the applicant wrote to the sub-officer in charge May Pen Constabulary Station in the following terms:-

"Application for re-enlistment for a further term of five (5) years of No.5039 Cpl. G. Clarke.

I hereby apply for re-enlistment for a further term of five (5) years in the Jamaica Constabulary Force.

I was enlisted on the 8th of November, 1978, hence my service is fourteen years and nine months.

I indeed would be grateful if my application is considered, please".

The sub-officer in charge referred the application to the Superintendent of Police in charge of Clarendon on the 7th September, 1993, with his comments, but the application was not forwarded to the Commissioner then.

The Commissioner's evidence is that on the 15th September, 1993 he "took the decision not to approve any application by the applicant for re-enlistment at the expiration of his term on the 19th November, 1993". As a result a directive was embodied in a memorandum to the Superintendent of Police, Clarendon which reads as follows:-

"Superintendent of Police
Clarendon.

Re: No.5039 Corporal G. Clarke

The Commissioner of Police has directed as follows:-

(a) That the above named Corporal of the Clarendon Division be advised that any application made by him or on his behalf for re-enlistment in the Jamaica Constabulary Force at the expiration of his present term of five (5) years on November 17, 1993 will not be approved.

(b) That he be granted whatever vacation leave he has to his credit with immediate effect (to culminate with the end of his present term on November 16, 1993) and that he be relieved immediately of all Government property in his possession.

2. Please take action accordingly and advise this office as soon as it is done.

3. The grounds for refusing any application for re-enlistment from Corporal Clarke will be forwarded early for service upon him.

4. Has he applied for re-enlistment? If so, forward his application by despatch.

for Commissioner of Police"

The directive of the Commissioner was communicated to the applicant by the Superintendent of Police for Clarendon on the 16th September, 1993, and the applicant was instructed to proceed on leave as of 6 a.m. on the 17th September, 1993. His application for re-enlistment was forwarded by the Superintendent of Police to the Commissioner under cover of letter dated 16th September, 1993 and it reached the Commissioner on the 17th September, 1993. Before then, the Commissioner could not have been aware that the applicant would be applying for re-enlistment, since the application had not been made in the prescribed time. In the circumstances, it would appear to me that the Commissioner's directive contained in his letter of the 16th September, 1993 was necessary for the proper exercise of his administrative powers, as without an application, the applicant's contractual period of enlistment would come to an end by effluxion of time. However, on the receipt of the application for re-enlistment a different situation arose. The Commissioner considered the matter and on the 27th September, 1993, a letter was sent to the applicant through the Superintendent of Police for Clarendon. That letter reads as follows:-

"No.5039, Corporal G. Clarke
c/o Clarendon Division

Re: Non Approval of Your Application for re-enlistment

On September 16, 1993, you were advised by the Divisional Officer Clarendon, acting on the instructions of the Commissioner of Police that your application for re-enlistment for a further term of 5 years at the expiration of your present term on November 19, 1993 will not be approved.

You were also advised that the grounds upon which this refusal is based will be forwarded your Divisional Officer shortly to be served on you.

Attached are the grounds:

Asst. Commissioner of Police"

The reasons for not approving the application for re-enlistment were fully set out. The relevant sections are as follows:-

"REASONS FOR NOT APPROVING APPLICATION FOR RE-ENLISTMENT IN JAMAICA CONSTABULARY FORCE - NO.5039, CORPORAL G. CLARKE.

The records show that you were enlisted in the Jamaica Constabulary Force on November 20, 1978.

Section 5 of the Jamaica Constabulary Force Act states that a member of the Force is enlisted for a term of 5 years and that he may be re-enlisted for further terms of 5 years service.

Rule 1.10 of the Book of Rules of the Jamaica Constabulary Force provides for the re-enlistment of Sub-officers and Constables and states at sub-section (i) that Sub-officers and Constables may be enlisted for a term of 5 years, and at Sub-section (ii) that Sub-Officers and Constables desiring to be re-enlisted for a further term of 5 years must make an application at least 14 weeks before the expiration of the current term.

Your application for re-enlistment has been received.

The Commissioner of Police directed that you be informed that your application for re-enlistment will not be approved and you have been so advised.

Set out below are the reasons for refusing your application:

a) On November 17, 1979 at 10 p.m., you were despatched from the Negril Police Station on patrol duty along Norman Manley Boulevard. You left your patrol and found yourself at the home of Merlene Shaw at Sheffield District. Whilst there you were confronted by Leslie Babooram of Port Antonio who had arrived to pay a surprise visit to his girlfriend and baby mother. You used the service revolver with which you were armed to shoot him in his head, claiming that he had attacked you and Shaw with a machette. Babooram died on May 10, 1980, from the effect of the gun shot wound. The matter was investigated and submitted to the Director of Public Prosecutions who sent the matter to the Coroner. The Coroner eventually ruled that no one was criminally responsibl

b) In 1982, one David Peters, filed a Suit against you and the Attorney General, claiming that whilst arresting him on July 28, 1982, on a charge of larceny from the person you used your service revolver and gunbutted him on the left side of his head causing a swelling and persistent headache thereafter. You denied this allegation but in the face of the Medical Certificate and other supporting evidence, Judgment was entered against the Attorney General in the sum of $11,642.

c) In 1983, Hugh Reid of 3 Fourth Avenue, Vineyard Town, reported at the Police Complaints Office, that on the night of Saturday, October 29, you carried out a most brutal and unprovoked assault on him in the area of Milk Avenue, Montague Street and Langston Road in Rollington Town and Vineyard Town. The matter was investigated but eye witnesses refused to give written statements stating that they were fearful of your aggressiveness and reprisal.

d) on August 27, 1983, you fatally shot Delroy Parchment of Back Bush at Chaves Avenue. The circumstances of the shooting were so bad that the Director of Public Prosecutions ruled that you be arrested on a charge of Murder. A Nolle prosequi was eventually entered by the Director of Public Prosecutions as the witnesses could not be found to attend Court.

e) On Friday July 15, 1988, it is alleged that with gun in hand you chased one Desreen Slowly from the Santa Cruz Police Station and along the public road. A Court of Enquiry was ordered to enquire into your conduct but because Miss Slowly refused to give a statement before the Enquiry, the President returned a verdict of "Not Proven" on the charges brought against you.

f) On November 27, 1992, you left the island from Norman Manley International Airport and went to Miami, Florida, without first obtaining leave or permission so to do. For this you were tried at a Court of Enquiry and deprived of a total of 10 days pay.

g) You are reported to be a frequent user of indecent language to and within the hearing of members of the public.

Your conduct as described above, has demonstrated that you are a person with a very aggressive and violent nature. Many law abiding citizens have expressed fear for your hostile behaviour and this is not in the best interest of the Force.

The Commissioner of Police, having assessed your conduct and discipline over the past years and after considering certain intelligence reports he had received, gave instructions that you be advised that your application for re-enlistment would not be approved.

You have been so advised.

This Notice is to formally inform you that your application for re-enlistment for a further term of 5 years service at the expiration of your present term on November 19, 1993, has not been approved.

You may, if you so desire, appear before the Commissioner of Police by your self or accompanied by your Attorney, to argue your case as to why he should review his decision and re-enlist you. If you decide to do so, you should forthwith advise your Divisional Officer in writing of your desire to do so in order that he can make an appointment on your behalf."

The last paragraph of the abovementioned correspondence seems to have prompted the applicant to avail himself of the opportunity to be heard. On the 6th October, 1993, he requested an interview with the Commissioner and expressed his intention "to be present with a team of lawyers at the interview." The interview was arranged for the 11th November, 1993, and on that day, the applicant and his Attorney-at-Law, Mr. Chester Stamp, appeared before the Commissioner and made submissions to him. The Commissioner

took time to consider the submissions and on the 16th November, 1993 he came to the final decision not to re-enlist the applicant and the applicant was informed accordingly on that day. The submissions which were subsequently embodied in a letter to the Commissioner reads as follows:-

"16th November, 1993

Without Prejudice

The Commissioner of Police
103 Old Hope Road
Kingston 6.

Dear Sir,

Re: No. 5039 Cpl. Glenroy Clarke

We refer to yours of 27th September, 1993 and our meeting of 11th November, 1993, at which we expressed strong objections to the procedures adopted in refusing Cpl. Clarke's application for re-enlistment.

We stressed that we attended the meeting under strong protest, that we could not participate in a "hearing" at that stage, and that our attendance was not a waiver of our objection.

Our reasons include:-

a) Cpl. Clarke received no notice of the grounds for possible refusal and no hearing before his application was refused.

b) We are instructed that the decision was made even before the recommendations of Cpl. Clarke's Commanding Officers were received and considered; and

c) The grounds for refusal delivered after the decision had been made refer to (i) matters for which Cpl. Clarke had been exculpated or not found guilty of wrongdoing, (ii) matters determined prior to November, 1988, which would have been considered by a previous Commissioner when he was then re-enlisted, (iii) vague and unsubstantial allegations of misconduct which cannot be answered in the absence of specifics and (iv) one matter for which a penalty had already been imposed.

In the circumstances it is manifested that in prejudging the issue the Commissioner has fettered his discretion acted on irrelevant considerations and had not taken account of all relevant matters. There is also an appearance of bias.

Since the exercise of the power in respect to approval of re-enlistment rests solely in the Commissioner and cannot be delegated we would propose that the only just course is to approve Cpl. Clarke's re-enlistment in which case he would have no cause to institute proceedings thus avoiding unnecessary expense to all parties.

We would be grateful if you would furnish us with a copy of letters of 15th September, 1993 over the signature of A.C.P. Campbell advising the Supt. i/c Clarendon that Cpl. Clarke would not be re-enlisted.

Yours faithfully,
STAMP, USIM & MORRIS

Per.....
CHESTER STAMP"

Before us, Mr. Stamp argued a number of grounds, but the main thrust of his argument was centered around ground 3(c) which reads as follows:-

"(c) The said Orders/directives of the Commissioner of Police are unjust, arbitrary, null, void, and contrary to Law and in breach of the principles of Natural Justice in that:

(1) The applicant was not afforded a fair hearing and or any hearing at all.

(ii) The Orders/directives were based on suspicion, speculation, bias, irrelevant considerations and/or malice by the Commissioner of Police;

(iii) No valid reasons has been given for the directive/ orders."

Mr. Stamp submitted that the Commissioner went wrong in that he failed to give the applicant "proper notice of the grounds or reasons." He criticized the judgment of the Commissioner in "considering certain intelligence reports he had received" in coming to his decision, and more so, because the reports were not made available to the applicant so that he could refute them. He conceded that the applicant need not be told the source of the reports but he expressed the view that the applicant must be told the nature of the reports, and that failure to do so was repungnant to the rules of natural justice .

The principle which Mr. Stamp urged us to act on is well established. It is known as the audi alteram partem rule, and is a cardinal principle which applies not only to judicial proceedings but also to administrative proceedings. The development of this principle in administrative law has been prodigious, and the rule has been applied even in cases where a final discretionary decision is required without a charge being made. But the rule is not rigid and inflexible. Parliament may confer unfettered discretionary power on a person or body, and in so doing, exclude the operation of the rule. Again, the rule will be abrogated where confidential report touching the personal character of a

person or some breach of the law by him is brought to the attention of the administrative body, and the disclosure of such confidential matter to the interested party would be prejudicial to the public interest, or may tend to injure others. (See for example Collymore v. Attorney General [1969] 2 ALL ER 1207 and Re P.A. (an infant) [1971] 3 ALL ER 552). These are but two examples where the Court has upheld the exclusion of the rule. We were referred to the case of B. Surinder Singh Kanda v. Government of the Federation of Malaya [1962] A.C. 322. In that case the question of whether the applicant, an inspector of police, was afforded a reasonable opportunity of being heard was considered by their Lordships. The applicant had been found guilty of an offence against discipline by an adjudicating officer who had been supplied with the report of a board of enquiry before he sat to inquire into the charge. The report contained "a severe condemnation of inspector Kanda" but he was not supplied with a copy of it. The relevant section of the headnote to the judgment of the Judicial Committee reads as follows:-

> "Held, secondly, that the failure to supply the appellant with a copy of the report of the board of inquiry, which contained matter highly prejudicial to him and which had been sent to and read by the adjudicating officer before he set to inquire into the charge, amounted to a failure to afford the appellant 'a reasonable opportunity of being heard' in answer to the charge within the meaning of article 135(2) of the Constitution and to a denial of natural justice."

That case must be considered on its own facts. I know of no rule of law which specifically binds the courts as to when the audi alteram partem rule must be applied. The circumstances of each case must be looked at to determine whether the procedure adopted at each stage requires the application of the rule. The over-riding principle is, in my view, that where the circumstances are such that fairness is required, then the rule applies.

The facts in the instant case are quite different to those in the Kanda case. The prime consideration of the Commissioner was not whether the sub-officer was guilty of a charge, (there was no charge against him) but whether or not he was a fit and proper person to be re-enlisted in the Force to carry out its duties and functions for another five years term. The Commissioner must consider

not only the past conduct of the sub-officer, but also his personal character. The Commissioner is entrusted with the sole responsibility to assess and evaluate the character and conduct of the members of the Force and to ensure that a disciplined and efficient Force is maintained at all times for the proper administration of justice. It must be remembered that the contractual period of the applicant would have expired by effluxion of time and there was no automatic right to re-enlistment; it was dependent on a favourable consideration of his application. I do not share the view that in such circumstances it is incumbent on the Commissioner to disclose any confidential reports that he has received and used in arriving at a decision whether or not to re-enlist or employ the applicant. In considering the application the Commissioner exercises an administrative function and he arrives at a decision based on his discretion which involves no question of law.

We were also referred to the case of Ridge v. Baldwin and ors. [1963] 2 ALL ER 66, but in my view, that case is easily distinguishable from the instant case, and it does not assist the applicant's contention. In that case, the chief constable had been summarily dismissed by the watch committee. He had not been charged in accordance with the relevant regulations, nor was he informed of the grounds upon which the watch committee proposed to proceed. He was not given a proper opportunity to present his defence, and in thosecircumstances, it was held that the watch committee had failed to observe the principles of natural justice, and the dismissal was null and void. This was clearly a case of the wrongful exercise of the power of dismissal, and Lord Reid in his opinion, dealt with the principles of natural justice as they applied to cases of dismissal. He had this to say (at p.71).

> "So I shall deal first with cases of dismissal. These appear to fall into three classes, dismissal of a servant by his master, dismissal from an office held during pleasure, and dismissal from an office where there must be something against a man to warrant his dismissal."

Mr. Stamp laid stress to Lord Reid's opinion where he said (at p.73):-

> "So I come to the third class which includes the present case. There I find an unbroken line of authority to the effect that an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation."

The exercise of a discretion not to approve an application for re-enlistment or re-employment must not be equated to or confused with the exercise of the power to dismiss a member of the Force or terminate his appointment. There are strict laws, rules and regulations which govern the exercise of the power of dismissal of a member and also the termination of appointment. There are no such rules and regulations governing the exercise of the discretion for the approval or refusal of an application for re-enlistment. Although in general the principles of natural justice are applicable, in my view, the rules governing their exercise do not necessarily coincide. In particular, the rules of natural justice may be excluded from the exercise of a discretion not to approve an application for re-enlistment as I have already pointed out. In the instant case, it is my judgment that the Commissioner's decision not to approve the applicant's application for re-enlistment is not void because he took into account "certain intelligence reports" which were not made known to the applicant. The applicant was afforded ample opportunity to press his case for re-enlistment, and the Commissioner must have come to his decision after taking into consideration all relevant factors. I found that the rules of natural justice had not been infringed.

But even assuming that I am wrong on that score, the complaint of the applicant relates to only that part of the Commissioner's reasons for not approving the application where he states that he considered "certain intelligence reports he had received." When one looks at the entire reasons set forth, it is fair to say, in my judgment, that that consideration played only a minor part in the Commissioner's decision, and is separate and apart from the real and substantial reasons which centered around an assessment of the applicant's "conduct and discipline over the past years". Looked at in that light, the words of May L.J. are apposite when in Reg. v. Broadcasting Commission Exparte Owen (D.C.) [1985] 2 W.L.R. 1025 at 1041

he said:-

> "Where the reasons given by a statutory body for taking a particular course of action are not mixed and can clearly be disentangled, but where the Court is quite satisfied that even though one reason may be bad in law, nevertheless the statutory body would have reached precisely the same decision on the other valid reasons, then this court will not interfere by way of judicial review. In such a case, looked at realistically and with justice, such a decision of such a body ought not to be disturbed."

So, even if it can be said that the Commissioner committed a breach of the rules of natural justice by not informing the applicant of the nature of the intelligence reports and to afford him a fair hearing on that point, nevertheless the other reasons given are so compelling that by themselves, there can be no doubt that the Commissioner would have arrived at the same decision.

The question as to whether or not the Commissioner is obliged to state his reasons for refusing an application for re-enlistment did not arise. It seems obvious that if he decides to grant an application, there is no necessity to give reasons. However, if the Commissioner gives reasons for refusing the application and those reasons adversely affect the applicant generally, in such a case, it is incumbent on him to give the applicant an opportunity to be heard in that regard before coming to a final decision.

The next ground argued by Counsel was this:-

> "The orders/directives were based on suspicion, speculation, bias, irrelevant considerations and/or malice by The Commissioner of Police."

On the question of bias, Counsel submitted that the Commissioner showed bias and expressed bias by prejudging the applicant without hearing him. He argued that this could be gleaned from the Commissioner's directives embodied in the memorandum to the Superintendent of Police, Clarendon dated September 15, 1993, (which I have already quoted). It will be remembered that this memorandum was written before the Commissioner received the application for re-enlistment. Counsel submitted that the Commissioner, "having prejudged the issue, had fettered his discretion even after he

indicated to the applicant that he would hear him." He argued that in the circumstances, the Commissioner should not have considered the application but should have referred it to the Police Services Commission for a determination.

It would seem at first glance that the Commissioner's decision taken on the 15th September, 1993, that any application made by the applicant for re-enlistment would not be approved, was premature, since he did not have then for consideration an application for re-enlistment. As I said before, there is no automatic right to re-enlistment, and so, in my view, if the applicant failed to apply, his service would determine by effluxion of time, and the Commissioner would not be required then to make a decision in relation to re-enlistment. Therefore any decision arrived at before such an application, in my view, is otiose, and accordingly is invalid and of no effect. A needless procedure was adopted. But whatever was done then and assuming there was a defective decision taken, it appears to me that what transpired after the application for re-enlistment was received by the Commissioner clearly dispelled any semblance of a prior breach of natural justice, and firmly established that there was no bias on the part of the Commissioner. The applicant was afforded every opportunity to a full and fair hearing, based on the principles of natural justice, and due consideration was given to his application and submissions before the final decision was taken. It has not been shown that the Commissioner had any personal animosity or malice against the applicant which would tend to colour his judgment to re-enlist the applicant. In my judgment, the procedure adopted was fair. I found no reason why the Commissioner's decision should be faulted on this score.

The decision of the Commissioner was attacked from yet another angle. Counsel submitted that the decision of the Commissioner was "unreasonable arbitrary and based on suspicion, speculation and irrelevant considerations, and/or malice". He contended that it was unreasonable for the Commissioner to take into account matters that came before a previous Commissioner. The applicant, he said,

had committed only one offence within the last year for which he could have been dismissed. His application for re-enlistment had been recommended by the Superintendent of Police and the sub-officer within the parish that the applicant was stationed. Further, the applicant had been promoted in 1992 to the rank of corporal, and in 1993, he was appointed to act as sergeant. These were compelling factors, he said, that should have dissuaded the Commissioner from exercising his discretion in the way he did. He submitted that if the Court found "that the grounds (for dismissal) were based on suspicion, speculations and irrelevant considerations, then the Court would be entitled to find that the Commissioner acted unreasonable and take it out of his discretion."

I have referred to the grounds on which the Commissioner said he acted. In my view the Commissioner, in considering the application for re-enlistment, is entitled to take into account the overall record of the applicant and not only his record over the last 5 years as urged by Counsel. The conduct and discipline of the applicant cannot be assessed by only convictions before a court of law or on departmental charges. There are accepted standards of behaviour which every member of the Force must adhere to, and in every case, it is the duty of the Commissioner to consider the overall picture and ensure that the standards are upheld. He must take into account all relevant factors germane to what is being considered and in my opinion, his discretion ought not to be interferred with by the court unless it is clearly shown that he has acted on wrong principles or has acted unreasonably or unfairly in arriving at his decision. I found no such basis on which the court ought to interfere.

I turn now to the final submission of Counsel for the applicant, which, as I understand it, is this. The commissioner acted in excess of jurisdiction because once an applicant for re-enlistment, who has previously been re-enlisted for a five year period, substantially complies with the requirements for re-enlistment, there is no discretion in the Commissioner to refuse. He referred to the Jamaica Constabulary Force Rules and Regulations (1939) paragraph 575, which

reads as follows:-

> "575. A constable is enlisted for a term of five years, and during that time he cannot leave the Force except for physical disability. At the end of this term if he so desires and if the Inspector General approves, he will be allowed to extend his service."

He argued that the omission of the words "if the Inspector General (Commissioner) approves" from the present provisions for re-enlistment, and on the basis of "standard construction", it is plain that any discretion of the Commissioner to refuse re-enlistment has been taken away. He equated a refusal to re-enlist to a termination of employment because, as he puts it, in law and in fact, the applicant would have "a legitimate expectation" to be re-enlisted.

That submission did not find favour with me. As I have already pointed out, the procedure to be followed by sub-officers and constables desiring to be re-enlisted for a further term of five years is set out in the Book of Rules at paragraph 1.10(ii) (supra). Implicit in those provisions is the necessity for the Commissioner to consider the application. There is no automatic right to re-enlistment, I must re-iterate, and accordingly, the application may be approved or refused. If it is approved, there is no necessity for the applicant to be given a further opportunity to be heard, but even then he cannot perform the duties of a constable after the expiration of his enlisted term until he has again been sworn in (see Rule 1.9). On the other hand, if the Commissioner is inclined to refuse the application, in my view, he must inform the applicant and give him an opportunity for a fair hearing before a final decision is taken. It seems to me that the reason for this does not arise from any "legitimate expectation" of the applicant to be re-enlisted, but purely from the principle that an executive or administrative authority must act reasonably in the exercise of a discretion, and it would be unreasonable and unfair to refuse the application without giving the applicant a further opportunity to be heard. It is not the case that the applicant is being deprived

"of some benefit or advantage which (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment." (per Lord Diplock in Council of Civil Service Unions and others v. Minister of the Civil Service [1984] 3 ALL ER 935 at 949 K.) He was invited to argue his case as to why the Commissioner should review his decision and re-enlist him, and he accepted the invitation. I saw nothing wrong with the manner in which the Commissioner exercised his discretion, nor was it shown that his decision was unreasonable or unfair. For those reasons, I concluded that there was no basis on which the Court could interfere with the Commissioner's decision not to re-enlist the applicant, and accordingly, in my judgment, I dismissed the motion for certiorari.

ELLIS, J.

The applicant moves this court for an Order of Certiorari to quash an order of The Commissioner of Police made on the 18th November, 1993 discharging him from The Jamaica Constabulary Force as of 19th November, 1993 as he had not been permitted to re-enlist.

The grounds on which he moves are:-

(a) The orders/directives of the Commissioner of Police are unlawful and in breach of the Police Service Regulations 1961 and the Book of Rules for the Guidance and General Direction of the Jamaica Constabulary Force 1988.

(b) The said orders/directives of The Commissionet of Police are unjust, arbitrary, null, void and contrary to Law and in breach of the principles of natural justice in that:-

(i) the applicant was not afforded a fair hearing and/or any hearing at all.

(ii) The orders/directives were based on suspicion, speculation, bias, irrelevant considerations and/or malice by the Commissioner of Police.

(iii) no valid reason has been given for the directives/orders.

(d) The Commissioner of Police has acted and continues to act without authority or in excess of jurisdiction and in breach of The Constitution of Jamaica and the rules of national justice.

He supports his motion by an affidavit and exhibits marked "G.C.1-G.C.3."

The Commissioner of Police opposes the motion and supports his opposition by an affidavit and exhibits marked "TM"1 - "TM"5.

The Facts

The affidavits disclose that:

1. The applicant was sworn to be a member of The Jamaica Constabulary Force on 20th November, 1978.

2. He re-enlisted as a member of The Jamaica Constabulary Force on the 20th November, 1983 and again on 20th November, 1988.

3. On the 6th September, 1993 he applied to be re-enlisted for a further period of five years as of 20th November, 1993.

4. On the 16th September, 1993 he was instructed to proceed on leave with effect from 17th September, 1993.

5. On the 27th September, 1993 he was informed by letter "G.C.2" that his application for re-enlistment was not approved. That letter contained the grounds for the non approval and an invitation for the applicant to attend on the Commissioner by himself or with his attorney to argue for a review of the decision not to re-enlist him.

6. On 6th October, 1993 the applicant duly evinced his intention to appear before the Commissioner of Police with a team of lawyers to argue his case for re-enlistment.

7. The applicant and his attorney-at-law appeared before the Commissioner of Police and submissions on his behalf were made and heard by the Commissioner of Police.

8. The submissions on behalf of the applicant were considered by The Commissioner of Police who did not relent his decision not to approve the applicant's application for re-enlistment.

Is the applicant therefore entitled to the Order sought?

Section 5 of Constabulary Force Act provides for the enlistment of Sub-Officers and Constables for a period of five years when he first becomes a member of the Force. The section is silent as to the re-enlistment of a Sub-Officer or a Constable.

Provision for such re-enlistment is to be found at Rule 1.10 of The Rules for Guidance and General Direction of the Jamaica Constabulary Force. This rule deals with the re-enlistment of Sub-Officers and Constables thus:-

(ii) "Sub-Officers and Constables desiring to be re-enlisted for a further term of five years must make an application at least fourteen weeks before th expiration of the current term and must be medically examined at least twelve (12) weeks before the current term expires."

That rule 1.10 appears to be a remake of Regulation 580 of The Constabulary Force Regulations to be found in the Extraordinary Gaette of 1939. That rule 580 required an application for re-enlistment to be made one month before the expiration of the existing term and a medical examination 14 days before the term expired.

There was also in the Regulations of 1939 at rule 575, provision for re-enlistment of a Constable in the following terms:-

"A constable is enlisted for a term of five years and during that time he cannot leave the force except for physical disability.

> At the end of the five year term and if the Inspector General approves, he will be allowed to extend his service.

Attorney for the applicant conceded quite frankly that the applicant's application for re-enlistment was out of time. No point was taken by the attorney representing the Commissioner on that circumstance, and in any event, for my part nothing turns on it since the Commissioner's refusal to re-enlist was not based on that circumstance.

Section 5 of the The Constabulary Force Act seems to reflect rule 575 but omits any reference to a re-enlistment on the approval of the Commissioner who now takes the place of the Inspector General.

Mr. Stamp for the applicant asked the court to say that the omission of any reference to a re-enlistment being subject to the Commissioner's approval, removes his discretion to refuse or grant an application for re-enlistment. If there is no discretion, he argued, the refusal to re-enlist the applicant is a termination of his employment. Such a termination of employment can only be effected within the rules as to Disciplinary Proceedings contained in The Police Service Regulations of 1961. In any event Mr. stamp submitted that the applicant had a legitimate expectation of being re-enlisted in all the circumstances. That legitimate expectation ought not to be deprived him without his being heard on the reasons for the refusal of his application for re-enlistment.

Mr. Robinson for the Commissioner of Police submitted that the rule 1.10 has done no violence to the prior discretion of the Commissioner when considering applications for re-enlistment.

He contended that the applicant had no legitimate expectation of being re-enlisted in that there was:

(i) no express promise of re-enlistment held out to him by any Public Authority or Body.

(ii) there is no practice of re-enlistment so well established as to make a departure therefrom unreasonable.

On this point he referred the Court to CCSU v. Minister for The Civil Service [1984] 3 All E.R. 935 [1985] 1 A.C. 401 in support of being denied a hearing with expectation.

On the applicant's entitlement to a hearing he submitted that the applicant

did have a hearing and so cannot raise any complaint of being denied a hearing with any success.

I do not agree with the applicant's contention that no discretion is now resident in the Commissioner of Police when he is considering whether or not he should approve or disapprove an application for re-enlistment.

The Commissioner of Police has by section 3 of The Constabulary Force Act the responsibility of superintending the Police Force. In that capacity, applications for re-enlistment go for his consideration. I hold that he must have a discretion to decide who are fit persons to be re-enlisted in the Force which he superintends. Were it not so, the elaborate rules contained in the Police Service Regulations of 1961 would say so.

A refusal to allow a re-enlistment determines a policeman's employment in the Constabulary Force. So too is his dismissal from the Force after disciplinary proceedings are conducted. Although both have a similar result, the latter can only be valid if it is obtained by strict adherence to the express rules of disciplinary proceedings. The validity of the former is dependent on a proper exercise of discretion.

The Commissioner must therefore exercise his discretion with fairness and without abuse.

Between 1978 and 1988 the applicant's application for re-enlistment was approved on two occasions. In 1993 after serving his third five year term as a policeman his application for re-enlistment was refused. The applicant's application for re-enlistment having been approved without any demur on the previous occasions in my opinion created, if not a practice, certainly a situation for a legitimate expectation that his future application would be approved. I hold that the applicant had a legitimate expectation of being re-enlisted. I find support for so holding from the cases of Council of Civil Service Unions v. Minister for the Civil Service (1984) 3 W.L.R. 1174 and Attorney General of Hong Kong v. Ng Yuen Shin (1983) 2 W.L.R. 735.

On the submissions of Counsel I have found:

(i) The presence of a discretion in the Commissioner of Police to refuse or allow an application for re-enlistment.

(ii) The applicant had a legitimate expectation of being re-enlisted.

As I said before, the Commissioner of Police in exercising hs discretion must act with fairness and without abuse of that discretion. If he does not so act, a court is competent to declare the consequence of his act invalid.

Fairness in exercising a discretion involves an obedience to the rules of Natural Justice and in particular the right to a fair hearing.

In this case, the factual situation in that the applicant was invited to appear before the Commissionr of Police to argue his case for his re-enlistment (See Exhibit "TM3" of The Commissioner's Affidavit). The applicant did accept that invitation and attended as invited with his attorney and his case was argued.

No cogent argument was addressed to the Court which would constrain me to hold that the applicant did not have a fair hearing.

Legitimate expectation that something will happen is not immutable. It does not mean that it cannot be curtailed or even dissipated, but any curtailment or dissipation of that legitimate expectation must be able to bear the light of fairness.

Having found that the applicant was heard on the refusal for his re-entitlement I am constrained to hold that the refusal to re-enlist him was a consequence of the proper exercise of the Commissioner's discretion.

In the light of that I would dismiss the motion.

G.G. James, J.

I agree that the motion should be dismissed.