



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011HCV06165

COR: The Honourable Mr. Justice Marsh

The Honourable Mr. Justice Campbell

The Honourable Mr. Justice Fraser

**IN THE MATTER OF AN APPLICATION FOR AN ORDER FOR
RELIEF AND CONSTITUTIONAL REDRESS**

AND

**IN THE MATTER OF SECTION 19 OF THE CONSTITUTION OF
JAMAICA**

AND

**IN THE MATTER OF THE INDEPENDENT COMMISSION OF
INVESTIGATIONS ACT**

BETWEEN	THE POLICE FEDERATION	FIRST CLAIMANT
A N D	MERRICK WATSON (Chairman of the Police Officers' Association)	SECOND CLAIMANT
AND	THE SPECIAL CONSTABULARY FORCE ASSOCIATION	THIRD CLAIMANT
AND	DELROY DAVIS (President of the United District Constables' Association)	FOURTH CLAIMANT
AND	THE COMMISSIONER OF THE INDEPENDENT COMMISSION OF INVESTIGATIONS	FIRST DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	SECOND DEFENDANT

Mr. Donald Gittens & Mr. Seymour Stewart instructed by Jamlaw Caribbean for the Claimants

Mr. Richard Small and Ms. Shawn Wilkinson instructed by Ms. Shawn Wilkinson for the First Defendant

Ms. Althea Jarrett Director of Litigation instructed by the Director of State Proceedings for the Second Defendant

Ms. Paula Llewellyn Q.C. Director of Public Prosecutions and Ms. Meridian Kohler Deputy Director of Public Prosecutions appeared as *amici curiae*

February 13, 14, 15, 16, 2012 & July 30, 2013

Constitutionality of legislation – Whether section 20 of the Independent Commission of Investigations (INDECOM) Act is unconstitutional – Effect of section 20 conferring on the Commissioner and investigative staff of INDECOM, in the exercise of their duty, like powers, authorities and privileges as are given by law to a constable – Whether INDECOM’s officers have the powers of arrest and charge – Whether INDECOM’s officers having such powers would undermine the Office of the Director of Public Prosecutions

MARSH J

[1] By Amended Fixed Date Claim Form filed on the 10th October 2010, the Claimants, the Police Federation, Merrick Watson (Chairman of the Police Officers Association); the Special Constabulary Force Association and Delroy Davis (the United District Constables Association) respectively sought administrative order and/or constitutional redress under Section 25 of the Constitution of Jamaica. They contended that the provisions of Sections 13 (3) (a), 14 and 19 of the Constitution are likely to be contravened by the first Defendant in relation to them.

[2] The relief claimed by the Claimants against the first Defendant (the person appointed pursuant to Section 3 (2) of the Independent Commission of Investigations Act, and called hereafter ‘the Act’, the Commissioner, the following:-

- i. A declaration that Section 20 of the Independent Commissions of Investigations Act 2010, construed against the provisions of Sections 13 (3) (a), 14 and 19 of the Constitution does not confer on the Defendant, the power to arrest and/or charge anyone for any criminal offence, or for the offence of Murder or for any felony and neither does the common law.
- ii. A declaration that neither the said Section 20 of the Act nor the Common Law does not confer on the Defendant the power to arrest and/or charge a member of the Jamaica Constabulary Force or of the Island Special Constabulary Force or any District Constable.
- iii. A declaration that any act by the Defendant to charge any member of the Jamaica Constabulary Force, Island Special Constabulary Force or any District Constable for any criminal offence, arising from circumstances that occur in the execution of their duties, in the absence of a ruling from the Director of Public Prosecutions that the member be so charged would be likely to contravene the rights of such a member under Sections 13 (a) and 15 of the Constitution, in that it would deprive such a member of Legitimate Expectation, derived from the custom and practice of the Director of Public Prosecutions, that such member would not be so charged in the absence of such a ruling.
- iv. Interim relief by way of an injunction to restrain the Defendant from arresting and or charging and/or from in any manner to interfere with or restrict the personal liberty of any member of the Jamaica Constabulary Force or of the Island Constabulary Force or of the Rural Police for or on account of any criminal offence arising from circumstances that occur in the execution of their duties, in the absence, of a ruling from the Director of Public Prosecutions that the member be so charged.

[3] The legal bases the Claimants give as grounding their entitlement to the remedies sought are the following:-

- i. The Claimants all have the same or similar interest in the “subject matter and the issues raised in these proceedings.”
- ii. The Defendant has claimed and purported to exercise a power of arrest and charge for the criminal offence of murder against the Claimants and has grounded his power under Section 20 of the Act and under common law. They are not founded, on any reasonable interpretation of the Act, as against Section 13 (3) (a) 14 and 19 of the Constitution or under common law.
- iii. They are repugnant to procedure and guidelines set out in the Police Services Regulations 1961. They violate the Claimants’ legitimate expectation to a ruling from the Director of Public Prosecutions, whether they should be arrested and/or charged for murder or any criminal offence.

[4] The claim is made under Section 25 of the Constitution of Jamaica, invokes the interpretation of the Act generally, especially of Section 20 thereof, together with all the sections referred to in Section 20.

THE EVIDENCE

[5] The Claimants as joint affiants state that the first Defendant has claimed and purported to exercise a power of arrest and charge for the criminal offence of Murder against the Claimants and has sought to ground his power on the said Section 20 of the said Act.

[6] That they were advised by Corporal Malica Reid and believed to be true that he had been dispatched, from Kingston on November 4, 2010, as a member of a police team on special duties in Westmoreland. This was a result of orders from a superior officer. While on this said duty his party came under gunfire from a group of 4 or 5 men; the fire was returned and one of the men was hit fatally.

[7] Investigations were commenced into the incident mentioned and he, Cpl. Malica Reid, on February 25, 2011 was requested to attend at Savanna-La-Mar Police

Station where an investigator from the Independent Commissioner for Investigations arrested and charged him for the murder of one Fredrick Mickey Hill, alleged to have been killed during the incident of November 4, 2010. He was subsequently taken to the Savanna-La-Mar Resident Magistrate Court, appeared before a Resident Magistrate, was detained and his fingerprints taken.

- [8] If the injunctive relief sought by the Claimants is not granted, the Defendant will pursue the course he has embarked upon “of arresting and charging us and our members under the circumstances complained about in this claim”. It is also the affiants’ claim that after the arrest and charge of Malica Reid, the Defendant has “arrested and charged other members of the Jamaica Constabulary Force for the offence of Murder.”

SUBMISSIONS

- [9] Counsel for the first Defendant submitted that it amounted to an abuse of the process of the Court for the Claimants to have brought the instant claim for Constitutional redress, as:

- i. There are alternative remedies,
- ii. The claim is academic as there is no issue joined between the Claimant and the first Defendant.
- iii. Matters for determination do not raise constitutional issues that are essentially questions of statutory interpretation of the common law on which any Court can pronounce.

- [10] The Declarations sought by the Claimants boil down to two issues, namely:

- i. Does the INDECOM Act or the common law confer on the first Defendant the power to arrest or charge anyone for a criminal offence?
- ii. Does the INDECOM Act or the common law confer on the first Defendant the power to arrest or charge a member of the Jamaica Constabulary Force without the requirement of a ruling from the Director of Public Prosecutions?

[11] Neither of these questions raises constitutional issues as by merely adding the phrase “construed against the provisions of sections 13 (3) (a) and 14 and 19 of the Constitution”, does not raise the issues to issues of constitutional interpretation. These issues are essentially issues of either statutory interpretation and/or interpretation of the common law – determination of which is well within the ordinary court’s jurisdiction.

[12] Where there exist alternative remedies, the bar to access to the Constitutional Court is embodied in Section 19 (4) of the Jamaica Constitution. This is stated thus. “...the Supreme Court may decline to exercise its powers and may remit the matter to the appropriate court...if it is satisfied that adequate means of redress for the contravention alleged are available to the person concerned under any other law.”

[13] It is a further submission that the Claimants are possessed of alternative remedies in respect of the Claims they have brought to the Constitutional Court. Despite the first Defendant’s contention that the claim is baseless, he submits that, if the matter can properly be pursued, it would have had to be in the form of a claim for declarations as to statutory interpretation without resorting to the Constitutional Court. A similar requirement exists in respect of Judicial Review matters. In ***R ex parte Livingstone Owayne Small v. The Commissioner of Police and the Attorney General HCV 2362*** of 2003 delivered on 18th September, 2006 Campbell J, at paragraph 15 expounded the principle thus:

...the availability to an alternative remedy is a bar to the grant of judicial review. It is settled that judicial review is a remedy of “last resort.”

[14] The first Defendant contended further that having regard to the Overriding Objective of the of the Civil Procedure Rules 2002, that if the court finds that the instant claim has merit, then the court ought to remove the matter to an appropriate court as this will involve less judicial time and resources, thus allotting to each case “an appropriate share of the court’s resources, while taking

into account the need to allot resources to other cases.” (See Rule 1.1 (2) e of the Civil Procedure Rules 2002).

[15] The claim is merely academic as there is currently no issue formed between the Claimants and the first Defendant. The evidential ground on which Claimants’ based their claim is on the circumstances surrounding the charging of Malica Reid for Murder. Reid’s claim was struck out and the appeal brought by the first Defendant against the grant of leave for judicial review was withdrawn. The Director of Public Prosecutions has terminated the proceedings brought by the first Defendant and has instituted her own proceedings against Malica Reid. There therefore is no proceedings pending on which there can be basis of any claim before this court.

[16] There is no evidence for the Claimants that any police officer, Special or District Constable has been threatened with arrest since the charge of Malica Reid. There is no allegation of their being any breach of their rights nor is there any evidence of their contention that there is any likelihood that their rights will be breached. They have only come to this court and said that the first Defendant is alleging that he has the power to arrest and prosecute police officers, that they are police officers and therefore are fearful that one day they may be arrested by the said INDECOM. This is not sufficient. Reliance is placed on Lord Diplock’s statement in ***Gouriet v. Union of Post Office Workers [1978] AC 435 at 501-***

[T]he jurisdiction of the Court is not to declare the law generally or to give advisory opinions, it is confined to declare contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else.

[17] This, it is submitted was followed in the Jamaica Supreme Court in the case ***Dorothy Lightbourne v. Christopher Michael Coke and Joseph Mayer Matalon (President of the Private Sector Organization of Jamaica and Portia Simpson-Miller 2010 5 JJC.*** The Claimants’ case therefore should fail for the reasons that the first Defendant has advanced.

- [18] For the Claimants, Mr. Gittens in reply pointed to the evidential basis of their claim located at paragraph 10 of the joint affidavit of Merrick Watson and Delroy Davis. This paragraph reads as follows: **“Indeed, after the arrest and charge of Malica Reid, the Defendant has arrested and charged other members of the Jamaica Constabulary Force for the Offence of Murder”**. He claimed that despite the results of the Malica Reid case occurring as they did, this in no way removed the Claimants’ right to approach the Constitutional Court, to complain and seek redress concerning the conduct of the first Defendant in the Malica Reid case which had the effect of putting Claimants and others of their members in fear of suffering a fate similar to Malica Reid’s.
- [19] Claimants’ counsel formed for the Court the question which the Court should answer in assessing the first Defendant’s submissions *in limine*. **Was it a reasonable fear that the Claimants should have, in the light of the conduct of the first Defendant re Malica Reid, that they would be similarly arrested and taken before the court by the first Defendant?** The first Defendant had not indicated anywhere in his affidavit, anything which could assuage their fears. It is therefore reasonable for the Claimants to hold that fear. He further argued that in cases where intentions and possible future action became the subject of litigation, declaration of intent and undertaking not to pursue action complained of usually are enough to satisfactorily end such proceedings. The reluctance of the first Defendant to extend an undertaking that he would not pursue that conduct, which is sought to be prohibited by the injunctive orders sought, is noteworthy.
- [20] Mr. Gittens for the Claimants contended further that even if the first Defendant had given such assurance or given any such undertaking, this Court would not be precluded from the jurisdiction of hearing the claim and making the declarations which the Claimants seek, if the Court deemed fit. If the Court declined from so doing, the effect of this need be to leave on the statute books a law which was constitutionally challenged, because the Defendant had undertaken not to act. This would be a totally unsatisfactory situation.

- [21] Counsel contended that there were three circumstances in which constitutional redress could be sought: past, present and continuing and future. In the instant case, the Claimants' case sought redress based on a fear that at some future time, the first Defendant was likely to breach the Claimants' constitutional right not to be deprived of their liberty unlawfully. The value of the material regarding Malica Reid's case was to provide a historical context only.
- [22] The Claimants' case is that the first Defendant is likely to break the law, in that certain provisions are likely to be contravened, in relation to them. The Act did not, they contended, confer on the first Defendant the powers of arrest as he claimed. Therefore, the said first Defendant might be minded by himself or his agents, to seek to exercise the powers of arrest in circumstances as done with Malica Reid.
- [23] As it stands the Act was unconstitutional as it is capable of disturbing settled practice of matters involving police officers being first sent to the Director of Public Prosecutions. They were unaware of any situation where this did not operate, where any number of the groups to which Claimants belonged, was arrested and charged for an alleged offence without a prior ruling of the Director of Public Prosecutions. Reliance therefore is placed on the doctrine of legitimate expectation.
- [24] Mr. Gittens, on the matter of alternative remedies, referred to Section 19 of the Charter of Rights and opined that it is so structured that if a claim was wrongly included in a constitutional claim that should have been brought elsewhere, the constitutional court would still have jurisdiction to entertain that claim. It would be the first Defendant's duty to inform the court what alternative remedies the Claimants could have pursued and had not. In this case, the first Defendant has not done so.
- [25] The Court was to find that it had the jurisdiction, as constituted, to entertain the Claimants' claim against the first Defendant and should reject the points raised *in limine* by the first Defendant.

- [26] Miss Althea Jarrett appeared on behalf of the second Defendant and submitted that the issue identified as academic by the first Defendant is not, as although the Malica Reid matter was not before the Court, the Claimants were acting not only on behalf of themselves, but also in representative capacities for persons part of the Security Forces. The issues raised in the first declaration sought made the claim appropriate, although the evidence relied on could have been “more fulsome.”
- [27] It is likely that the Claimants might be affected by the first Defendant’s acting pursuant to the powers which he claimed to have as a result of Section 20 of the Act, namely powers of arrest and charge. However, the first Defendant had been, as stated at paragraph 5.2(h) of the Claimants’ joint affidavit, addressing the Court on March 1, 2011 acting as counsel and that the investigators, had acted as private citizens when Malica Reid was arrested and charged. They had therefore acted under common law powers. Counsel argued, that even if this was in fact the position, a very live issue, which was not academic, must be whether or not the first Defendant would be in breach of the Constitution if he sought to exercise a common law power of arrest to bolster his perceived statutory mandate if the Act did not give him that power.
- [28] If it was the legislature’s intention to give the first Defendant the power of arrest, it would have expressly given that power, as a power of arrest in these circumstances takes away a constitutional right, the right to liberty, a fundamental right under the Charter of Rights. She also argued that the first defendant did not have a right to arrest at common law or by statute. The exercise of this right would be *ultra vires*. The claim should therefore be properly justiciable in the Constitutional Court. It is a matter of public importance as to whether the first Defendant has the right to arrest.
- [29] As to the second declaration sought by the Claimant, Counsel for the second Defendant supported the stance taken by the first Defendant in resisting that declaration sought by the Claimants at paragraph 4.2 of the Amended Fixed Date

Claim Form. She was unable to see any statutory or other basis requiring that there be a prior ruling of the Director of Public Prosecutions before any member of the Police Force can be charged. As to whether the Police Service Regulations have the effect of binding INDECOM, she concluded that it did not, although it would bind the Police Service Commission.

[30] Further submissions were made on Legitimate Expectation as a basis for Claimants' constitutional claim, with the Court's permission. As these submissions were adopted and amplified during the later hearing, these will be again revisited when there is a review of the substantive application.

[31] It is not disputed that the Claimants have grounded their claim on the history of the action of the first Defendant and his investigators (of INDECOM) in the arrest and charge of Malica Reid. The Claimants also allege that there is no evidence that the first Defendant has made any declarations that he would not take similar action in the future. There is no disagreement with these facts coming from the first Defendant. This, in my view, is the basis of a factual foundation on which to ground a real fear that the Claimants or their members might, in the future, be subjected to such actions as it is alleged by Malica Reid

[32] The Claimants have sought declarations and injunctions which they are of the opinion will prevent the first Defendant or his agents from acting ***as in the case of Malica Reid***. Unlike the Claimants in ***Gouriet and Others v. H. M. Attorney General [1978] A.C. 435***, who could not benefit from an "advisory opinion" the Claimants in the instant case sought these remedies as they were of the view that they would suffer damage at the hand of the first Defendant and his agents, if the first Defendant were to behave towards them in the future as he had behaved towards Malica Reid. The relief the Claimants sought is not such as could be accurately described as "***pointless relief***." See ***Regina ex parte Livingston Owayne Small (Claim No. 2003/HCV 2362)*** delivered on 18th September 2006.

[33] Having considered the issues raised *in limine*, I have concluded -

- i. These issues raised by the Claimants are not academic nor are they hypothetical. The Claimants are individually representative of members of the Security Forces as defined in the Act, are persons likely as they carry out their respective roles as security officers, to be investigated, arrested and charged by INDECOM, in circumstances similar to those of Malica Reid. This the Claimants contend would breach their constitutional rights, an issue which is justiciable and can be determined in this court.
- ii. The Claimants have raised issues as to whether their constitutional rights have been breached by virtue of the first Defendant's action and that of his agents by virtue of the exercise of a statutory or common law power, in the absence of a prior ruling by the Director of Public Prosecutions. This is, to my mind, enough to have this Court consider and rule on these issues.
- iii. The first Defendant had submitted that the Court should decline to provide redress as if there is a breach, (which is not admitted), alternative remedies exist. However it should be noted that Section 19 (4) of the Constitution replaced the former Section 25 (2) and provides that even if there are alternative remedies available to the Claimant, the court is not obliged to decline jurisdiction – **"...it may remit the matter to the appropriate Court, tribunal or authority if it is satisfied that adequate means of redress for the contravention alleged are available to the person concerned under any other law."** (Emphasis added).

[34] The Court therefore concluded that the submissions made *in limine* failed and so the substantive application contained in the Amended Fixed Date Claim Form proceeded.

[35] The declarations and relief sought by the Claimants in the Amended Fixed Date Claim Form are founded on relatively bare allegations of the Claimants in the joint affidavits. These set out the history of the arrest and charge of Malica Reid

by investigations of INDECOM. The Claimants have alleged that because the first Defendant has not given any assurances or provided any undertaking that in a similar situation, in the future, he would not proceed against another member of the security forces (as defined in the Act), they fear that the first Defendant and/or his agents may, relying on perceived powers of arrest and charge under the common law or under the Act proceed against them.

[36] The issues which the Claimants have asked this Court to resolve, I formulate as follows:-

- i. Do the first Defendant and his agent have powers of arrest and charge and if so what is the limit of such powers?
- ii. Can the first Defendant and or his agents proceed to exercise such perceived power and charge without a prior ruling of the Director of Public Prosecutions as required by Regulations 33 of the Police Service Regulations 1961?
- iii. Are the claimants entitled to the declarations sought by them based on their legitimate expectations as set out in their Amended Fixed Date Claim Form and the facts relied on in their joint affidavit?

[37] The historical basis for the applications made by the Claimants is set out in the joint affidavits of the Claimants in their representative capacities as members of the Security Forces (as defined in the Act). Briefly put, Malica Reid, a policeman sent to Westmoreland on police duties, was arrested at the Savanna-La-Mar Police Station. Here, an investigator from the Independent Commission of Investigations (INDECOM) reading from a document told him that he was arresting him and charging him for the murder of one Fredrick Mickey Hill, allegedly killed in a shooting in Negril in November 2010. The said investigator detained him and placed him before the Resident Magistrate. He was detained in the Savanna-La-Mar Police Station jail and fingerprinted. The first Defendant later indicated to the court that investigators acted as private citizens when they

arrested and charged Reid and he, the first Defendant, was addressing the court as their counsel. The charge against him was later terminated by the Director of Public Prosecutions who had entered a *nolle prosequi* and herself laid a new charge of murder against him.

[38] The claim and exercise of power by the investigator are in violation of the constitutional provisions as they are not on any reasonable interpretation of the Act, in light of the Constitution founded in the Act, nor grounded in common law. They are repugnant to the procedure and guidelines set out in the Police Service Regulations 1961. They violate the legitimate expectations of the Claimants and their members to a ruling from the Director of Public Prosecutions whether they should be arrested and/or charged for Murder or any other criminal offence.

[39] The submissions of Counsel for the Claimants were oral and in writing. He submitted that one of the most important consequences of the protection from arbitrary arrest and deprivation of liberty is that a private citizen is not to arrest another citizen and be protected from civil liability if the arrest turns out to be wrongful or mistaken. On the other hand, a constable is so protected unless malice or absence of probable cause is established.

[40] The Act is unconstitutional if indeed it confers the status of a constable on the Commissioner and his agents thereby giving them protection without making this subject to the regime of discipline and dismissal that applies to constables generally under the Constitution, the Jamaica Constabulary Force Act related legislations and the Police Service Regulations.

[41] The context in which the Act confers the status and the purposes for which it is conferred do not show a clear and unambiguous intention to confer it for the purposes of empowering the Commissioner to arrest and charge anyone for any criminal offence. The Act sets out the context in which the status is conferred. Any reliance therefore by the Commissioner on that status to justify arresting or charging anyone for any criminal offence, for that reason alone would be unconstitutional as legislation which seeks to confer powers which conflict with

constitutional rights must use clear and unambiguous language to achieve that result. Counsel found comfort in the dictum of Lord Diplock in ***R v. IRC ex parte Rossminster [1980] AC 952*** –

If the statutory words relied upon as authorizing the acts are ambiguous or obscure, a construction should be placed upon them that is least restrictive of individual rights which would otherwise enjoy the protection of the common law.

[42] Counsel's further contention was that the "status of constable" conferred by Section 20 of the Act was limited to giving effect to Sections 4, 13 and 14 of the Act. The provisions of sections 4, 13 and 14 respectively provide.

Section 4

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

- (a) conduct investigations, for the purposes of this Act;*
- (b) carry out in furtherance of an investigation and as the Commission considers necessary or desirable —*
 - (i) inspection of a relevant public body or relevant Force, including records, weapons and buildings;*
 - (ii) periodic reviews of the disciplinary procedures applicable to the Security Forces and the specified officials;*
- (c) take such as are necessary to ensure that the responsible heads and responsible officers submit to the Commission, report of incidents and complaints concerning the conduct of members of the Security Forces and specified officials.*

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

- (a) *have access to all reports, documents, or other information regarding all incidents and all other evidence relating thereto, including any weapons, photographs and forensic data;*
- (b) *require the Security Forces and specified officials to furnish information relating to any matter specified in the request, or*
- (c) *make such recommendations as it considers necessary or desirable or –*
 - (i) *the review and reform of any relevant laws and procedures;*
 - (ii) *the protection of complaints against reprisal, discrimination and intimidation; or*
 - (iii) *ensuring that the system of making the complaints is accessible to members of the public, the Security Forces and specified officials;*
- (d) *take charge of and preserve the scene of any incident.*

3. *For the purpose of the discharge of its functions under this Act, the commission shall, subject to the provisions of this Act, be entitled –*

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

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

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

Section 13-

“13 An investigation under this Act may be undertaken by the Commissioner on its own initiative.”

Section 14-

“14(1) The Commission shall, for the purpose of deciding the most appropriate method of investigation, make an assessment of –

- (a) the seriousness of the case;*
- (b) the importance of the investigations;*
- (c) public interest considerations;*
- (d) the particular circumstances in which the incident occurred.*

(2) The Commission may manage, supervise, direct and control an investigation carried out by the Security Forces or the relevant public body in relation to an incident, where, in the opinion of the Commission, it is necessary to direct and oversee that investigation.”

Section 20

“(20) For the purpose of giving effect to Sections 4, 13 and 14, the Commissioner and the investigative staff of the Commission shall, in the exercise of their duty under this Act have the like powers, authorities and privileges are given by law to a constable.”

[43] Counsel insists that nowhere in the sections recited above was any power to arrest or charge conferred, nor did section 20 of the Act confirm the common law right to charge as a private citizen. It instead gave the Commissioner and the investigators of INDECOM the status of a constable for expressly limited

purposes. They have imported into and misconstrued the power given as a constable to include the power to arrest and to charge. That the Commissioner had to rely on the common law, exhibits a tacit acknowledgement that there is something constitutionally wrong with the statute (See Para 5 (2) (h) of the Joint Affidavit of Claimants).

[44] Counsel also maintained that the Claimants were also, in the same way, impugning the power to arrest and the power to charge claimed by the first Defendant and the investigators of INDECOM. He argued that if the Act had in fact conferred on the first Defendant and the investigators of INDECOM protection from civil liability without making them subject to the regime of discipline and dismissal applicable under the Constitution, the Constabulary Force Act, other related legislation and the Police Service Regulations, then the Act was unconstitutional.

[45] Counsel for the Claimants also contended that by purporting to also appoint the Commissioner a Constable, the Act usurped the power of the Police Service Commission and was also in breach of Section 13 of the Constitution – this section relates to the Delegation of functions of the Police Service Commission. See ***Moses Hinds and another v. The Director of Public Prosecutions And Others (1975) 13 JLR 262.***

[46] Another weapon in Counsel's armoury is that when the first Defendant charged a policeman without a prior ruling of the Director of Public Prosecution, whether at Common law or by Statute, he was in breach of Section 94 of the Constitution – the section that guarantees the DPP's independence.

[47] Counsel for the first Defendant, Mr. Small, by written and oral submissions, countered those made by Claimants. He submitted that contrary to the position advanced in the Claimants' grounds, the first Defendant and the officers of INDECOM have the powers to arrest and prosecute. These powers arose by virtue of the establishment of INDECOM, the mandate of INDECOM and the

powers given to INDECOM by provisions of the Act and by virtue of the Common Law.

- [48] INDECOM was created by the Act to investigate alleged abuses of the rights of citizens by members of the security forces. The Act provides that INDECOM is independent, it has primacy of investigations and it can take over or direct an investigation being pursued by another agency and is primarily responsible for the management of the scene of any alleged incident. Counsel outlined the contents of sections 4, 13, 14, 20 and 22 of the Act. As these sections, save section 22 have already been repeated, I will set out that part of Section 22 of the Act referred to by first Defendant's counsel in his submissions. **Section 22** provides:

“(1) Notwithstanding anything to the contrary in any other law, the Commission shall have primary responsibility for the preservation of the scene of an incident or alleged incident and may issue directions to the Commissioner of Police or any other authority for the purposes of this section.”

- [49] Counsel submitted that having regard to INDECOM's mandate and the relevant provisions given to it to give effect to the mandate, it would be inconceivable not to be held to have the powers of arrest. How then could arrest be effected during or after an INDECOM investigation? It cannot be at the direction of INDECOM or the Director of Public Prosecutions (DPP) to a member of the Jamaica Constabulary Force (JCF). It cannot be that INDECOM must always involve the police in their investigations in the hope that they too will become genuinely suspicious, as this would be contrary to the Act's purpose. If INDECOM's agents do not have the powers of arrest as stated by the Claimants, then this would result in an absurdity which could not have been the intention of Parliament nor would it be a true reflection of the common law.

- [50] Counsel for the first Defendant contended that a constable or a citizen may arrest with or without a warrant although both the citizen and the police must have a reasonable suspicion that a felony has been committed, the constable's suspicion can be based on second hand information, while the citizen preferably ought to have witnessed the felony. This common law seems to be wider than the statutory power under the Section 15 of the Constabulary Force Act. See **R v. Self [1992] EWCA Crim 2**. It is settled law that a constable may arrest a suspect without warrant, during an investigation for any legitimate aim. Vide ***Holgate Mohammed v. Duke [1984] AC 437***.
- [51] Counsel's contention was that it was clearly the intent of section 20 of the Act to give the INDECOM investigators the powers of a constable for the purposes of carrying out investigations under the Act – as a constable may arrest without warrant during an investigation, so too can an INDECOM investigator.
- [52] Counsel pointed to Section 33 of the Justices of the Peace (Jurisdiction) Act and noted that it empowers a Justice of the Peace to issue an arrest warrant upon the application of any person and may direct any constable or other person to execute the warrant. Any person may effect an arrest armed with a warrant issued by a Justice of the Peace or other such Judicial Officer.
- [53] Further, Counsel continued that in both instances of the arrest both persons must have a reasonable suspicion – the officer himself must have formed a genuine suspicion – this means that neither the constable nor the other person can based their decision on an order from a superior official. This Lord Steyn described as the “independent responsibility and accountability of a constable”. Confirmation of those principles have recently been confirmed by the English Court of Appeal in ***Commissioner of Police for the Metropolis v. Raissi [2008] EWCA 1237*** and see also ***Snodgrass v. Topping (1952) 116 JP 532***.

[54] Counsel, in relying on the foregoing submissions, submitted that the first Defendant and officers of INDECOM have the power to arrest with or without a warrant.

The Right to initiate Prosecutions

[55] Counsel for the first Defendant submitted that the Director of Public Prosecutions by virtue of Section 94 (1) and (3) of the Constitution has the power to:

- “(a) initiate and undertake criminal proceedings;
- (b) take over and continue....
- (c) discontinue... any criminal proceedings instituted or undertaken by himself and any other person or authority...”

[56] By necessary implication, the very language of the provisions confirms that persons other than the DPP may initiate prosecutions as the DPP “may take over” and “discontinue such prosecution.” The Jamaican Constitution did not seek to alter the common law position which has always recognized the right of ordinary citizens to institute criminal proceedings.

[57] To support his contention that the common law position has been maintained that the private citizen has the same right to substitute any criminal prosecution as the Attorney General or anyone has, Counsel referred the court to Sir Leslie Stephens’ *“A History of the Criminal Law of England (1883)”*. Counsel opined that despite the fact that this work was written in 1883, it continues to reflect a general principle of English Public Law. ***Vide Hayter v. L. and another Times Law Reports February 3, 1998.***

[58] In Jamaica, prosecutions in the Resident Magistrates’ Courts, although normally instituted by the police, under the Justices of the Peace Jurisdiction Act, may also be instituted by a private individual – Form 15 and Section 29 of the Justices of the Peace Jurisdiction Act are relevant. Further, Counsel pointed to a case from this region ***Chokolingo v. Law Society of Trinidad and Tobago (1978) 30***

WIR 372. Here, the standing of the Law Society to initiate a prosecution for contempt of court was affirmed.

- [59] The **Chokolingo case**, earlier referred to by Counsel for the first Defendant also further held that a private individual might enforce the criminal law without the consent of the Attorney General (or any other authority whose duty it was to prosecute offenders). **A.G. v Times Newspapers [1973] 3 All ER 54** and **Gouriet v. Union of Post Office Workers [1977] 3 All ER 70** also supports the position held in **Chokolingo**, re an individual's right to bring a private prosecution.
- [60] Counsel also relied in his submissions on **Scopelight Limited and others v. Chief Constable of Northumbria Police Force and another [2010] Q.B. 438** to further support the proposition that there exists a right by private citizens to initiate criminal proceedings. Further also, authority for the proposition that the right to bring a private prosecution survives even a decision by the Director of Public Prosecutions not to pursue a prosecution. Neither the Director of Public Prosecutions nor the court considered the Director of Public Prosecutions the sole arbiter of the public interest on whether a prosecution should be brought.
- [61] Counsel submitted that there were several safeguards against dangers perceived in pursuing a private prosecution. These may be obtained in the course of any criminal process and are:
- a. the DPP entering a Nolle Prosequi and taking over the case (as in the Malica Reid case).
 - b. criminal prosecution for vexatious prosecution
 - c. in relation to each prosecution the Justice of the Peace must be satisfied that it is a proper case in which to issue a warrant of arrest or summons.

- d. application is open to any Defendant to make application to the Court to stay the prosecution on the ground that it is an abuse of the process of the Court.

[62] Counsel cited another case from the United Kingdom. In ***R. v. Rollins [2010] 4 All E.R. 880*** the Claimant contended that the Financial Services Authority (FSA) did not have the power to prosecute for any offences other than those specified in the Financial Services and Market Act (FSMA). The FSA was initiating prosecutions even before the legislature gave it specific powers under the Act. The Court stated that the FSA “had the power of a private individual to prosecute provided that this fell within the scope of its objects and prosecution was not precluded or restricted by the terms of the relevant statute.”

[63] Counsel pointed out dicta of Sir John Dyson in ***Rollins (supra)***.

...it is legitimate to ask why Parliament should have intended to deprive the FSA (but no-one else) of the power it previously enjoyed to bring prosecutions

One of the functions of the FSA including the reduction of financial crime..... It would have been even more perverse not to remove the power to bring prosecutions for offences (other than those under FSMA and its subordinate legislation itself) from anyone else, including private individuals.

... if the power is limited... then... there are consequences which it is unlikely that Parliament intended. For example, it means that, if in the course of its investigations, the FSA discovers evidence which would support a prosecution under section 401 or 402 of FSMA and a prosecution for other offences, it has to refer the question whether to prosecute those other offences to the DPP. This is a most inefficient and unsatisfactory way of prosecuting crime Parliament cannot have intended to create such an absurd state of affairs. (emphasis added). Vide, paragraphs 17 and 18 of the Judgment.

[64] At paragraph 20 Dyson SCJ added-

The technique usually employed by the legislature to indicate an intention to limit the class of persons who may prosecute a particular offence is the obvious one of stating expressly that a particular offence may only be prosecuted by a specified person or persons.

[65] In ***Regina (Hunt) v Criminal Cases Review Commission [2001] Q.B. 1108*** the court similarly held in relation to the Inland Revenue:-

The common law and statute has preserved the right of individuals to bring prosecutions. There has been no abrogation by statute. Not only is the Claimant's contention... without merit but to find otherwise would be perverse and contrary to the intention of Parliament.

[66] The authorities referred to above are germane to the issues being considered before this court. Similarly, this honourable court ought to hold that Parliament could not have intended to establish an independent body removed from the Police Force and subject to the control of no one, but still have the Commissioner and officers of INDECOM having to rely on the police to initiate arrests, or to charge police officers. This, it is submitted, would result in an absurdity.

[67] Counsel submitted that the Constitution contemplates that the right to personal liberty of the subject may be restricted "on reasonable grounds and in accordance with fair procedure established by law." See Section 14 (1) of the Charter of Rights. It would therefore be a matter for the Courts as to whether a Claimant was arbitrarily or unlawfully deprived of his right to personal liberty. The law provides alternative recourses to deal with unlawful arrests.

[68] Counsel for the first Defendant submitted that it is the Claimants' contention that the matter must first be referred to the Director of Public Prosecutions for a ruling before criminal proceedings may be brought in respect of a Public Officer. This position is rejected by the first Defendant. ***George Anthony Lawrence v.***

Commissioner of Police and the Attorney General CA 26th May 2010 makes it clear that Section 31 (5) 8 of the Police Service Regulations 1961, is designed to ensure that members of the Police Force are not made subject of simultaneous criminal and disciplinary proceedings. It is submitted that nothing in the Police Service Regulations lays down that the DPP's consent or ruling is required before a police officer can be charged with a criminal offence. The Claimants' contention in this regard is without merit.

[69] The Claimants have alleged, it is submitted, that were the first Defendant able to charge their members this would deprive such members of a legitimate expectation derived from the practice and custom of the DPP, that such member would not be so charged in the absence of a ruling. Even if the Claimants had provided substantial proof to ground a Legitimate Expectation based on practice, no practice can undermine the lawful right of a citizen to bring a private prosecution. No alleged practice between the Claimants and the Director of Public Prosecutions can bind the first Defendant or any person at all, or to the extent that it will limit their right to prosecute.

[70] The Director of Public Prosecutions submitted that it was her view that Sections 4, 13, 14 and 20 of the Act did not confer any power of arrest and charge on the first Defendant and any officers of INDECOM. As the liberty of the subject was a fundamental right under the Charter of Rights, the DPP submitted that the legislature would not give any entity the right to remove the liberty of the subject other than by express provision. The arrest of Malica Reid, she continued, without a warrant, could not have been justified under the common law. A private citizen can only arrest an offender if that citizen has seen the offender commit the felony. It is the constable who can arrest before the commission of the felony, during and after its commission.

[71] The DPP indicated that she understood the first Defendant's concern that certain powers would have to be implied from INDECOM to carry out its function.

However, she submitted that this concern would have to be taken back to Parliament for an amendment of the Act to include such an express power, if that was the policy the legislature wished to pursue.

[72] The Director of Public Prosecutions raised the possibilities which may arise where an officer of INDECOM operating under powers of the Act attempted to arrest a policeman. She further submitted that the first Defendant might wish to continue the current practice of submitting files for ruling from the police bearing in mind their particular role — further, the requirement for submissions seemed to enhance the credibility of claims made against members of the Police Force who may or may not be guilty of some infraction or malfeasance.

[73] The Claimants contend that the Act is unconstitutional if in fact it confers the status of constable on the first Defendant and his agents as it would afford them protection without making them also subject to a regime of discipline and dismissal to which a constable would be answerable. Additionally, the Act also is an attack on Section 131 of the Constitution, the Police Services Commission. The above stated contention is fallacious. The Act does not appoint the first Defendant and his agents (the investigative staff of INDECOM) as constables. They are not appointed pursuant to any of the statutes under which the Claimants and those persons represented by them have been appointed. None of them is subject to direction from or control of any commanding officers of the Forces of which the Claimants are members. To the contrary, they have been conferred with the powers of a constable, pursuant to Section 20 of the Act; such powers, authorities and privileges as are given to a constable, solely for the specific purpose of giving effect to particular Sections of the Act. They are not in fact constables and so do not have all the powers, authorities and privilege which enable constables.

[74] There is therefore no trespass in any form on the powers of the Police Services Commission as under the Act, no one is purported to be appointed a constable. There is no breach therefore of the separation of powers. The principles as

discussed in *Hinds* are not here engaged. What then are the “like powers, authorities and privileges as are given by law to a constable” which Section 20 of the Act confers?

[75] The Claimants have contended, supported also by the second Defendant and the Director of Prosecutions as *amicus* that in giving effect to Section 4, 13 and 14 of the Act, the power of arrest is not part of the powers conferred because the constitutional right to liberty guaranteed in the Charter of Rights could only be taken away by express provisions. On the other hand, the first Defendant contends that given the stated mandate of INDECOM and its remit, the need also to independently carry out its function, it is inconceivable that the Act does not afford the first Defendant and his investigative staff with the power of arrest. As a constable may arrest without warrant, during the currency of an investigation, so too may an investigator of INDECOM.

[76] Sections 4, 13 and 14 of the Act have given to INDECOM very wide and extensive investigation powers. Everything in these sections relate to investigations for the purpose of the Act. The full extent of the Act’s purposes and INDECOM’s wide remit are evident in an examination of Section 4 of the Act. Section 2 of the Act defines an ‘incident’ as any occurrence which involves misconduct by a member of the Security Forces i.e. member of the police, military or correctional services, which resulting in, or was intended or likely to result in death or injury, involving sexual assault, involving assault or battery result in damage to property or the taking of money or other property and which not falling under any of the above, in INDECOM’s opinion is an abuse of the rights of a citizen.

[77] INDECOM is also possessed of powers to investigate public bodies such as Ministries, departments or agencies of government, parish councils, statutory bodies and government companies. It may obtain and execute search warrants to access records, documents, information and premises, occupied or unoccupied in order to further its investigations. INDECOM may also require

information to be furnished in relation to the extensive powers of search given to it by the Act.

[78] Under Section 4 (2) (a) the Act gives to INDECOM power to take charge of and preserve the scene of any incident, and has the power to issue directions to the Commissioner of Police or any other authority for the purposes of the section. Under Section 13 of the Act, INDECOM may on its own initiative initiate an investigation. Section 13 reads “An investigation under this Act may be undertaken by the commission on its own initiative.” Section 14 provides that INDECOM in deciding the most appropriate method of investigation should assess the seriousness of the case, importance of the investigations, public interest considerations and the particular circumstances in which the incident occurred. This section also gives INDECOM the right to manage, supervise, direct and control an investigation carried out by the Security Forces or relevant public body in relation to an incident and to direct that no action should be taken until INDECOM has completed its investigation.

[79] It is neither disputed nor debated that a constable is possessed of wider powers than a private individual. The powers of a constable are conferred on him either by common law or by special statutory provisions. Section 3 (5) of the Constabulary Force Act provides that:

Every member of the Force, shall have in every parish of the island, all powers which may lawfully be exercised by a Constable whether such powers are conferred by this Act or otherwise.

[80] Section 13 of the Constabulary Force Act sets out what are the general duties and powers of the police under the Act. Section 15 of the Constabulary Force Act gives the police the power to act without warrant, to apprehend any person found committing any offence punishable upon indictment or summary conviction, and set out what the police should do subsequent to such an arrest.

Section 16 relates to the power to the police to execute lawfully issued warrants; sections 17 – 22 of the Constabulary Force Act provide for the police to be able to arrest without warrant persons known or suspected to be in possession of dangerous drugs, material relating to games of chance, powers to stop and search vehicles for stolen goods among other things.

[81] A constable's power to arrest relates to all crimes in which an arrest may properly be made, either under common law or by statute. The Act and the Customs Act give power to persons who are not actual constables to perform functions of a constable for the sole purpose of facilitating the remit and purposes of the legislation in question. In the case of the Act, the extensive investigative functions to be undertaken to ferret out and unearth evidential and other material relating to alleged Sections offences against citizens by agents of the State.

[82] It is against this background that the Claimants' submissions, supported by the second Defendant's and of the Director of Public Prosecutions will have to be examined. Their contention is that the legislature would have had to expressly give the first Defendant and his investigators the power to arrest, if it was Parliament's intention to do so. However, it would seem to me that Parliament having provided the first Defendant and his officers with a raft of investigative functions and also conferring on them "the powers, authorities and privileges" as are given by law to a constable" would not have excluded from those powers authorities or privileges of a constable, the power to arrest, without making that exclusion in expressed terms.

[83] Counsel for the first Defendant, in his submissions asked the question, "How then could arrests be effected during or following the INDECOM investigations?" If it was Parliament's intention to locate the powers of arrest in matters relating to investigations of INDECOM, elsewhere than the first Defendant and his investigations, it could be expected that parliament would expressly state that. It would seem strange that the very body the actions of whose members

INDECOM is investigating, during or after the investigation should be asked to perform the act of arrest and charge. The case of **Regina v. Rollins [2010] 4 All ER 880**, a decision of the UK Supreme Court is relevant in the instant case, as issues discussed therein resemble those occasioned by the relief sought by the Claimants in paragraph 4.1- a declaration that “section 20 of the Act construed against the provisions of Section 13(3) (a) and 15 of the Constitution, does not confer on the Defendant the power to arrest and/or charge anyone at all for any criminal offence...and neither does the common law.”

[84] The Claimant in **Rollins** had contended that the Financial Services Authority did not have powers to prosecute criminal offences other than those specified in the Financial Services and Market Act. The Financial Services Authority was however initiating prosecutions even before the legislature had given it specific powers under the Act. Here the court stated that even before the expressed power to prosecute was given by the FSMA, the FSA had the power of a private individual to prosecute provided that this fell within the scope of its objects and prosecution was not precluded or restricted by the terms of the relevant statute.

[85] Sir John Dyson SCJ expressed himself thus:

... is it legitimate to ask why Parliament would have intended to deprive the FSA (but no one else) of the power it previously enjoyed to bring prosecutions ... all of the functions of the FSA including the reduction of financial crime ... it would have been perverse of Parliament to impose on the FSA the general duties set out in Section 2 of the FSMA and yet at the same time deprive it of the power it previously enjoyed to prosecute financial offences ... if the power is limited ... then there are consequences which it is unlikely that Parliament intended ... For example it would mean that, if in the course of his investigations, the FSA discovers evidence which would support a prosecution ... under sections 401 and 402 of the FSMA and prosecution for other offences, it

has to refer the question whether to prosecute those other offences to the DPP. This is a most inefficient and unsatisfactory way of prosecuting crime – Parliament cannot have intended to create such an absurd state of affairs.

- [86] In ***Regina (Hunt) v. Criminal Cases Review Commission [2001] Q.B. 1108***, it was held that there was a category of criminal behaviour in respect of which the Inland Revenue was in a particularly advantageous position to prosecute; that although the revenue had no express statutory power to prosecute, it had such a power at common law, ancillary to, supportive of, and limited by its duty to collect taxes; and that accordingly the revenue could prosecute a trial on indictment... without the consent of the Attorney General. At paragraph 20 the court also stated that:

Great importance has always been attached to the ability of an ordinary member of the public to prosecute in respect of breaches of the criminal law. If an ordinary member of the public can bring proceedings for breaches of the criminal law, it would be surprising if the Inland Revenue were not in a similar position.

- [87] It would, to my mind, be an aberration for Parliament to have established an independent body removed from the Police Force to investigate allegations against members of the Police Force, among others, by citizens of Jamaica, but still have the first Defendant and his investigators having to rely on the police or the DPP to initiate arrest and charge police officers against whom allegations are made by citizens. This would certainly be a classic case of an "absurd state of affairs" that "Parliament cannot have intended." (per Sir John Dyson SCJ in ***R v. Rollins (supra)***).

- [88] The concerns raised by the Director of Public Prosecutions with regards to the first Defendant and his investigations having the power to arrest police officers

against whom investigations have been pursued by the said officer of INDECOM, though quite valid concerns, do not affect the issues as raised in the Declaration sought by the Claimants in paragraph 4.1 of the Fixed Date Claim Form as amended. They may be adequately addressed by establishing some protocols of how arrests are made in those circumstances.

[89] Section 14 (1) of the Charter of Rights secures that no person shall be deprived of his liberty save on reasonable grounds and in accordance with fair procedures established by law. This shows that the Charter of Rights indicates that the right is not an absolute one but may be restricted on “reasonable grounds and fair procedures established by law”. With Section 20 of the Act conferring on the first Defendant and his investigators the powers of a constable, (which includes the power to arrest), the lawful and proper use of that power qualifies as a fair procedure established by law. It would be open to the Claimants, as counsel for the first Defendant opined, to bring individual cases of arrest before the courts to determine whether the complaining party was deprived of his right to liberty in breach of his constitutional rights or whether his arrest was legal.

[90] The mechanics of the first Defendant and his investigators having to investigate, prepare files and then passing them over to the police to effect an arrest seem both unpractical and without a modicum of good sense. Besides, it would be inconsistent with INDECOM’s independence and objectives, especially with the wide investigative powers which have been given by statute as its, mandate.

[91] It was the contention of the first Defendant that the mandate given to him by the Act gives to INDECOM the right to lay charges in relation to incidents investigated by INDECOM. Counsel for the first Defendant recognized that Section 94 (3) of the Constitution gives the Director of Public Prosecutions the right to:

- (a) institute and undertake criminal proceedings;
- (b) take over and continue;

(c) discontinue ... any such criminal proceedings instituted by himself or any other person or authority.

[92] By necessary implication, counsel contends that persons other than the DPP may initiate prosecutions – the DPP being able to “take over, continue or discontinue” such prosecutions.

[93] Sir Leslie Stephen in ***A History of the Criminal Law of England (1883) Vol. 1 at page 495*** stated-

Every private person has exactly the same right to institute any criminal prosecution as the Attorney General or anyone else. A private person may not only prosecute anyone for High Treason or a Seditious Conspiracy, but A may prosecute B for a libel upon C, or an assault upon D, or a fraud upon E, although A may have no sort of interest in the matter, and C, D and E maybe altogether averse to the prosecution.

[94] The courts have continued to guard jealously the right of private citizen to institute criminal proceedings. In ***Hayter v. L and another Times Law Reports February 3, 1983***, the court cautioned against limiting the right of citizens to institute private prosecutions. The situation in Jamaica is governed by Section 29 of the Justices of the Peace Jurisdiction Act. There is nothing in the said Act (the Justices of the Peace Jurisdiction Act) that stipulates that the informant must be a police officer. This indicates, and I agree, that Jamaican Law contemplates that anyone may bring an information or complaint. With this I am in complete agreement.

[95] Support for the submission that the right for an individual to initiate proceedings as above stated can be found in several cases cited by Counsel for the first Defendant. In ***Chokolingo v. Law Society of Trinidad and Tobago (1978) 30 WIR 372***, it was held that a private individual might enforce the criminal law

without the Attorney General's consent. See also ***AG v. Times Newspapers [1973] 3 ALL ER 56 and Gouriet v. Union of Post Office Workers [1977] 3 ALL ER 70. Scopelight Ltd. and others v. Chief Constable of Northumbria Police Force and Another [2010] Q.B. 438.***

[96] ***Chokolingo (supra)*** is also authority for holding that where a body created by statute seeks to initiate a prosecution, that prosecution must be in keeping with the objects for which that body was established. In the case of INDECOM, it follows that any prosecution it would seek to imitate would have to be in keeping with the mandate and purposes for which it had been set up by Statute. INDECOM would, as a result of its statutory mandate, have a strong and adequate interest in prosecuting offences stemming from abuses of members of the security forces alleged by citizens. See ***R v. Rollins (supra)***.

[97] I have acknowledged the existence of Section 25 of the Act which relates to the duty of the investigators of INDECOM to “attend court and provide such other support” on the request of the DPP in a prosecution arising out of an incident and in relation to proceedings instituted against “the concerned member” or “the concerned official” under the Act. This section is unhelpful in deciding any of the issues which arise from the Claimants’ request of this court in the Amended Fixed Date Claim Form filed herein.

[98] Nothing in the Act in any way diminishes or undermines the constitutional powers of the DPP whose powers are set out in Section 94 of the Constitution. However, should the DPP be of the view, that anyone including the first Defendant and his investigators, have laid charges which are improper, or flawed for any reason, she has the constitutional authority to take over and discontinue the charge or charges. (Section 94 (3) (a) – (c) of the Constitution). This provides a formidable defence against capricious or patently wrong use of the right to prosecute by the private entity.

[99] It was the Claimants' contention that it had been the established practice for the DPP to make a ruling whether and where police officers had been charged for offences arising out of the course of their duties – that this was a practice which the Claimants reasonably and legitimately expect to continue. This is pithily put in paragraph 5 (2) (b) and (c) of the Amended Fixed Date Claim Form – “They are repugnant to the procedure and guidelines set out in the Police Service Regulations 1961. They violate the legitimate expectations of the Claimants and their members to a ruling from the DPP whether they should be arrested or charged for Murder or any criminal offence.”

[100] The Claimants relied for their contention on the Police Service Regulations 1961 which had survived the coming into force of the Constitution. Regulations 31 — paragraph 4 provides that subject to paragraph 5, the Commissioner may institute disciplinary proceedings on any member of the Force below the rank of Inspector. Paragraph 5 reads “Where an offence against any enactment appears to be committed by a member the Commission or as the case may be the authorized officer, before proceeding under this regulation shall obtain the advice of the Attorney General or as the case may be, of the Clerk of the Courts of the parish, as to whether criminal proceedings ought to be instituted against the member concerned and if the Attorney General or Clerk of the Court advises that criminal proceedings ought to be so instituted, disciplinary proceedings shall not be initiated before the determination of the criminal proceedings so instituted.”

[101] Regulation 33 reads as follows:

“Where upon a preliminary investigation or a disciplinary enquiry an offence against any enactment appears to have been committed by a member the Commissioner, shall unless criminal proceedings has been or are about to be instituted, obtain the advice of the Attorney General as to whether criminal proceedings ought to be instituted.”

[102] Claimants' Counsel relied on two cases to ground his contention. Firstly ***Attorney General v. Mohammed et al (1987) 41 WIR 176***. This case was cited to show the relationship of the doctrine of legitimate expectation to matters constitutional.

[103] This case originated from the Court of Appeal of Guyana. This was a challenge to an amendment to a Labour Act allowing government to enter into an agreement with the Trade Union Congress to bind all public workers. It was rushed through Parliament with great speed and this prevented the Trade Union Congress from commenting prior to its passage. The amendment was struck down on appeal and one of the bases on which the first instance decision was upheld was that the amendment was done in breach of Article II of the Constitution by virtue of which the Trade Union and other parties had had a reasonable expectation to have been consulted prior to the amendment producing such changes.

[104] The second case cited was ***Attorney General of Hong Kong v. Ng Yuen Shiu, [1983] 2 AC 629***. The Judicial Committee of the Privy Council held that where a public authority charged with the duty of making a decision promised to follow a certain procedure before reaching a decision, good administration required that, it should implement that promise, unless to do so conflicted with the authority's statutory duty. In the instant case, the applicant's denial of an opportunity to state his case and make representations why he should not be removed, was a sufficient ground for setting aside the decision. The Claimants relied on the two mentioned authorities to support their request to the court that it should find the "arrest" without a prior reference to and ruling from the DPP, deprived the Claimants of their legitimate expectations.

[105] There can be no basis on the authorities and the facts and the regulations referred to on which the Claimants can pray in aid the doctrine of legitimate expectation. It is patent that the Regulations would bind the Police Services Commission, the Commissioner of Police and members of the Police Force, but

not the first Defendant and his investigators. Counsel for the first Defendant relied on the case ***George Anthony Lawrence v. Commissioner of Police and the Attorney General SCCA No. 75/2004 (26 March 2010)***. This case is authority for the following propositions:

- (i) Regulation 31 (5) is to ensure that members of the Police Force are not at the same time subjected to both criminal and disciplinary proceedings. (See Para 13)
- (ii) There is need for the Attorney General's or the Clerk of Court's rulings only prior to the institution of disciplinary proceedings (See Para. 19).

Vide also ***Rohan Ellis vs. R 2012 JMCA Crim 8***.

[106] I agree with the first Defendant's Counsel's submissions that nothing in the Regulation 31 (5) requires the consent of the DPP prior to charging a member of the Police Force. Charges may quite properly be laid against members of the Police Force without need for any prior reference to the Attorney General (the DPP) or the Clerk of the Courts. The Regulations are designed to prevent any member of the Police Force being charged with a criminal offence and facing disciplinary action for the same allegations contemporaneously. The Regulations therefore do not avail the Claimants in anyway.

[107] Having considered the submissions, the authorities and the facts provided to this court in this matter, my conclusions are as follows:

- i. The first Defendant and his investigators have the power of arrest both under common law and by virtue of the Act, having been conferred with powers of a constable by Section 20 of the said Act.
- ii. The first Defendant and his investigators have powers at Common Law to charge and initiate prosecutions of members of the Police Force for the purposes of the Act.

- iii. There is no requirement for a prior ruling by the DPP before members of the Police Force can be arrested and charged by the first Defendant and his investigators; and
- iv. The powers of the first Defendant and his investigators in no way dilute the DPP's constitutional authority to continue, to take over or discontinue any prosecution where such a course is deemed by the DPP to be an appropriate one.

[108] The Declarations and Injunctive relief sought by the Claimants are refused.

CAMPBELL J

BACKGROUND

[109] The 1st, 2nd and 3rd Claimants are organizations representing police officers. The 2nd and 4th Claimants are Chairman and President respectively of two such bodies.

[110] The Defendant is constituted pursuant to Section 3 of the Independent Commission of Investigations Act 2010 (hereinafter, the Act). On the 3rd October 2011, the Claimants filed a Fixed Date Claim Form seeking administrative orders for relief and constitutional redress under Section 19 of the Constitution of Jamaica, alleging that the provisions of Section 13 (3) (a), 14 and 19 of the Constitution are likely to be contravened in relation to them by the Defendant.

RELIEFS CLAIMED

[111] The Claimants claim the following relief, severally, or alternatively:

4.1 A declaration that section 20 of the Act, construed against the provisions of sections 13 (3) (a), 14 and 19 of the Constitution, does not confer on the Defendant, the power of arrest/or charge anyone at all for any criminal offence, or for the offence of murder.

4.2 A Declaration that section 20 of the Act, construed against the provisions of section 13 (3) (a), 14 and 19 of the Constitution, does not confer on the Defendant the power to arrest and or charge a member of

the Jamaica Constabulary Force, or the Island Special Constabulary Force, or any District Constable, for any criminal offence, or for the offence of murder, arising from circumstances that occur in the execution of their duties, in the absence of a ruling from the Director of Public Prosecutions that the member be so charged.

4.3 A Declaration that under the Police Services Regulations 1961, sections 31 and 33 now in force under and pursuant to the Constitution, the Defendant cannot lawfully charge any member of the Jamaica Constabulary Force, or the Island Special Constabulary Force, or any District Constable, for any criminal offence, or for the offence of murder, arising from circumstances that occur in the execution of their duties, in the absence of a ruling from the Director of Public Prosecutions that the member be so charged.

4.4 A declaration that any act by the Defendant to charge any member of the or the Island Special Constabulary Force, or any District Constable, for any criminal offence, or for the offence of murder, arising from circumstances that occur in the execution of their duties, in the absence of a ruling from the Director of Public Prosecutions that the member be so charged, would be likely to contravene the rights of such a member under sections 13(a) and (15) of the Constitution in that it would deprive such a member of a Legitimate Expectation, derived from the practice and custom of the DPP, that such member would not be charged in the absence of such a ruling.

4.5 A declaration that any act by the Defendant to charge any member of the Jamaica Constabulary Force or the Island Special Constabulary Force, or any District Constable, for any criminal offence, or for the offence of murder, arising from circumstances that occur in the execution of their duties, in the absence of a ruling from the Director of Public Prosecutions that the member be so charged, would be likely to contravene the rights of such a member under Section 15 of the Constitution, not to be unlawfully deprived of the members personal liberty.

4.6 Interim Relief, by way of an Injunction to restrain the Defendant from arresting and or/charging, and/or from in any manner to interfere with or restrict the personal liberty of any member of the Jamaica Constabulary Force, or the Island Special Constabulary Force, or of the Rural Police, for or on account of any criminal offence, or for the offence of murder, arising from circumstances that occur in the execution of their duties, in the absence of a ruling from the Director of Public Prosecutions that the member be so charged.

4.7 All the necessary and consequential directions.

GROUNDS

[112] 5. The legal bases for the claim to the remedies sought are as follows;

5.1 The 1st Claimant, the Police Federation, constituted by Section 67 of the Constabulary Force Act, represents 5 or more persons having the same or similar interest in the proceedings, and the Federation is a body having a sufficient interest in the subject matter and the issues raised in these proceedings.

5.2 The 2nd Claimant, Superintendent Merrick Watson, is the Chairman of the Police Officers Association, a voluntary association of Officers of the Jamaica Constabulary Force and which association represents 5 or more persons having the same or similar interest in the proceedings, and he is a person and the Police Officers Association, a body having a sufficient interest in the subject matter and the issues raised in these proceedings.

5.3 The 3rd Claimant, the Special Constabulary Force Association, constituted by section 26 of the Constables (Special) Act, represents 5 or more persons having the same or similar interest in the proceedings, and is a body having a sufficient interest in the subject matter and the issues raised in these proceedings.

5.4 The 4th Claimant, District Constable Delroy Davis, is the Chairman of the United District Constables Association, a voluntary association of members of the Rural Police established by the Constables (District) ACT, and which association represents 5 or more persons having the same or similar interest in the proceedings, and he is a person and the United District Constables Association is a body having a sufficient interest in the subject matter and the issues raised in these proceedings.

5.5 The Defendant has claimed and has purported to exercise a power of arrest and charge for the criminal offence of murder against members of the Federation and of the aforesaid associations and of the Jamaica Constabulary Force, and has grounded his power under section 20 of the Act.

5.6 The Claim and exercise of the powers aforesaid are in violation of the constitutional provisions referred to above for the following reasons:

5.2(a) They are not, on any reasonable interpretation of the Act of as against sections 13 (3) (a), 14 and 19 of the Constitution founded therein.

5.2 (b) They are repugnant to the procedure and guidelines set out in the Police Service Regulations 1961.

5.2(c) They violate the legitimate expectation of the Claimants and their members to a ruling from the DPP whether they should be Arrested and /or charged for Murder or any criminal offence.

6. This claim is made under Section 19 of the Constitution of Jamaica and involves the interpretation of Section 20 of the Act generally, particularly Section 20 thereof and the sub-sections referred to in the said Section 20.

Claimants' affidavits in support of the application

[113] The Claimants filed a joint affidavit in support of their application, in which they alleged inter alia;

5.2 In particular we are advised by Corporal Reid and believe it to be true that;

5.2 (a) On Thursday, 4th November 2010 at about 9:30 am, he was a member of a police team that was sent by a superior officer from Kingston on a special duty to Westmoreland police division.

5.2 (b) He was in the company of at least four other police personnel and 2 Deputy Superintendents of the Savanna-La-Mar police division and the Mobile Reserve respectively.

5.2(c) While on the said duty, his party came under gunfire from a group of four or five men, the gunfire was returned, after which one of the men was found suffering from gunshot wound and was taken to hospital where he was pronounced dead.

5.2(d) Investigations were commenced into the incident during the course of which investigations, he made himself available for a question and answer session conducted by the Independent Commission of Investigations and was awaiting another session that had been proposed for 28th February, 3rd March or 4th March 2011.

5.2(e) On Friday 25th, 2011, after being asked to do so, he attended the Savanna-La-Mar police station where and when an investigator of the Commission, reading from a document, told him he was arresting and charging him for the murder of Mr. Fredrick Mickey Hill, who was allegedly killed in the shooting in Negril on 4th November 2010.

5.2 (f) The Investigator, acting on the instructions of the Defendant herein, detained him and placed him in the dock before Her Honour Lyle Armstrong, who was addressed by the Clerk of Courts, and

then by the Defendant herein, who told the court that he was not yet prosecuting the case but was acting as an investigating officer.

5.2(g) The Learned Resident Magistrate remanded him in custody on the application of the Defendant herein and he was detained at the Savanna-La-Mar Police Station jail and fingerprinted.

5.2(h) On 1st March 2011, the Defendant in addressing the court stated that investigators acted as private citizens when they arrested and charged him, and that he the Defendant was acting as their Counsel.

5.2(i) The DPP entered a nolle prosequi terminating the charges brought against him by the Defendant, and herself laid the charge of murder against him, which charge is pending before the Home Circuit Court.

5.2(j) He obtained leave to seek judicial review for certorari and other remedies against the Defendant herein, but his claim was struck out because of a procedural error on the part of his Attorney – at –law.

6. We have been longstanding members of our respective police forces and associations and are aware of several instances in which our colleagues were charged with murder and other offences arising from incidents that occurred while they were on duty and, as far as we are aware, in none of those instances has there ever been a charge of murder without a ruling from the Director of Public Prosecutions.

7. We contend and believe that we and our members have a legitimate expectation and are entitled to such ruling.

8. We and our members are all employed to the Government of Jamaica as policemen and women generally so called and are all subject to the duties, risks and liabilities involved in such policing, and are likely to be involved in circumstances that will give rise to the likelihood of us being actually or purportedly arrested and charged by the Defendant and/or his agents or servants, if the court does not grant the declarations and the injunction sought in the Claim Form hereby supported.

9. We fear that if the order for interim injunction sought by us is not granted, the Defendant will, before the claim is determined, pursue the course he has embarked upon of arresting and charging us and our members under the circumstances complained about in this claim.

10. Indeed, after the arrest and charge of Malica Reid, the Defendant has arrested and charged other members of the Jamaica Constabulary Force for the offence of Murder.

11. We contend that the claim and exercise of power aforesaid are in violation of the constitutional provisions referred to above, for reasons that;

11.1 They are not on any reasonable interpretation of the Act, founded therein.

11.2 They are repugnant to the procedure and guidelines set out in the Police Service Regulations 1961.

11.3 They violate the legitimate expectations of the Claimants and their members.

The First Defendant's Response

[114] On the 28th December 2011, Terrence Williams, Commissioner of the Independent Commission of Investigations, filed an affidavit in response to the joint affidavits of the Claimants, in referring to the Claimants' paragraph 5, inter alia;

i. That on or about the 18th March 2011, Malica Reid was granted leave to apply for judicial review by the Honourable Miss Justice Straw.

ii. That myself, the First Respondent, together with the Fourth and Fifth Respondents, officers of INDECOM, filed an Appeal against the judgment of the Honourable Miss Justice Straw.

iv. That on our about the 29th July 2011 the Honourable Mr. Justice Brooks ruled that the failure of Malica Reid to file an Affidavit in Support resulted in the leave for judicial review having lapsed and consequently, the Fixed Date Claim Form filed by the Appellant was void and of no effect.

ix That on our about the 18th day of November 2011, the First, Third and Fourth Appellants withdrew their appeal against the judgment of Miss Justice Straw.

4 That I deny paragraph 10 of the Claimants' Affidavit and state that, since charging Malica Reid for the offence of murder, no other police

officers have been charged by any officer of INDECOM. That I put the Applicants to strict proof of the allegations made in paragraph 10 thereof.

Claimants' Submissions

- [115] The claim, according to the written submissions of the Claimants, “was originally brought for an administrative order for relief and/or constitutional redress under section 19 of the Constitution of Jamaica, on the ground that the provisions of Sections 13 (3) (a), 14 and 19 of the Constitution are likely to be contravened in relation to the Claimants by the first Defendant.
- [116] One of the most important consequences of the constitutional protection from arbitrary arrest and deprivation of liberty is that a private citizen is not empowered to arrest another citizen and be protected from civil liability if the arrest turns out to be wrongful or mistaken. On the other hand, a constable is so protected unless malice or absence of probable cause is established.
- [117] The Claimants submitted that the Act is unconstitutional, if it indeed confers the status of a constable on the commissioner and its agents, and thereby gives them that protection, without making them subject to the regime of discipline and dismissal that applies to constables generally under the Constitution, the Jamaica Constabulary Force Act and related legislations, and the Police Service Regulations.
- [118] It was also submitted that the context in which the Act confers the status and the purposes for which it is conferred, do not show a clear and unambiguous intention to confer it for the purposes of empowering the commissioner to arrest and charge anyone for any criminal offence. The Act in fact sets out the context in which the status is conferred. Any reliance by the Commissioner on that status to justify arresting or charging anyone for any criminal offence would therefore, for that reason alone, be unconstitutional, as legislation that seeks to confer powers which conflict with constitutional rights must use clear and unambiguous words to achieve that result.

- [119] Section 131 of the Constitution of Jamaica empowers the Police Services Commission to appoint police officers not above the rank of Inspector, and to discipline and dismiss them. The Act breaches that section of the Constitution in that it derogates from the power of and makes a collateral attack on the Police Services Commission.
- [120] The Claimants further submitted that the Commissioner's actions, whether under the Act or at common law, breaches the constitutional provisions which guarantees the independence of the DPP. Section 5 of the Act attacks the constitutional independence and power of the DPP, and the doctrine of separation of powers.
- [121] The Claimants submitted that the doctrine of legitimate expectation applies to cases in which legislation is being challenged for unconstitutionality. The practice of the DPP to make a ruling whether police personnel should be charged for the offences arising from situations that occur in the course of their duties, is one that they reasonably and legitimately expected to continue. The practice has been an instrument whereby the constitutional protection against arbitrary arrest and unlawful deprivation of their liberty has been achieved.
- [122] The Claimants submit that the 'status of constable' conferred by the Act has been used by the first Defendant in Malica Reid's case and is available for his use in other cases if he wishes. Unless that section of the Act with the status it confers is struck down, as sought by the Claimants, and unless the claim by the first Defendant to the power of "citizen's arrest" of police personnel, without a ruling from the DPP, is also struck down, the Claimants will be deprived of their legitimate expectation to such a ruling from the DPP.

The First Defendant's Submissions

- [123] The first Defendant submitted that the INDECOM officers have the power to arrest and to prosecute. These powers arise by virtue of the establishment of INDECOM, the mandate of INDECOM and the powers given to INDECOM by the

provisions of the Independent Commission of Investigations Act and by virtue of the common law. If the INDECOM investigators do not have the power of arrest, this would result in an absurdity and cannot have been the intention of Parliament nor would it be a true reflection of the common law.

[124] It was further submitted that a constable or a citizen can arrest with or without a warrant. A constable enjoys greater powers for effecting an arrest without a warrant, although both must have a reasonable suspicion that a felony has been committed, the constables suspicion can be based on second-hand information, whilst the citizen ought to have witnessed the felony. This common law power appears wider than the statutory power under section 15 of the Constabulary Force Act. The fact that a reasonable suspicion must be held, the officer cannot base his decision on an order of a superior officer. This constitutes the “independent responsibility and accountability of a constable.” In arresting without a warrant or to seek a warrant of arrest, the constable, despite membership of a large organization, acts individually.

[125] The language of S94 of the Constitution, by necessary implication, confirms that persons other than the DPP may initiate prosecutions. In Jamaica, prosecutions may be instituted by private persons under the Justices of the Peace Jurisdiction Act. See form 15 and Section 29 of the Justices of Peace Jurisdiction Act. The Defendant relied on **Chokolingo v Law Society of Trinidad and Tobago** (1978) 30 WIR 372, **Gouriet v Union of Post Office Workers** (1977) 3 All ER 70, **Scopelight Ltd. and others v Chief Constable of Northumbria Police Force and another** [2010] QB 438. Nothing in the Police Service Regulations lays down that a ruling of the DPP is a precondition for charging of an officer before criminal proceedings are instituted. No practice can undermine the lawful right of a citizen to bring a private prosecution. Police Officers are subject to the same procedures as any other person charged before the courts.

[126] The questions for determination by the court is firstly, whether the Act allows the officers of INDECOM to effect an arrest on a security officer so defined in the absence of a ruling from the Director of Public Prosecutions. Secondly, does the

Act appointing the Commissioner, and his agents, as police officers preserves for the benefit of those officers, the common law acquired protection afforded an officer, acting on reasonable suspicion in the execution of his duty. If the answer to either question is in the affirmative, are the sections of the Act, which so empowers the commissioner, in breach of the Jamaican Constitution.

Does the legislative framework establishing INDECOM provide for the Commissioner and his agents to effect arrest?

[127] The state of the law at the time of the enactment and the history of relevant legislative background leading to the passage of the Act is a valuable tool in unearthing the mischief that the Act came to remedy, and in construing the language of the Act. This approach commended itself to Morrison JA, in **Annette Brown v Orville Brown**, SCCA 12/2009, delivered on the 26th March 2010, in considering the retrospective effective of the Property (Rights of Spouses) Act, the Court of Appeal felt it was of some value in locating the “presumed mischief which it (the Act) sought to address,” at paragraph 17, Morrison, JA said, inter alia;

The issue is primarily one of construction of the 2004 Act and, as Lord Hoffman observed in a recent decision of the House of Lords concerned with the question of whether a particular set of regulations was intended to have retrospective effect, "Like any other question of construction, this depends upon the language of the [Act], construed against the relevant background" (Odelola v Secretary of State for the Home Department [2009] 3 All ER 1061, at [4]).

And at paragraph 18;

*It may therefore be of some value to consider briefly the background to the 2004 Act and the presumed mischief which it sought to address. Authority, if it is needed, for this approach may be found in the judgment of the Full Court of the Supreme Court in **R v Industrial Disputes Tribunal, ex parte Seprod Group of Companies** (1981) 18 JLR 456, in which it was held that, when the court is called upon to construe an enactment, it is permissible not only to consider the state of the law at the time of the enactment, but also to review the history of the legislation on the subject in order to detect what mischief Parliament wished to*

correct. Parnell J in his judgment referred with approval (at page 462) to the well known statement of Lord Halsbury (in **Eastman Photographic co v Comptroller-General of Patents** [1898] AC 571, 576) that in construing a statute "it is not only legitimate but highly convenient to refer both to the former Act and to the ascertained evils to which the former Act had given rise, and to the latter Act which provided the remedy".

[128] The Memorandum of Aims and Objectives of the Act recites;

The existing system of investigation in public complaint concerning members of the Security Forces has been found to be ineffective and lacking integrity. Under the current system, the Police Public Complaint Act applies only to members of the Constabulary Force. In response to the recurrent complaint from members of the public regarding the shortcomings of the present system, the government has decided to replace the existing system with a new independent commission, which will be empowered to hold the Security Forces accountable to the public and ensure that Human Rights are respected. This Bill seeks to repeal the Police Public Complaint Act, and to provide for the establishment of a Commission of Parliament, with a specific mandate to investigate all shooting and other abuses by the Security Forces.

[129] The long Title of the Act reads;

This Bill is to repeal the PPCA, to make provision for the establishment of a commission of Parliament to be known as INDECOM, to undertake investigation concerning actions by members of the Security Forces and other agents of the State that result in death or injury to persons or the abuse of the Rights of persons and for connected matters.

The Repealed Legislative Framework

[130] The Police Public Complaints Act (herein after, PPCA) was signed into law on the 1st December 1962. S4 states the functions of the Authority,

Functions of the Authority

4. (1) Subject to the provisions of this Act, the functions of the Authority shall be to –

- (a) monitor the investigation by the Force of any complaint or other matter to which this Act applies with a view to ensuring that such investigation is conducted impartially;
 - (b) supervise the investigation of complaints by the force;
 - (c) undertake direct investigation of complaints in such circumstances as may be prescribed by or pursuant to this Act; and
 - (d) evaluate and report to the Minister from time to time on the system of handling complaints
- (2) For the purposes of the discharge of its functions under this Act, the Authority shall, subject to the provisions of this Act, be entitled –
- (a) to be advised of any complaint made against a constable;
 - (b) upon the authority of a warrant issued by a Justice of the Peace.
 - (i) to have access to all records, documents or other information relevant to any complaint or other matter being investigated pursuant to this Act .
 - (ii) to have access to any premises or other location where the Authority has reason to believe that there may be found any such records, documents or other information as are referred to in sub-paragraph (1) or any property which is relevant to an investigation pursuant to this Act;
 - (ii) to enter any premises occupied in order to make such enquires or to inspect such documents, records, information or property as the Authority considers relevant to any matter being investigated pursuant to this Act;
 - (c) to retain any records, documents or other property referred to in paragraph (b)
- (3) For the purposes of subsection (2) the Authority shall have power to require any person to furnish in such manner and at such times as may be specified by the Authority, information which in the opinion of the Authority is relevant to any matter being investigated pursuant to this Act.

[131]

Supervision of investigation.

6. (1) The Authority shall supervise the investigation –
 - (a) of any complaint alleging that the conduct of a constable resulted in the death or serious injury to some other person; and
 - (b) of any other description of complaint specified for the purpose of this section in regulations; and
 - (c) of any other matter which, whether or not the subject of a complaint, is in the opinion of the Authority of such a nature that it should be so supervised because of –
 - (i) its gravity; or(ii) its exceptional circumstances.
- (2) Where the Authority undertakes the supervision of any investigation under this section it shall give notice thereof to the Commissioner.
- (3) In the exercise of its functions under this section, the Authority shall have power to give directions to a constable as to a particular investigation and it shall be the duty of that constable to comply with any such directions.

[132]

Appraisal by the Authority of reports of investigation

7. (1) After considering a report submitted to it under section 17 (4) (formal handling of complaints) the Authority shall submit an appraisal statement to the Commissioner and the Director of Public Prosecutions.
- (2) In this section "appraisal statement" means a statement –
 - (a) as to whether or not the investigation was conducted to the satisfaction of the Authority;
 - (b) specifying any respect in which it was not so conducted; and
 - (c) dealing with such other matters as may be prescribed.
- (3) The power to issue an appraisal statement includes power to issue separate statements in respect of the disciplinary and criminal aspects of an investigation.

[133]

Direct investigation by the Authority

8. (1) Notwithstanding anything to the contrary, the Authority may, if it thinks necessary, instead of supervising an investigation pursuant to section 6, itself undertake and carry out the investigation and shall notify the Commissioner in writing accordingly.
 - (2) The Authority may adopt whatever procedure it considers appropriate to the circumstances of a particular case.
 - (3) Nothing in this section shall be construed as requiring the Authority to hold any hearing.
 - (4) On completion of an investigation under this section, the Authority shall submit a report thereon –
 - (a) to the Commissioner;
 - (b) where the report indicates that a criminal offence may have been committed, to the Director of Public Prosecutions,

[134]

Powers, authorities and privileges in relation to sections 6 and 8

9. For the purpose of giving effect to sections 6 and 8 the members of the Authority, the investigative staff of the Authority and any person authorized thereto by the Authority shall, in the exercise of their duty under this Act, have the like powers, authorities and privileges as are given by law to a constable.

[135] Section 4 empowered the Authority to monitor and supervise investigations by the Force and, pursuant to s8 (1) “where it thinks necessary, instead of supervising an investigation pursuant to section 6, itself, undertake and carry out the investigation.” The powers, authorities and privileges as are given by law to a constable that was provided to the Authority, were restricted to two of its functions. The Authority was imbued with the powers “given by law to a constable,” whilst supervising investigations as provided by S6, and whilst conducting direct investigation as provided by S8.

[136] The Authority functions, as provided by S4, did not proceed beyond the submission of reports, and appraisal statements. In accordance with S8(4), **on the completion** of the direct investigation, the Authority *shall* submit a report to

the Commissioner of Police and if there is an indication that a criminal offence may have been committed, shall make a submission to the DPP. The Authority had no express function beyond the submission of statements and reports at the end of the investigatory process, whether that process involved the monitoring, supervising or the direct investigations of the Authority.

[137] The Memorandum of Objectives and Reasons of the Act stated that the system that operated under the old legislative regime was found to be ineffective and lacking in integrity. The Commission to be created by the new legislation was to be independent, and was to hold the security forces accountable to the public. It appears that the ineffectiveness of the Authority stemmed from its perceived lack of independence. The agencies to which the Authority's investigatory process was subjugated were the Commissioner of Police and the Director of Public Prosecutions. The Authority was mandated to report to these bodies and, in the event, there was an indication of a criminal offence being committed to the Director of Public Prosecutions.

[138] Section 5 of PPCA provided;

Independence of Authority

5. (1) Subject to the provisions of the Constitution relating to the powers of the Director of Public Prosecutions and the Police Service Commission, in the exercise of the powers conferred upon it by this Act, the Authority shall not be subject to the direction or control of any other person.
- (2) Nothing in subsection (1) shall be construed as preventing the assignment to a Minister of responsibility for such aspects of the administration of this Act as are necessary or desirable to facilitate the operations of the Authority.

[139] The Commissioner of Police exercised full control of the Authority as provided for by S 11.3

3) It shall be the duty of the Commissioner –

(a) to make arrangements to facilitate –

- (i) supervision under this Act of an investigation by the Authority; and
 - (ii) the conduct of any direct investigation under this Act by the Authority; and
- (b) to take such steps, consequent on an investigation under this Act, as he thinks appropriate having regard to the provisions of section 18 (final investigation reports).

Any final investigatory report or appraisal statement from the Authority's investigation must be sent to the Commissioner of Police, who is obliged to refer to the DPP any matter in which there is an indication of a criminal conduct.

The new legislation – The Independent Commission of Investigations, 2010

[140] The Independent Commission of Investigations Act, 2010 was signed into law on the 15th April 2010, entitled, an Act to repeal Police Public Complaints Act, and to make provisions for the establishment of a Commission of Parliament to be known as the Independent Commission of Investigations to undertake investigations, S4 provides;

Functions of the Commission

4.- (1) Subject to the provisions of this Act, the functions of the Commission shall be to-

- (a) conduct investigations, for the purposes of this Act;
- (b) carry out in furtherance of an investigation and as the Commission considers necessary or desirable -
 - (i) inspection of a relevant public body or relevant Force, including records, weapons and buildings;
 - (ii) periodic reviews of the disciplinary procedures applicable to the Security Forces and the specified officials.
- (c) take such steps as are necessary to ensure that the responsible heads and responsible officers submit to the Commission, reports of incidents and complaints

concerning the conduct of members of the Security Forces and specified officials.

- [141] (2) In the exercise of its functions under subsection (1) the Commission shall be entitled to -
- (a) have access to all reports, documents or other information regarding all incidents and all other evidence relating thereto, including any weapons, photographs and forensic data;
 - (b) require the Security Forces and specified officials to furnish information relating to any matter specified in the request; or
 - (c) make such recommendations as it considers necessary or desirable for-
 - (i) the review and reform of any relevant laws and procedures;
 - (ii) the protection of complainants against reprisal, discrimination and intimidation; or
 - (iii) ensuring that the system of making complaints is accessible to members of the public, the Security Forces and specified officials;
 - (d) take charge of and preserve the scene of any incident.

[142] The Commission may, on its own initiative, undertake investigations for the purposes of the Act. The purpose, as indicated in its memorandum of reasons, is to empower the Commission to hold the Security Forces accountable to the public and ensure that human rights are respected. In order to, achieve its objectives, the Commission may manage, supervise, direct and control an investigation which is being undertaken by the Security Forces, where the Commission considers it necessary to so direct the investigation. Importantly, the legislation bestows on the Commission, the powers, authorities and privileges that the constable has at law.

[143] Sections 5, of the PPCA and INDECOM Act both deal with the independence of the respective bodies. The later Act has reproduced S5 (1) of the earlier legislation, with the following words excised, "relating to the powers of the

Director of Public Prosecutions and the Police Services Commission". The fetter imposed on the Authority's exercise of powers as provided for by S5 of PPCA, which made those powers subject to the provisions of the Constitution relating to the DPP and the Police Services Commission, has been removed. The powers of those organizations which are related to the Constitutional provisions are no longer a restriction on the newly established powers of INDECOM. The Act extends the powers of INDECOM and mandates that body "to take such steps" to ensure that the Commissioner of Police Chief of Staff of Jamaica Defence Force, the Commandant of the Island Constabulary Force, among others, as responsible officers as defined by the Act, submit to the Commission, reports of incidents and complaints concerning the conduct of members of the Security Forces and specified officials.

[144] What were the fetters on the Authority pursuant to S5 of the PPCA which relate to the powers of the DPP that have been removed from the new Commission? The Act has carved out a special area over which, the Commission will not be subject to any authority other than the Constitution. That area deals with the investigatory capacity of INDECOM in relation to incidents and complaints as defined by the Act. The proviso in S5 under the repealed legislation had the effect of imposing the Constitutional powers of the DPP and the Commissioner of Police on such investigations. S94 of the Constitution which establishes the Office and functions of the DPP, deals with the power of the DPP, to institute and undertake, to takeover and continue and to discontinue any, "*criminal proceedings*". I have not been shown any authority that DPP exercises any constitutional hegemony, pursuant to S94, over any investigatory process undertaken by any authority or body.

Commencement of Criminal Proceedings

[145] In **Llewellyn da Costa v. The Queen** (1990) 38 WIR 201, the Judicial Committee was examining the DPP's powers under S94 of the Jamaican

Constitution. Lord Lowry delivering the judgment on behalf of their Lordship Board, said at page 208 g;

The Director of Public Prosecutions (the DPP) can institute and undertake criminal proceedings against any person before any court other than a court-martial in respect of any offence against the law of Jamaica (Constitution, section 94(3)). He can therefore institute such proceedings before the Gun Court.

[146] The constitutional powers of the DPP as ascribed by S94, is restricted to the criminal proceedings stage of any criminal event. At what point in the criminal process did the constitutional functions, pursuant to S94, commence? Their Lordships Board in **Llewellyn da Costa**, went on to examine how proceedings were commenced before several courts in Jamaica at page 208 h;

The trial before a High Court Division of the Gun Court shall be commenced by preferring of an indictment (as in this case, by direction of the D.P.P) without a preliminary examination and Criminal Justice (Administration) Act section 2 (2). . .

At page 208 i;

When Section 12(2) of the Gun Court Act provides that the trial shall be commenced by preferring of an indictment, it must mean that the preferring of an indictment is an essential preliminary step because the indictment does nothing to fix the date of the trial and the trial proper only commences with the arraignment of the accused. This, too, is the only way to make sense of a voluntary bill in the Circuit Court, which commences the proceedings.

At page 209h

In any event there are two ways of instituting proceedings with a view to trial on indictment, either by an information to a magistrate, who may commit the accused for trial, or by preferring an indictment which the DPP in Jamaica can do without leave –this is, in the true sense of the word, a voluntary bill in the Circuit Court or the Gun Court; both procedures are contemplated by S2 (2) of the Criminal Justice (Administration) Act.

[147] Under the repealed legislative regime, it was clear that the scope of the Authority's involvement in incidents and complaints pursuant to the PPCA were subject to the control of the DPP, as it concerns any criminal proceedings that

were a consequence of the Authority's investigation. There was no attempt by the Authority to undertake or institute criminal proceedings. The INDECOM Act removed the subordination of the Commission to the constitutional functions of the DPP in relation to criminal proceedings. As it concerns the DPP, those functions are unimpaired by this removal. As it concerns INDECOM, when read with other provisions of the repealing legislation, it envisages the involvement of INDECOM in criminal proceedings. In practice, under the PPCA, the Authority never involved itself in the criminal proceedings, other than at the behest of the DPP. The Claimants therefore contend that they have a legitimate expectation, that the DPP will make a ruling before charges are leveled at their membership.

Who can institute criminal proceedings?

[148] The circumstances in which an indictment can be preferred are set out in S2 (20) Criminal Justice (Administration) Act 1960. The law that existed at the time of the coming of the Jamaican Constitution gave the right to any person, to institute criminal proceedings. There are five different situations. See **Grant and Others vs DPP** [1982] AC 190, S2 (2) (1) of the Criminal Justice (Administration) Act enumerates those five situations as follows: (1) the prosecutor or other person has been bound by recognizance to prosecute or give evidence against the person accused of such offence; (2) the accused has been detained or committed in custody; (3) or has been bound by recognizance to appear to answer an indictment; (4) or such indictment is preferred by the direction, or with the consent of a Judge; (5) or by the direction or with the consent of the Director of Public Prosecutions.

[149] The law that existed before the coming into being of the Jamaican Constitution, acknowledged that criminal proceedings may be commenced by the private citizen. However, Section 4 of the PPCA recognised the Director of Public Prosecutions hegemony over any criminal proceedings commenced before any court, to enter a *nolle prosequi* to such proceeding, by stating in open court to such Justice or court where the proceedings are pending or by whom the

accused has been committed . . . that the Crown intends not to continue such proceedings, and thereupon the proceedings will be at an end.

[150] In the United Kingdom, the Prosecutions of Offences Act, 1908, amending the Prosecution of Offences Acts, 1879 and 1884, gave power to the DPP, to institute, undertake, or carry on such criminal proceeding, and to give such advice to the chief officers of police, clerks to justice, and to other persons, whether officers or not, concerned in any criminal proceedings, respecting the conduct of that proceedings. The Act of 1908, recited that nothing in the Act precluded any person from instituting or carrying on any criminal proceedings, but the Director of Public Prosecutions may undertake at any stage, the conduct of those proceedings, if he thinks fit. In England, the DPP has no personal power as does his Jamaican counterpart, to proffer a voluntary bill. In England and Wales, it is a Judge of the High Court alone who has the power to proffer a voluntary bill.

[151] Did the repealing legislation confer the status of a constable on the Commissioner, giving them the protection not afforded the private citizen in the event that a wrongful arrest is made? The Claimants' main grievance appears to be that the Act would be unconstitutional if such powers are conferred on the Commissioner without making them subject to the regime of discipline and dismissal that applies to constables generally under the Constitution. The Claimants contend that the statutory words relied on to confer the status of constable must, "show a clear and unambiguous intention to confer such a status." They submitted that legislation which seeks to confer powers which conflict with constitutional rights must use clear and unambiguous words to achieve that result. They relied on **R v IRC ex p Rossminster** [1980] AC 952, that case dealt with how much information must be disclosed upon the face of a search warrant issued by a Judge under section 20 C(1) of the Taxes Management Act 1970. Lord Diplock was of the view, in his judgment at page 1008C that,

What has to be disclosed upon the face of the search warrant depends on the true construction of the statute.

At letter D he continued:

So, if the statutory words relied upon as authorizing the acts are ambiguous or obscure, a construction should be placed upon them that is least restrictive of individual rights which would otherwise enjoy the protection of the common law. But judges, in performing their constitutional function of expounding what words used by Parliament in legislation mean, must not be over-zealous to search for ambiguities or obscurities in words which, on the face of them, are plain, simply because the members of the court are out of sympathy with the policy to which the Act appears to give effect. Lord Diplock upheld the validity and sufficiency of the search warrant.

[152] The Claimants did not point out those ambiguities or obscurities of which they spoke. The Claimants have failed to demonstrate any ambiguity in the statutory words conferring the status of constable. Lord Salmon's judgment proceeded on the basis of balancing two public interests, the right that anyone who commits an offence should be brought to justice and the right of the citizen to be protected from an abuse of power by the Executive. In his judgment, Lord Salmon quoted with approval from Lord Denning's judgment "that the duty of the courts so to construe the statute as to see that it encroaches as little as possible upon the liberties of the people of England"(see page 972B). Lord Salmon said at 1017D:

I respectfully agree with this passage which I think is consistent with the view that court should construe a statute which encroaches upon liberty so that it encroaches upon it no more than the statute allows , expressly or by necessary implication.

[153] The case of **Rossminister** cannot support the Claimants' case. In this matter, there is no argument that the repealing legislation constitutes an encroachment on the liberty of the Jamaican people. What the amending legislation seeks to do

is to expand the human rights of the Jamaican people by an expansion of the powers of the Commission. The mischief that the legislation came to remedy is an alleged abuse by members of the security forces against the Jamaican people. This abuse resulted in a diminution of their guaranteed rights. The INDECOM Act leaves untrammelled and undiminished, the constitutional power of the Office of the Director of Public Prosecutions to discontinue at any stage, criminal proceedings instituted by himself or any other person or authority. The Commission is such an authority as contemplated by Section 94 (3), to have the power to *institute or undertake criminal proceedings*. Its worthy of note that the active words “institute or undertake,” that imbues the DPP with the power to commence criminal proceedings pursuant to S94 (3) (a) are similarly used in S94(c), to acknowledge that there exists the undeniable constitutional right of *any person or authority*, such as the Commission, to commence criminal proceeding, in like manner, to the DPP. There is no distinction in the language according the right to commence criminal proceedings as amongst the DPP, any other person or authority. The proviso to Section 5 also allows any person or authority, having instituted criminal proceedings, to withdraw the proceedings so began at his own instance or with leave of the court. Instead of withdraw, as in the case of the Commission, the Constitution at S94 (c) states that the DPP can discontinue not only the matter begun by himself, as with any other person or authority, but may discontinue proceedings began by others.

[154] The Constitution recognizes the right of the ordinary citizen to bring criminal prosecution; this right is well hallowed in practice, particularly amongst rural folk. The Constitution did not confer this right, which existed prior to the coming into being of the Constitution and is as entrenched as those provisions that accord the DPP the right to commence proceedings. The interpretation that is urged by the Claimants would have the effect of encroaching on the rights, long enjoyed, of the private citizens, to effect an arrest and to institute criminal proceedings. It is a recognized rule that legislation should be interpreted, if possible, so as to respect those rights, and if there is an ambiguity, the construction which is in

favour of the freedom of the individual, should be adopted. See **Walsh v Secretary of State for India** (1863) 10 H.L.C. 367, per Lord Westbury.

[155] In **R v Rollins** [2010] UKSC 39, the appellant appealed against the dismissal of his appeal from his conviction for money laundering contrary to the Proceeds of Crime Act 2002 (POCA). The appellant contends that the FSA powers to prosecute criminal offences are limited to the Financial Services and Marketing Act 2000 (FSMA), which did not include offences under POCA, such as the insider trading offences for which he was convicted. He doesn't challenge the conviction, since they were expressly provided for in the law. He does raise a challenge to the money laundering which is not provided for expressly under the FSMA. The Supreme Court held that the FSA's powers were not limited in that way and that it had the power to bring prosecutions in respect of other persons.

[156] The court in **Rollins** found that before the enactment of FSMA, the FSA could initiate criminal proceedings for any offence which fell within its objects. The court approved the dicta in **Gouriet v Union of Post Office Workers** [1977] 3 All ER 70, that every person has the right to bring a private prosecution. In Jamaica, that right has been expressly preserved by S2 of the Criminal Justice (Administration) Act. Nothing in the definition of *other person*, in section 2 excludes statutory authority. Sir John Dyson, who delivered the judgment on behalf of the court, referred to **Broadmoor Hospital Authority v Robinson** [2000] Q.B 775 at (25), where Lord Woolf said;

The statutes only rarely provide that a particular public body may institute proceedings in protection of specific interests. It is usually a matter of implication. If a public body is given responsibility for performing public functions in a particular area of activity, then usually it will be implicit that it is entitled to bring proceedings seeking the assistance of the courts in protecting its special interests in the performance of those functions.

[157] The Commission has always had the right to bring prosecutions subject to statutory restrictions. The fact that it is not expressly stated in the Act is not an

irregularity. The Act gives the Commission the responsibility of performing certain public functions as it pertains to the investigation of complaints and incidents that concern the members of the Security Forces. These responsibilities were assigned the Commission against a background where the previous legislative framework led to complaints of continued human rights abuses. In **Rollins**, Sir John Dyson SCJ notes at paragraph 20 of the judgment, “that the technique usually employed by the legislature to indicate an intention to limit the class of persons who may prosecute a particular offence is the obvious one of stating expressly that a particular offence may *only* be prosecuted by a specified person or persons”.

[158] There are many rational reasons for Parliament not restricting the Commission’s right to prosecute offences their investigations lay bare; paramount among which is that the Commission had been given greater control over the investigatory process. It would have been absurd and defeating of the steps that Parliament had taken, to restrict by implication the Commission’s right to prosecute. I find that the practice, such as existed between the DPP and persons against whom allegations were made to have the DPP rule on the matter, insufficient to disturb the right of the Commission to prosecute.

Is likely to be contravened

[159] The Respondents submitted in their written submissions, that there was no issue joined between the Claimants and the first Defendant. That the Claimants’ claim was grounded on the circumstances surrounding the charging of Malica Reid by the first Defendant for murder. The DPP has terminated the proceedings brought by the first Defendant against Malica Reid. Malica Reid’s claim, according to the first Defendant, has been struck out and the DPP has instituted her own proceedings. The appeal brought by Malica Reid has been withdrawn. It was further submitted that since Malica Reid, no other person has been arrested and charged. There are no allegations that any of the Claimants’ members are being investigated. Neither has any member of the security forces been threatened

with any arrest. The Claimants have merely come to the court to say that, “INDECOM is alleging it has power to arrest and prosecute police officers. We are police officers and we fear that one day we might be arrested by INDECOM”. It was further submitted that any relief granted would be pointless.

[160] Mr. Small submitted further that the declarations sought do not raise any constitutional issues. That the court is being asked to determine whether the Act confers the power of arrest. It’s a standard question of statutory interpretation that need not engage the constitutional court. The third issue is whether Regulations 31 and 33 of the Police Service Regulations should be observed before police officers are charged. This also involves only an interpretation of the Regulations. In any event, there are alternative remedies available to the Claimants. The question before the court is academic; there has been no repetition of any police officer being charged since the Malica Reid case.

[161] The Judicature (Constitutional Redress) Rules No. 2 1963, require that complaints that constitutional rights “are likely to be contravened”, must be commenced by writ and not motion. The failure of the Claimants to comply with this procedural requirement caused the applicant to restructure their claim in the matter of **Grant v DPP and the Attorney General**. In that case, the appellants had argued before the Supreme Court that they were unlikely to get a fair trial due to massive pre-trial publicity. The court had before it copious evidence of the prejudicial effect of the massive publicity that had been given, described by Smith CJ, as, “I find that the evidence presented overwhelmingly establishes that there has been pre-trial publicity of the widest dissemination.” It is important to note that in **Desmond Grant’s** case, a bill had been tendered for a trial to be held. In the case at bar, the factual substratum is challenged as being academic and hypothetical. Mr. Small invited this court to say that it being a case already adjudicated on was being sought to be re-litigated by the claimants, and in those circumstances had invited the court to have the matter dismissed on a preliminary objection, that the DPP had taken control of the proceedings, therefore any relief would be pointless.

[162] I would hesitate to determine an application for constitutional redress on such grounds, and can do no more than adopt the reasoning of the Learned Chief Justice Smith, who at page 239 h said;

The preliminary objection was overruled. In my opinion, an applicant for redress under s25 should not be sent away without hearing application unless it manifest appears that there is no merit in his application, or that adequate means of redress are, or have been otherwise available.

[163] Having said that, there is no evidence by any member of the several security organizations that raise the likelihood of an arrest or charge beyond mere speculation. The claim is previous and premature. In **Desmond Grant**, White J, at first instance, met the application in the following way.

In my view, it is previous and premature to suggest that the pre-trial publicity will have had such an effect that a Judge and jury of twelve persons cannot be found in Jamaica to give careful and objective audition to the evidence, and to earnestly and conscientiously deliberate the issues that will be raised there and so give a true verdict according to the evidence. I reject any such notion as untenable, and as displaying a most regrettable lack of confidence in, and respect for, the institutions established to this end.

[164] To my mind his comments are apposite. In the **Director of Public Prosecutions v Patrick Nasralla (Jamaica)** [1967] 2 A.C. 238, Lord Devlin, in delivering the judgment of their Lordships Board said at pages 247-248,

To obtain redress under Chapter III of the Constitution the applicant has to show that his fundamental rights have been or are likely to be infringed and he cannot show this if his whole case rests on a procedural fault that could easily be put right . . . This Chapter, as their Lordships have already noted, proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall, in any matter which the Chapter covers derogates from the rights which at

the coming into force of the Constitution the individual enjoyed. Accordingly Section 26.8 in Chapter III provides as follows:-

'Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions.'

- [165] The Claimant's fear that a public body may have him arrested and charged as was done to Malica Reid, constitutes the reason for this constitutional challenge. S19 (4) of the Jamaican Constitution provides that the Supreme Court may decline to exercise its powers, if it is satisfied that adequate means of redress for the contraventions alleged are or have been available to the persons concerned under any other law. If it is that the Commission has acted out with its jurisdiction, it would be susceptible to a challenge that its actions are ultra vires the statute that has established it. The Claimant would also have the prerogative writs of certiorari, mandamus and prohibition at their disposal. Apart from judicial review of the actions of the Commission, the Claimants could pursue civil remedies for false imprisonment, etc.
- [166] Their Lordships Board, in **Kemrajh Harrikissoon v Attorney General of Trinidad and Tobago**, [1979] UKPC 3, Lord Diplock, delivering the judgment of the Board of the Privy Council, said;

The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened is an important safeguard of those rights and freedoms, but its value will be diminished if it's allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating applications to the High Court under section 6 (1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the Court as being made solely for the purpose of avoiding the necessity of

applying the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.

[167] Between the parties, there has been no great divergence on the law as it concerns the rights of the private prosecutor as against the public or state prosecutor or the right of the ordinary citizen to arrest and charge. Both parties are agreed that these rights existed prior to the coming into effect of the Constitution. The Commission has many peculiarities of the private prosecutor, despite it being a public body with clear public law functions. In England, organizations such as Royal Society for the Prevention of Cruelty to Animals (RSPCA) often bring prosecutions in their own right. The Commission similarity to the private prosecutor stems from its restricted functions. It is focused substantially on “the investigation of incidents and complaints” involving members of the Security Forces. Nonetheless, there is a public law duty imposed by the statute that established the Commission. In England, the DPP is obliged to issue a Code for Crown Prosecutors. That Code enshrines the direction that although there may be a public interest factors against prosecution in a particular case, often, the prosecution should go ahead and those factors placed before the court at sentencing.

[168] In **Scopelight Limited and Others v Chief of Police for Northumbria and Another** [2010] 2 All ER 431. Police had seized items from the property of the appellants. These items were handed over to a private prosecutor, FACT, that represented copyright holders, whose data it was alleged was downloaded by the appellants in breach of the copyright laws. On an application for return of the property by the appellants, the trial judge ordered the return of the property. On appeal from that decision, the court examined the role of the private prosecutor as against the public prosecutor. Counsel for the appellants had submitted that the DPP and the Crown Prosecution Service (CPS) are the “ultimate arbiter and determinative of the public interest; the CPS, having decided not to institute a prosecution, it cannot be in the public interest for the case to be prosecuted and thus it cannot be necessary for the police to retain documents to use for a

prosecution.” (See paragraph 31). That argument was solidly rejected. The Court of Appeal considered the decision in **R v DPP, ex p Duckenfield, R v South Yorkshire Police Authority, ex p Chief Constable of the South Yorkshire Police** [1999] 2 ALL ER 873, [2000] 1 WLR 55. Levenson LJ, with whom the other judges concurred, said at paragraph 36,

That there was no presumption that the DPP should normally takeover and discontinue a private prosecution where there has been no prior inertia, partiality or improper action by the public prosecutor or where he would not himself have instituted proceedings in accordance with the code, and that the DPP stated policy with the statutory, objects proper and lawful. Thus there are, or at least may be, circumstances in which it is perfectly consistent for the DPP to decide not to prosecute yet, for him to decline to decide that a private prosecution is not in the public interest so as to justify his interference with it, in other words, he does not consider himself (or, in less significant cases, the CPS) the sole arbiter of the public interest and neither does the court.

And at paragraph 39, inter alia;

Thus, it is in the public interest that other bodies should be able to investigate and prosecute because of the strain that the CPS would otherwise face, it is equally difficult to see why a prosecutor should not be able to use material seized by the police . . . In my judgment, there is no basis either in the statutory framework, the authorities or policy to justify the proposition that a decision by the CPS not to prosecute conclusively determines that a prosecution is not in the public interest.

[169] The court referred to the role of the private prosecutor, and Lord Wilberforce comments “that the right to bring a private prosecution is valuable constitutional safeguard against inertia or partiality on the part of authority.” Lord Diplock thought the right, “a useful constitutional safeguard against capricious corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law”.

[170] For these reasons, I have refused the declarations and the injunctive reliefs sought. I have had the benefit of reading the judgments of my brothers, Marsh J, and Fraser J and agree with the views therein.

FRASER J

THE CREATION OF INDECOM

[171] “An Act to repeal the Police Public Complaints Act, to make provision for the establishment of a Commission of Parliament to be known as the Independent Commission of Investigations to undertake investigations concerning actions by members of the Security Forces and other agents of the State that result in death or injury to persons or the abuse of the rights of persons; and for connected matters.” That is the full text of the commencement of the Independent Commission of Investigations Act, commonly referred to as the INDECOM Act, which came into force on April 15, 2010. For the purposes of this judgment it will be referred to as “the Act”.

[172] The Act is the latest legislative attempt by the Government of Jamaica to create an effective and credible mechanism for the investigation of alleged abuses of the rights of persons by Security Forces and other agents of the State. A previous legislative attempt had led to the creation of the Police Public Complaints Authority (PPCA) under the Police Public Complaints Act, now repealed by the Act. The Bureau of Special Investigations (BSI) was also created within the Jamaica Constabulary Force to address concerns in relation to alleged abuses by members of the police force.

[173] Judicial notice is taken of the fact that unfortunately, neither the PPCA nor the BSI enjoyed satisfactory levels of public confidence in their effectiveness. The hope and expectation was and is that INDECOM will enjoy far greater success than the agencies it replaced or supplements, in effectively investigating alleged abuses, which fall under its remit.

THE BACKGROUND TO THE CLAIM

[174] The supplemental joint affidavit of the claimants filed October 10, 2011 outlines the background to the claim which in summary is as follows:

- i. On Thursday November 4, 2010 at about 9:30 a.m. Corporal Malica Reid was a member of a police team on special duty in Negril in the Westmoreland Police Division.
- ii. During that duty it is alleged by Corporal Reid that his police party came under fire from a group of 4 or 5 men. The gunfire was returned by the police after which a man was found suffering from gunshot wounds from which he died.
- iii. Investigations into the incident were commenced by INDECOM and on February 25, 2011 Corporal Reid was arrested and charged by an investigator of INDECOM for the murder of Frederick Mikey Hill, who was allegedly killed in the shooting incident in Negril on November 4, 2010.
- iv. The Director of Public Prosecutions subsequently entered a *nolle prosequi* terminating the charges brought against Corporal Reid by the investigator from INDECOM and herself laid a charge of murder against Corporal Reid. This [re-laid] murder charge is pending before the Home Circuit Court.
- v. Corporal Reid had obtained leave to seek judicial review to obtain certiorari and other remedies against the Commissioner of INDECOM, the first defendant herein, but his claim was struck out because of a procedural error on the part of his attorneys-at-law.

[175] It should be noted that in the affidavit of the first defendant he details the “procedural error” that led to the striking out of Corporal Reid’s claim. He avers that, after being granted leave Corporal Reid filed the claim within the required period, but failed to file an affidavit in support of the claim. That resulted in the claim being struck out. The first defendant’s affidavit further indicates that Corporal Reid subsequently filed a Notice of Appeal and Notice of Application for Permission to Appeal in the Court of Appeal. When that application was heard,

the Court of Appeal declined jurisdiction holding that the application should have first been made to the Supreme Court.

THE CLAIM

[176] In this action the claimants are acting on behalf of themselves and in a representative capacity on behalf of all others who fall under the umbrellas of their respective police bodies (Federation or Associations). The claim is framed against the background of the fact that an investigator from INDECOM had charged Corporal Reid for murder. The claimants in their joint affidavit aver that their duties and the duties of the members of their federation or associations are such, that they are expected to be involved in circumstances, giving rise to the likelihood of them being actually or purportedly arrested and charged by the first defendant, and/or his servants or agents.

[177] Seeking to forestall that possibility the claimants brought this action by Fixed Date Claim Form (FDCF) for the following reliefs:

- i. A Declaration that section 20 of the Act, construed against the provisions of sections 13 (3) (a), 14 and 19 of the Constitution, does not confer on the [First] Defendant, the power to arrest and/or charge anyone at all for any criminal offence, or for the offence of murder, or for any felony, and neither does the common law.
- ii. A Declaration that section 20 of the Act, construed against the provisions of sections 13 (3) (a), 14 and 19 of the Constitution, does not confer on the [First] Defendant, and neither does the common law, the power to arrest and/or charge a member of the Jamaica Constabulary Force, or of the Island Special Constabulary Force, or any District Constable, for any criminal offence, or for the offence of murder, or for any felony arising from circumstances that occur in the execution of their duties, in the absence of a ruling from the Director of Public Prosecutions (hereinafter called "the DPP") that the member be so charged.

- iii. A Declaration that under the Police Services Regulations 1961, sections 31 and 33, now in force under and pursuant to the Constitution, the [First] Defendant cannot lawfully charge any member of the Jamaica Constabulary Force, or of the Island Special Constabulary Force, or any District Constable, for any criminal offence, or for the offence of murder, or for any felony, arising from circumstances that occur in the execution of their duties, in the absence of a ruling from the Director of Public Prosecutions that the member be so charged.
- iv. A Declaration that any act by the [First] Defendant to charge any member of the Jamaica Constabulary Force, or of the Island Special Constabulary Force, or any District Constable, for any criminal offence, or for the offence of murder, or for any felony, arising from circumstances that occur in the execution of their duties, in the absence of a ruling from the DPP that the member be so charged, would be likely to contravene the rights of such a member under sections 13 (3) (a) , 14 and 19 of the Constitution in that it would deprive such member of a Legitimate Expectation, derived from the practice and custom of the DPP, that such member would not be so charged in the absence of such ruling.
- v. A Declaration that any act by the [First] Defendant to charge any member of the Jamaica Constabulary Force, or of the Island Special Constabulary Force, or any District Constable, for any criminal offence, or for the offence of murder, or for any felony, arising from circumstances that occur in the execution of their duties, in the absence of a ruling from the DPP that the member be so charged, would be likely to contravene the rights of such member, under sections 14 and 19 of the Constitution, not to be unlawfully deprived of the member's personal liberty.
- vi. Interim Relief by way of an Injunction to restrain the [First] Defendant from arresting and/or charging, and/or from in any manner to interfere with or restrict the personal liberty of any member of the Jamaica Constabulary

Force, or of the Island Special Constabulary Force, or of the Rural Police, for or on account of any criminal offence, or for the offence of murder, or for any felony, arising from circumstances that occur in the execution of their duties, in the absence of a ruling from the DPP that the member be so charged.

vii. All necessary and consequential directions.

[178] During the hearing in respect of the first two declarations sought, counsel for the claimants withdrew the reference to the common law.

THE SUBMISSIONS *IN LIMINE*

The Submissions of Counsel for the Defendant

A The issues raised are academic and hypothetical

[179] Counsel for the first defendant in written and oral submissions raised three points *in limine* on the basis of which the court was invited to decline to consider the claim. The first challenge was that the claim brought was merely academic and hypothetical. Counsel submitted that there was currently no issue between the claimants and the first defendant that could constitute the basis of any claim in this matter before the court. This was because the action brought by Corporal Reid had ended and the Director of Public Prosecutions (DPP) had terminated the proceedings commenced by officers of the first defendant against Corporal Reid and instituted her own proceedings against him.

[180] Further, counsel directed the court's attention to the first defendant's affidavit where he disclosed that, contrary to the assertion of the claimants in their joint affidavit, since Malica Reid, INDECOM had not charged anyone with a criminal offence. He pointed out that the claimants had given no evidence that they or some of their members were being threatened with arrest or were even being investigated by INDECOM. The claimants had not alleged any breach of their rights nor illustrated any ground for their contention that there was likelihood that

their rights would be breached. There was therefore counsel submitted, no basis — no factual substratum to substantiate a request for the court to grant constitutional relief.

[181] Counsel cited Lord Diplock in ***Gouriet v Union of Post Office Workers*** [1978] A.C. 435 at 501 where the learned law lord stated that:

...the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else.

[182] This dicta, counsel pointed out, was applied in the Jamaican case of ***Dorothy Lightbourne v Christopher Michael Coke and Joseph Mayer Matalon (President of the Private Sector Organisation of Jamaica) and Portia Simpson - Miller*** Claim No. 2010 HCV01860 (May 11, 2010).

[183] Counsel also cited ***Regina ex parte Livingston Owayne Small v The Commissioner of Police and The Attorney General*** 2003HCV2362 (September 18, 2006). This was a case in which a male student constable of police in training was dismissed by the Commandant after being caught *in flagrante delicto* with a female student. By way of judicial review the dismissed student sought an order of certiorari to quash the Commandant's decision and an order of mandamus directing the Commandant or the Commissioner of Police to restore him to being a student constable. One of the grounds on which the application was refused was that the class that the applicant had been a member of at the time of the application had long since graduated. Campbell J opined at paragraph 12 of the judgment that, "*The Court is reluctant to grant pointless relief*".

[184] In summary on this point, counsel advanced that the claimants had not properly brought themselves before the court, as, in the circumstances outlined, the claim was merely academic and hypothetical. Therefore in law, there was no basis on which the court could grant the reliefs sought.

B The matters for determination in the application do not raise constitutional issues but are essentially questions of statutory interpretation or interpretation of the common law on which any court can pronounce

[185] Under this second head counsel submitted that none of the declarations sought raise constitutional issues. All the court was being asked to do was to interpret the Act or the common law, which were standard questions for any court. That did not require the convening of the Constitutional Court. He maintained that the claimants indicating in paragraphs 4.1 and 4.2 of the FDCF that section 20 of the Act should be “construed against the provisions of sections 13 (3) (a), 14 and 19 of the Constitution” did not add anything to the basic interpretive function which the court was being asked to undertake. The claim was therefore merely attempting to elevate to constitutional significance the conduct of the ordinary functions of all courts.

[186] In respect of paragraph 4.3 of the FDCF counsel advanced that all that is required is a simple interpretation of the Police Service Regulations of 1961 which the claimants maintain are in force pursuant to the Constitution. There was no requirement for constitutional interpretation but rather just an interpretation of what the Regulations say.

[187] Similarly, concerning paragraph 4.4 of the FDCF all that was required was a simple interpretation by a court to determine whether or not those Regulations give rise to a legitimate expectation that any member of the Jamaica Constabulary Force, the Island Special Constabulary Force or any District Constable would not be charged for any criminal offence arising from circumstances that occur in the execution of their duties, in the absence of a ruling from the DPP. Counsel indicated he was hard pressed to appreciate how, as claimed in paragraph 4.4, a constitutional right could be engaged by a legitimate expectation that had its genesis outside the constitution.

C *If there was a breach of any rights, which is not admitted, there exists adequate alternative remedies and the court should therefore decline to provide redress*

[188] Counsel submitted that there exists “alternative remedies” for the claimants in respect of the claims they brought to the Constitutional Court. He referred to section 19(4) of the Constitution which provides:

Where any application is made for redress under this Chapter, the Supreme Court may decline to exercise its powers and may remit the matter to the appropriate court, tribunal or authority if it is satisfied that adequate means of redress for the contravention alleged are available to the person concerned under any other law.

[189] Notwithstanding the first defendant's contention that there was no basis for the claim, counsel advanced that, in light of section 19(4), if it could properly be pursued, it would have to be in the form of a claim for declarations as to the interpretation of the Act, without resort to the Constitutional Court.

[190] Counsel further contended that having regard to the overriding objective of the Civil Procedure Rules 2002 (CPR) that, if, which was not conceded, the court found there was merit to the claim, the court ought to remit the instant matter to the appropriate court, as that would involve less judicial time and resources. Counsel continued by noting that the overriding objective mandates the court to ensure that it allots to each case "*an appropriate share of the court's resources, while taking into account the need to allot resources to other cases*" (CPR 1.1(2) (e)).

[191] Therefore having regard to the strain on the court's resources, to allot three (3) judges to hear the instant claim in the Constitutional Court for a period of three (3) days, when the matter could have been brought as an ordinary claim, was not the best use of judicial time and did not further the overriding objective.

[192] Counsel therefore submitted that on the three bases outlined, the court should dispose of the matter and decline to hear the substantive application.

The Submissions of Counsel for the Claimants in Response

[193] Counsel for the claimants Mr. Donald Gittens pointed out that the joint affidavit of the claimants had in paragraph 10 set out the factual background to the claim so far as one existed. He maintained that the outcome of the Malica Reid case did not derogate from the right of the claimants to approach the constitutional court. He contended that the course of conduct pursued by the Commissioner of INDECOM (the Commissioner) in the Malica Reid case had put the claimants and their members in fear of similar action being taken against them. It was this fear that led them to the constitutional court.

[194] Counsel framed the essential question to be answered in response to the *in limine* submissions in terms of whether it was reasonable for the claimants to hold the fear they had taken before the court, based on the course of conduct pursued by the Commissioner in the Malica Reid case. Counsel proposed the answer in the affirmative and drew support for that position from what the Commissioner omitted to state in his affidavit. Counsel pointed out that faced with the expressions of the claimants fear as posed in the declarations sought in the FDCF, and as supported by their reliance on the course of conduct adopted in the Malica Reid case, the Commissioner did not give any undertaking to refrain from so proceeding in the future. Counsel summarised his interpretation of the position taken by the Commissioner thus: *I agree with the history of the Malica Reid case; I do not admit that I did anything wrong in that case, and I cannot say I would not do again what I did in that case.*

[195] Counsel submitted on that basis, it could not be successfully argued that the claim would be academic unless it could be shown that the Commissioner either had adopted the same course of conduct as he did in relation to Malica Reid's case or intended to do so again. Counsel supported his contention by arguing, that where there are cases in which intentions and possible future actions become the subject of litigation, declarations of intent and undertakings to refrain from action complained of, are usually sufficient to terminate such proceedings

satisfactorily. The absence of an undertaking from the Commissioner not to pursue the conduct sought to be prohibited by this claim, was therefore telling and significant.

[196] Counsel however went a step further. He maintained that even if the Commissioner had made such a declaration of intent or had given any such undertaking, the court would still not have been precluded from hearing the claim and making the declarations sought, if it so deemed fit. He submitted that a declination from so doing would result in the unsatisfactory situation where a law that had been constitutionally challenged was left “on the books” in the same state in which it was challenged without any pronouncement on the challenge, just because the defendant undertook not to act under it.

[197] Counsel maintained that there were three circumstances in which constitutional redress could be sought: past; present and continuing; and future circumstances. Counsel argued that the claimants’ case fitted into the category of redress sought based on a fear that in the future the Commissioner was likely to breach their constitutional right not to be unlawfully deprived of their liberty. In that regard the material from the Malica Reid case had been used only for its historical value to provide a context for the fear held by the claimants.

[198] Counsel advanced that it was the contention of the claimants that the Act did not confer the power of arrest claimed by the Commissioner. Therefore in so far as the Commissioner or his agents might seek to exercise the power of arrest pursuant to the Act those actions would be unconstitutional. Counsel however further contended that if the Act indeed conferred the powers claimed by the Commissioner, then the Act was unconstitutional in that it ignored policies and procedures that had enured over a significant period of time to the benefit of the claimants: namely the submission of files to the DPP for a ruling with a charge only being preferred where the DPP ruled that charges be laid by the police. That, counsel submitted, was the basis on which the claim for a breach of

legitimate expectation was based. A legitimate expectation which had its foundation in the Police Service Regulations.

[199] Counsel argued that from both practical and “Rule of Law” points of view a dangerous situation could arise if a policeman knew that in performing his duties he was liable to be arrested and charged without the oversight or input of the DPP that he had grown to expect. Counsel cited a part of the factual substratum outlined in the affidavit of the claimants. In particular, where it was stated that the claimants were unaware of any situation in which any of the members of their Federation or Associations was arrested and charged for an alleged offence that arose in the performance of their duties, without a ruling from the DPP.

[200] Concerning the question of alternative remedies, counsel noted that section 19 of the Charter of Rights is so structured that even if a claim were included in a constitutional matter that should have been brought elsewhere the claim could still be addressed in the Constitutional Court. Further counsel submitted that section 19 required a court to be satisfied that there were alternative remedies before the matter could be remitted elsewhere. He submitted it was for counsel for the first defendant to indicate what those alternative remedies were and he had not done so.

[201] Counsel concluded his submissions by asking the court to find that as constituted the court had the jurisdiction to entertain the claim and therefore should refuse the points taken *in limine*.

The Submissions of Counsel for the Second Defendant

[202] Ms. Jarrett for the Attorney General’s Chambers submitted that the issue was not academic. Though the Malica Reid matter was not before the court, as the claimants were acting on behalf of themselves, and in representative capacities for persons part of the security forces as defined by the Act, the larger issues articulated in the first declaration sought in the FDCF made the claim appropriate.

[203] Counsel indicated that it would have been desirable for there to have been a more fulsome affidavit to trigger the third element of the mechanism in Section 19 (1) of the Charter of Rights. However based on the evidence in paragraph 8 of the joint affidavit dated October 10, having regard to Malica Reid's arrest and charge, the claimants and those they represent were persons whom INDECOM could acting under section 20 of the Act likely seek to arrest and lay charges against. Therefore the claimants and those they represent could be directly affected by any power the Commissioner sought to exercise pursuant to section 20 of the Act.

[204] Counsel however noted that based on what was outlined in paragraph 5.2h of the joint affidavit of the claimants, the Commissioner in the Malica Reid case purported to act under common law powers. Counsel submitted that even so there was a very live issue which was not academic. If the Act does not give the Commissioner the power of arrest, would he be breaching the Constitution if he sought to exercise a common law power of arrest to support his statutory mandate?

[205] Counsel submitted that had the legislature intended the Commissioner to have the power of arrest it would have expressly given that right, as the power of arrest takes away a constitutional right to liberty, which is a fundamental right under the Charter of Rights.

[206] On the question of alternative remedies, counsel noted that the new Section 19 (4) of the Charter of Rights which replaced the old section 25 (2) of the Constitution was more permissive. The old section 25 (2) provided the court "shall not" grant a constitutional remedy if they was alternative means of redress while section 19 (4) states that where an application was made for constitutional redress the court "may decline" to grant relief if there was adequate alternative means of redress. Therefore counsel argued the "alternative remedy principle" was not as strong under the new dispensation. Counsel maintained that it was a matter of public interest for it to be determined whether or not the Commissioner

and the investigative staff of INDECOM had powers of arrest under the Act and/or under the common law. Further it also needed to be determined whether any such power was constitutionally valid. Counsel therefore submitted that the claim should properly be addressed by the constitutional court.

[207] Counsel concluded her submissions by indicating that she supported the position of the first defendant in resisting the second declaration sought, as she did not see a statutory or other basis requiring a prior ruling of the DPP before members of the police force could be charged.

[208] Concerning the effect of the Police Service Regulations counsel submitted that they would bind the Police Service Commission but not INDECOM.

[209] Counsel declined to make any submissions in relation to the parts of the claim which alleged that section 20 of the Act conflicted with powers of the DPP and requirements under the Police Service Regulations.

Further submissions on Legitimate Expectation

[210] Additional detailed submissions were by permission made in relation to the claim of a breach of constitutional rights that were founded on legitimate expectation. Those submissions were adopted and expanded upon during the hearing of the substantive application. For convenience, those submissions will all be addressed during the review of the substantive application.

IS THE FACTUAL SUBSTRATUM SUFFICIENT TO GROUND THE CLAIM?

[211] It is accepted that not all the facts are before the court concerning the Malaica Reid case which is the genesis of this claim. As indicated by counsel for the claimants their claim is based on the historical foundation of the action taken by the Commissioner and other agents of INDECOM in that case. Further, also on the fact that there has been no clear statement from the Commissioner that similar action would not be taken in the future. There is common ground and no

dispute as to those facts. The dispute concerns whether or not the Commissioner and other agents of INDECOM were legally authorized to act as they did and whether they could legally carry out similar actions in the future.

[212] The key points in respect of which the court is being asked to rule are clear. Does the conferral of the status of a constable include the power to arrest pursuant to the Act? Do the officers of INDECOM possess powers at common law to arrest and charge? Though counsel for the claimants submitted that the court was not being asked to pronounce on the common law, the common law position will necessarily have to be considered in order for the court to assess the extent of the statutory power bestowed. If the Act does not give the power to arrest would a reliance on the common law to supplement statutory powers be constitutional?

[213] Therefore the history relied on, I find, provides a sufficient factual basis to ground a legitimate, real and not fanciful fear that the claimant or their members might be subjected to such future actions by the Commissioner and other agents of INDECOM.

[214] The test in ***Gouriet*** is therefore satisfied as the claim seeks to declare “*contested legal rights, subsisting or future, of the parties represented in the litigation*”. Further it cannot be said as in ***Regina ex parte Livingston Owayne Small*** that this claim is about “*pointless relief*”. If the claimants are correct, the declarations and injunctions sought will prevent the first defendant from acting in future as he did in the Malica Reid case. If the claimants are incorrect, the clarification of the law will guide INDECOM and the claimants as to the powers that INDECOM may legitimately exercise.

THE RULING ON THE POINTS *IN LIMINE*

[215] Having heard the arguments on the points *in limine* the following was the ruling of the court in respect of each point:

i. ***The issues raised are academic and hypothetical as there is currently no issue between the claimants and the first defendant.***

- There is an issue joined between the claimants and the first defendant. The claimants who appear for themselves and in representative capacities on behalf of members who fall within the definition of the security forces in the INDECOM Act, are persons likely by virtue of alleged unlawful incidents that may occur as they carry out their role and function as security officers, to be investigated and arrested by INDECOM without the prior ruling of the DPP. Such action the claimants allege would breach their constitutional rights which is an issue properly for the determination of this court.

ii. ***The matters for determination in the application do not raise constitutional issues but are essentially questions of statutory interpretation or interpretation of the common law on which any court can pronounce.***

- Issues have been raised as to whether constitutional rights of the claimants are likely to be breached by virtue of the exercise of a statutory power or a power at common law in the absence of a ruling by the DPP, to which the claimants submit they are entitled, pursuant to the doctrine of legitimate expectation. Sufficient has been raised before this court to require consideration of these issues.

iii. ***If there is a breach, which is not admitted, there exists alternative remedies and the court should therefore decline to provide redress.***

- If a breach of the claimant's rights is established, the new Charter of Rights having under section 19(4) of the Constitution enhanced the rights of the claimants when compared to the former section 25(2) which it replaced, even if there are alternative remedies, the court does not have to decline jurisdiction. It is an appropriate case for the court's consideration concerning whether or not any

constitutional rights have been or are likely to be breached as alleged, and if so, whether this court should itself provide redress.

[216] The submissions *in limine* therefore failed and the substantive application proceeded.

THE SUBSTANTIVE APPLICATION

A. DO OFFICERS OF INDECOM HAVE POWERS OF ARREST, CHARGE AND PROSECUTION?

The Status of a Constable and the Power to Arrest and Charge

The Submissions of Counsel for the Claimants

[217] Counsel submitted that one of the most important consequences of the constitutional protection from arbitrary arrest and deprivation of liberty is that a private citizen is not empowered to arrest another citizen and be protected from civil liability if the arrest turns out to be wrongful or mistaken. On the other hand, a constable is so protected unless malice or absence of probable cause is established.

[218] Counsel contended that the status of constable conferred by section 20 of the Act was limited to giving effect to sections 4, 13 and 14. Those sections or aspects of those sections so far as deemed relevant, are set out below for convenience.

Section 4 provides:-

(1) "Subject to the provisions of this Act, the functions of the Commission shall be to—

- (a) conduct investigations, for the purposes of this Act;
- (b) carry out in furtherance of an investigation and as the Commission considers necessary or desirable—

- (i) inspection of a relevant public body¹ or relevant Force², including records, weapons and buildings;
 - (ii) periodic reviews of the disciplinary procedures applicable to the Security Forces³ and the specified officials⁴;
- (c) take such steps as are necessary to ensure that the responsible heads⁵ and responsible officers⁶ submit to the Commission, reports of incidents and complaints concerning the conduct of members of the Security Forces and specified officials.
- (2) In the exercise of its functions under subsection (1) the Commission shall be entitled to—
- (a) have access to all reports, documents or other information regarding all incidents and all other evidence relating thereto, including any weapons, photographs and forensic data;
 - (b) require the Security Forces and specified officials to furnish information relating to any matter specified in the request; or
 - (c) ...
 - (d) take charge of and preserve the scene of any incident.
- (3) For the purpose of the discharge of its functions under this Act the Commission shall, subject to the provisions of this Act, be entitled—
- (a) upon the authority of a warrant issued in that behalf by Justice of the Peace—

¹ Per section 2 “relevant public body” means the public body—

(a) Involved in an incident; or

(b) In relation to which a complaint is made, or an investigation is carried out under this Act;

² Per section 2 “relevant Force” means any of the Security Forces—

(a) involved in an incident; or

(b) in relation to which a complaint is made, or an investigation is carried out, under this Act;

³ Per section 2 “Security Forces” means — (a) the Jamaica Constabulary Force; (b) the Jamaica Defence Force; (c) the Island Special Constabulary Force; (d) the Rural Police; and (e) Parish Special Constables.

⁴ Per section 2 “specified official” means — (a) a correctional officer; (b) such other public officer, as the Minister may by order specify, being a person upon whom is conferred any of the powers, authorities and privileges as are conferred by law on a member of the Jamaica Constabulary Force.

⁵ Per section 2 “responsible head” means the head of a relevant Force.

⁶ Per section 2 “responsible officer” means the officer in charge of a relevant public body.

- (i) to have access to all records, documents or other information relevant to any complaint or other matter being investigated under this Act;
 - (ii) to have access to any premises or other location where the Commission has reason to believe that there may be found any records, documents or other information referred to in subparagraph (i) or any property which is relevant to an investigation under this Act; and
 - (iii) to enter any premises occupied by any person in order to make such enquiries or to inspect the documents, records, information or property as the Commission considers relevant to any matter being investigated under this Act; and
- (b) to retain any records, documents or other property if, and for so long as, its retention is reasonably necessary for the purposes of this Act.
- (4) For the purposes of subsection (3), the Commission shall have power to require any person to furnish in the manner and at such times as may be specified by the Commission, information which, in the opinion of the Commission, is relevant to any matter being investigated under this Act.

Section 13 provides:

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

Section 14 provides:

(1) The Commission shall, for the purpose of deciding the most appropriate method of investigation, make an assessment of —

- (a) the seriousness of the case;
- (b) the importance of the investigations;
- (c) public interest considerations;

- (d) the particular circumstances in which the incident occurred.
- (2) The Commission may manage, supervise, direct and control an investigation carried out by the Security Forces or the relevant public body in relation to an incident, where in the opinion of the Commission, it is necessary to direct and oversee that investigation.
- (3) Where the Commission takes action under subsection (2), it shall notify the responsible head or the responsible officer, as the case may be, and direct that no action shall be taken until the Commission has completed its investigation.

Section 20 provides:

For the purpose of giving effect to sections 4, 13 and 14, the Commissioner and the investigative staff of the Commission shall, in the exercise of their duty under this Act have the like powers, authorities and privileges as are given by law to a constable.

[219] Counsel submitted that nowhere in sections 4, 13, 14 or 20 was the power to arrest or charge conferred. Counsel further maintained that section 20 of the Act does not confirm the common law right to charge as a private citizen. Rather it gave the Commissioner and the investigative staff of INDECOM the status of a constable for expressly limited purposes. They however had misconstrued the power given as a constable to include the power to arrest and charge.

[220] Counsel maintained that on the contrary, an examination of sections 4, 13, 14 and 20 of the Act made it clear that section 20 did not confer any powers of arrest or charge on the Commissioner and the investigative staff of INDECOM. Counsel relied on the maxim *expressio unius est exclusio alterius* which translated is the expression of one thing is the exclusion of another—a cardinal principle of and recognised aid to statutory interpretation. He argued that Parliament having deliberately legislated, the power to arrest should not be read into the Act by the Court; especially as the power falls within the realm of the

criminal law and would have the effect of impinging on the fundamental rights not to be unlawfully deprived of liberty and to exercise freedom of movement. He maintained that for the power of arrest to be granted it would have to be expressly, clearly and unambiguously given and not left to implication. He relied on dicta from Lord Diplock in ***R v IRC ex p Rossminster*** [1980] AC 952 at 1008 where the learned Law Lord stated, *“If the statutory words relied upon as authorizing the acts are ambiguous or obscure, a construction should be placed upon them that is least restrictive of individual rights which would otherwise enjoy the protection of the common law.”*

[221] Counsel further maintained that, if the Commissioner were to arrest or charge anyone placing reliance on the common law or some other statutory power to compensate for any insufficiency in the Act, that would also be unconstitutional.

[222] Counsel indicated that the claim assailed, to the same extent, both the power to arrest and the power to charge claimed by the officers of INDECOM. He further submitted that if in fact the Act conferred the status of constable on the Commissioner and his agents to the extent whereby they received the protection from civil liability earlier referred to, without making them subject to the regime of discipline and dismissal that applies to constables generally under the Constitution, the Constabulary Force Act, related legislation and the Police Service Regulations, the Act was unconstitutional.

[223] Counsel pointed to the fact that section 131 of the Constitution of Jamaica empowers the Police Service Commission to appoint members of the police force below the rank of inspector and to discipline and dismiss them. He maintained that by purporting to appoint the Commissioner as a constable, the Act breached section 131 of the Constitution in that it derogated from the power of and made a collateral attack on the Police Service Commission. He cited in support ***Moses Hinds and other v The Director of Public Prosecutions and others*** (1975) 13 J.L.R. 262.

[224] Counsel had further complaint. He submitted that when the Commissioner sought to charge police personnel for criminal offences without a ruling from the DPP, by purporting to act pursuant to the powers of a constable under the Act, or alternatively under common law, the Commissioner breached the section of the Constitution that guaranteed the independence of the DPP.

[225] He sought to buttress that point by arguing that, as the DPP was empowered to terminate any criminal prosecution, section 5 of the Act which provided that subject to the Constitution INDECOM should not be subject to the direction or control of another person or authority, was an indirect attack on the constitutional independence and powers of the DPP. Therefore to the extent that the Act infringed the constitutional doctrine of separation of powers it should be declared unconstitutional (*Hinds* supra).

The Submissions of Counsel for the First Defendant

[226] Counsel contended, contrary to the position advanced by counsel for the claimants, that INDECOM officers have the power to arrest and to prosecute. These powers, it was submitted, arose by virtue of the establishment of INDECOM, the mandate of INDECOM and the powers given to INDECOM by the provisions of the Act and by virtue of the common law.

The Power of Arrest

[227] While counsel for the claimants submitted that the power to arrest would need to be specifically given, counsel for the first defendant argued that power existed and had not been specifically taken away. Counsel contended that as INDECOM was set up as an independent agency it could not be that arrests were to be effected at the direction of INDECOM or the DPP to a member of the police force nor by INDECOM involving a member of the police force in their investigations in the hope that they would apprehend the suspicion necessary to ground a lawful arrest. It would therefore be inconceivable, contrary to the intention of Parliament

and not reflective of the common law if INDECOM investigators were held not to have the power of arrest.

Arrest without Warrant

[228] Counsel submitted a constable or a citizen may arrest with or without warrant. A constable enjoys greater powers when it comes to an arrest without warrant as, although both the citizen and the police must have a reasonable suspicion that a felony has been committed, the constable's suspicion can be based on second-hand information whilst the citizen ought to have witnessed the felony. This common law power appears wider than the statutory power under section 15 of the Constabulary Force Act. (See **R v Self** [1992] EWCA Crim. 2).

[229] Further counsel maintained that it is settled law that a constable may arrest a suspect without warrant during an investigation for any legitimate aim for example, to secure evidence, to prevent the commission of another offence or to exercise control over a suspect to seek to get a confession. (See **Holgate Mohammed v Duke** [1984] AC 437).

[230] Counsel contended it clearly was the intent of section 20 of the Act to give the INDECOM investigator the powers of a constable for the purposes of carrying out investigations under the Act. Therefore as a constable may arrest without warrant during an investigation, so too can an INDECOM investigator.

Arrests with a warrant

[231] Counsel noted that Section 33 of the Justice of the Peace (Jurisdiction) Act empowers a Justice of the Peace (JP) to issue an arrest warrant upon the application of any person and may direct "any constable or other person" to execute the warrant. Therefore any person may effect an arrest with a warrant issued by a Justice of the Peace or other such judicial officer.

[232] He continued that in both instances of an arrest the constable or other person must have a reasonable suspicion. The fact that a reasonable suspicion must be

actually held means that the constable or other person acts individually and cannot base their decision on an order from a superior official. Counsel pointed out that Lord Steyn in ***O'Hara v Chief Constable of the Royal Ulster Constabulary*** [1997] AC 286 described this as the “*independent responsibility and accountability of a constable*”. (Cited by Sir Anthony Clarke MR in ***Commissioner of Police for the Metropolis v. Raissi*** [2008] EWCA Civ 1237 at para 14.).

[233] Counsel therefore submitted that the first defendant and officers of INDECOM have the power to arrest with or without a warrant.

The Right to Initiate Prosecutions (Charge)

[234] Counsel contended that the very language of section 94 of the Constitution which established the Office of the Director of Public Prosecutions, confirms by necessary implication that persons other than the DPP may initiate prosecutions. This is clear as it is stated the DPP may 'take over" and "discontinue" such prosecutions.

[235] Counsel maintained that the Jamaican Constitution, therefore, left unchanged the common law position which has always recognized the right of ordinary citizens to institute criminal proceedings. (See Sir Leslie Stephen's ***A History of the Criminal Law of England (1883)*** Vol. 1 at page 495.) Counsel stated that this ancient common law right has been preserved in modern criminal law. He cited in support ***R (on the application of Ewing) v. Davis*** [2007] 1 WLR 3223; ***Snodgrass v Topping*** (1952) 116 JP 332 and ***Hayter v. L. and Another*** [1998] 1 W.L.R. 854.

[236] Counsel also advanced that prosecutions in the Resident Magistrates' Courts although normally instituted by the police, may, under the Justices of the Peace Jurisdiction Act, also be instituted by a private individual. He referred to Section 29 and Form 15 in the first schedule of that Act which he submitted show that

any person can bring an information or complaint. He additionally relied on Sections 4 and 33 of the Justices of the Peace Jurisdiction Act.

[237] Counsel then pointed out that in ***Chokolingo v. Law Society of Trinidad and Tobago*** (1978) 30 WIR 372 the Trinidad and Tobago Court of Appeal recognised the right to institute private prosecutions. In that case the standing of the Law Society to initiate a prosecution for contempt of court was affirmed despite the fact that the constitutional law officer in whom was vested the duty of public prosecutions had declined to prosecute and there was no specific power under their statute to bring charges.

[238] Counsel then cited two very important cases. Firstly ***Scopelight Ltd and others v Chief Constable of Northumbria Police Force and another*** [2010] QB 438. ***Scopelight*** he submitted:

- i. recognized the right of individuals to bring a private prosecution.
- ii. stated that the right survives even a decision by the DPP not to pursue a prosecution.
- iii. decided that the right to a private prosecution includes the right of the private prosecutor to retain property of a potential accused person that had originally been seized by the police when there was contemplation of a public prosecution.
- iv. recognised that neither the DPP nor the court considered the DPP the sole arbiter of the public interest concerning whether or not a prosecution should be brought.

[239] Counsel also pointed out that in ***Scopelight*** the court highlighted that there were several safeguards before and during a trial against any perceived dangers in the pursuit of a private prosecution.

[240] Secondly, counsel cited ***R v Rollins*** [2010] 4 All ER 880, a case from the United Kingdom Supreme Court in which the issues bear some resemblance to those in

the instant case. In **Rollins** the claimant contended that the Financial Services Authority (the FSA) did not have the power to prosecute for any offences other than those specified in the Financial Services and Market Act (FSMA). The FSA was, however, initiating prosecutions even before the legislature gave it specific powers under the Act.

[241] The court found that the fact that the legislature had indicated specific offences which the FSA could prosecute, did not limit the power of the FSA generally to prosecute matters falling within its remit. The case of **Broadmoor Hospital Authority v R** [2000] 2 All ER 727 was cited in **Rollins**. In **Broadmoor** it was recognised that the power to prosecute is not usually expressly stated by rather left to implication.

[242] Finally counsel cited **Regina (Hunt) v Criminal Cases Review Commission** [2001] Q.B. 1108 in which the preservation of the right of individuals to prosecute was confirmed.

[243] Counsel concluded his submissions on these points by submitting that Parliament could not have intended to establish an independent body removed from the police force and subject to the control of no one, but still have the Commissioner and Officers of INDECOM having to rely on the police and/or the DPP to initiate arrests on, or to charge, police officers. This, counsel submitted, would result in an absurdity.

Unlawful deprivation of personal liberty

[244] Counsel submitted that if restriction of the right to personal liberty was not done in accordance with section 14 (1) of the Charter of Rights, the courts on application by an aggrieved party, could grant the necessary redress. Whereas if a person was lawfully arrested and charged for an offence, no breach of the right to personal liberty would have occurred.

The Submissions of Counsel for the Second Defendant

[245] Counsel for the second defendant declined to make further submissions during the hearing of the substantive application. However, it will be recalled that her submissions in response to the points raised *in limine* advanced the position that section 20 of the Act did not confer on the Commissioner and the investigative staff of INDECOM the power to arrest. Further that if the legislature had intended them to have that power it would have expressly given that right as the power to arrest takes away a constitutional right to liberty — a fundamental right under the Charter of Rights.

The Submissions of the Director of Public Prosecutions

[246] The DPP submitted that it was the view of her Office that Sections 4, 13, 14 and 20 of the Act did not confer any powers of arrest or charge on any officers of INDECOM or members of the public. As the liberty of the subject is a fundamental right under the Charter of Rights, the DPP submitted that the legislature would not give any entity the power to remove that liberty of the subject other than by express provision. There was no such express provision in the Act and that power could not be inferred by implication.

[247] The DPP also disagreed with counsel for the first defendant that the arrest of Malaica Reid without a warrant could have been justified under the common law. The DPP contended that under the common law, a private citizen can only arrest an offender if he has seen the offender commit the felony. She submitted that in the Malica Reid case the commission of the alleged felony would have longed passed at the time the first defendant purported to have him arrested. She further argued that it is the constable at common law who is able to arrest just before the felony is committed, during or after the commission of the felony.

[248] The DPP stated that she understood the concern of the first defendant that certain powers would need to be implied for INDECOM to carry out its function. However, she submitted, that concern would need to be taken back to the

legislature with a request for amendment of the Act to include such an express power; if that was the policy the legislature wished to pursue. She maintained nothing short of such an express provision would entitle anyone acting on behalf of INDECOM to deprive a citizen of their right to freedom or liberty.

[249] She submitted that despite the reality of equality before the law, because of the peculiar functions of law enforcement officers there was good reason for special arrangements to be put in place in relation to arresting such officers. As an example of the difficulties that could be created she raised the possibility of a scenario whereby, if a citizen operating under the powers of the Act arrested a policeman who was guarding a prisoner and the rank structure of the Force was unaware of the intention to arrest, that action could put the public at risk. There was also the spectre of a civilian trying to arrest an armed member of the Security Forces in a context where that member operated in a structure where he had a duty to obey and execute superior orders. The present practice she submitted afforded the Commissioner of Police the opportunity to make adequate operational provisions for the tidy extraction of the alleged offender from the system without putting national security in jeopardy.

[250] The DPP submitted in conclusion that the first defendant might therefore wish to continue the practice of submitting files for ruling in respect of the police bearing in mind their peculiar role. Further the requirement for such submission she argued also served to enhance the credibility of claims made against members of the police force who may or may not be guilty of some infraction or malfeasance.

ANALYSIS

The Status of a Constable and the Power to Arrest without a warrant

[251] The first issue that has to be addressed is the contention that the Act is unconstitutional if it indeed confers the status of a constable on the Commissioner and his agents, as it would afford them protection without making them subject to the regime of discipline and dismissal that a constable would be

answerable to. Further that the Act therefore makes a collateral attack on the Police Service Commission.

[252] There is a fundamental flaw in the argument put forward by counsel for the claimants. The Act does not purport to appoint the Commissioner and the investigative staff of INDECOM as constables. They are not appointed pursuant to any of the statutes under which the claimants and those they represent have been appointed. They are not subject to the direction or control of the commanding officers of any of the Forces the claimants belong to. Instead, pursuant to section 20 of the Act they have been conferred with like powers, authorities and privileges as are given to a constable, for and only for, the specific purpose of giving effect to certain sections of the Act. They are not constables and do not have all the powers, authorities and privileges that enable constables, by virtue of their enlistment and appointment as such, to carry out all the duties of general policing.

[253] No issue therefore arises of the Act trespassing in any way on the powers of the Police Service Commission as the Act does not purport to appoint anyone as a constable. In the circumstances there is no breach of the principle of the separation of powers as discussed in the case of *Hinds*. In fact as pointed out by counsel for the first defendant the principles in that case are not engaged at all.

[254] The more significant debate concerns the extent of the statutory power conferred on the Commissioner and the investigative staff of INDECOM. What is the true intent and effect of section 20 of the Act? In relation to “giving effect to” sections 4, 13 and 14 the critical issue is, what are the “like powers, authorities and privileges given by law to a constable” that have been conferred?

[255] The claimants supported by the second defendant and the DPP acting as *amicus curiae* say that in “giving effect to” Sections 4, 13 and 14 of the Act, the power of arrest is not included because the constitutional right to liberty guaranteed by the Charter of Rights could only be taken away by express provisions. The first defendant on the other hand maintains that given the remit of INDECOM and its

clearly stated mandate to operate independently in carrying out its functions, it is inconceivable were it not to be held that the Commissioner and his investigative staff have the power of arrest. Therefore as a constable may arrest without a warrant during an investigation, so too may an INDECOM investigator.

[256] In deciding this issue it is critical to first examine the sections that section 20 seeks to give effect to. The powers, authorities and privileges conferred are related to what they are to facilitate. Sections 4, 13 and 14 were set out *in extenso* while I outlined the submissions of counsel for the claimants. A close examination of those sections reveals that INDECOM has been given wide and extensive investigative powers. Under section 4 the first of INDECOM's stated functions is to conduct investigations for the purposes of the Act. It is critical to note that everything else in Sections 4, 13 and 14 relate to and are in support of the conduct of investigations for the purposes of the Act. When section 4 is read in light of the definition section which includes definitions of "incident", "public body", "Security Forces", "relevant Force", "relevant public body", "specified official", "responsible head" and "responsible officer", the full extent of "the purposes of the Act" and of INDECOM's wide remit becomes apparent.

[257] INDECOM under the Act may investigate incidents or complaints. From the definition in section 2 of the Act an incident is any occurrence that involves misconduct by a member of the police, military or correctional services: a) which results in or was intended or likely to result in death or injury; b) involving sexual assault; c) involving assault or battery; d) resulting in damage to property or the taking of money or other property; and e) which although not falling under a-d, is, in the opinion of INDECOM an abuse of the rights of a citizen.

[258] The case of ***Gerville Williams et al v The Commissioner of INDECOM et al*** [2012] JMFC Full 1 has also established that section 21 of the Act pursuant to which a member of the Security Forces, a specified official or any other person may be required to provide a statement in the course of an INDECOM investigation is constitutional. That case however recognises limitations on the

use of material gleaned in that manner as well as the ability of the trial process to safeguard the rights of anyone charged following an investigation.

[259] INDECOM's reach extends further; beyond the Security Forces and correctional officers to the investigation of public bodies which include Ministries, departments or agencies of government, parish councils, statutory bodies and government companies.

[260] INDECOM also has the power to obtain and execute search warrants to access records, documents, information and premises whether occupied or unoccupied to further its investigations. Additionally INDECOM may require the furnishing of information in relation to the powers of search given by the Act.

[261] Under section 4 (2) (d) INDECOM is given power to take charge of and preserve the scene of any incident. This sub-paragraph is supplemented by section 22 which gives INDECOM primary responsibility for the preservation of the scene of an incident or an alleged incident and the power to issue directions to the Commissioner of Police or any other authority for the purposes of that section.

[262] Section 13 of the Act makes it clear that INDECOM may undertake an investigation on its own initiative. Section 14 provides that INDECOM in deciding the most appropriate method of investigation should assess the seriousness of the case, importance of the investigations, public interest considerations and the particular circumstances in which the incident occurred. Section 14 also gives INDECOM the right to manage, supervise, direct and control an investigation carried out by the Security Forces or relevant public body in relation to an incident and to direct that no action should be taken until INDECOM had completed its investigation.

[263] It is convenient to address here one of the submissions made by counsel for the claimant. He sought to distinguish the formulation in section 20 of the Act whereby the conferral of powers of a constable is in respect of particular sections of the Act compared to, for example the Customs Act, where the conferral on

customs officers of the powers of officers of the Constabulary Force is “*For the purpose of carrying out the provisions of the customs laws...*” The argument was that limited powers of a constable were conferred by the Act while broadly enabling powers were conferred in the case of the Customs Act. The brief review of the Act just concluded however has demonstrated that, in effect, the distinction highlighted is one without a real difference. The sections to which the powers of a constable are specifically attached, Sections 4, 13 and 14, all relate to and are dependent on other sections for their full meaning and operation. In essence therefore, even though the conferral of the powers of the constable was stated as being to give effect to specific sections, given the scheme of the Act, of necessity that means the conferral is in support of all the investigative purposes of the Act. On the basis of that analysis, the formulation used in the Act to confer powers, authorities and privileges of a constable has no less effect than the formulation used in the Customs Act.

[264] Against that background the powers of a constable to arrest can now usefully be explored. As has been submitted, constables derive their powers from both common law and statute. The “law” referred to in section 20 of the Act, would therefore, include a combination of relevant common law and statutory provisions. In the context of how the law governing the power of arrest developed historically, as well as the way in which the arguments were advanced before the court, it is logical to commence the review by discussing the common law before examining the statutory powers. That foundation will then inform the subsequent determination of whether or not for the purposes of the Act, those common law and statutory powers of the constable complement each other, have been conferred on the Commissioner and his Investigative staff and if so are in keeping with the Constitution.

[265] Though not cited by any of the parties I find the case of ***Dallison v Caffery*** [1965] 1 Q.B. 348 the most convenient starting point for the analysis of the different common law powers of arrest without warrant, possessed by the private citizen and by the constable. In that case two of the most celebrated English

jurists of the twentieth century, Lord Denning MR and Diplock LJ, (as they then were), pronounced on the issue.

[266] Lord Denning MR had this to say at pages 366-367:

So far as *arrest* is concerned, a constable has long had more power than a private person. If a constable makes an arrest without a warrant, he can justify it on the ground that he had reasonable cause for suspecting that the accused had committed a felony. He does not have to go further (as a private person has to do) and prove that a felony has in fact been committed. So far as *custody* is concerned, a constable also has extra powers. If a *private person* arrests a man on suspicion of having committed a felony, he cannot take the man round the town seeking evidence against him: see *Hall v. Booth* (1834) 3 Nev. & M.K.B. 316. The private person must, as soon as he reasonably can, hand the man over to a constable or take him to the police station or take him before a magistrate; but so long as he does so within a reasonable time, he is not to be criticised because he holds the man for a while to consider the position: see *John Lewis & Co. Ltd. v. Tims* [1952] A.C. 676; [1952] 1 T.L.R. 1132; [1952] 1 All E.R. 1203, H.L. A *constable*, however, has a greater power. When a constable has taken into custody a person reasonably suspected of felony, he can do what is reasonable to investigate the matter, and to see whether the suspicions are supported or not by further evidence. He can, for instance, take the person suspected to his own house to see whether any of the stolen property is there; else it may be removed and valuable evidence lost. He can take the person suspected to the place where he says he was working, for there he may find persons to confirm or refute his alibi. The constable can put him up on an identification parade to see if he is picked out by the witnesses. So long as such measures are taken reasonably, they are an important adjunct to the administration of justice. By which I mean, of course, justice not only to the man himself but also to the community at large. The measures must, however, be reasonable.

[267] Diplock LJ for his part at pages 370-371 stated that:

The rule that a person who arrests, detains or prosecutes a suspected felon commits no actionable wrong if he acts honestly and reasonably applies alike to private persons and to police officers, but what is reasonable conduct in the circumstances may differ according to whether the arrestor is a private person or a police officer. One difference, too well settled now by authority to be altered, is that a private person can only arrest if a felony has in fact been committed, whereas a police officer can

do so if he reasonably believes that a felony has been committed; but this, together with the distinction between felony and misdemeanour, is, I believe, the only respect in which the common law has become fossilised. In all others the rule of reasonableness applies. Where a felony has been committed, a person, whether or not he is a police officer, acts reasonably in making an arrest without a warrant if the facts which he himself knows or of which he has been credibly informed at the time of the arrest make it probable that the person arrested committed the felony. This is what constitutes in law reasonable and probable cause for the arrest. Since arrest involves trespass to the person and any trespass to the person is prima facie tortious, the onus lies on the arrestor to justify the trespass by establishing reasonable and probable cause for the arrest. The trespass by the arrestor continues so long as he retains custody of the arrested person, and he must justify the continuance of his custody by showing that it was reasonable. What is reasonable conduct on the part of a police officer in this respect may not be the same as what would be reasonable conduct on the part of a private arrestor. This is explicit in the early authorities cited by Lord Porter in *Lewis (John) & Co. Ltd. v. Tims* [1952] A.C. 676, H.L. and implicit in the actual decision in that case, which was concerned with the duty of a private arrestor to deliver up custody of his prisoner to a police officer.

[268] In summary therefore the relevant principle emanating from this case is that a constable has wider powers than the private person both in relation to making an arrest and also in delaying the taking of a suspected person to a police station or before a magistrate while he carries out such reasonable investigation as may be necessary into the matter, in the interests of the administration of justice; the test in each case being whether his conduct is reasonable in all the circumstances. I also indicate that especially in light of the judgment of Diplock LJ, at common law a private citizen may arrest someone without a warrant if the facts which he himself knows or of which he has been credibly informed at the time of the arrest make it probable that the person arrested committed the felony. The private citizen therefore does not have to actually witness the commission of the felony; but he must be credibly informed of its commission. Unlike the constable however, the private citizen is only protected from civil action if in fact the felony has been committed.

[269] I will now turn to the statutory powers of constables. The Constabulary Force Act which empowers the Governor General to constitute the Jamaica Constabulary Force and provides for the appointment of members of the Force to include constables, is the relevant statute that outlines the general duties and powers of a constable. There are other statutes which confer powers on constables, however they like the Act which is the subject of this litigation, do so in furtherance of their specific objectives.

[270] Section 3 (5) of the Constabulary Force Act provides that:

Every member of the Force shall have, in every parish of this Island, all powers which may lawfully be exercised by a Constable, **whether such powers are conferred by this Act or otherwise.** (emphasis added).

[271] The general duties and powers of the police under the Constabulary Force Act are stated in section 13. So far as material to this case the section states:

The duties of the Police under this Act shall be to keep watch by day and by night, to preserve the peace, to detect crime, **apprehend or summon before a Justice, persons found committing any offence or whom they may reasonably suspect of having committed any offence, or who may be charged with having committed any offence,** to serve and to execute all summonses, warrants, subpoenas, notices, and criminal processes issued from any Court of Criminal Justice or by any Justice in a criminal matter and to do and perform all the duties appertaining to the office of a Constable,... (emphasis added).

[272] Section 15 of the Constabulary Force Act provides that:

It shall be lawful for any Constable, without warrant, to **apprehend any person found committing any offence punishable upon indictment or summary conviction** and to take him forthwith before a Justice who shall enquire into the circumstances of the alleged offence, and either commit the offender to the nearest jail, prison or lock-up to be thereafter dealt with according to law, or grant that person bail in accordance with the Bail Act. (emphasis added).

[273] It should be noted that in one sense the power granted by section 15 may appear narrower than that afforded to a constable under the common law, as it is limited

to arresting without warrant persons found committing an offence. However it also has to be considered that the power is not restricted to felonies, as in the case of the common law, given that the section speaks to being found committing an offence punishable “*on indictment or summary conviction*”. Therefore section 15 supplements the common law power of the constable to arrest without a warrant. Under the common law the constable may arrest without warrant any person reasonably suspected of having committed a felony. Under section 15 the constable may also arrest any person found committing an offence whether that offence is a felony or not.

[274] Section 16 of the Constabulary Force Act provides that:

Any warrant lawfully issued by a Justice for apprehending any person charged with any offence may be executed by any Constable at any time notwithstanding that the warrant is not in his possession at that time but the warrant shall, on the demand of the person apprehended, be shown to him as soon as practicable after his arrest.

[275] Sections 17 – 22 of the Constabulary Force Act contain certain other powers to search persons; to arrest without warrant persons known or suspected to be in unlawful possession of particular dangerous drugs or material related to certain games of chance; powers to stop and search vehicles for certain stolen goods, prohibited and dangerous substances or material related to certain games of chance and also to regulate both pedestrian movement and vehicular traffic.

[276] Returning to the central question on this issue; has section 20 of the Act conferred on the Commissioner and Investigative staff of INDECOM the same powers a constable has by common law and statute to arrest without a warrant? I will commence by stating the obvious. By conferring the status of constable in relation to stated sections of the Act, the legislature was clearly elevating the powers of the Commissioner and his investigative staff above those of the private citizen. The most significant common law power of the constable is the power to arrest without warrant on reasonable suspicion of the commission of a felony. A

review of the relevant sections of the Constabulary Force Act dealing with the general powers of the police under that Act, additionally reveals that the power to arrest without warrant also features significantly in sections 13, 15 and 18.

[277] The power of a constable to arrest is thus a significant and critical power that enables the constable to carry out his functions. That power is general to all crime in respect of which an arrest may properly be effected under common law or by statute. Statutes such as the Act and the Customs Act import that power of a constable and clothe functionaries under their specific legislative enactments with such power, but only in so far as that power facilitates the purposes of the legislation in question. The powers conferred on such functionaries are therefore dependent on the nature of the functions carried out under the particular statute. In the case of the Act the functions needed to be supported are extensive investigative actions and methods. Functions geared towards unearthing the truth concerning allegations of serious offences committed by natural or juridical agents of the state, against citizens of Jamaica. Alleged offences that may involve death or serious injury to the person, as well as damage to or loss of property.

[278] The above analysis inexorably points the way to the answer to one of the main submissions advanced by counsel for the claimants, counsel for the second defendant and the DPP; that the power to arrest without warrant should have been expressly given if it was meant to have been conferred. I find it has been expressly given — by a clear statement that the powers, authorities and privileges of a constable have been conferred on the Commissioner and his investigative staff to give effect to sections which outline INDECOM's extensive investigative functions under the Act. I do not find the wording of the Act to be either “ambiguous or obscure” when subjected to the test outlined in *ex p Rossminster*. Undoubtedly one of the seminal powers and a vital part of the authority of the constable that sets him apart from the private citizen, is the wider power of arrest without warrant in the course of an investigation. A wider power conferred both by common law and by statute.

[279] The argument could therefore properly be reversed. The powers of arrest of a constable being one of the main powers possessed by a constable, if it was not to be included in the powers conferred it would be expected that would be expressly stated. The fact that hitherto the powers of a constable conferred for example in the Customs Act have been sparingly exercised by customs officers, who the court takes judicial notice often act in concert with members of the police force, does not detract from the reality or the extent of the powers of an officer of the Constabulary Force, conferred by that Act⁷. By parity of reasoning given the wider investigative powers conferred by the Act, compared to the Customs Act, it would seem there would be even greater need than exists in the case of the Customs Act for wide powers, including the power of arrest to be conferred on the Commissioner and the investigative staff of INDECOM.

[280] The case of *Holgate Mohammed v Duke* relied on by the first Defendant supports the conclusion that the conferral of powers by the Act includes the power of arrest without warrant. At page 445 Lord Diplock writing on behalf of the House of Lords said:

That arrest for the purpose of using the period of detention to dispel or confirm the reasonable suspicion by questioning the suspect or seeking further evidence with his assistance was said by the Royal Commission on Criminal Procedure in England and Wales (1981) (Cmnd. 8092) at paragraph 3.66 “to be well established as one of the primary purposes of detention upon arrest”...It is a practice which has been given implicit recognition in rule 1 of successive editions of the Judges’ Rules, since they were first issued in 1912.

[281] The power of arrest has therefore long been recognised as an important investigative tool in and of itself. A tool, the absence of which, could in some circumstances seriously undermine the search for truth and accountability.

⁷ Interestingly the formulation in the Customs Act does not seem to take account of the fact that in section 2 of the Constabulary Force Act, “Officer” means all members of the Jamaica Constabulary Force above the rank of Inspector.

[282] The DPP raised some practical security concerns associated with the Commissioner and investigative staff of INDECOM possessing powers of arrest in relation to serving members of the Constabulary Force.

[283] The concerns raised by the DPP are operational rather than legal. They can thus be addressed by the implementation of appropriate operational measures as they do not constitute any legal impediment. It is expected that INDECOM investigators acting under the direction of the Commissioner would act responsibly in discharging all their functions. Information available in the public domain discloses that the Commissioner and senior members of the Constabulary Force have had discussions seeking to establish protocols to guide interactions between the two entities. There should be no difficulty developing guidelines as necessary to regulate the exercise of the power of arrest. Certainly extensive codes governing that exercise exist in other jurisdictions such as the United Kingdom, (referred to below), which could form a starting point for discussions.

[284] The important nature of the power of arrest has been demonstrated by significant legislative activity concerning the classification of offences in relation to that power and the establishment of Codes regulating its exercise in the United Kingdom. It is well known that after the passage of the Police and Criminal Evidence Act of 1984 (PACE) offences in the United Kingdom fell into three broad categories; “non-arrestable” “arrestable” and “serious arrestable” offences. Thereafter and up to the abolition of those distinctions by the passage of the Serious Organised Crime and Police Act 2005 (SOCPA) it was clear from legislation enacted into which category a particular offence fell. With the passage of SOCPA, since January 1, 2006, in the United Kingdom a constable may arrest for any offence subject to the conditions set out in the amended PACE and to the Code of Practice for the Statutory Power of Arrest by Police Officers (Code G). Specific distinctions are drawn between the power of a constable and of other persons to arrest without a warrant.

[285] The situation has however remained static in Jamaica. The longstanding traditional classification of offences into treasons, felonies and misdemeanours still prevails. Each category contains offences which make the suspected perpetrator susceptible to arrest, though the powers of arrest at common law would be different in the case of treasons and felonies on the one hand and in respect of misdemeanours on the other. It is therefore neither automatic nor axiomatic in Jamaica that generally where a statutory power of arrest exists it would be explicitly outlined in the enabling enactment.

[286] The constitutional right to liberty is not absolute. Section 14 (1) of the Charter of Rights contemplates that the liberty of the subject may be restricted on “reasonable grounds and in accordance with fair procedures established by law.” Section 20 of the Act clothes the Commissioner and his investigative staff for the purposes of investigations with the powers of a constable which I have held includes the power of arrest. The proper exercise of that power would qualify as a fair procedure established by law. However, whatever the authority claimed for exercising the power of arrest, it may be challenged as unlawful. I therefore agree with counsel for the first defendant that it would be a matter for the court in individual cases to determine whether a claimant was arbitrarily or unlawfully deprived of his right to personal liberty or was appropriately arrested according to law.

[287] Just before passing on to the next heading, though it was not argued, an examination of what other powers of the constable apart from arrest have been conferred, may shed further light on the effect of section 20 of the Act. Therefore another power of the constable that it would appear has naturally been conferred will be highlighted here. INDECOM has been given the power to preserve scenes of incidents (sections 4 (2) (d) and 22 of the Act). To achieve that end, it would seem an INDECOM investigator has been conferred with the power or authority given to a constable under section 20 of the Constabulary Force Act to regulate pedestrian movement. However, the issue not having been argued, I make no final pronouncement on it.

Power of Arrest with a Warrant

[288] Counsel for the claimant noted in his submissions that prior to the creation of INDECOM the Commissioner was not in the habit of arresting persons. That is true both in respect of arresting persons without a warrant and with a warrant. Having being given such a wide investigative mandate and being clothed with the powers of a constable necessary to give effect to that mandate, there may now be circumstances where the Commissioner or a member of his investigative staff, would consider it appropriate to seek a warrant of arrest.

[289] Section 33 of the Justice of the Peace (Jurisdiction) Act empowers a Justice of the Peace (JP) to issue an arrest warrant upon the application of any person and may direct “any constable or other person” to execute the warrant. Of course, as submitted by counsel for the first defendant, both in circumstances where an arrest is made without a warrant as well as when a decision is made to seek a warrant of arrest, the person making the arrest or seeking the warrant must himself have a reasonable suspicion that an offence has been committed. The decision cannot therefore for example be based on the order of a superior official. As Lord Steyn stated in the case of ***O’Hara v Chief Constable of the Royal Ulster Constabulary*** cited by Sir Anthony Clarke MR in ***Commissioner of Police for the Metropolis v. Raissi*** this speaks to the fundamental principle of the “*independent responsibility and accountability of a constable*”. It is noted that in ***O’Hara*** Lord Steyn was treating with the powers of arrest conferred by the Prevention of Terrorism (Temporary Provisions) Act 1984 (UK). However Lord Hope of Craighead in that same case in his analysis, indicated the approach to the interpretation of the relevant section was consistent with the common law position expounded in ***Dallison v Caffery***.

[290] I agree with counsel for the first defendant that it would be incongruous for INDECOM to be required to conduct all the investigations and then hand over the file to a member of the police force to effect an arrest. That member would have to acquaint himself with the investigations and form a reasonable suspicion that

the alleged offence was committed before he could act. A scenario that is inconsistent with the independence with which INDECOM has been vested and the wide investigative powers it has been granted.

[291] I therefore am satisfied that the Commissioner of INDECOM and his investigative staff have the powers of arrest of a constable by virtue of section 20 of the Act. Those powers are both at common law and pursuant to the Constabulary Force Act. They are conferred to the extent required to give effect to the investigative purposes of the Act.

The Power to Charge and Initiate Prosecutions

[292] All parties are agreed that the Act does not confer on the Commissioner or any officer of INDECOM the power to lay charges. All parties are also agreed that the power to lay charges remains vested in private citizens by virtue of the common law. Counsel for the claimants argued that the conferral of the status of constable did not constitute a basis for the Commissioner or his investigative staff either to arrest or to charge. Counsel for the claimant has also submitted that not only did the conferral of the status of constable not give the Commissioner nor his investigative staff a right to charge anyone, neither were they in the habit of arresting or charging anyone as private citizens prior to the passage of the Act. The Act he submitted did not provide a basis for the Commissioner or his investigative staff to now start utilizing the common law power to charge.

[293] The first defendant's position is that its mandate gives it a sufficient interest to lay and pursue charges in relation to matters it has investigated. INDECOM not claiming a power for its officers to charge under the Act, the live issue that remains is the appropriateness of INDECOM's officers laying charges pursuant to the acknowledged common law power that exists for them to do so.

[294] In **A History of the Criminal Law Of England** (1883) Vol. 1, Sir Leslie Stephen at page 495 stated that:

Every private person has exactly the same right to institute any criminal prosecution as the Attorney General or anyone else. A private person may not only prosecute anyone for high treason or a seditious conspiracy, but A may prosecute B for a libel upon C, for an assault upon D, or a fraud upon E, although A may have no sort of interest in the matter, and C, D and E, may be altogether averse to the prosecution.

[295] Section 94 of the Jamaican Constitution which established the post of Director of Public Prosecutions acknowledges by necessary implication that persons other than the DPP may initiate prosecutions, as the section gives the DPP power to “take over” and “discontinue” such prosecutions. The common law power to lay charges was thus not abrogated in any way by the Constitution.

[296] The right of private citizens to institute prosecutions has also been preserved under the Justices of the Peace Jurisdiction Act. Pursuant to section 29 of that Act charges may be made according to Form 15 in the First Schedule which is the form by which an information and complaint is laid for indictable offences. That form names a “(labourer, etc)” as an example of a person bringing the charge. I agree with counsel for the first defendant that this shows that Jamaican law contemplates that any person may bring an information and complaint.

[297] In the United Kingdom the Crown Prosecution Service in its Legal Guidance⁸ notes that offences where proceedings cannot be instituted without the prior consent of the Attorney General or the Director of Public Prosecutions are statutorily created with the purpose being to prevent certain offences being prosecuted in inappropriate circumstances. To demonstrate what such circumstances might be, reference was made to the 1972 Home Office Memorandum to the Franks Committee which listed five overlapping reasons to include:

(a) Securing consistency in prosecution;

(b) Preventing abuse by vexatious private prosecutions;

⁸ Available at http://www.cps.gov.uk/legal/a_to_c/consent_to_prosecute/

- (c) Enabling account to be taken of mitigating factors;
- (d) Providing central control over the use of the criminal law in sensitive areas such as race relations; and
- (e) Ensuring that prosecution decisions are informed by important public policy or international considerations.

[298] Therefore, absent express statutory restrictions, the right to launch private prosecutions continues to be enjoyed in the United Kingdom. The same position exists in Jamaica. Several cases from the United Kingdom were cited that demonstrated acknowledgment by the courts in the United Kingdom of the right possessed by private citizens to institute prosecutions. In ***Snodgrass v Topping***, “*the common law right of any person to take proceedings if an offence has been committed, whether he is a person who is aggrieved or not*”, was recognised by Lord Goddard CJ with whom Oliver and Byrne JJ concurred. Later, in ***Hayter v L and Another***, the Queens Bench Division in England declined to add any further restrictions to the right to bring a private prosecution beyond those outlined in the Prosecution of Offences Act 1985. Poole J in giving the main judgment of the court stated that:

The right of private prosecution was expressly preserved by section 6(1) of the Prosecution of Offences Act 1985. It was subject to a number of procedural limitations, for example, justices' refusal to enter a summons, Attorney-General's power in relation to vexatious litigants and Director of Public Prosecution's power to take over private prosecutions and terminate them.

The court should not in effect add what would amount to a further category of constraint to that list to cases in which a caution had been issued. Nor was his Lordship persuaded that there was likely to be a flood of private prosecutions in cases where cautions had been administered if the present appeal was allowed.

[299] In the more recent case of ***R (on the application of Ewing) v Davis*** [2007] 1 WLR 3223 at 3231 Mitting J in upholding the right of a member of the public to prosecute said, “*if the right of private prosecution is to be taken away or subject*

to limitation, it is for Parliament to enact and not for the courts by decision to achieve”.

[300] Here in the Caribbean the right of private entities to institute prosecutions was recognized by the Trinidad and Tobago Court of Appeal in ***Chokolingo v. Law Society of Trinidad and Tobago***. In ***Chokolingo*** a journalist published material that constituted a scandalous and scurrilous attack on the judiciary of Trinidad and Tobago. Proceedings for contempt were instituted by the Law Society with leave of the court. Included in the objects of the Law Society under Section 3 of the Trinidad and Tobago Law Society (Incorporation) Act 1969 (TTLISA) was “to support and protect the character, status and interest of the legal profession...” The journalist was convicted and imprisoned. On appeal one of the issues raised was whether the Law Society had *locus standi* to bring the proceedings.

[301] The Court of Appeal held that, except where otherwise provided by statute, a private individual might enforce the criminal law without the consent of the Attorney General (or of any other authority whose duty it was to prosecute offenders); the Law Society had a sufficient interest in the administration of justice to entitle it to institute the proceedings against the journalist in accordance with Section 3 of the TTLISA and was not precluded from doing so by the refusal of the Attorney General to institute proceedings in the case. ***Chokolingo*** applied ***Gouriet v Union of Post office Workers***. At pages 385 - 386 of ***Chokolingo*** Sir Isaac Hyatali CJ cited page 79 of ***Gouriet*** where Lord Wilberforce stated that, “*The individual, in such situations, who wishes to see the law enforced has a remedy of his own: he can bring a private prosecution. This historical right...remains a valuable constitutional safeguard against inertia or partiality on the part of authority.*” The decision of the Court of Appeal was affirmed by the Judicial Committee of the Privy Council in ***Chokolingo v Attorney General*** (1980) 32 WIR 354.

[302] The ***Chokolingo*** case is important as it emphasises that where an entity created by statute seeks to bring a prosecution, such prosecution must be in

keeping with the objects for which that entity has been established. In the case of INDECOM any prosecution it would seek to launch would similarly have to be in keeping with the purposes for which it has been established by statute. INDECOM having been established to investigate abuses of citizens' rights by various state actors and agencies that would seem to constitute a strong argument that INDECOM would have a "sufficient interest" in the prosecution of offences that flow from those alleged abuses.

[303] The case of ***Rollins*** from the United Kingdom Supreme Court is of assistance on the question of the right of individuals and corporations to bring prosecutions where they have a sufficient interest. As submitted by counsel for the first defendant, in ***Rollins*** the claimant contended that the Financial Services Authority (the FSA) was limited to prosecuting those offences specified in the Financial Services and Market Act (FSMA). Significantly however the FSA had been initiating prosecutions even before the legislature gave it specific prosecutorial powers under the FSMA.

[304] At paragraph 14 the court stated that even before the power to prosecute was given by the FSMA, "*the FSA had the power of a private individual to prosecute provided that this fell within the scope of its objects and prosecution was not precluded or restricted by the terms of the relevant statute.*"

[305] The court held that the specification by the legislature of particular offences which the FSA could prosecute, did not prevent the FSA from prosecuting other offences which fell within its objects. Sir John Dyson who delivered the judgment of the Supreme Court stated at paragraphs 17 to 18 that:

[I]t is legitimate to ask why Parliament would have intended to deprive the FSA (but no one else) of the power it previously enjoyed to bring prosecutions ... One of the functions of the FSA ... including the reduction financial crime. ... It would have been perverse of Parliament to impose on the FSA the general duties set out in s 2 of FSMA and yet at the same time deprive it of the power it previously enjoyed to prosecute financial offences. It would have been even more perverse not to remove the

power to bring prosecutions for offences ... from anyone else, including private individuals.

... if the power is limited ... then ... there are consequences which it is unlikely that Parliament intended. For example, it would mean that, in the course of its investigations, the FSA discovers evidence which would support a prosecution under s 401 and 402 of FSMA and a prosecution for other offences, it has to refer the question whether to prosecute those other offences to the DPP. This is a most inefficient and unsatisfactory way of prosecuting crime ... Parliament cannot have intended to create such an absurd state of affairs.

[306] At paragraph 20 Sir John Dyson SCJ added:

The technique usually employed by the legislature to indicate an intention to limit the class of persons who may prosecute a particular offence is the obvious one of stating expressly that a particular offence may only be prosecuted by a specified person or persons.

[307] Counsel for the claimants submitted that the **Rollins** case was not applicable to the situation that exists with INDECOM as in **Rollins'** case the FSA was expressly given statutory powers to prosecute and the resort to common law powers to prosecute additional offences was merely supplementary to a the power already granted. Furthermore there was not the practice in Jamaica as there exists in the United Kingdom for several different agencies to exercise prosecutorial powers.

[308] I do not agree with counsel for the claimants. Firstly, as was noted by the Court in **Rollins'** case, prior to the granting of specific prosecutorial powers under the FSMA, the FSA had the power of prosecution of a private individual, provided the power was exercised within the scope of its objects. In the same way, prior to the creation of INDECOM private citizens had the power to prosecute police officers. Further, at paragraph 9, Sir John Dyson referred to the decision of **Broadmoor Hospital Authority v R.** [2000] 2 All ER 727 at paragraph 25 where Lord Woolf MR stated that, "...statutes rarely provide expressly that a particular public body may institute proceedings in protection of specific public interests. It is usually a matter of implication..."

[309] The absence of a statutory power to prosecute was also not found to be a bar to the right of the Inland Revenue to conduct private prosecutions in the case of ***Regina (Hunt) v Criminal Cases Review Commission***. It was held that there was a category of criminal behaviour in respect of which the Inland Revenue was in a peculiarly advantageous position to prosecute; that although the revenue had no express statutory power to prosecute, it had such a power at common law ancillary to, supportive of, and limited by its duty to collect taxes; and that, accordingly, the revenue could prosecute a trial on indictment before the Crown Court without the consent of the Attorney General.

[310] I find these cases to be persuasive authority for the proposition that the legislature did not need to specifically indicate that INDECOM should have the power to initiate prosecutions given the remit given to INDECOM and the acknowledged existence of the common law power of private individuals to prosecute. The fact that hitherto it has not been the practice of agencies to prosecute offences but rather to rely on the Office of the DPP to conduct such prosecutions, has not extinguished the right of any agency with legal personality to pursue such prosecutions, provided there is no statutory impediment and the prosecution falls within the scope of their objects. It follows that if INDECOM wishes to pursue its own prosecutions it has the power at common law to do so.

[311] I have come to that conclusion fully cognizant of Section 25 of the Act which requires an investigator on the request of the DPP in relation to a prosecution arising out of an incident, to attend court and provide such other support as the DPP may require in relation to proceedings instituted under the Act. That section is unremarkable. It is predicated on the acknowledged practice that the DPP would prosecute such matters. That does not however preclude the exercise by INDECOM or officers on its behalf of the common law power to itself prosecute matters it has investigated.

[312] It should also be realised that there are significant and adequate safeguards in place to reign in any prosecution should it be deemed either that it should not

have been advanced or that its continuation is not in the public interest.

[313] In ***Scopelight Ltd and others v Chief Constable of Northumbria Police Force and another*** the right to conduct private prosecutions and to retain material in furtherance of such prosecution which was initially seized by the police, pursuant to the PACE was recognised. In respect of the instant case however, what is perhaps more critical is that at paragraph 45 the court highlighted that there exists several safeguards to prevent the abuse of the power to initiate and conduct private prosecutions. These include:

- (a) the prosecution of those who bring vexatious criminal prosecutions;
- (b) the fact that in relation to each prosecution a justice of the peace must be satisfied that it is a proper case to issue a summons (*the same principle would apply to the issue of a warrant of arrest that is more directly related to the questions being determined in the instant case*);
- (c) the power of the DPP to take over and discontinue the case (*that is what was done in the Malica Reid case by the DPP entering a nolle prosequi. In an appropriate case the DPP could also offer no evidence or no further evidence*);
- (d) the liberty any defendant has to make an application to the court to stay the prosecution on the ground that it is an abuse of process.

[314] The analysis in ***Scopelight*** as well as the constitutional foundation on which the office of the DPP rests in Jamaica, make it abundantly clear that the possession by the relevant officers of INDECOM of the power to charge persons in no way abrogates or undermines the powers of the DPP. Section 5 of the Act which establishes the independence of INDECOM is expressly made subject to the provisions of the Constitution. The DPP is a constitutional officer who has wide powers set out in Section 94 of the Constitution. The constitutional powers of the DPP are also supplemented by section 4 of the

Criminal Justice (Administration) Act which expressly outlines the power of the DPP to enter a *nolle prosequi*. Therefore while the DPP may not be able to give directions to the Commissioner, if the DPP were to form the considered view that a charge has been improperly laid by INDECOM or any other person or entity, the DPP has both constitutional and statutory authority, and in fact a duty, to take over and/or discontinue those proceedings. The powers of the DPP therefore remain as a bulwark against private misuse of the power of prosecution, and have in no way been undermined by the passage of the Act. Here again the reliance on *Hinds* by counsel for the claimant to support some perceived breach of the constitutional safeguard of the separation of powers is misconceived.

[315] Having carefully considered all the submissions and authorities advanced I accept the submissions of counsel for the first defendant. I find that the Parliament could not have intended to establish an independent body removed from the police force and subject to the control of no one, but still have the Commissioner and investigative staff of INDECOM having to rely on the police and/or the DPP to initiate arrests of, or to charge, members of the police force. Parliament cannot be taken to have legislated an absurdity. I therefore find as submitted by counsel for the first defendant, that the Commissioner and the investigative staff of INDECOM have the powers of arrest both under common law and by virtue of the Act, having been conferred with the powers of a constable. Further, I hold that pursuant to the common law, they also have the power to initiate prosecutions in furtherance of the statutory objectives of INDECOM.

B. LEGITIMATE EXPECTATION AND THE EFFECT OF THE POLICE SERVICE REGULATIONS 1961: DO THE CLAIMANTS HAVE THE RIGHT TO A PRIOR RULING FROM THE DPP BEFORE THEY CAN BE CHARGED FOR MURDER OR ANY OTHER FELONY?

[316] The contention of the claimants was that the established practice for the DPP to make a ruling whether police personnel should be charged for offences arising

from situations that occurred in the course of their duties, was one that the claimants could reasonably and legitimately expect to continue. That practice they maintained protected their constitutional right not to be subjected to arbitrary arrest or the unlawful deprivation of their liberty.

[317] This legitimate expectation, counsel for the claimant argued, was indirectly reinforced by the disciplinary provisions set out in the Police Service Regulations and in the Constitution itself. He submitted that criminal charges are in themselves an extreme form of disciplinary action. Therefore, if the first defendant were able to “leap frog” the ruling of the DPP and subject members of the police force to this extreme form of disciplinary action, that would amount to a serious denial of this expectation.

[318] He relied on the Police Service Regulations 1961 which he submitted survived the coming into force of the Constitution by virtue of section 2 of the Constitution as well as the general savings law clause in section 26(8) of the Constitution. Regulations 31 and 33 were said to be relevant. Paragraph 2 of regulation 31 provides that subject to paragraph 5, the Commission⁹ may recommend to the Governor General that disciplinary proceedings ought to be instituted against a member of the Force of or above the rank of Inspector. Paragraph 4 of regulation 31 provides that subject to paragraph 5 the Commissioner¹⁰ may institute disciplinary proceedings on any member of the Force below the rank of Inspector. Then paragraph 5 of regulation 31 reads:

Where an offence against any enactment appears to have been committed by a member the Commission, or as the case may be the authorized officer, before proceeding under this regulation shall obtain the advice of the Attorney General or, as the case may be, of the Clerk of the Courts for the parish, as to whether criminal proceedings ought to be instituted against the member concerned; and if the Attorney-General or Clerk of Courts advises that criminal proceedings ought to be so

⁹ Police Service Commission

¹⁰ Commissioner of Police

instituted, disciplinary proceedings shall not be initiated before the determination of the criminal proceedings so instituted.

[319] Regulation 33 reads:

Where upon a preliminary investigation or a disciplinary enquiry an offence against any enactment appears to have been committed by a member the Commissioner¹¹ shall, unless criminal proceedings have been or are about to be instituted, obtain the advice of the Attorney General as to whether criminal proceedings ought to be instituted.

[320] Counsel placed particular reliance on regulation 33. He submitted however that the reliance he was placing on this regulation was solely in the context that it was the only written material that could show the historical origin of the practice and custom whereby the DPP rules whether or not a policeman should be charged arising out of alleged offences committed during the performance of his duty. The citing of these regulations, was based on the fact that with the coming into force of the Constitution in 1962, the functions relating to the institution and conduct of criminal proceedings were transferred from the Attorney General to the newly created Office of the DPP. Regulation 33 was therefore put forward as the fountainhead of the present practice and not as justifying the practice itself.

[321] Counsel relied on two cases to advance his argument. He cited **Attorney-General v Mohammed Ali and Others** (1987) 41 WIR 176 to show the applicability of legitimate expectation to constitutional matters. That case he submitted was essentially a challenge to an amendment to the Labour Act which allowed the government to enter into an agreement with the Trade Union Congress (TUC) that would bind all public sector workers. The amendment was rushed through parliament in a day and the TUC was not given an opportunity to comment on it prior to its passage. On appeal, one of the bases on which the first instance decision to strike down the amendment was upheld, was that the amendment was done in breach of Article 11 of the Constitution by virtue of

¹¹ Commissioner of Police

which the trade unions and other parties had a reasonable expectation to have been consulted prior to any such changes.

[322] The second case cited on this point was ***Attorney General of Hong Kong v Ng Yuen Shiu (Hong Kong)*** [1983] 2 A.C. 629. In that case an illegal immigrant from Macau was ordered deported by the Director of Immigration without having been given an opportunity to be heard and have his case decided on the merits, as had been promised to all illegal immigrants of Macau by a senior immigration officer.

[323] The Judicial Committee of the Privy Council held that where a public authority charged with the duty of making a decision promised to follow a certain procedure before reaching that decision, good administration required that it should act by implementing the promise, provided the implementation did not conflict with the authority's statutory duty. Accordingly, the implementation of the promise required the applicant to be given an opportunity to state his case. The failure to ask him if he wished to make representations why he should not be removed was therefore held to be a sufficient ground for setting aside the decision.

[324] Relying on the Police Service Regulations and the authorities cited, counsel therefore invited the court to strike down the status of the constable conferred by the Act as well as the claim by the first defendant to the power of "citizens' arrest" of police personnel without a ruling of the DPP. Otherwise, counsel argued, the claimants would be deprived of their legitimate expectation to such a ruling.

[325] The reliance placed on the doctrine of legitimate expectation and on the Regulations and authorities cited to apply that doctrine to the facts of this case is misconceived. It was tellingly observed by counsel for the first defendant with whom counsel for the second defendant agreed on this point, that the Regulations would bind the Police Service Commission, Commissioner of Police and members of the police force but not officers of INDECOM. I entirely agree. Further, counsel for the first defendant relied on the case of ***George Anthony***

Lawrence v Commissioner of Police and the Attorney General SCCA No. 75/2004 (26 March 2010). That case makes it clear that:

- i. Regulation 31(5) is designed to ensure that members of the Police Force are not simultaneously subjected to both criminal and disciplinary proceedings. (See para.13);
- ii. The need for a ruling of the Attorney General or the Clerk of the Courts is only required prior to the institution of disciplinary proceedings (See para. 19);

[326] I also agree with the submissions of the first defendant where he indicated that nothing in regulation 31(5) requires the consent of the DPP prior to the charging of a member of the Police Force. Regarding regulation 33 the position is manifestly clear as well. The indication in that regulation that the advice of the Attorney General¹², should be sought is qualified by the fact that if criminal proceedings have been or are about to be instituted there is no such need for referral. The regulation therefore acknowledges that charges may lawfully be instituted against members of the Police Force without the need for prior referral to the Attorney General or the DPP.

[327] The interpretation of regulations 31 and 33 I have accepted, is entirely in keeping with the scheme established by the Regulations concerning how proceedings in relation to members alleged to be involved in offences should be handled. The Regulations are drafted to give priority to criminal proceedings where an alleged offence may support a criminal charge as well as disciplinary action — a classic case of the greater including the lesser. To avoid a member of the Force being subjected to two different proceedings in relation to the same alleged offence, where a preliminary investigation or disciplinary enquiry is being conducted and a criminal offence against an enactment appears to have been committed, a ruling should first be sought to determine whether or not criminal charges will be pursued. If criminal charges are pursued and the member convicted the need to

¹² By virtue of the Constitution in practice the DPP.

pursue disciplinary proceedings would not normally arise. If, on the other hand disciplinary proceedings were held before criminal charges were concluded, those criminal charges might be compromised regardless of the outcome of the disciplinary hearing, as there might be concerns that notions of fairness, abuse of process or double jeopardy might be engaged. In short, the purpose of a ruling in the context of the Regulations is to guide the Commission or the Commissioner of Police concerning whether or not they should pursue disciplinary action. If a decision has already been made for a charge to be laid there is obviously absolutely no need for a ruling. The criminal process would then take precedence and any disciplinary action contemplated put on hold pending the outcome of the criminal proceedings. It is useful to restate here what was indicated before. The Regulations can only bind those they regulate; the Commission, the Commissioner of Police and the members of the Police Force. They cannot bind the DPP, INDECOM or any other party not subject to their purview.

[328] There is a further very important point which I should highlight. The Regulations speak to possible offences against “any enactment”. The Regulations therefore address statutory breaches that may be criminal. They do not appear to address situations where members of the Police Force are accused of murder or other felonies contrary to common law.

[329] In any event, after the hearing of this matter was concluded, the case of **Rohan Ellis v R** [2012] JMCA Crim 6 was decided and brought to the attention of the court and other counsel in this matter, by counsel for the first defendant. In that case the appellant was convicted of a breach of section 80(b) of the Corrections Act having been found with prohibited items. On appeal one of the issues was the effect of regulation 30 of the Public Service Regulations which is *mutatis mutandis* the same as regulation 33 of the Police Service Regulations. The advice of the Attorney General had not been sought in that case before the charges were laid. The appeal was allowed on other grounds, but in respect of the non-observance of the procedure set out in regulation 30 Harris P(Ag.) writing for the court had this to say at paragraphs 25 - 26:

[25] There is no evidence that any of the prerequisites laid down by the section were observed by the Commissioner of Corrections prior to the arrest of the appellant. This, however, would not have affected the legitimacy of his prosecution. It would have been proper for a preliminary investigation to have been made, touching the allegations against the appellant and the advice of the Attorney General sought prior to his arrest. However, this does not mean that the police would not have had a right to have intervened where it was reasonably suspected that a criminal offence had been committed.

[26] The dictates of the regulations as to the receipt of advice of the Attorney General as a precursor to an arrest of a public officer are not mandatory. They are merely directory and indeed procedural...In the present case the failure of the authorities to comply with directions laid down in section 30¹³ is a mere irregularity which does not in any way affect the right of the police to have made the arrest. As a consequence the arrest would have been lawful.

[330] The Regulations therefore cannot assist the claimants in any way. They do not bind INDECOM, they speak to statutory rather than common law offences, there is no requirement that any party not bound by the Regulations follow the procedure they prescribe, and being only procedural, their non-observance where they should have been followed, would not make an arrest unlawful.

[331] The cases cited also do not advance the cause of the claimants. As pointed out by counsel for the first defendant, in ***Attorney-General v Mohammed Ali and Others*** the reasonable or legitimate expectation arose from the constitutional right enshrined in Article 11 of the Guyanese Constitution. In the instant case there is no right to a prior ruling before arrest and charge enshrined in the Constitution. Further the link that the claimants have sought to establish between the constitutional right to freedom from arbitrary arrest and a legitimate expectation of the right to a ruling prior to being charged has not been established for all the reasons outlined above. Whether or not the current practice is grounded in the Regulations or merely on years of custom that have developed between the Police Force and the Office of the DPP, that custom cannot bind the Commissioner and the investigative staff of INDECOM.

¹³ Regulation 30

[332] In *Attorney General of Hong Kong v Ng Yuen Shiu (Hong Kong)* the legitimate expectation arose from a promise that a certain procedure would be followed. In the instant case if it is accepted that the practice which existed prior to the creation of INDECOM does not bind INDECOM, there is no extant promise that the practice of seeking a ruling would be followed by INDECOM. In fact the opposite is evident. This case has been brought because INDECOM has not followed that practice and the case has continued because the Commissioner has given no indication that he would not adopt the course he adopted in the Malica Reid case, in future.

[333] There being no legitimate expectation and no other legal entitlement to a prior ruling of the DPP before charges are laid against police personnel, observations made by the Judicial Committee of the Privy Council in the case of *Sharma v Brown Antoine and Others* (2006) 69 WIR 379, (which were relied on by counsel for the first defendant), are apposite. In that case the Honourable Chief Justice of Trinidad and Tobago challenged by way of judicial review a decision of the Deputy DPP to approve the initiation of a prosecution by the police against him. Interestingly, given the context of the instant case, though the opinion of the Deputy DPP was sought by the police, it was not suggested that opinion was a prerequisite to charges being laid. The Judicial Committee of the Privy Council held that the judicial review proceedings were inappropriate and that whatever challenges the Honourable Chief Justice wished to mount to the prosecution, they should be brought in the criminal proceedings themselves. At page 387 paragraph 14, Lords Bingham and Walker in their joint opinion outlined a number of governing principles of law. The first principle they outlined at sub-paragraph (1), is of general application and relevant to the instant case. They said:

The rule of law requires that, subject to any immunity or exemption provided by law, the criminal law of the land should apply to all alike... The maintenance of public confidence in the administration of justice requires that it be, and be seen to be, even-handed.

CONCLUSION

[334] I have therefore concluded that:

- i. The Commissioner and the investigative staff of INDECOM have the power of arrest both under common law and by virtue of the Act, having been conferred with the powers of a constable;
- ii. The Commissioner and investigative staff have powers at common law to charge and initiate prosecutions of members of the Police Force;
- iii. There is no requirement for a ruling of the DPP before members of the Police Force are arrested and charged by officers of INDECOM; and
- iv. The powers possessed by officers of INDECOM to arrest, charge and prosecute members of the Police Force in no way undermine the constitutional authority of the DPP who still retains the authority to take over and/or discontinue any prosecution where such action is deemed appropriate by the DPP.

[335] Therefore, subject only to the fact that all parties are agreed, and the court accepts, that the Act does not confer a power to charge, I would refuse the Declarations and Injunctive relief sought.

Marsh J

ORDER

Subject to fact that the Act does not confer a power to charge, the Order of the court is that the Declarations and Injunctive relief sought are refused.