IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. 2011 HCV06344

COR: The Honourable Mrs Justice Lawrence-Beswick
The Honourable Mr Justice Sykes
The Honourable Mr Justice F Williams

BETWEEN	**GERVILLE WILLIAMS**	**1ST CLAIMANT**
AND	**ORRETT WILLIAMSON**	**2ND CLAIMANT**
AND	**FRANCIS RENNALS**	**3RD CLAIMANT**
AND	**DEVON NOBLE**	**4TH CLAIMANT**
AND	**DAVID HUTCHINSON**	**5TH CLAIMANT**
AND	**PETRO GREENE**	**6TH CLAIMANT**
AND	**MARCEL DIXON**	**7TH CLAIMANT**
AND	**KENNETH DALEY**	**8TH CLAIMANT**
AND	**THE COMMISSIONER OF THE INDEPENDENT COMMISSION OF INVESTIGATIONS**	**1ST RESPONDENT**

AND	**THE ATTORNEY GENERAL**	**2ND RESPONDENT**
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**3RD RESPONDENT**

Mrs Carolyn Reid-Cameron and Mr Chukwuemeka Cameron instructed by Carolyn C Reid and Co for the Claimants

Mr Richard Small and Mrs Shawn Wilkinson instructed by Shawn Wilkinson for the 1st Respondent

Ms Althea Jarrett for the 2nd Respondent

Mr Adley Duncan for the 3rd Respondent

Heard: February 27, 28, 29, May 2 and May 25, 2012

CONSTITUTIONALITY OF LEGISLATION – WHETHER SECTION 21 OF INDEPENDENT COMMISSION OF INVESTIGATION ACT BREACHES CONSTITUTION – TEST FOR UNCONSTITUTIONALITY – NEW CHARTER OF RIGHTS AND FREEDOMS – WHETHER NEW TEST NEEDED – RIGHT AGAINST SELF INCRIMINATION – RIGHT TO SILENCE

Lawrence-Beswick J

Introduction

[1] On May 2, 2012 we dismissed the claimants' case in its entirety and promised to put our reasons in writing. These are the reasons. The claimants are police officers and on Friday, August 13, 2010, they formed a team which was on operation in the Tredegar Park Community. There was heavy gunfire and at the end of the operation two men lay dead.

[2] The 1st respondent, the Commissioner of the Independent Commission of Investigation (Indecom) launched an investigation into the circumstances of the death of these men and in the course of that sought to obtain information about the deaths from the claimants.

[3] The claimants, on the advice of their attorneys-at-law, indicated that they did not wish to answer any questions put to them by an investigator of Indecom and were thereafter prosecuted for failing to comply with a lawful requirement of the Commission to provide a statement and answer questions concerning the operation.

[4] They were placed before the Resident Magistrate's Court and their trial began. They sought to persuade the presiding Magistrate that the Constitution provided them with protection from prosecution on the charges but the arguments did not find favour with her.

[5] They now bring this matter before the Constitutional Court seeking redress. The Attorney General (AG) and the Director of Public Prosecutions (DPP) are the other respondents, the AG as the representative of the Government and the DPP as a person having an interest because of her constitutional powers and authority.

Reliefs Sought

[6] The claimants are in this matter seeking declarations concerning constitutional rights not only of themselves but also of suspects in similar circumstances and including a declaration that any requirement for them to answer questions posed

by an investigator of Indecom is a violation of their constitutional right against self incrimination and of their common law right to remain silent.

[7] The claimants submit that they are here challenging:

(a) “the acts of Indecom and the process that was adopted” and

(b) the constitutionality of the Act setting up the Commission. They are not challenging “the Resident Magistrate or the decision to prosecute by the DPP.”

[8] The reliefs they seek are:

(a) A Declaration that the right not to be compelled to testify against himself or to make any statement amounting to a confession or admission accrues to the claimant.

(b) A Declaration [that the right] to silence accrues to the claimant.

(c) A Declaration in (a) continues to be contravened by the prosecution in prosecuting the claimant under Section 33 Indecom Act.

(d) A Declaration in (b) continues to be contravened by the prosecution under Section 33 Indecom Act.

(e) A Declaration that the Indecom Act does not compel persons named as suspects to give evidence against themselves.

(f) and (g) A Declaration that the claimants were deprived of an independent and impartial prosecution.

(h) A Declaration that paragraphs 4 and 5 of the caution administered by the Commissioner deprived the claimants of an independent and impartial prosecution.

(i) A Declaration that claimants were deprived of expectation that DPP would have prosecuted them, not Indecom.

(j) A Declaration [that] the claimants could not be compellable in court of law.

(k) A Declaration [that] the claimants' right to freedom of movement was and continues to be contravened by the Commissioner in prosecuting the claimants for failure to attend at the Video Identification Unit on September 14, 2010.

(l) A Declaration that the requirement by the Commissioner under Section 21(1) and (5) of the Indecom Act that the police furnish a statement is null and void by virtue of Section 2 of the Constitution since it breaches the right to equality of treatment under Section 13 (3)(g) of the said Constitution.

(m) An order that the criminal proceedings instituted against the claimants by information number 9454/05 in the Resident Magistrate's Court, for the Corporate Area being held at Half Way Tree be discontinued by the first respondent.

(n) A stay of any proceedings in the Resident Magistrate's Court arising from the first respondent's decision to proceed with the

prosecution proceedings pending determination of the action herein.

(o) An order of Prohibition to restrain the Resident Magistrate of the parish of St. Andrew, or any other Resident Magistrate of the island of Jamaica, from holding or continuing any proceedings in furtherance of the aforesaid charge laid or purportedly laid against the claimants.

[9] Meanwhile Indecom urges the Court to accept that no rights have been breached by its actions and that in any event the rights stated in the Constitution are not absolute but are subject to certain exceptions under which the Indecom Act would fall.

Background

[10] The police started to investigate the circumstances of the death of the two men but within days Indecom took over the investigations. The instructions from Indecom to the claimants and their attorneys-at-law changed often but the overall purpose appeared to be to obtain information from the claimants and also to put them on an identification parade.

There was no clear decisive action by Indecom as it concerned informing the claimants as to the place, time and reason for attending on the Indecom officers. The number of notices served, and then altered, and the correspondence reflecting changes exemplifies that.

Notices and Correspondence

[11] Indecom issued several notices to the claimants. They were served with:

(1) A "Notice to Suspect" dated August 25, 2010 concerning an identification parade.

(2) A notice dated September 1, 2010 requiring them to attend September 14, 2010 at the Video Identification Unit and "report to officers of Indecom to furnish to them a statement, and to answer questions touching and concerning their action, the actions of other members of the JCF and JDF and all occurrences witnessed by them in the vicinity of Tredegar Park (between August 12 and 13, 2009)……..including the circumstances that lead (sic) to the death of Mr Derrick Bolton and Mr Rohan Dixon."

(3) A notice dated September 13, 2010 concerning an identification parade.

(4) Two notices, one unsigned and one signed dated December 20 2010, requiring attendance on January 3, 2011 at the Indecom's office with a statement and to answer questions as per the September 1 notice. Those were served on December 18, two days before the date they bore.

(5) A notice dated January 3 requiring the claimants to attend with the statement and to answer questions on January 21, 2011.

Letters

A letter of December 31, 2010 from Indecom changed a proposed Court date of December 31, 2010 to January 7, 2011.

Another letter dated January 7 indicated there was to be a change of Court date to a date unspecified because a video identification parade was to be held on January 7.

The notices and letters elicited further correspondence. Attorneys-at-law representing the claimants had both sent letters dated September 14, 2010 to Indecom asking that a more convenient date be agreed as they were unable to attend on that date. The claimants did not attend asserting that they had the understanding that the meeting was being rescheduled because of the unavailability of their attorneys-at-law.

Later, letters also passed between Indecom and the police authorities dated December 16 and 17, 2010 asking for arrangements to be made for the

claimants to be transported to named places for the "necessary process" to be executed on them on December 20, 2010 after which they would be put before the Court.

Meanwhile, by telephone, Indecom sought to arrange for an identification parade to be held for the claimants on December 30. The notice was too short for the lawyers representing the claimants and they proposed January 5, 2011.

[12] In a letter dated January 14, 2011, Indecom informed the attorneys-at-law for the claimants that they should make their first appearance in Court on January 20 to be prosecuted for their failure to comply with a lawful requirement of Indecom.

[13] A summons dated January 14, 2011 required them to attend on January 20, 2011 at Court to answer to a charge of failing to comply with a lawful requirement of Indecom.

[14] A letter from the claimants' attorney-at-law dated January 20, 2011 sought confirmation that the appointments for January 21 had been cancelled by Indecom.

[15] The date for Court appearance was also changed to January 21 on which date they made their first appearance before the Resident Magistrate's Court to answer that charge.

[16] In the midst of all the notices and changes issued from Indecom, all claimants and their attorneys-at-law attended at Indecom's office on January 3, 2011 in response to the requirement to give a statement to Indecom. Claimant, Ms Petro Greene was the first person to be questioned. The other claimants left the room.

The Question and Answer Session

[17] Claimant Ms Petro Greene swore an oath to give evidence and Commissioner Williams asked her questions. She refused to answer. Ms Greene did not wish to participate and her attorney-at-law indicated that in so doing she was relying on Section 21 (5) of the Indecom Act which allowed her not to answer in the circumstances.

[18] Nonetheless, the Commissioner of Indecom had prepared a caution and he read it to Ms Greene. She signed, confirming that it had been read to her. He maintained that the claimants were not accused persons or suspects and they held no immunity from answering relevant questions.

[19] Thereafter, the Commissioner asked questions and Ms Greene responded that on the advice of her attorney, she had nothing to say because she had been served with a notice to attend an identification parade as a suspect. She herself informed the Commissioner that the reason why she was not answering was that she was relying on Section 21(5) of the Indecom Act.

[20] According to Ms Greene, Mr Williams then asked her for the statement which she had been required to bring to Indecom's office. She continued to say she was refusing to answer because of Section 21(5).

[21] The Commissioner then informed her that it is an offence to refuse to comply with a lawful requirement of Indecom and that although the question he had asked her did not incriminate her; she had refused to answer it. He continued that, had she been in a Court of Law, she would have had to answer so that Section 21(5) of the Indecom Act could not exclude her from being required to answer questions posed by Indecom.

[22] After some legal submissions by Ms Greene's attorney-at-law, the Commissioner stated that he would be referring the matter to the DPP concerning the possibility of charging her as her objection to answering was not valid.

[23] Ms Greene's affidavit indicates how the meeting ended:

> *He further asked me 'Is this the position of all the rest of your members'? I answered and said we are all relying on the same statute.*

[24] The other claimants were called into the room and each was given a copy of a notice dated January 3, 2011, to attend on January 21, 2011 concerning the statements which they were being required to provide. They say that they also

understood from the Commissioner that if they agreed to that interview then Indecom would cancel the interview of January 3.

[25] Subsequently, the DPP recommended that the claimants were to be charged for failing to comply with a lawful requirement of the Commission, but added that they (DPP) would not disagree with not pursuing that in view of the fact that the claimants were willing to attend an identification parade.

Court process

[26] Indecom proceeded to prosecute the claimants. January 5 saw a Video Identification Parade being held for Constable Hutchinson and he was not identified.

[27] The claimants were charged, and are now being tried in the Resident Magistrate's Court that on 14th day of September 2010 they failed to comply with a lawful requirement of the Commission in that they:

> Failed to attend at Video Identification Unit on September 14, 2010 at 9:00 a.m.
>
> Failed to report to Isaiah Simms and other officers to furnish to them a statement.
>
> Failed to answer questions touching and concerning their actions and actions of other members.

Pre and post September Considerations

[28] Counsel for Indecom urges the Court to not consider any activity said to be relevant to this matter which occurred after September because, he argues, the claimants were to have presented themselves with a statement and to be questioned on the September 14, 2010. They failed to attend on that day and were charged with failing to speak on that September day concerning the events

of August 13, 2010 so that any other considerations after September 14 are irrelevant.

[29] I disagree with the submission to ignore activities after September 14, 2010. All the notices culminating in those of January 2011 are concerned with obtaining information about the same incident, the deaths of the two men.

[30] Indecom had continued to send notices and letters concerned with setting a date for the claimants to attend to provide the statements sought and to answer questions. All the activity subsequent to the September date was geared at obtaining the same information which Indecom had been trying to obtain from September 2010. In my view, the activities after September 2011 may well assist in providing a comprehensive understanding of the issues.

Claimants' Submissions

[31] Counsel argues for the claimants that one of the central issues to be determined is whether the proceedings to seek to obtain information from the claimants as a whole were fair.

Fair trial

[32] Counsel for the claimants argues that since the Constitution guarantees a citizen the right to not incriminate himself and also to have a fair trial that means that when charged with a criminal offence a person has the right to not incriminate him/herself and also to be silent.

[33] The submission further is that these rights apply not only during criminal proceedings but also at the very outset of the proceedings.

[34] Counsel asks if Indecom can compel a suspect to answer questions when the Court itself would not have had such power because it would be in breach of the right against self incrimination and also the right to silence in the Court.

[35] Counsel urges the Court to recognise that Indecom is in fact doing investigations which would have been the duty of the police prior to the formation of Indecom.

It follows that investigations by Indecom should also be subject to the same strictures that restrict police investigations.

[36] Counsel submitted that even if the information being sought appears to be not incriminatory a citizen should not be compelled to provide it because an apparently innocuous statement may be used against the statement maker in subsequent prosecution. Indecom should not be permitted to gather information from a person and then be permitted to use it against the person providing it.

[37] The submission continues that the extent to which Indecom will go to compel a suspect to speak is evident by the fact that the consequence of not speaking is that the suspect would be liable to be charged with a criminal offence which carries with it a substantial fine.

[38] Counsel submitted therefore that by not attending at the Video Identification Unit the claimants were asserting their right to silence and not to incriminate self.

Counsel of their choice

[39] The claimants contend further that their right to be represented by Counsel of their choice was violated because their Counsel had indicated that they were not available on the dates specified by Indecom and would be available at other times which were in fact rejected by Indecom.

Freedom of movement

[40] Counsel argues that the Commissioner does not have the power to direct the claimants to attend at the Video Identification Unit nor to attend an identification parade because they have the right to freedom of movement which is guaranteed to all citizens. They cannot be compelled to go to any particular place.

Powers of Indecom

[41] Counsel concludes that the Indecom's Commissioner is acting as investigator, complainant, witness, prosecutor and judge and that should not be permitted. To exemplify that Counsel shows that the Commission investigated, created its own caution for the suspects, determined if the questions were incriminatory, sent the matter to the DPP to be determined, then ignored the advice, prosecuted and became a witness in the criminal prosecution.

Respondents' Submissions

Alternative method of redress

[42] The submission is that this claim for Constitutional redress by the claimants is an abuse of the process of the Court because the claimants have not disclosed any reasonable grounds for making the claim and because the matter is frivolous and vexatious and further that alternative remedies exist.

[43] Counsel argues that the Resident Magistrate can adequately adjudicate on the issue as to whether or not the relevant portions of the Indecom Act are unconstitutional and that she did in fact do so and had ruled in a manner not finding favour with the claimants, which resulted in this approach to the Constitutional Court. Also it had been open to the claimants to appeal her ruling in the Court of Appeal.

Statements

[44] Counsel argues that there is no question that the claimants did not attend with their statements to the Commissioner of Indecom. He urges the Court to recognise that their Counsel had simply written to say that they were relying on the Act which provided certain rights and would not be attending on the date specified and did not offer another date. This amounted to a clear failure to attend.

[45] The issue, he argues, is whether the charging of the claimants for failure to attend or give a statement in August 2010 was an infringement of their Constitutional rights.

Right to be claimed in person and by persons charged

[46] Counsel argued that any claim to the right to silence must be taken by the claimant himself not by his attorney-at-law. The Indecom Commissioner's function is analogous to a judge's and therefore the privilege must be claimed before him on oath. Further, the right to silence he says, is only available to persons charged or who are reasonably suspected of having committed a criminal offence.

[47] There was no evidence that the claimants were charged or had reason to believe they were to be charged except in their own mind. In fact there was no evidence that the Commissioner had started any criminal investigation.

Are the claimants suspects?

[48] Counsel's view is that all the claimants' submissions are based on the presumption that the claimants are suspects because the notices requiring the claimants to attend an identification parade use the word "suspect." He argues that there is no allegation of wrongdoing by the claimants in the incident of August 13, 2010 and the investigation by Indecom was by its own initiative and in accordance with its mandate and not because of any allegation of wrongdoing. It was in those circumstances that the notices of September 14 were served. The claimants were not suspects.

[49] There had in fact been notices using the word "suspect" addressed to the claimants but all that Indecom had done was to hand out notices which had been given to them by the police at their inception. Where Indecom had created its own document there was no reference to "suspect."

[50] In addressing the effect of requiring the claimants to attend at an identification parade, Counsel argued that the parade may have eliminated a person from being accused of being involved in a matter. Several persons had been described as being involved and the entire group of police officers had been invited to the identification parade.

However, he acknowledged that once a person has been identified he becomes a suspect and can no longer be questioned.

Statements for other purposes

[51] Counsel submits that Indecom may require statements for a purpose other than an investigative one. They can be used for reports and recommendations for the future conduct of the security forces. This could therefore mean that the suggestion that the Commissioner's actions are unconstitutional is premature. In fact the submission is that under the Indecom Act the function of the Commissioner is primarily administrative and therefore would not contravene anyone's rights.

Fair trial

[52] As it concerns the argument that the claimants would be deprived of the right to a fair trial if required to answer questions it is argued that the trial judge would preserve that right through the supervision of the trial process.

Right to freedom of movement

[53] Further, Indecom has the power to require persons to travel to a place in order to do specified things, in this case, to give the statement.

Right to ask for statements

[54] Counsel submits that the Commissioner is empowered to summon anyone to provide a statement, not only one special class. This power therefore does not discriminate against any one person or group in particular.

[55] He argues that if the Commissioner of Indecom did not have the right to ask a person questions touching and concerning circumstances of a matter being investigated by Indecom, and to require answers, then it would be extremely difficult to investigate a criminal offence or wrongful conduct by the security forces. He submits that Section 21 (5) of the Indecom Act which provides for limits to compelling a witness cannot be construed to apply to a witness who is not a suspect or who is not charged and it is therefore not unconstitutional.

Analysis

[56] I consider first whether this matter ought properly to be considered in the Supreme Court or whether recourse should have been had to alternative relief from another Court.

Alternative reliefs

[57] A person who alleges that any of his constitutional rights has been, is being, or is likely to be contravened may seek redress in the Supreme Court.
Section19 (1) of the Charter of Rights provides:

> *If any person alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.*

[58] However, if the Court is satisfied that adequate, not necessarily identical means of redress for the contravention alleged are available to the person concerned under any other law, then it may remit the matter to that other Court and decline to exercise its powers.

Section 19 (4) of the Charter speaks of that option and 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.*

[59] The claimants' trial for breaching the provisions of the Indecom Act is even now before the Resident Magistrate's Court. When stripped to its bare bones, the claimants' complaint is that they were being forced by Indecom to speak on pain of prosecution before the Resident Magistrate's Court. If it were true that:

(a) they had a right to not self-incriminate and/or to be silent and

(b) the Indecom Act was wrong in seeking to require their prosecution for not providing a statement and information,

then they should not have been required to appear before the Resident Magistrate's Court at all.

[60] The redress for their complaint would therefore be to prevent such an appearance or at the very least, to prevent the continuation of any proceedings which would have started in that Court prematurely/erroneously.

[61] It seems to me that if the claimants contend that they should not be before the Resident Magistrate's Court at all, they should not be required to subject themselves to the very Court against which the protest lies, to argue their claim that they should not be before it. By then the proverbial horse would have

already gone through the gate. In this matter, the trial has already started but it is my view that the claimants still have the right to have a Court determine if they should be required to continue to face the Resident Magistrate's Court.

[62] If the claimants were correct in maintaining that they ought not to appear before a Magistrate, it appears to me that it may well result in grave injustice if they were required to face the Magistrate's Court to submit that they are wrongly there. It would mean that if, as in this matter, the Magistrate does not agree with their submission, they would have to proceed through an entire trial, of whatever length, and only on conviction be allowed to access the Court of Appeal to present arguments in this regard.

[63] In my view, in the circumstances of this case, the proper forum to argue the constitutional point is the Constitutional Court where the varied constitutional issues can be determined so that the decision can be made as to whether the claimants ought properly to be put to trial before the Resident Magistrate's Court. A claimant must have the right to challenge the constitutionality of requiring him to answer to a criminal charge and to mount that challenge in a separate and distinct Constitutional Court before he actually commences on the trial of that charge or at the very least, during the trial. I am of the opinion that a person ought not to be put to the peril of facing a court if such an appearance is in fact contrary to the law.

[64] Further, as I consider this aspect of the matter I am mindful of the fact that there is a great likelihood that the issues with which this Court is now concerned will recur, that is, that persons may wish to know the extent of the powers of Indecom to require them to provide statements and to attend at particular places to do so.

[65] I take judicial notice of the fact that several Courts are now engaged in considering aspects of the Indecom Act. It is a relatively new Act and litigants have been seeking clarification from the Court as to the true meaning of some of its provisions. The interpretation of the Act has become a matter of great public importance.

[66] Such redress as there is to be had during the conduct of the substantive trial of this matter in the Resident Magistrate's Court would be limited to the parties involved and would redound to the benefit/detriment of the individual litigants in the matter.

However, as presently framed before this Court, the claim would receive a more generalised analysis and determination of the issues. This would no doubt lead to greater certainty as to how the particular sections of the law are to be interpreted and also the likelihood of less future litigation on the same or similar issues.

[67] It follows therefore that I do not regard such redress as may be available, as being adequate in the circumstances of this case, and I view the Supreme Court as being the proper forum to adjudicate on these issues.

Requests by Indecom – Notices

[68] In considering this matter it is important to identify what the claimants were being requested by Indecom to do.

[69] The first notice which is dated September 1, 2011 requests the claimants to attend at a designated place to "furnish to [Indecom] a statement, and to answer questions touching and concerning [their] actions, the actions of other members of the JCF and JDF and, all the occurrences witnessed by you in the vicinity of Tredegar Park…….and Spanish Town … between 8:00 p.m., 12th August 2010 and 8:00 a.m., 13th August 2010, including the circumstances that lead (sic) to the death of Mr. Derrick Bolton and Mr. Rohan Dixon."

[70] Indecom was by this notice asking each claimant to provide (1) a statement and (2) answers about:

(a) his/her actions and

(b) actions of members of the JCF and JDF

(c) all occurrences witnessed by the claimant

between specified times and including the circumstances that led to the deaths of the two men.

This was in accordance with the Indecom Act.

Can the Indecom Act be challenged for unconstitutionality?

[71] The Constitution recognises that there are certain rights to which persons in Jamaica are entitled. They are individually described in the Charter of Rights and Freedoms and are protected from being whittled away by any laws passed. In referring to those constitutional rights, Section13 (2) of the Constitution states:

> *(b) Parliament shall pass no law …….which abrogates, abridges or infringes those rights.*

The Charter of Rights and Freedom

[72] The Charter is a recent piece of legislation. It came into force on April 7, 2011. It was born of the desire to more clearly legislate the rights and freedoms to be enjoyed by Jamaican citizens. It replaces Chapter 3 of the Constitution which had previously identified the rights of the citizens but which had come to be regarded as being inadequate. The Charter therefore had more rights specified than had been in Chapter 3.

[73] A question which arises is whether the Charter with the new rights, applies to the Indecom Act because the Act came into force before the Charter. The answer to that lies in the Charter itself where at Section13 it provides:

> *(12) Nothing contained in or done under the authority of any law in force immediately before the commencement of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, relating to:*

(a) sexual offences;

(b) obscene publications; or

(c) offences regarding the life of the unborn,

shall be held to be inconsistent with or in contravention of the provisions of this Chapter.

[74] This means that no law existing immediately before the Charter of Rights came into force is to be held to be unconstitutional if that law relates to sexual offences, obscene publications or offences regarding the life of the unborn. It would follow therefore that any laws not relating to those specified categories can be held to be unconstitutional.

The Indecom Act does not concern those areas and thus it is governed by the Charter, and can be held to be unconstitutional, that is, it can be challenged for unconstitutionality.

[75] Section 5 of the Indecom Act also specifically states that the Commission is subject to the provisions of the Constitution.

Are the relevant provisions of the Indecom Act contrary to the Constitution?

[76] I consider now if this section of the Indecom Act which empowers the Commissioner to make the requests which he did, deprives the claimants of rights under the Constitution and also at common law.

Self-incrimination

[77] The Charter recognises the right against self-incrimination. Prior to the Charter there had been no provision in the Constitution giving the right against self-incrimination.

Section16 (6) (f) of the Charter provides:

(6) Every person charged with a criminal offence shall ….

(f) not be compelled to testify against himself or to make any statement amounting to a confession or admission of guilt.

[78] Section 9 of the Evidence Act had, however, provided against self-incrimination where it provides that a person charged with an offence shall be a competent witness for the defence provided that such a person shall not be called as a witness except upon his own application.

One of the rights which the claimants argue is infringed by the Indecom Act is that against self-incrimination.

[79] The Indecom Act provides that the Commissioner can require any person to give a statement to assist in an investigation. It provides:

21 (1) Subject to subsection (5), the Commission may at any time require any member of the security forces, a specified official or any other person who, in its opinion, is able to give assistance in relation to an investigation under this act, to furnish a statement of such information and produce any document or thing in connection with the investigation that may be in the possession or under the control of the member, official or other person.

Section 21(5) limits the nature of the evidence which is so compellable and states:

A person shall not, for the purpose of an investigation be compelled to give any evidence or produce any document or thing which he could not be compelled to give or produce in proceedings in any court of law.

[80] Here the parallel between investigations by Indecom and proceedings in Court is drawn. It is only if the person could be compelled to give evidence in a Court of law that he could be compelled to give evidence for an Indecom investigation. Evidence taken in a Court of law must be in accordance with the Constitution. Therefore the Indecom Act in this regard is in keeping with the provisions of the Constitution and protects a person's right against self-incrimination in accordance with the Constitution.

Was the request of the Commissioner in accordance with the Indecom Act and Constitution?

[81] Under what circumstances can a person be compelled to give evidence in a Court of law?

Section 16(6) of the Constitution provides:

> *Every person **charged** with a criminal offence shall …*
>
> (g) *not be compelled to testify against himself or to make any statement amounting to a confession or admission of guilt.* (emphasis added)

[82] This section concerns a person who is charged, and protects such a person from self-incrimination. It does not refer to persons not charged. It follows that any person who is not charged can be required to give a statement. Section 21 (5) of the Indecom Act provides that a person cannot be compelled if he could not be compelled in proceedings in a Court of Law. Persons charged cannot be compelled in a Court of Law but persons not charged do not have that protection. It follows therefore that Section 21 of the Indecom Act would

prohibit a person charged with the offence from being compelled to testify against himself or make a statement amounting to a confession or admission of guilt in an Indecom investigation but persons not charged would be compellable.

[83] There is no evidence that the claimants had been charged with an offence at the time when they had been required by the Commissioner to give a statement.
Any person who is not charged can be required to give a statement as is mandated in Section 21 Indecom Act and his right against self-incrimination would not be violated.

The request by the Commissioner to obtain the statement from the claimants was thus in accordance with the Indecom Act and with the Constitution.

Right to silence

[84] I now consider the claimants' right to silence.
The right to silence arises at common law and is associated with the right to a fair hearing. There is the presumption that an accused is not guilty until he is proved guilty or pleads guilty. He must therefore have the right to be silent whilst the prosecution seeks to rebut that presumption in a fair hearing.

Section 16 of the Charter of Freedoms and Rights provides that:

> *16- (1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded* ***a fair hearing*** *within a reasonable time by an independent and impartial court established by law.* (emphasis added)

[85] This right also arises when the person is charged. By providing that the person being requested to give a statement can only be compellable if he would have been compellable in Court proceedings, the Indecom Act also embraces this

right to silence when a person is charged. Here, as with the right against self-incrimination, the action of the Commissioner is in accordance with the Indecom Act and with the Constitution as there is no evidence that the claimants were charged.

Administrative use of information

[86] In **R v Kearns** [1] the Court recognised that:

> *A law will not be likely to infringe the right to silence or not to incriminate oneself if it demands the production of information for an administrative purpose or in the course of an extra judicial enquiry. However, if the information so produced is or could be used in subsequent judicial proceedings, whether criminal or civil, then the use of the information in such proceeding could breach those rights and so make that trial unfair.* [2]

[87] It is instructive that there is no evidence as to the reason why the information was sought. Common sense would dictate that it was to help to determine who was/were responsible for the deaths of the two civilians but that would not exclude the possibility of obtaining information about the security operation for administrative purposes in order to improve it in the future.

Rights of Security Forces

[88] It must be noted also that inasmuch as the citizen enjoys the right to life, so too must each member of the security forces. The investigation by Indecom can have the result of recommendations for better equipment or procedures with a view to giving as much protection as possible to the security forces to seek to safeguard their right to life.

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[1] [2003] 1 Cr App R 111.
[2] Kearns (n 1) at page 128.

Rights of suspects

[89] Many of the reliefs sought by the claimants are declarations concerning the rights of suspects. The submissions in this regard centred around their arguments that they were being regarded as suspects and therefore ought not to have been required to speak on pain of prosecution.

[90] The documents with which the claimants were served during the course of the investigation referred to them as "suspects". In my view the claimants were certainly entitled to form the view that they were being treated as suspects. They would have no basis to conclude that Indecom was serving them with documents which it did not embrace as being its own. Further, the tone of the letters and documents was commanding.

[91] The Constitution does not provide any special rights as it concerns suspects. The Common law provides some limited protection in terms of recommending that a suspect being questioned should be reminded that there is no obligation to speak. This would take the form of a caution to the suspect.

A caution was administered by Commissioner Williams to the sole claimant who was questioned.

The Caution

[92] The caution included the warning that it was only after each question was asked that the privilege to not answer could be claimed and it continued:

> 4. Your claim to these privileges may or may not be upheld as it will be for INDECOM by its legal representative to determine whether the privilege is applicable to the particular question.

5. It is for INDECOM to decide whether or not to uphold the privilege by determining whether the objection you take is good and whether there are reasonable grounds for your belief that an answer to any particular question may incriminate you or remove legal profession privilege.

It is these latter paragraphs which the claimant found objectionable. I now consider the merit in such an objection.

[93] In ***R v Director of the Serious Fraud Office, ex parte Smith***,[3] the applicant, having been charged, was questioned by the Director of the Serious Fraud Office and the Court held that the Director was so entitled but only on administering a prescribed caution to the applicant. That caution indicated that he did not have to say anything but that if he did say something it could not be used against him except in specified circumstances.

Claiming the right

[94] Where a person seeks to rely on Section 21 (5), of the Indecom Act that is, to claim that he is not compellable, he must claim it himself and on oath. This allows for a determination by an adjudicating officer as to whether in the circumstances presented, the person from whom the statement should be taken, should in fact not be compelled. It is not sufficient that his attorney-at-law states that claim on his behalf in his absence. The Commissioner is the adjudicating officer in this regard.

[95] These principles have long been determined. In **Downie and Others v. Coe and Others**, [4] the Court recognised that the practice had always been that if any witness sought to rely on the privilege against self-incrimination, the objection had to be taken by the witness on his or her oath. The privilege cannot be claimed by the advising attorney-at-law. In reviewing the authorities the Court

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[3] [1993] AC 1.
[4] EWCA Civ 2648; (1997) Times, 28 November; (unreported) (November 5, 1997).

showed that it was not however necessary to give "chapter and verse to show why …answering a question … might incriminate him." [5]

[96] Lord Denning MR it was who said that it is for the Judge to say whether there is reasonable ground for protection from self incrimination. He explained that the witness "should not be compelled to go into detail-because that may involve his disclosing the very matter to which he takes objection. But if it appears to the judge that, by being compelled to answer, a witness may be furnishing evidence against himself-which could be used against him in criminal proceedings or in proceedings for a penalty- then his objection should be upheld." [6]

[97] The issue as to whether the court should accept, without more, the opinion of the attorney at law that the witness would be the victim of self-incrimination was considered in **Crown Prosecution Service v. Bolton**. [7] There Lord Justice Kennedy opined that the duty imposed by the court is non-delegable. He believed that the Court cannot simply adopt the conclusion of the attorney-at-law advising the witness whose conclusion may or may not be correct. He found support for that statement of the law in Blackstone's Criminal Practice, stating that before acceding to a claim to privilege the court should satisfy itself, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is a reasonable ground to apprehend real and appreciable danger to the witness with reference to the ordinary operation of the law in the ordinary course of things, and not a danger of an imaginary or insubstantial character.

[98] The pertinent paragraphs of the caution therefore accord with the law. It follows therefore that the caution would not in my view deprive the claimants of an independent and impartial prosecution which was the argument of the claimants.

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[5] Note 4 per Lord Bingham CJ.

[6] Rio Tinto Zinc Corporation v Westinghouse Electric Corporation [1978] AC 547 at 574.

[7] [2004] 1Cr. App R.33.

Are the rights absolute?

[99] It should be clear that my view is that the claimants have the right against self incrimination and the right to be silent and that the Commissioner has not violated those rights in seeking to obtain information from them. However, in the event that I am wrong in this regard I consider further. Are these rights absolute?

[100] The Trinidadian Court of Appeal wrestled with this issue in **Hayden Tony v PC Joseph Corraspe** [8] where the rights of a firearm licence holder were considered. The law required the holder to report the loss of his firearm and as a result of obeying that law the holder was prosecuted. The Court held that the rights of silence and self-incrimination are not absolute and in any event had not been infringed. Public interest factored into the deliberations and Bereaux JA held:

> *In our judgment the need to protect the greater public interest renders it unlikely that the right of silence and the privilege against self incrimination are rights which ought to at all cost to be maintained. Indeed … both rights have been eroded time and again by the legislature.*[9]

[101] The rights in the Jamaican Constitution are not absolute. Section 13 of the Charter limits the citizens' rights and provides:

> *(2) Subject to sections 18 and 49, and to subsections (9) and (12) of this section, and save only as may be* ***demonstrably justified in a free and democratic society.***

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[8] Mag App No. 68 of 2008 (Unreported) (Delivered February 26, 2010) (Court of Appeal of Trinidad and Tobago).

[9] Tony (n 8) [34] (Bereaux JA).

(a) This Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17. (emphasis added)

[102] I need therefore to determine if requiring the claimants to provide a statement for an Indecom investigation is demonstrably justified in a free and democratic society.

[103] To determine that answer I consider firstly the purpose for which Indecom was created. One of the purposes according to the Act is to investigate the circumstances where death or injuries or abuses result from the actions of the Security forces. It may reasonably be expected that in the majority of cases the members of the security forces who are present in such a circumstance would either have been actively involved in the activities or would be witnesses as to what had occurred.

[104] Indecom's interest is in investigating with a view to preventing such death, injuries or abuses in the future and to help to ensure that the perpetrators be held accountable.

[105] Where police shooting is involved, there often appears to be a knee jerk reaction by the public in general, to assume that the police officer has committed a wrong and must be incarcerated and punished immediately. However it is important that the rights of the security officers should not be overlooked in the search for what is perceived as justice.

[106] In a free and democratic society it is important that there be justice for all and an adherence to the rights of all, importantly for the victim but also for the alleged perpetrators and indeed actual perpetrators of crimes. This requires accurate investigation and information gathering.

[107] The most accurate information would most likely emanate from persons on the scene of the incident. It seems clear that the information from the security officers present during an incident and/or concerned with an incident is vital and has to be given to accomplish the goal of justice for all - the victim, the perpetrator (alleged or actual) and the public in general.

Accountability

[108] The security officer must recognise that he is accountable to the citizens in general for his actions. He is a servant of the State and is required to allow himself to be debriefed by his superiors in the Force as to what has occurred during an operation and thereby report as to his actions and their results. A person who chooses to be a security officer chooses to be subject to orders from his superiors, to report to them and to be accountable to the public.
Indecom is required to bring transparency to that accounting process.

[109] I conclude therefore that where the Indecom Act requires anyone to provide a statement, such a requirement would be demonstrably justified in a free and democratic society seeking to obtain accurate reports from persons who have useful information for the purposes of the Act.

[110] Therefore even if there were a derogation of the right to silence and against self-incrimination, obtaining information in the situations specified in the Indecom Act can be justified in any free and democratic society.

Freedom of movement

[111] I now consider the argument that the claimants' right to freedom of movement was compromised by requiring their attendance at the identification parade.
The claimants have not been charged for failing to attend the parade, but rather, with failing to provide statements. It follows therefore that I find no merit in this argument.

Discrimination against security officers

[112] Counsel's argument that the Indecom Act discriminates against the security forces as a group by providing for them to give incriminatory statements is without merit. The Act applies to:"the Security Forces, a specified official or **any**

other person who….is able to give assistance in relation to an investigation." (emphasis added)

Right to Due process

[113] The claimants have claimed that they were deprived of their right to due process in that they were deprived of an independent and impartial prosecution as the Commissioner of Indecom retained Counsel to prosecute the claimants in the same matter in which he is investigating.

[114] There is no law of which I am aware which prohibits the investigator from prosecuting. In my view the claimants were not deprived of an independent and impartial prosecution.

Conclusion

[115] The Indecom Act is relatively recent having come into operation on April 15, 2010. It was expected to fill the perceived need to have an independent body which would investigate killings, injuries and abuses caused by the Security Forces.

[116] Investigations by the police of such killings were being stymied by the "squaddie" approach where one security officer would not give information that might have implicated another officer in a crime.

[117] The concept of Caesar investigating Caesar led to the public reposing no confidence in the State's ability to engage in fair and impartial investigations with the objective of eventually having a fair trial wherever members of the security forces were involved. Without investigations of that calibre it was feared that extra judicial killings, injuries and abuses would continue as the probability of the perpetrator being brought to justice when they did occur was very slim.

[118] The Indecom Act provides for the creation of a Commission headed by an independent Commissioner who has judicial and administrative roles. The Act

also gives him powers of investigation. This necessitates obtaining as accurate information as is possible, within the parameters of the Indecom Act and the Constitution.

[119] In the circumstances of this case, I find that the provision in the Indecom Act concerning a person providing information is not contrary to the Constitution. There were no violations of rights in requiring the claimants to provide statements concerning an operation of which they were a part and where persons died. In any event even if there were a violation to a right in making that request, it would be demonstrably justified in a free and democratic society to require statements from persons presumed to have important information which is needed by the State and therefore a request for that information would not run afoul of the Constitution.

[120] It has, in my view, been appropriately observed that:

> *A written constitution is intended to serve present and future generations. As a living organism it should be made to serve the society in the climate existing when its aid is summoned.* [10]

[121] It is of interest that in some other jurisdictions, the results of similar investigations will not be used in later proceedings. Although there is a reasonable expectation that in Jamaica information from a person compelled to speak could not and would not be used in a proceeding against him it seems to me that there ought to be a provision in the Act which specifically states that to be the position.

[122] Indeed where the Indecom Act provides for an informal resolution of complaints, it restricts the use that can be made of the information there obtained. Section 15(5) provides:

> *No answer or statement made, in the course of attempting to dispose of a complaint informally, by the complainant*

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[10] R v *Industrial Disputes Tribunal and Half Moon* (1979) 16 JLR 333, 348 (per Parnell J).

…..shall be used or receivable in any criminal or civil proceedings except, with consent of the complainant……

[123] In my view the Indecom Act should clearly state that information obtained under compulsion in accordance with section 21 would not be used in proceedings against the informant.

[124] It must be understood that such a provision would not prevent the State from subsequently charging the informant or others by using evidence gleaned by skilful investigation including other willing sources and perhaps most importantly, scientific evidence.

Reliefs

[125] I agree with the submission that it appears that the claimants have abandoned some reliefs sought as there has been no argument by the claimants in some areas.

I would dismiss the claims.

SYKES J

[126] It was Friday, August 13, 2010. A police-led party, comprising members of the Jamaica Constabulary Force (JCF) and the Jamaica Defence Force (JDF), were on an operation in several areas of the parish of St. Catherine, including Tredegar Park. During the operation the police allege that they were fired on. The police returned the fire. After the smoke cleared, two men lay dead. Their names are Mr Derrick Brown and Mr Rohan Dixon.

[127] The Independent Commission of Investigations (Indecom), a body established by the Independent Commission of Investigations Act (ICIA), has taken over the investigation into the incident. As part of its investigation, Indecom served notices on the claimants to attend at the Video Identification Unit at the Central Police Station, East Queen Street, Kingston for the purposes of (a) being placed on an identification parade; (b) handing in a statement and (c) answering questions that may be asked of them. These notices were said to have been served under the authority of section 21 of the ICIA. The date for this appointment was September 14, 2010. The police officers failed to attend on that date. After a number of developments and the service of several other notices, which have been given by Lawrence-Beswick and F Williams JJ, the claimants eventually turned up on January 3. 2011, at Indecom Headquarters. At this meeting only one police officer was questioned. This was Woman Constable Petro Greene.

[128] The failure to attend on September 14, 2010 led to charges being preferred against the claimants for the offence of failing to comply with a lawful order given by the Commissioner without lawful justification or excuse. The offence is contrary to section 33 (1) (b) of the ICIA. The charges were laid on January 13, 2011. Thus at the time the claimants turned up at Indecom Headquarters, the claimants were not charged with any criminal offence on January 3, 2011. Even now they have not been charged with any offence arising from the August 13, 2010 operation save the offence under section 33 (1) (b).

[129] The claimants now say that their rights, as guaranteed by the Charter of Rights and Freedoms of the Constitution of Jamaica, have been, are being and are likely to be infringed. They are seeking declarations that section 21 of the ICIA is unconstitutional and if it is not then a declaration that Indecom has breached their constitutional rights. The provisions of the Charter of Rights alleged to be breached are sections 13 (3) (f), 16 (2) and 16 (6) (f). Before examining the various issues, a brief background to the context that led to the enactment of ICIA is necessary.

The ICIA

[130] Jamaica has had a long-standing problem with the investigation of the circumstances in which persons have either been killed or mistreated by members of the security force, particularly the Jamaica Constabulary Force (JCF). The view has developed, rightly or wrongly, that members of the security forces, the police in particular, are involved in too many shooting incidents which have led to the death or serious injury of citizens. Others have been injured or killed while in the custody of the state. Over the years, successive government administrations have sought to address the problem. A major attempt to address the problem and to reduce public cynicism was the establishment of a statutory body known as the Police Public Complaints Authority (PPCA). It functioned for a number of years. It was felt that this body despite its best efforts did not accomplish the task satisfactorily. The statutory provisions were said to be inadequate. In the eyes of some, the PPCA was ineffective. Another significant effort saw the establishment of the Bureau of Special Investigations (BSI). This body, whatever the objective evidence may be, did not appear to command public confidence largely because it was established within and operated by the JCF, the very institution which was under a cloud of suspicion when it came to allegations of serious abuse and misconduct. Persons felt that it would not be able to conduct fair and impartial investigations into members of the force. In

one sense the BSI was even weaker than the PPCA because it did not have any statutory powers to conduct effective investigations.

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

[132] A brief reference to some statistics provided by Indecom appointed under the ICIA gives an insight into the scale of the problem. It makes sober reading. Indecom stated, in one of its affidavits filed in this claim, that between1999 to 2010 - a mere eleven years - 2257 persons were killed by the police. This figure came from the police - the BSI. By any measure this is indeed a high rate of killings, whether justified or not. The high rate of killings by the police and the perception that the police were unaccountable led the public to conclude that the cases were not being properly investigated. The PPCA body and the BSI were seen to be ineffective, underfunded and lacking in statutory authority to conduct investigations that met acceptable standards. This was the context of the passage of the legislation. Some important provisions of ICIA will be set out.

The powers and functions of Indecom

[133] Section 4 sets out the functions of the Commission. Section 4 (1) reads:

> *Subject to the provisions of this Act, the functions of the Commission shall be to*
>
> *(a) conduct investigations for the purposes of the 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 review of the disciplinary procedures applicable to the Security Force and 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.

[134] Indecom was given wide powers to carry out its mandate. Section 4 (2) reads:

In the exercise of its mandate 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 Force 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, Security Forces and specified officials.

iv. take charge of and preserve the scene of any incident.

[135] Section 2 of the Act contains some significant definitions.

[136] 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.

[137] Specified official means

(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.

[138] According to section 2, incident means any occurrence that involves misconduct of a member of the Security Forces or a specified official:

(a) resulting in the death of, or injury to, any person or that was intended or likely to result in the death of, or injury to, any person;

(b) involving sexual assault;

(c) involving assault or battery;

(d) resulting in damage to property or the taking of money or other property;

(e) although not falling within paragraphs (a) to (d), is, in the opinion of the Commission an abuse of the rights of a citizen;

[139] Under section 2 public body means:

(a) a Ministry, department or agency of Government;

(b) a Parish Council, the Kingston and St. Andrew Corporation'

(c) a statutory body or authority;

(d) a company registered under the Companies Act, being a company in which the Government or an agency of Government, whether by the holding of shares or by financial means, is in a position to influence the policy of the company.

[140] Sections 11, 12 and 13 indicate how investigations are activated. Section 11 states that the responsible head or the responsible officers having been made aware of an incident which involves the relevant public body or the relevant Force shall make a report to Indecom of the incident. Responsible head means head of the relevant Force (section 2). Responsible officer means the officer in charge of the relevant public body (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 the Act (section 2). There is therefore a duty on the heads of various public institutions (using the term broadly to encompass public bodies and the security forces) to make reports to Indecom once they are aware that certain incidents have taken place.

[141] Section 11 goes further to require that once the relevant head or responsible officer is made aware of an incident involving the relevant public body or Force then that head must inform Indecom of the incident (a) forthwith, where the incident involves conduct that resulted in the death of or injury to any person and (b) not later than twenty four hours in any other case. In other words, not only must the heads made the report but a strict time line is set.

[142] In respect of any member of the Security Forces or a specified official who, in the course of his duties, either becomes aware of or is involved in any incident, then that person shall take the necessary steps to ensure that a report is made to Indecom in accordance with section 11 (1) (section 11 (2)). The duty of reporting incidents to Indecom extends lower down the hierarchy of the security forces and correctional system. It is imposed on any member of those institutions. This

duty is clearly designed to break the culture of silence. Nothing is wrong with this.

[143] Under section 12, if Indecom forms the view that an incident is of an exceptional nature that is likely to have a significant impact on public confidence in the Security Forces or public body, Indecom shall require the relevant Force or the relevant public body to make a report of that incident to it. Indecom can specify the form, content and particulars of the report.

[144] Section 13 permits Indecom to undertake an investigation on its own initiative.

[145] When sections 11, 12 and 13 are read together it is obvious that the legislation is creating a circumstance where no significant incident remains unreported to Indecom. Indecom can initiate its own investigations. The heads of the Security Forces and public body must make a report to Indecom where death or injury results and in any other case, within twenty hours. The duty to report extends to the individual member of the Security Force or specified public official once they become aware or are involved in the incident themselves.

[146] What is it that Indecom investigates? According to section 2 investigate means 'an investigation into any occurrence carried out by the Commission for the purposes of this Act.'

[147] From these definitions, Indecom is not just a body to investigate alleged abuses by police or the military. Neither is Indecom's remit limited to cases involving death or serious injury. Its remit covers property damage or any alleged abuse of rights of citizen as well as any incident which in its opinion has the effect specified in section 12. Therefore its remit is not limited to what are commonly called 'police shootings'.

[148] Indecom has the power to investigate parish councils, statutory bodies and government companies. In order to carry out its mandate Parliament gave Indecom important powers to secure information against the will of the holder of documents. There is power to obtain and execute search warrants and there is also power to administer compulsory questions, under oath, to any person including but not limited to members of the Security Forces. In respect of the first power, Indecom is authorised, by virtue of a warrant issued by a Justice of the

Peace, to enter premises and other location as well as gaining access to records, documents and other information relevant to an investigation under the ICIA (section 4 (3)). The specific provision regarding the compulsory questioning is set out below since that is the power in question in this case.

[149] The compulsory questioning power is found in section 21. This section has drawn the most concentrated fire of the claimants. Section 21 read as follows:

> *(1) Subject to subsection (5), the Commission may at any time require any member of the Security Forces, a specified official or any other person who, in its opinion is able to give assistance to an investigation under this Act, to furnish a statement of such information and produce any document or thing in connection with the investigation that may be in the possession or under the control of that member, official or other person.*
>
> *(2) The statements referred to in subsection (1) shall be signed before a Justice of the Peace.*
>
> *(3) Subject to subsection (4), the Commission may summon before it and examine on oath-*
>
> *(a) any complainant; or*
>
> *(b) any member of the Security Force, any specified official or any other person who, in the opinion of the Commission, is able to furnish information relating to the investigation.*
>
> *(4) For the purposes of an investigation under this Act, the Commission shall have the same powers as a Judge of the Supreme Court in respect of the attendance and examination of witnesses and the production of documents.*
>
> *(5) A person shall not, for the purpose of an investigation, be compelled to give any evidence or produce any document or thing which he could not be compelled to give or produce in proceedings in any court of law.*

[150] This detail concerning the remit of Indecom has been delved into because the claimants throughout their submissions have taken the view that Indecom investigates murders and is conducting criminal investigations. The statute does not say so. What the statute plainly says is that in instances where death or serious injury results Indecom has the power to investigate. Indecom is an investigative body designed to enquire into alleged misdeeds of members of the Security Forces and specified public bodies. Indecom can only investigate if the alleged incident falls within the boundaries of the legislation. Also, from the provisions already cited Indecom also has power to investigate property damage and stolen money. It can investigate Ministries, Parish Councils, government departments, and government controlled companies. However, it is the police killings that have attracted most public attention.

[151] As can be seen, it is not only police officers who are subject to the compulsory questioning regime. It applies even to complainants and even to any other person who is able to assist in the investigation.

[152] Under the legislation, once Indecom completes its investigations, it prepares a report which is then sent to a number of persons and institutions named in section 17 (10). The Commission shall furnish a report to:

(a) the complainant;

(b) the concerned officer or the concerned official;

(c) the responsible head or the responsible officer;

(d) the Director of Public Prosecutions;

(e) the Office of the Special Coroner (where the incident involves the death of any person);

(f) the Police Service Commission (where the incident involves the misconduct of a member of the Jamaica Constabulary Force, the Island Constabulary Force, the Rural Police and the Parish Special Constables);

(g) the Public Service Commission (where the incident involves the misconduct of a specified official);

(h) the Chief of Defence Staff (where the incident involves the misconduct of a member of the Jamaica Defence Force).

[153] Indecom can even give a copy of the report to the Solicitor General where that is considered appropriate (section 17 (11)). It is to be noted that the person or persons about whom the complaint was made must receive a copy of the report. Why would Indecom be under a duty to provide a report to all these persons and institutions? The answer must be for those persons and institutions to take such action as they see fit. It may be used for internal disciplinary measures if necessary. It can form the basis of changes in policy, procedures or even changes in the law. The persons complained about may be exonerated. Undoubtedly, it may lead to criminal charges being preferred. If that is the case, so be it but that is not its primary focus. It is to unearth the facts and report. The first major issue is now addressed.

Is section 21 (1) and (5) of the ICIA in breach of sections 13 (3) (g) and 16 (6) (f) of the Charter of Fundamental Rights and Freedoms?

[154] The claimants seek the following remedies:

(a) A declaration that the requirement by the Commissioner under section 21 (1) and (5) of ICIA that the police furnish a statement is null and void by virtue of section 2 of the Constitutions since it breaches the right to equality of treatment under section 13 (3) (g) of the said Constitution.

(b) A declaration that the right not to be compelled to testify against himself or to make any statement amounting to a confession or admission of guilt, guaranteed by section 16 (6) (f) of the Constitution accrues to the claimants, persons considered as

suspects in a criminal investigation conducted by the Commissioner of Indecom.

(c) A declaration that the right to a fair trial which encompasses a right to silence guaranteed by section 16 (6) (f) of the Constitution accrues to the claimants, person considered as suspects in a criminal investigation conducted by the Commissioner of Indecom.

(d) A declaration that the right of the claimants as persons named as suspects in a criminal investigation under section 16 (6) (f) of the Constitution not to be compelled to give evidence against himself, was and continues to be contravened by the Commissioner in prosecuting claimant (sic) under section 33 of ICIA. A declaration that on a true and proper interpretation of section 21 (5) of ICIA the Commissioner and/or its (sic) officers or agents do not have the power to compel persons named as suspects in a criminal investigation to give evidence against themselves.

(e) A declaration that on a true and proper interpretation of section 21 (5) of ICIA and section 9 of the Evidence Act, the claimants being named suspects in the matter under investigations could not be compelled to answer the questions asked by the Commissioner if they were in court of law (sic) as they would be the accused persons if the matter were to be heard in a court of law.

[155] As stated earlier an investigation is now underway conducted by Indecom. By a notice dated September 1, 2010 all the claimants were required to attend the Video Identification Unit at the Central Police Station on '*September 14th, at 9:00am and report to Mr. Isaiah Simms and other officers of the Independent Commission of Investigations to furnish them a statement, and to answer questions touching and concerning your actions, the actions of other members of the JCF and JDF and all the occurrences witnessed by you in the vicinity of Tredegar Park, Lauriston, Brooklyn and Spanish Town, St. Catherine between*

8:00 p.m., 12th August 2010 and 8:00am 13th August 2010, including the circumstances that lead to the death of Mr Derrick Bolton and Mr Rohan Dixon.'

[156] The notice specified that the statement must be signed by the police officer before a Justice of the Peace. The notice also reminded the police officers that willfully making false statements, obstructing, hindering, resisting or failing to comply with any lawful requirement of Indecom was criminal offence punishable by fine or imprisonment. The notice ended by stating that section 4 of the Perjury Act applies to the proceedings under section 21.

[157] There was a second notice served on the claimants. That notice was the one used by the JCF when it is conducting identification parades in respect of persons suspected of involvement in criminal offences. The Commissioner indicated in his affidavit that this notice was adopted, without modification, by Indecom and that it was not intended to say to the claimants that they were in fact suspects in respect of the August 13, 2010. Not all the notices served were exhibited but those that were exhibited had handwritten information on them. In respect of the claimant David Hutchinson, the hand written information reads '*witness saw suspect took (sic) the men Derrick, Terrence and Rohan from her home. Derrick was subsequently found dead nearby*.' This hand written information appears on a document headed 'Jamaica Constabulary Force,' 'Identification Regulations – Code D' and 'Provision of details of first description of suspects given by witness.'

[158] There is also hand written information on the second notice which reads, 'The suspect is stationed at the Spanish Town Police Station.' This document is headed 'Jamaica Constabulary Force' 'Identification Regulations – Code D' 'Application form.'

[159] A third document headed 'Jamaica Constabulary Force' 'Identification Regulations – Code D' 'Provision of details of first description of suspects given by witness' has information of descriptions given by witness.

[160] When September 14, 2010 arrived, none of the claimants turned up. Instead two letters from two attorneys were sent to Mr Isaiah Simms, the investigator from Indecom. The letters stated that based on section 21 (5) of the ICIA the

claimants were not compellable to furnish any statement. One letter from Mr Peter Champagnie, attorney-at-law, indicated that four of the claimants (Williams, Greene, Reynolds and Daley) had recently retained counsel and additional time was needed to make firm and suitable arrangements for his retainer. The letter also went on to note that 'it would appear that the request to be placed on an identification parade' suggests that they were suspects in respect of the August 13 incident. The second letter was from Mrs Valerie Neita-Robertson, attorney-at-law, indicating that in respect of three claimants (Hutchinson, Noble and Williams) they would not be turning up because the notices referred to them as suspects however they would be available on later dates for identification parades.

[161] The claimants have submitted that section 21 (1) and (5) is null and void because it is in breach of the right to equality guaranteed by section 13 (3) (g) of the Charter of Rights provision of the Constitution of Jamaica.

[162] Section 13 (3) (g) of the Charter of Rights states:

> *The rights and freedoms referred to in subsection (2) are as follows-*
>
> *…*
> *(g) the right to equality before the law.*

[163] It was also submitted that no law can infringe any of these fundamental rights unless the requirements of section 13 (2) are met. Section 13 (2) reads:

> *Subject to sections 18 and 49, and to subsection (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society*
>
> *(a) This Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of*

this section and sections 14, 15, 16 and 17; and

(b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights.

[164] The argument put was that the ICIA was not immune from challenge under the new Charter of Rights enacted in 2011. The point being made was that the ICIA became law in 2010 and under the Charter of Rights certain laws are immune from challenge and the ICIA was not one of them. Consequently, it was said, section 21 (1) of the legislation can only pass constitutional muster if it is demonstrated to be demonstrably justified in a free and democratic society. The burden of proving this was on the respondents since all that the claimants need to do is show that, prima facie, the statute infringes one or more of the fundamental rights guaranteed under the Constitution and on this prima facie showing, the burden shifts to the respondents to justify the constitutionality of the impugned section. This the respondents can only do if they can show that (a) the objective to be served by limiting a fundamental right must be sufficiently important to warrant overriding the constitutional right and (b) the means must be reasonable and demonstrably justified (**Her Majesty The Queen v David Edwin Oakes** [1986] 1 SCR 103).

[165] The claimants have also argued that in the event that this submission fails, the conduct of Indecom has infringed the Constitution, that is to say, even if the provision is compatible with the Charter of Rights, on the facts and circumstances of the particular case, the manner in which Indecom has exercised its powers has breached the claimants' right to silence and right not to incriminate themselves. These rights (right to silence and right not to incriminate one's self) are said to be implied in the Charter of Rights. The claimants rely on section 16 (1), (5), (6) (c) and (f) to support their propositions. These provisions read:

16 (1) – Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(5) Every person charged with a criminal offence shall be presumed innocent until he is proved guilty or has pleaded guilty

(6) Every person charged with a criminal offence shall

…

(c) be entitled to defend himself in person or through legal representation of his own choosing or, if he has not sufficient means to pay for legal representation, to be given such assistance as is required in the interests of justice;

…

(f) not to be compelled to testify against himself or to make any statements amounting to a confession or admission of guilt;

[166] In responding to these submissions it is fair to point out that no right under the Constitution is absolute. The rights under the Constitution can be overridden but it must be demonstrably justified in a free and democratic society. This constitutional test only applies to laws passed which infringe rights protected by the Constitution. It follows, therefore that rights not protected by the Constitution can be overridden by an ordinary Act of Parliament and there would be no need to show that the legislation was demonstrably justified in a free and democratic society.

[167] It is important to note that the right under section 16 (6) (f) applies to persons charged and so prima facie a person not charged cannot claim this right under the Constitution. It is important to observe what the actual text of the Constitution says. It says that a person charged with a criminal offence shall 'not be

compelled to testify against himself or to make any statement amounting to a confession or admission of guilt.' Thus the right is saying that the defendant himself cannot be compelled to give evidence against himself or to make statements amounting to a confession or admission of guilt. This constitutional right is engaged only if the person is charged. This does not mean the person does not have other rights before charge and some of those other rights may well be in the Constitution but this specific right cannot be claimed until he comes within the class of persons charged. Broad and purposive interpretation cannot mean giving the words a meaning that linguistically they cannot bear unless the context compels that conclusion. Nothing here requires giving the words 'person charged' an unnatural meaning.

[168] While expressions may have a range of meanings, it cannot be said that there is never a point at which the legitimate meanings of a particular word, phrase or clause have been exhausted and so another word, phrase or clause is needed to convey the meaning intended. Thus, the expression 'person charged' cannot by any measure extend to persons not charged in the absence of exceptionally compelling reasons. This must be so because in the normal course of things the expression 'persons charged' linguistically cannot include persons not charged.

[169] It is important to begin the analysis by looking at what judges in other countries have said about compulsory questioning system under various statutes. The cases under examination were decided either in England or in the European Court of Human Rights (ECtHR) on referral from England.

[170] I shall begin with **Smith v Director of Serious Fraud Office** [1992] 3 All ER 456. The case is important because in it the House of Lords delineated at least six senses in which the expression 'right to silence' is used. As will be seen not all aspects of this right are protected by the Constitution. In that case the Director of the Serious Fraud Office had statutory authorization to question persons during the course of his investigation into whether serious fraud had occurred. Lord Mustill delivered the leading judgment and the parts of his Lordship's judgment which I accept are set out below.

[171] The statute in **Smith** expressly permitted evidence obtained under compulsory questioning to be used in any subsequent criminal trial. Mr Smith was arrested and after a series of interviews was ultimately charged with criminal offences. **After he was charged**, the Director of the Serious Fraud Office served a notice indicating that he would be subject to the compulsory questioning regime of the relevant statute. Under the legislation, it was a criminal offence to refuse to answer the questions without reasonable excuse. The offences carried terms of imprisonment or a fine. Mr Smith sought judicial review to quash the notices before the questioning took place. The Divisional Court ruled that Mr Smith could not be questioned in respect of the offences with which he had been charged but could be questioned in respect of those with which he was not charged. The Director appealed to the House of Lords.

[172] Lord Mustill observed that when one speaks of the right to silence one needs to identify which dimension of the right one is speaking about. His Lordship said at pp 463 – 464:

> *This expression [right to silence] arouses strong but unfocused feelings.* ***In truth it does not denote any single right, but rather refers to a disparate group of immunities, which differ in nature, origin, incidence and importance, and also as to the extent to which they have already been encroached upon by statute****. Amongst these may be identified: (1) a general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies; (2) a general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them; (3) a specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of*

> *punishment to answer questions of any kind; (4) a specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock; (5) a specific immunity possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority; (6) a specific immunity (at least in certain circumstances, which it is unnecessary to explore), possessed by accused persons undergoing trial, from having adverse comment made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial.* (emphasis added)

[173] From this passage there is the understanding that before any rational discourse can take place regarding the right to silence, the first thing to do is to establish which dimension of the right is in view. For the purpose of the claimants' submissions it seems to me that the two dimensions of the right to silence they are speaking about are categories three and four of Lord Mustill's taxonomy. Already, it can be seen that they are two distinct and separate categories. It is my view that this distinction is manifested in the Charter of Rights. The wording of section 16 (6) (f) says that a person charged shall not be compelled to testify against himself or make any statement amounting to a confession or admission of guilt. It seems to me that section 16 (6) (f) has clearly given constitutional protection to category four. It may be that depending on how the provision is interpreted category three may or may not attract constitutional protection. The consequence of this is that, at the very least, category four aspect of the right is obviously on a higher plane than the other five dimensions of the right to silence. In any event category three is protected by section 21 (5) so that no person questioned under section 21 can be forced to admit guilt or confess since that would be a clear infringement of section 21 (5).

[174] It is equally clear that ICIA gives statutory recognition to category two of Lord Mustill's taxonomy (section 21 (5)). This category is not protected by the Constitution. The point is that a person not charged nor even suspected can claim the statutory right given by section 21 (5) of ICIA.

[175] It means that it is easier to encroach upon the other manifestations of the right to silence than it is to encroach upon category four. Even in respect of category four which has received constitutional protection, the legislature can legislate to curtail it provided that it can be shown that it is '*demonstrably justified in a free and democratic society*.' Therefore not even constitutional protection makes category four absolutely inviolable. That said, it does not negate the point that the constitutional right has to be accorded the highest respect.

[176] Since the right has multiple dimensions which may have originated from diverse sources it is prudent to bear Lord Mustill's observation in mind. His Lordship warned at page 464:

> *Each of these immunities is of great importance, but the fact that they are all important and that they are all concerned with the protection of citizens against the abuse of powers by those investigating crimes makes it easy to assume that they are all different ways of expressing the same principle, whereas in fact they are not. In particular it is necessary to keep distinct the motives which have caused them to become embedded in English law; otherwise objections to the curtailment of one immunity may draw a spurious reinforcement from association with other, and different, immunities commonly grouped under the title of a 'right to silence.*

[177] In other words, if a dimension of the right is curtailed by legislation, before objection can be taken, the foundation and purpose of the dimension curtailed needs to be identified so that the objection to the curtailment does not draw

support from another dimension of the right which rests upon different foundations and directed at a different purpose. While in a general sense the various dimensions of the right to silence protect the accused from oppression and abuse it would be wrong to think that basis of the protection was the same in all instances. Consequently, his Lordship wisely observed at page 465:

> *In these circumstances I think it clear, given the diversity of immunities and of the policies underlying them, that it is not enough to ask simply whether Parliament can have intended to abolish a long-standing right of silence. Rather, an essential starting point must be to identify what variety of this right is being invoked, and what are the reasons for believing that the right in question ought at all costs to be maintained.*

[178] For Lord Mustill, careful thought is necessary when dealing with these immunities.

[179] If one looks at the expression '*to testify against himself or to make any statements amounting to a confession or admission of guilt'* in section 16 (6) (f) it is possible to say that the first part, 'to testify against himself' applies to the actual trial (or to use Lord Mustill's words 'undergoing trial), while the second part 'to make any statement amounting to a confession or admission of guilt' applies not just to the trial itself but to any period of time after the person has been charged. The possible rationale for this is that the phrase 'to testify against himself' is the type of language one uses in the context of a trial and not during the investigative phase of the proceedings, whereas a statement amounting to a confession or admission of guilt can be extracted even before the trial and in such circumstance it would not be appropriate to describe the admission or confession as testimony. On the other hand, the provision may be saying that a person under trial (which necessarily means that he has been charged since charge precedes a trial) cannot be compelled to (a) testify; or (b) confess or (c)

admit guilt. Thus depending on the interpretation it may be that category three is also within the provision but on either interpretation the person must be charged. However, as noted earlier, section 21 (5) bars Indecom from forcing anyone to admit or confess because such an answer would clearly incriminate them.

[180] His Lordship rejected the submission that merely because questions were asked after Mr Smith was charged that that fact without more made the questions unlawful or worse, the answers unusable. Lord Mustill held at pp 471 – 472:

> *This leads to the respondent's second ground for supporting the judgment under appeal, namely that whatever the words of the Act may mean, they must be understood as qualified by a tacit exception, preserving the ancient right of silence in its particular manifestation of the immunity from being asked questions after charge, previously embodied in the Judges' Rules …*
>
> *That there is strong presumption against interpreting a statute as taking away the right of silence, at least in some of its forms, cannot in my view be doubted. Recently, Lord Griffiths (delivering the opinion in the Privy Council in Lam Chi-ming v R [1991] 3 All ER 172 at 179, [1991] 2 AC 212 at 222) described the privilege against self-incrimination as 'deep rooted in English law', and I would not wish to minimise its importance in any way. Nevertheless, it is clear that statutory interference with the right is almost as old as the right itself. Since the sixteenth century legislation has established an inquisitorial form of investigation into the dealings and assets of bankrupts which is calculated to yield potentially incriminating material, and in more recent times there have been many other examples, in widely separated fields, which are probably more numerous than is generally appreciated.*

[181] That the right to silence has been curtailed in some respects cannot be doubted. In Jamaica, the development of the Mareva injunction (now freezing order) when coupled with the usual disclosure order is in fact a curtailment of the right to silence in civil litigation. Failure to comply is punishable as a contempt which may result in a fine or imprisonment or both. In enforcement proceeding in civil litigation there is power to question a judgment debtor about his assets.

[182] Lord Mustill continued at page 472:

> *The statutes differ widely as to their aims and methods. In the first place, the ways in which the overriding of the immunity is conveyed are not the same. Sometimes it is made explicit. More commonly, it is left to be inferred from general language which contains no qualification in favour of the immunity. Secondly, there are variations in the effect on the admissibility of information obtained as a result of the investigation. The statute occasionally provides in so many terms that the information may be used in evidence; sometimes that it may not be used for certain purposes, inferentially permitting its use for others; or it may be expressly prescribed that the evidence is not to be admitted; or again, the statute may be silent. Finally, the legislation differs as to the mode of enforcing compliance with the questioner's demands. In some instances failure to comply becomes a separate offence with prescribed penalties; in others, the court is given discretion to treat silence as if it were a contempt of court.*

[183] In addition to the various types of statutes mentioned at the time of Lord Mustill's judgment, there has been an increase in proceeds-of-crime-type legislation where Parliament has authorised the appropriate law enforcement agencies to extract information from a person for use against him in civil proceedings involving property alleged to be the proceeds of criminal activity.

[184] Lord Mustill added at page 472:

> *In the light of these unsystematic legislative techniques there is no point in summarising the various statutes drawn to our attention. They do no more than show that the legislature has not shrunk, where it has seemed appropriate, from interfering in a greater or lesser degree with the immunities grouped under the title of the right to silence. Nor do I believe that anything is to be gained by analysing the reported cases in what is presently a contentious area of the law. Most of them are concerned with admissibility of evidence, which is not in issue here; and none, aside from those already mentioned, arose where in the face of clear and general language it was contended that Parliament must nevertheless have intended the words of the statute to have only a limited effect.*

[185] From what has been said, it is clear that section 21 (1) is directed at the dimension of the right to silence (category one) that has received over time less protection than dimension the right to silence that the defendant enjoys during the actual trial itself while he is in the court room. The dimension of the right to silence which exists while the defendant is actually in the court room undergoing a criminal trial has received constitutional protection. As ***Smith's*** case shows, the defendant can be questioned in relation to the matters he was involved in even after he has been charged. However, if he feels that he may incriminate himself he can claim protection under section 21 (5). How this protection is claimed is set out later in this judgment. The House of Lords expressly deprecated the distinction that previous cases had drawn under the same statute between being questioned about matters which were the subject matter of the criminal charge and those which were not. The previous position was that once the person had been charged then he could not be questioned about those matters but could only be questioned about the matters with which he had not

been charged. Despite the fact that Lord Millett expressly recognised that the courts should be slow to interpret a statute which would undermine the right to silence in its various dimensions yet if the statute is intended to override such a right then the courts must give effect to it, and, I would add, in case of countries with written constitutions, the courts must give effect to the statute unless it is declared to be unconstitutional. If this analysis is correct then, subject to the outcome of the analysis below, section 21 does not infringe section 16 (6) (f) of the Constitution

[186] In finally resolving the issue of the right to silence it is necessary to embark on an analysis of the submission regarding questioning of suspects. In order to do this the following needs to be pointed out. Section 21 (1) gives Indecom the power to ask persons to give information, provide documents or any other thing in their possession or control in respect of an investigation under the legislation. In this particular case, it is being said that because the claimants were referred to as suspects in the documents dealing with an identification parade then that means that they were suspects in law and consequently any questioning of them necessarily infringes their right to silence. This is not correct. Whether a person is a suspect in law is an objective determination and is not decided by the subjective views of the investigator or words written on a document.

[187] The term suspect will be analysed from the standpoint of the Judges' Rules because that is the only 'source of law' in Jamaica that governs the questioning of persons regarded as suspects. If the claimants wish to succeed in showing that the claimants were suspects in law then they must show that they were suspects under those Rules.

[188] In the case of **R v Osbourne, R v Virtue** [1973] QB 678 two defendants were taken into custody. They were interrogated without a caution being administered. The submission by counsel in that case was that this was a breach of rule 2 of the Judges' Rules. One of the interrogators admitted that he suspected that the two defendants were involved in the crime under investigation but denied that he had any evidence to justify his reasonable suspicion. The court held that the

police officer was correct in his assessment that he had no evidence to justify his suspicion. The result was that no caution was required at the time of the interrogation.

[189] The court pointed out that the structure of the Rules contemplated three stages in investigations. Lawton LJ said at page 680:

> *The rules contemplate three stages in the investigations leading up to somebody being brought before a court for a criminal offence. The first is the gathering of information, and that can be gathered from anybody, including persons in custody provided they have not been charged. At the gathering of information stage no caution of any kind need be administered. The final stage, the one contemplated by rule III of the Judges' Rules, is when the police officer has got enough (and I stress the word "enough") evidence to prefer a charge. That is clear from the introduction to the Judges' Rules which sets out the principle. But a police officer when carrying out an investigation meets a stage in between the mere gathering of information and the getting of enough evidence to prefer the charge. He reaches a stage where he has got the beginnings of evidence. It is at that stage that he must caution. In the judgment of this court, he is not bound to caution until he has got some information which he can put before the court as the beginnings of a case.*

[190] This approach of Lawton LJ was approved by the Judicial Committee of the Privy Council in **Thompson v R** (1998) 52 WIR 203, 232 on appeal from the Court of Appeal of the Eastern Caribbean States.

[191] If nothing else, **Osbourne** establishes that it is not the subjective assessment of the police officer that is determinative of the issue of whether a person is a

suspect but whether on an objective assessment the information fell within the definition of 'evidence' as that word is used in the Rules which would then require a caution. The court defined 'evidence' as 'some information which … can put before the court as the beginnings of a case.' It is at this stage that the police officer is to administer a caution. Rule 3 does not use the word evidence but as counsel for ***Osbourne*** submitted, when the police officer is going to charge the person the expectation is that he has moved past the gathering-of-information stage and has something more substantial.

[192] The fact that Indecom wished to place the claimants on identification parades, without more, does not make them suspects in law. As has often happened in these operations, the police officers are not easily identified and in many instances are unknown to the citizens. The citizens may give very general descriptions. However, if the police are keeping proper records then it should not be hard to identify which police officers went on the operation. If the police officers are identified from records, then it would seem to me that there is nothing wrong with asking them to participate in an identification parade. This would be part of the information-gathering stage. The police officer may be identified as being on the operation.

[193] The parade properly conducted, provides a safeguard for the police officer and at the same time provides a test of the witness' ability to identify police officers who may have taken part in a particular operation. And even then, if the police officer is identified by the witness as being on the operation, that without more does not make him a suspect. It all depends on what he is alleged to have done. If, for example, he is identified as doing some act or omitting to do some act that when taken with the other information shows that a crime has been committed then he, at the moment of identification becomes a suspect and ought to be cautioned. If he is not identified at all or not identified as a person involved in criminal activity he is not a suspect in law despite that Indecom may think. Consequently, I see nothing inherently wrong in Indecom, in the context of these

kinds of cases, placing the police officers on an identification parade. No right is infringed and the procedure of the parade provides protection.

[194] In the context of this case, the fact that the documents called the claimants suspects is not conclusive of the matter. Based on the analysis in **Osbourne**, the written designation of suspects has no greater power than an oral one. The claimants have not provided any other information other than the written designation in order for the court to determine whether they were suspects under the Judges' Rules. All that has been presented is that an incident involving the police took place and Indecom served notices on which the word suspect was written or printed. One of the notices indicated that Constable Devon Hutchinson is alleged to have taken one of the deceased from a house. On this evidence and in accordance with Lawton LJ's analysis, this would not be sufficient evidence on which to charge someone. Consequently, there would be no need for a caution under the Judges' Rules. Therefore the fact that the word suspect was used in the case before this court is not a sufficient basis for saying that the person was suspect within the meaning of the Rules. I must not be understood to be indicating that it is not open to the trial court before which the claimants are charged currently to make a contrary finding. What I am saying is that the material before this court is not sufficient to say that the claimants were suspects in law.

[195] If the claimants were not suspects within the meaning of the Judges' Rules then they would be in the category of persons from whom information may be sought by Indecom without any breach of any law, that is to say, they would be in category one of Lord Mustill's classification and can claim section-21-(5) protection. Category one is not protected by section 16 (6) (f) of the Constitution. The legislation has in fact overridden this category. Therefore no constitutional right enshrined in section 16 (6) (f) has been infringed.

[196] The only remaining basis for any objection must be that the claimants are not to be compelled to answer questions that may tend to incriminate them. Section 25

(5) of ICIA gives this protection. Section 25 (5) puts the common law position on a statutory footing.

[197] Turning now to the question of the right or privilege against self incrimination. I will summarise the legal position as gleaned from the cases and then support the conclusions with passages from the cases. The legal position applies to criminal and civil proceedings. First, a person who is not charged and appears in court as a witness cannot lawfully refuse to answer any question put to him unless it would incriminate him. Second, the question itself is not impermissible; it is the answer to which the right against self incrimination attaches. Third, it is for the court to decide whether there is indeed a basis, objectively determined, that the witness may incriminate himself. Fourth, it follows from what has been said that an attorney-at-law cannot claim this privilege on behalf of the client. Fifth, the person cannot lawfully refuse to answer if there is no such risk. Sixth, the privilege or right against self incrimination is not a blanket right that prohibits all questions; it is a question-by-question determination. This means that Constable Greene was absolutely incorrect so far as she thought that she the law gave her blanket immunity from answering any questions on the basis that they might incriminate her. Regrettably, I have to conclude that the two attorneys were not on safe ground in their advice to the claimants. The attorneys are not to be faulted. These kinds of issues are now coming up for judicial scrutiny in this jurisdiction.

[198] The cases in support of the above conclusions and passages from them will now be cited. In the criminal case of **R v Boyes** [1861 – 73] All ER Rep 172, 174 Cockburn CJ stated:

> *Upon review of the authorities, we are clearly of opinion that the view of the law [is] ... that to entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the*

witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. Indeed, we quite agree that if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question, there being no doubt, as observed by ALERSON B, in Osborn v London Dock Co (1) that a question which might appear at first sight a very innocent one, might, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering. Subject to this reservation, a judge is, in our opinion, bound to insist on a witness answering, unless he is satisfied that the answer will tend to put the witness in peril. Further than this, we are of opinion that the danger to be apprehended must be real and appreciable with reference to the ordinary operation of law in the ordinary course of things, not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable men would suffer it to influence his conduct. We think that a merely remote and naked possibility out of the ordinary course of the law, and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party called upon to give evidence in a proceeding inter alios, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice.

[199] This case emphasises that it is the answer which is protected and not the question that is barred.

[200] In the case of **Downie v Coe** EWCA Civ 2648; (1997) Times, 28 November; (unreported) (November 5, 1997) arising from an allegation of misappropriation of funds, the claimant sued the defendants and secured a freezing order with the usual order to disclose their assets. The defendants filed an affidavit in response to the order but did not claim any privilege against self incrimination. The claimants felt that the affidavit was deficient and so informed the defendants. The defendants' solicitors indicated that the defendants may raise the self incrimination point. Despite this intimation the defendants did nothing. The claimants pursued and secured an order for full disclosure against the defendants. The defendants appealed the order. The defendants raised the issue of the privilege against self incrimination. The claimants took the point that right against self incrimination was not properly raised. Lord Bingham CJ said:

> *In the experience of all three members of the court it has always been the practice that if any witness seeks to rely on the privilege against self-incrimination whether as a reason for not answering a question in the witness box or as a reason for not answering an interrogatory or as a reason for not disclosing a document on discovery, the objection must be taken by the claimant on his or her oath. That that is the established practice is very clearly shown by the authority to which I have referred. It is quite plain that the claimant does not have to give chapter and verse to show why disclosure or the answering of the question or interrogatory might incriminate him. As Lord Denning MR pointed out in Rio Tinto Zinc Corporation v Westinghouse Electric Corporation [1978] AC 547, [1978] 1 All ER 434, page 574 of the former report, to require him to do that might expose him to the very peril against which the privilege exists to protect him. It is also plain that the circumstances of a case may of themselves show that a risk of prosecution exists. So much was recognised by*

Cockburn CJ in Reg v Boyes (1861) 1 B & S 311, 329, where he said:

> *". . . to entitle a party called as a witness to the privilege of silence, the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer."*

It is not therefore incumbent on a party seeking to exercise this privilege himself to describe in detail the peril to which he might be exposed. That rule, however, does not in any way dispense with the need for a claim to be made on oath by the claimant, even if the support for the claim and the substantiation of it come from elsewhere. In this case, as it seems to me, it is clear beyond argument that the claim for privilege was not properly made and as a technical matter the plaintiffs would be entitled to resist the appeal on that ground alone.

[201] This passage makes it clear that the objection must be raised by the party himself and not by his attorney.

[202] In the case of **Allhusen v Labouchere** (1878) 3 QBD 654, 660 James LJ held:

Now I am bound to say, from my experience of interrogatories in the Courts of Chancery, that the decision in Fisher v. Owen (1) was entirely in accordance with everything that has been decided here. Nobody was ever allowed to object to a relevant question because that question tended to criminate himself. He might object to answer it, but it was never a ground of demurrer to an interrogatory, or a ground for striking it out, that the answer might involve him in a crime. I have known questions put to a man such

> *as, whether he had not forged a bill of exchange, or forged a deed which was sought to be set aside by a bill in Chancery? Of course he would not be obliged to answer such questions, but the questions were put, and could not be objected to. I entirely concur in the principle of that decision of Fisher v. Owen (1); and until the House of Lords chooses to overrule it, it ought to be adopted and obeyed by other Courts as the decision of a Court of Appeal. That is the law of this Court, and it ought to be followed according to its true intent and meaning, and not frittered away by nice distinctions. But, according to my view, no question can be put to a party except a question relevant to the matter in litigation, and a question cannot be put to a party merely because the answer may discredit him. It is not like the case of a witness. When a witness is put in the box he is unfortunately, and, I think, very often unfairly, exposed to be asked all kinds of questions about things that have occurred or been done, or omitted to be done by him in the course of his life, because the counsel says, "I am going to ask the jury to disbelieve his evidence, and am putting this to his discredit, and to shew that he is a person not worthy of credit." Luckily in this case, as far as the litigant is concerned, nothing of the kind can be done; no such questions ought to be put, and any such question, if put, ought not to be allowed. The matters to which he is questioned must be matters strictly material and relevant to something in issue between the parties, and if that is the limit, it appears to me that the chance of injury to him will be entirely, or to a very great extent, done away with.*

[203] The other two Lords Justices made similar comments. Again, it is the answer that is prevented, not the question.

[204] Kennedy LJ addressed the point of whether a witness can say that he or she is not answering questions, based on legal advice, because the answers would tend to incriminating. In the case of **R (on the application of Crown**

Prosecuting Service) v Bolton Magistrates' Court [2004] Cr App Rep 438, 448 – 449 Kennedy LJ said:

> *[25] I turn now to the decision of the justices that CB need not answer any questions where she was advised by her solicitor that to do so might incriminate her, in other words that if she acted on the advice of her solicitor that amounted to a just excuse. Mr Walker explains that he supported Mr Connolly's view that it was not necessary to investigate the claim, and they both say that at the hearing there was no suggestion that such an enquiry should be held. Essentially Mr Walker's explanation is that any enquiry would be likely to breach legal professional privilege.*
>
> *...*
>
> *It is not expressly stated in the rule that the justice shall investigate any explanation that may be given, but in my judgment it goes without saying that a justice charged with taking a deposition cannot simply accept a claim to privilege without investigating it. The question then becomes whether it is sufficient to ascertain that the claim is made on legal advice. In my judgment, the answer must be in the negative. The principle is neatly encapsulated in the 2003 edition of Blackstone's Criminal Practice, which states at para F9.11 that before acceding to a claim to privilege the court should satisfy itself, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is a reasonable ground to apprehend real and appreciable danger to the witness with reference to the ordinary operation of the law in the ordinary course of things, and not a danger of an imaginary or insubstantial character. The duty imposed by the court is non-delegable. It cannot simply adopt the conclusion of the solicitor advising the witness whose*

> *conclusion may or may not be correct, and that does seem to be what happened in this case, which explains where I considered it appropriate to grant the second declaration sought.*

[205] Here Kennedy LJ is explaining that it is not sufficient for the claim to be established merely by the witness saying that he received legal advice not to answer the question put to him or her. It is the court's duty to make the enquiry and satisfy itself that the claim is properly made.

[206] As a practical matter this is how I see section 21 (5) working. Before getting into the practical working of the section some other provisions need to be highlighted. Indecom has the power to administer oaths to the persons summoned (section 21 (3)). Section 21 (4) gives Indecom the same power as a Supreme Court Judge but that power is limited. Section 21 (6) says that section 4 of the Perjury Act applies to 'proceedings under this section in relation to an investigation as it applies to judicial proceedings under that section.' Section 4 of the Perjury Act criminalises the making of statements known by the lawfully sworn witness to be false or does not believe to be true. The risk of prosecution for perjury is to bring home to the person summoned that truth telling is important.

[207] Now to the practical working. Indecom summons a person to attend up on it for the purpose of being examined or producing documents under section 21 (4). The witness arrives. This person, unless there is evidence to suggest otherwise is within Lord Mustill's category one. He cannot claim protection under section 16 (6) (f) of the Constitution. The only protection he can claim is under section 21 (5). The person may be sworn. What is expected is that Indecom, in the event that a claim is made on the ground of the risk of self incrimination, is to make an initial decision on this. If it agrees with the claim then the answer is not insisted on. If Indecom does not accept the claim and the person insists then it has to be resolved by the courts.

[208] I would expect that if Indecom has evidence, based on the answers given that the person is a suspect in law, then the Judges' Rules would apply from that point forward.

[209] It would be helpful to see how the European Court of Human Rights (ECtHR) has approached the matter of compulsory questioning in the context of the fair trial provisions in the European Convention.

[210] The case of **Saunders v United Kingdom** [1997] B.C.C. 872 is a useful starting point. In that case Mr. Saunders was subjected to compulsory questioning by inspectors appointed by the United Kingdom's Department of Trade and Industry following allegations of financial impropriety in the takeover of a company. The inspectors were appointed under the relevant statutory provisions of the Companies Act. That Act specifically stated that the answers given could be used in any subsequent criminal proceedings. The transcript of the interviews with the inspectors was given to the police. It was after the interviews that Saunders was charged. Those transcripts were read to the jury for some three days during Saunders' trial.

[211] Before the ECtHR Saunders submitted that the use of the transcripts at his trial made his trial unfair and breached article 6 (1) of the European Convention on Human Rights.

[212] The majority held that the answers extracted under the compulsory questioning regime were improperly used by the prosecution at the subsequent criminal trial of Mr Saunders and therefore his right to a fair trial guaranteed under article 6 (1) of the European Convention on Human Rights was infringed. At first blush this outcome supports the contention of the claimants in this case but closer reading reveals a more subtle distinction. A close reading of the majority of the majority (because there was dissent among the majority on this point) reveals that they were saying that the focus of the court would be on the use made of the answers and not on the compulsory questioning regime itself because the trial phase was different from what went on before the trial. My comment on this

primary finding is that this is consistent with Lord Millett's approach to the right to silence and the need to appreciate that it has different dimensions.

[213] The majority of the majority also found that Saunders' right to fair trial was infringed and he was forced to testify against his will in the trial. The surprising thing here is not the conclusion but the reasoning to the conclusion because it is not what a common lawyer would expect to see. It is my view that paragraphs 69 – 75 of the majority of the majority make it clear that the right against self incrimination was undermined in the trial by the extensive use made of the transcripts from the inspectors by the prosecution so that the defendant felt obliged to give evidence at the trial. To be clear then, they were saying that merely to say that the defendant was subject to a compulsory regime before he was charge by the police is not in and of itself sufficient to say that the right was undermined. It was the pressure which mounted on Saunders during the trial by the use of the transcripts that compelled him to testify against his will which led to an infringement of his right to remain silent.

[214] The majority of the majority did not say, in terms, that a compulsory questioning regime used before criminal charges were laid followed by a criminal trial had the inherent effect of undermining the right to a fair trial. A careful reading of all the judgments in the case reveals this: the majority of the majority were saying that mere use of the transcripts did not per se make the trial unfair. It was the extent of their use and the great reliance on them by the prosecution that undermined the Convention protection. The minority of the majority took issue with this and preferred the more absolute position that any use made by the prosecution of the transcripts would render the trial unfair and to embark upon what was essentially a qualitative analysis of the extent of the use of the transcripts by the prosecution was not warranted. The minority of the majority were of the view that the other members of the majority were introducing undesirable refinements which undermined the protection given by the Convention. In other words, the minority of the majority were infavour of an absolute prohibition on the use of answers secured from compulsory questioning

whereas the majority of the majority preferred a qualitative approach. However, it is important to point out that the minority of the majority did not have any difficulty with compulsory questioning regimes, their point was that such transcripts could not be used for any purpose whatsoever at the trial.

[215] The dissenters, on the other hand, were saying that the position taken by the entire majority was illogical in that it sought to draw a distinction between incriminating evidence from answers given to questions and incriminating evidence secured by procedures such as search warrants or authorisations to take body samples for DNA analysis.

[216] It can be seen from **Saunders** that no member of the court had any difficulty with compulsory questioning. In fact it was a minority who felt that the answers could not be used at all in a trial while other judges felt either that (a) the assessment of the use should be a qualitative one or (b) it should be used without let or hindrance.

[217] The approach by the ECtHR in **Saunders** was confirmed in **Kansal v United Kingdom** (2004) EHRR 31. In that case, Mr Kansal was convicted based on answers given by him under compulsion to the official receiver who acted under section 291 of the Insolvency Act of 1986. The statute said that had he failed to comply without reasonable excuse he would have been guilty of contempt and liable to fine or imprisonment. The applicant was charged after the interviews with the official receiver. At the trial the prosecution read into evidence the transcript given before the official receiver and he was convicted. The ECtHR condemned the conviction because that significant use was made by the prosecution in the trial and not because use of the answers so acquired was inherently bad.

[218] It needs to be pointed out that article 6 (1) and indeed the European Convention on Human Rights does not have any provision identical to section 16 (6) (f) of the Charter of Rights and on that basis it may be said that neither **Saunders** nor **Kansal** addresses the issue this court has to decide. This distinction does not

undermine the power of the reasoning in those cases because it was held in **Saunders** that the right to a fair trial is underpinned by the right against self incrimination. Thus the fact that it has not been specifically stated in the Convention is not a legitimate basis for downgrading its significance. The critical point from the cases is that they do recognise a distinction between the right as it exists in extra curial situations and during the actual trial itself.

[219] In sum then, the extra curial dimension of the right against self incrimination can be overridden by legislation without any issue of unconstitutionality arising unless that dimension is specifically protected by the Constitution. The dimension of the right that has received constitutional protection can be overridden but only if it is demonstrably justified in a free and democratic society. Thus section 21 does not prima facie infringe the Constitution of Jamaica because it only overrides a dimension of the right that has not received constitutional protection. However, if I am wrong on this then the question is, has the statute passed the constitutionality test?

The test for constitutionality

[220] Mrs Reid-Cameron, for the claimants, has insisted that the test to be applied for unconstitutionality is that of proportionality. She has insisted on this even in light of the strong statements from the Judicial Committee of the Privy Council that the test for unconstitutionality in the Commonwealth Caribbean, including Jamaica, is proof beyond reasonable doubt. Not only that, the Privy Council have also said that the burden of proving unconstitutionality is a very heavy one (**Mootoo v Attorney General of Trinidad and Tobago** (1979) 30 WIR 411; **Grant v R** (2006) 58 WIR 354; **Suratt v Attorney General of Trinidad and Tobago** (2007) 71 WIR 391). The reason for this is that courts do not lightly or readily conclude that a law passed by the legislature is in breach of the constitution (**Public Service Appeal Board v Maraj** (2010) 78 WIR 410). This has been held to be the approach to bill of rights in the Commonwealth

Caribbean even after the Privy Council said that the constitution must be given a broad and purposive interpretation (**Minister of Home Affairs v Fisher** [1979] 3 All ER 21). These claimants have not discharged the burden placed on them by this test.

[221] According to Mrs Reid-Cameron, the new Charter of Rights has new words that introduce new concepts which, without more, need another approach. She may well be correct but in light of strong authority from the higher courts, that issue will have to be examined afresh by the higher courts.

[222] Counsel has drawn her inspiration from the Supreme Court of Canada. Mrs Reid-Cameron relied on the Supreme Court of Canada's decision of **R v Oakes** [1986] 1 SCR 103. In that case the court had to consider whether the Charter was infringed by a statute which placed a burden on a defendant to prove that he was not involved in drug trafficking if he was found to be in possession of illegal drugs. Dickson CJ delivered the judgment of the court. His Lordship took the view that the new Charter required a new approach. The previous test of proof beyond reasonable doubt was not applicable to the new Charter for a number of reasons. First, the language of the new Charter imported more refined considerations such as 'demonstrably justified in a free and democratic society.' Second, concepts such as 'demonstrably justified' and 'free and democratic society' were not easily susceptible to being analysed in terms of the proof beyond reasonable concept.

[223] The Chief Justice went on to make the very important point that where fundamental rights protected by the Charter are to be derogated from the burden is on those who seek to derogate from the right to justify that it is 'demonstrably justified in a free and democratic society.' This was the grist for Mrs Reid-Cameron's constitutional mill. The test for constitutional legitimacy is in two stages. First, the objective which the measure is designed to serve must be sufficiently important to warrant interfering with the protected right. Second, the means chosen must be reasonable and demonstrably justified. This second part of the test involves the concept of proportionality. This test of proportionality has

three parts. These are (a) the measures must be carefully designed to achieve the objective and are not arbitrary, unfair, biased or irrational. They must be rationally connected to the objective; (b) the right or freedom must be impaired as little as possible and (c) there must be a proportionate connection between the objective of the measure and the effect of the measure.

[224] Dickson CJ appreciated that because the Charter guaranteed a number of rights and because the factual situations which can arise are infinite it was inevitable that some limits on the rights and freedoms will be more deleterious than others. His Lordship noted that even if the first two elements of the proportionality test were met the measure may still infringe the constitution because 'the severity of the deleterious effects of a measure on individuals or groups' may be too disproportionate in relation to the objective sought to be attained by the measure. 'The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.' From this I understand the learned Chief Justice to be saying that fundamental rights and freedoms can be overridden but there must be a proportionate relationship between the objective, the measure and the effects of the measure.

[225] Mrs Reid-Cameron, in effect, is saying that the powers (to question under oath under risk of prosecution for perjury) given to Indecom are disproportionate to the objective (to investigate properly misconduct by the Security Forces and other state agencies). The unchallenged evidence before the court is that in eleven years 2257 persons have been killed by the Security Forces. In a country with less than three million persons and not in a state of war or civil war this number is cause for great concern. In its affidavit, Indecom has outlined in great detail that the system of investigation established by the PPCA and the BSI was unable to elicit any response from any Security Force member. In many cases the investigation the truth seemed not to have been unearthed. In the case of the police force, not even the intervention of the Commissioner of Police assisted. The members of the police force did not think it desirable to provide

any information concerning the death or injury of citizens. In practical terms, the Security Forces were above the law; they were unaccountable. The consequence was that not even the state that employed, trained and armed the Security Forces, was able to determine the exact circumstances under which many of its citizens were killed or injured by them. Indecom was designed to change this.

[226] In some instances, the sole source of information lay within the Security Force members who were present at the scene. The incident may have occurred while persons were in the exclusive custody of the state. The state has a responsibility to all persons within its borders, citizen and non-citizens alike, to protect the right to life of these persons. Surely, no reasonable person could contend that it is not a legitimate function of the state to make every effort to find out how, when, where and by what means a person died or was injured, especially if the incident is alleged to have taken place at the hands of the security forces of the state. This is nothing more than the minimum required of all civilized nations. As part of the international community of civilized nations, Jamaica is obliged to have a fair, impartial, independent and rigorous system of investigation whenever an allegation of impropriety alleged is against the Security Forces. This is all the more important when the allegation involves the death of a person; the right to life surely must rank among the top tier of rights.

[227] The case of Michael Gayle highlights the nature of the problem. The report from the Inter American Commission on Human Rights (exhibited in this case) catalogues the circumstances leading to his death. It is alleged that he left his home and came upon a joint police/military patrol. It is further alleged that he was beaten and he died from the beatings. A Coroner's Inquest decided that he was beaten to death by the police and soldiers but the jury did not name the persons responsible. They could not because the evidence did not make it possible to say who hit or struck Mr Gayle. The file went to the Director of Public Prosecutions and from the evidence presented he could not say who should be charged. Importantly, the Government of Jamaica accepted that its Security

Forces were responsible for Mr Gayle's death. Individual culpability could not be ascertained. The state was unable to distinguish witnesses from perpetrators. This led to the situation where a security force member may have committed a very serious crime (murder or manslaughter) and he cannot be identified even for administrative sanction. There was no credible suggestion that Mr Gayle had attacked any member of the security force.

[228] In Mr Gayle's case, the main source of information lay within the police and soldiers present. It does not appear that any forensic evidence was forthcoming which would indicate which member of the security force was implicated or may be implicated in his death. Gayle was a pre-Indecom case investigated either by the police or the PPCA.

[229] I am not saying that all 2, 257 cases of person who died at the hand of the security forces were similar to Michael Gayle's but it would be equally irresponsible to say all these killings were justified. The law of probability militates against such a conclusion.

[230] The claimants' attorney has quite responsibly accepted that there is indeed a serious problem with allegations of abuse by the Security Force. Another case from the old regime will be mentioned here. It is the case of **Millicent Forbes v The Attorney General of Jamaica** (2009) 75 WIR 406 (the Janice Allen case). I will set out, verbatim, the first three paragraphs of the advice of Lord Hoffman to Her Majesty in Council. The purpose is to illustrate that Michael Gayle's case is not an isolated instance or a rare event. This is what his Lordship indicated at paragraphs [1] – [3]:

> [1] *On 14 April 2000 the appellant's daughter Janice, aged 12, was shot dead in a street in Kingston. Since then, the appellant has been engaged in trying to have the child's killer brought to justice. The information which she received, in particular from another daughter*

who was present at the scene, was that Janice had been shot by one of a group of policeman who then refused assistance while she lay dying on the pavement. The appellant says that in the course of her attempts to discover what happened she was harassed by the police and offered money if she would drop the matter. Eventually a policeman named Rohan Allen was charged with murder. After a preliminary inquiry which lasted 16 months he was committed for trial. After some adjournments and a change of venue, this took place in the Portland Circuit Court, where on 15 March 2004 Allen pleaded not guilty and was put in the charge of the jury.

[2] *It appears that the main evidence to identify Allen as the person who fired the fatal shot was the ballistic examination of a fragment of a bullet taken from Janice's body. It was said to show that the bullet had been fired from a particular police gun. The prosecution proposed to prove that the gun in question had been used by Allen in two ways: first, by production of the firearm register, which would have shown which gun had been issued to him, and secondly by production of a statement which Allen had made in the course of the investigation. However, after the plea had been taken and the jury empanelled, Crown counsel told the judge that the relevant parts of the firearms register had been destroyed in a fire and that the detective sergeant to whom the statement had been made was overseas and that the inquiries which had been made suggested there was no likelihood that he would return. In the circumstances, he had decided that he could offer no evidence against the defendant. The judge thereupon directed the jury to return a verdict of not guilty and they did so.*

> [3] *The appellant claims that the information put before the court about the availability of the detective sergeant's evidence was false and was, together with the disappearance of the firearms register, part of a fraudulent conspiracy by members of the police to ensure that Allen was acquitted. She says that in the circumstances the proceedings were a sham and has applied for leave to bring proceedings against the Attorney General for certiorari to quash the acquittal and a declaration that the trial was a nullity.*

[231] These three paragraphs speak volumes. By any measure the allegations made against the police were serious: (a) murder; (b) intimidation of witnesses; (c) allegations of attempts to pervert the course of justice; (d) bribery; (e) providing misinformation to the prosecutor; and (f) securing an acquittal by fraud. It is fair to say that none of these allegations has been established in a court of law or in any competent tribunal but the very fact that they could be made and persisted in over a number of years and when taken along with the Michael Gayle case, show why confidence in the PPCA and the BSI was low. To put it bluntly, the Janice Allen case was one in which a police officer was accused of murder, the investigation conducted by either the police or the PPCA and the allegedly fraudulent acquittal procured by the police by supplying false information to the court via the prosecutor. Miss Forbes had now died. Her twelve year old daughter was killed and to date no proper trial to say nothing of a thorough, impartial and independent enquiry has taken place in this country into the circumstances of young Janice Allen's death. If nothing else, the Janice Allen and Michael Gayle cases have come to symbolise what has gone seriously wrong in the investigation of serious misconduct involving members of the Security Forces.

[232] The objective of ICIA is to establish a system of investigation after the previous systems of investigation had failed. In my view it is a legitimate objective for any

responsible state to try to unearth all information regarding any misdeed on the part of its Security Forces or other state agents. If the state has tried other methods such as voluntary cooperation with any investigation launched by the state and such a system has failed, any responsible state must consider other means and if the means considered include compulsion questioning the issue becomes whether that measure is appropriate and whether it is proportionate to the objective. If such measures have deleterious effects then the further issue is whether the deleterious effects are minimal in comparison to the harm at which the measures are directed.

[233] The deleterious effect is the possibility that any answers given by any person who may be eventually charged may be used at the trial against them. It is important to state again that the risk is not that the right against self incrimination is breached since the category one dimension of the right is protected by section 21 (5). The question is whether this risk, that is the use of the material gathered under the statute, is sufficiently injurious and out of proportion to the measure of compulsion that it would infringe the constitutionally protected right not to incriminate one's self. It is my view that it is not disproportionate. As the cases from the ECtHR have made clear the extra curial enquiries made by an investigative body and the actual court trial are two separate and distinct situations. Any unfairness regarding the use of any such answers gleaned under a compulsory questioning regime is decided on a case by case basis. The deleterious effects can be addressed in several ways: (a) disclosure by the prosecution of the intention to use that evidence; (b) there is the screening that is done by the trial judge either on his own volition if he has doubts about the voluntariness or fairness of using the evidence obtained under section 21; (c) counsel for the defendant can raise objection at the trial and a voir dire held to determine admissibility; (d) if convicted by the use of the evidence, the reasoning in ***Saunders*** is available at the appellate stage. Also, if the answer to the question may incriminate them then they can rely on section 21 (5). These mechanisms assume that the information is obtained under section 21.

[234] The independent and impartial investigation into misuse of power by the security forces (the objective) is sufficiently important that the measure (compulsory examination under oath and compulsory production of documents) is proportionate to that objective in light of other failed systems. The measure is rationally connected to the objective and the deleterious effect (possibility of information gathered under the compulsory system) is not disproportionate to the objective. I am satisfied that section 21 passes the test of proportionality and is compatible with the Constitution.

[235] The final issue to be addressed here is the alleged lack of equality under section 13 (3) (g) of the Charter of Rights. I do not see any inequality in the statute. The basis for this submission by the claimants is that they start from the fundamentally incorrect premise that Indecom is a criminal investigative agency like a police force. I have endeavoured to labour the point that it is not. The powers that it has under section 21 (1) apply to any member of the Security Forces, a specified official or any other person who may be able to assist the Commissioner in his investigations.

[236] But even if the claimants are right in their contention that the right to equality before the law is infringed, in my view it would be justifiable in free and democratic society for the reasons given above and these additional ones. The state in a free and democratic society has the responsibility of maintaining law and order. One way of achieving this goal is through a well-ordered and disciplined police force. If there are serious allegations of misconduct against the police force and necessarily an imputation against the state, surely any responsible government, in a free and democratic society, must establish means by which the truth can be uncovered by an investigative process. That process may involve compulsory questioning of those who can shed light on the matter backed up with the threat of a perjury prosecution. In effect there is an emphasis on truth telling which no well-thinking person can regard as an inappropriate objective. In the context of a police force such a measure can have a legitimate objective of maintaining order and discipline within the ranks of the police force.

By this means Indecom may uncover evidence that makes it desirable that some persons are expelled from the police force if it turns out that they are unsuited for the job; nothing in wrong with that. The remedy of compulsory questioning where there has been a long and sad history of lack of cooperation from those who may have the information necessary to establish the precise circumstances that lead to or caused the incident under investigation is an appropriate and proportionate response.

[237] The final point made by the claimants in their quest to say that provision was disproportionate was the absence of any prohibition against use of the information acquired under the compulsory examination in any subsequent criminal proceedings.

[238] Learned counsel for the claimants made the point that ICIA did not have any provision prohibiting the use of such answers at any subsequent trial that may arise in respect of the claimants.

[239] Broadly speaking the prohibition addressed by learned counsel is called use immunity. There are two types of use immunity: direct use and derived used. Direct use immunity refers to prohibiting the using the actual answers given by the person against him or her in subsequent proceedings. Derived use immunity refers to prohibiting the use of information discovered from the answers given. An example of the latter would be that the person may speak to the existence of a document or an item of real evidence. The investigators go and find the document or item and such evidence in some countries may be used in any subsequent trial provided that no reference is made to the source of the information that led to the discovery of the document or items. The theory here is that the document or item has an independent existence, that is to say, the answers given by the witness did not bring them into being. The answer only facilitated finding them.

[240] The submission by counsel does not find favour with me. The absence of use immunity provisions without more does not translate into unconstitutionality of

the legislation. In **Saunders** and **Kansal** the statute expressly permitted the answers given to be used at trial. The ECtHR did not say that such provisions contravened the European Convention's fair trial provision which is quite similar in wording and effect as the Jamaican equivalent. If provisions expressly permitting use of answers from compulsory examination do not breach fair trial provisions then the absence of such provisions cannot have a greater effect.

[241] In the judgment of Lawrence-Beswick J, her Ladyship stated that ICIA should clearly state whether the information obtained under the compulsory questioning system is usable in any court proceedings (see paras. [121] – [124]). It is my respectful view that Parliament has dealt with the issue in ICIA. First, it provides that the Perjury Act applies to section 21. In order to prosecute for perjury the answer given under oath would have to be proved and the prosecution would have to prove that the answer given is untrue. If the statute made any answer given under section 21 (1) inadmissible, I fear that section 21 (6) would become a dead letter. Second, it has to be assumed that Parliament legislated against the background of the established law. By the time ICIA was passed the distinction between direct use immunity and derived use immunity was established. It was also established that even where the statute specifically made the answers admissible, the appellate courts may still set aside a conviction secured by the use of the information so gained (**Saunders** and **Kansal**). From this, it seems to me that the legislature left the question of the use to be addressed by the combined effort of prosecutorial decision making, disclosure principles and the forensic process in trial to determine (a) admissibility and (b) use. Third, it seems to be the case that the legislature recognised that sometimes attempting to regulate an area by legislation may lead to undue rigidity whereas the case law method permits the law to develop on a case by case basis.

[242] I conclude from this that Parliament, by not legislating on this point, have indicated their preference, for the time being, of allowing the forensic process of trials to work out the law on a case by case basis. By opting not to legislate to

exclude such evidence Parliament have in fact said that the decision of whether such evidence ought to be used is left to be decided by the prosecution and the minutia are best left to the courts and the forensic process.

Right to due process, fair and impartial hearing

[243] The claimants allege that certain constitutional rights were infringed because of the manner in which Indecom exercised its statutory power. In that regard the claimants are seeking these declarations.

(a) A declaration that the rights of the claimants under section 16 (2) of the Constitution of Jamaica to a fair hearing was and continues to be contravened in that they were deprived of an independent and impartial hearing as the Commissioner of Indecom while exercising his powers under section 21 of the Independent Commission of Investigations Act acted as investigator qua prosecutor in conducting upon oath which examination (sic) may have resulted in a criminal charge being laid against the claimants, acted as Judge in determining whether questions being asked would result in answers being given that would incriminate the claimants.

(b) A declaration that paragraphs 4 and 5 of the caution administered by the Commissioner of Indecom contravenes, abridges and infringes the rights of the claimants to a fair hearing as the sections deprive the claimants of an independent and impartial hearing.

[244] This premise of these submissions is once again the false proposition that the dimension of the right to silence during an investigation is the same as the dimension of the right under section 16 (6) (f) of the Charter of Rights.

[245] The claimants say that Indecom's actions in relation to them have the cumulative effect of depriving them of their right to a fair hearing by an impartial and independent tribunal. The claimants observed that in Indecom's affidavit

reference was made to 2,257 persons who died at the hands of the police which was juxtaposed with this statistic: only one police officer was convicted in the eleven year period in which the 2,257 persons died. This juxtapositioning it was said shows bias on the part of Indecom. Assuming this to be so, since Indecom is not an adjudicating body it is not quite clear to me how the right to a fair hearing before an independent and impartial court is infringed.

[246] Complaint was made of the fact that the Commissioner said he was guided by his experience as a former prosecutor. Coupled with this, it was submitted that the Commissioner has taken a very 'partisan' approach to the claimants in that he (a) asked the DPP for a ruling on the matter; (b) has taken on the role of serving process and executing process to have the claimants appear before the court and (c) undertaking the prosecution of the claimants, by retaining counsel to prosecute, rather than leave it in the hands of the DPP. As Mr Small pointed out, if this submission is sound then every citizen arrested by the police could make this claim. This would mean that no investigation of any kind could ever take place

[247] The fair hearing provision of the Charter is directed at trials before independent and impartial courts. Indecom is not a court and so there is no breach of the Constitution.

[248] The claimants raised a separation of powers argument which I now deal with. The claimants argued that section 21 of ICIA is also unconstitutional because it combines judicial and investigative functions in one person. The judicial function is said to be this: section 21 (4) states that the Commission has the same powers as a Judge of the Supreme Court in respect of the attendance and examination and production of documents. It was also argued that Indecom not only investigates but conducts prosecutions because it is now involved in the prosecution of claimants by retaining counsel who received a fiat from the Director of Public Prosecutions. They rely on three cases: **Hinds v R** [1977] AC 195; **S.B. Shahane and others v State of Maharashtra** Civil Appeal No 676 of 1982 (delivered April 21, 1995); **National Human Rights Commission v State**

of Gujarat Writ Petition (CRL) 109 of 2003 (delivered May 1, 2009). The issue of judicial power in Indecom has already been addressed when discussing how it is expected that the process should unfold where Indecom summons a person to be examined on oath and need not be repeated here. Since full submissions were made relying on the three cases I will address each case.

[249] **Hinds** dealt with circumstances which are far removed from the circumstances here. In that case the legislation purported to give the jurisdiction of the Supreme Court to Resident Magistrates who did not have the same security of tenure as judges of the Supreme Court. Also the impugned Act gave sentencing powers to the executive and sentencing is purely a judicial function. That is not the case here. Indecom and the DPP are part of the executive branch of government. The only issue that can arise is whether Indecom is acting in breach of its statutory powers. There is no separation of powers issue here as envisaged by **Hinds**.

[250] In **Shahane**, the issue was whether police officers who were appointed prosecutors in the prosecutorial department could remain under the control of a senior police officer. The Supreme Court of India said that was not possible but not for the reasons advanced by the claimants. In **Shahane** there was a concern that police officers who were appointed public prosecutors received promotion based on the number of convictions they secured. A commission was set up to examine the practice and make recommendations. The commission completed its work and submitted its report along with recommendations. The state government accepted the recommendations and enacted legislation to give effect to the recommendations. A number of police officers were appointed public prosecutors but they were still under the administrative and disciplinary control of the police department. These officers petitioned the High Court of Maharashtra asking that they be freed from the administrative and disciplinary control of the police department as required by the statute. The High Court dismissed their application and they took the matter to the Supreme Court of India which allowed the appeal. There was no issue of constitutionality either

with the state constitution or the Federal Constitution of India. It was a plain matter of whether the State Government had complied with the legislation.

[251] In the **National Human Right Commission** case there was absolutely no issue of constitutionality. The part of the judgment extracted by the claimants has to be read in the context of the entire case. The Supreme Court of India was highlighting the need for fairness all round to persons involved in criminal prosecutions with special emphasis on witnesses. Fairness to the defendant, fairness to the witnesses, fairness to the society and fairness to the prosecution. A large portion of the judgment was concerned with the protection of witnesses. It also spoke to the desirability of having an independent prosecutorial service which was uninfluenced by political and improper motivations.

[252] The claimants have pressed these cases beyond their legitimate boundaries. The concept of separation of powers which was the underlying philosophical idea behind the submission has no application here. Separation of powers doctrine deals with separation between the executive, legislative and judicial branches of government. Investigation and prosecution of crime are undoubtedly executive functions.

[253] I now go to paragraphs 4 and 5 of the caution developed by Indecom. Summarised, the paragraphs say that the claim to any privilege claimed may not be upheld and the decision on this is for Indecom's legal representative to make. The deficiency here as I see it is that the caution should state that in the event that the person disagrees then that person has the right to seek judicial review or any other judicial remedy. That apart, the paragraphs are consistent with how I have interpreted section 21 (5). As I have said Indecom is subject to the rule of law and cannot be the final arbiter of its own powers. It is not a court and does not determine civil rights and liabilities. Neither does it determine criminal culpability.

Freedom Of Movement

[254] The claimants submitted that ICIA infringed the right to freedom of movement and therefore unconstitutional. The power to summon persons is given by the Act which is compatible with the Constitution of Jamaica. While the power to summon persons undoubtedly interrupts the freedom of the person to the extent that he must comply with the summons, it is a necessary power and demonstrably necessary in a democratic society. It is limited in scope to investigations within the remit of Indecom and is not a wide ranging power.

Alternative Remedies And Fragmentation Of Criminal Trials

[255] Mr Small made the very strong submission that the claimants have other remedies open to them and therefore all of their claims should be dismissed. It was submitted that the trial before the learned Resident Magistrate is still pending and all the issues raised here could be raised there. They could, for example, submit that their right to silence has been trampled on and so any evidence obtained in breach of that right should not be admitted against them. According to counsel, alternative means of redress do not mean identical means of redress as are available in the Constitutional Court. He accepted that the Resident Magistrate could not grant declarations of the nature sought by the claimants but nonetheless submitted that whatever transgressions committed against them could be set right. If they failed there, they could raise the issues in the Court of Appeal and the Judicial Committee of the Privy Council.

[256] One possible objection to this is that the right not to incriminate one's self is a substantive right and not a rule of evidence and so the Resident Magistrate would, at best, only recognise it evidentially and not substantively. The counter argument is that the substantive right translates into a rule of evidence that bars the evidence which could be given effect by the Resident Magistrate.

[257] It is true to say that constitutional matters have been raised in criminal appeals in Jamaica and on appeals from Jamaica to the Privy Council. The case of **Hinds v R** which has become one of the great cases in Commonwealth Caribbean constitutional law arose from convictions of five persons in the Resident Magistrate's Court Division of the Gun Court. The constitutionality of the provisions was raised in the Court of Appeal. The four appellants lost and went on to the Judicial Committee of the Privy Council. They succeeded on the constitutional point. The latest example of this was **Grant** where the appellant raised the constitutionality of section 31D of the Evidence Act before their Lordships in an appeal against his conviction. The constitutional issue was raised before the Court of Appeal of Jamaica on the substantive criminal appeal.

[258] From these two cases it is not accurate to say that it is not possible to secure adequate means of redress by going on appeal to the Court of Appeal. Adequate is not a synonym for identical.

[259] In this claim, many of the claimants' submissions turned on the interpretation of a number of provisions of the ICIA and whether those provisions were consistent with the Charter of Rights. The Resident Magistrate could have undertaken the same interpretation that has been done in this case and depending on the outcome, the claimants could take their matter on appeal and raise all the constitutional issues there without having to invoke the jurisdiction of the Constitutional Court. In fact, it seems that this was the case this claim before this court was a response to the rejection of the submissions made by claimants to the learned Resident Magistrate. This led Mr Small to pose this question: if the claimants' position is that the Resident Magistrate could not have granted appropriate relief why were the extensive submissions made before her?

[260] To summarise quickly, the claimants submitted that section 21 (5) of ICIA gave them the same rights as section 16 (6) (f) of the Charter which meant that they could not be subject to any compulsory questioning by Indecom. That was a matter of statutory interpretation and interpretation of the Charter. If the Resident Magistrate agrees with the submission then they will be acquitted but if

convicted they could raise the constitutionality of the legislation in the Court of Appeal. The charge against them arose out of their failure to attend upon the Video Identification Unit on September 14, 2010 at the appointed place and time. Their response was that they had lawful reason and they have given that reason. This was an issue that could be dealt with before the Resident Magistrate as a matter of evidence and statutory interpretation. The proposition that any compulsory questioning regime necessarily undermined the fair trial right guaranteed under the Charter could have been raised on appeal. There was indeed no relief raised here that could not be addressed either at the criminal trial itself or an appeal if convicted. I am satisfied that adequate means of redress exists. There is nothing here that required invoking the jurisdiction of the Supreme Court. In my view, the claim can be dismissed on this basis. Having said this, I fully appreciate the force of the contrary position indicated by Lawrence-Beswick and F Williams JJ. If I am wrong on this I would dismiss the claim in its entirety for the reasons given already.

[261] It must be a matter of concern that these applications are having the unfortunate consequence of fragmenting criminal trials. This issue was addressed by the Court of Appeal of Barbados in the matter of **Scantlebury v The Attorney General** (Appeal No. 18, 20 and 21 of 2007) (delivered June 8). In that case the defendants were ordered to be extradited to the United States of America. They applied for judicial review of the magistrate's decision to order extradition. Their application was refused. They appealed to the Court of Appeal from this rejection of their judicial review application. They raised all sorts of constitutional issues.

[262] The Chief Justice of Barbados looked briefly at some authorities from Australia which indicated that while a supervisory court of inferior tribunals can entertain judicial review applications when a case is at an interlocutory stage, it is not a jurisdiction that should be invoked in the absence of exceptional circumstances. The underlying reason, in the context of criminal trials, is that these applications fragment the trial in a manner that increases costs and does not bring finality to

the matter within an acceptable time frame. While it is true, as the Chief Justice noted, none of those decision from Australia involved provisions of a constitution it does not negate the point that fragmentation of a criminal trial should be avoided and only done where absolutely necessary. It is this underlying idea that I have adopted.

[263] In this very case, the trial began on May 24, 2011 and nearly a year later, it has not resumed. This cannot be good for the administration of criminal justice. Had the claimants continued in the criminal trial it may well have concluded already and in the event of a conviction the appellate process would have been engaged.

Conclusion

[264] The rights guaranteed under section 16 (6) (f) of the Charter of Rights apply only to persons charged with criminal offences and are applicable only when the trial of the actual offence is taking place and does not apply to investigations being conducted by Indecom when acting under the ICIA.

[265] Extra curial investigations are governed by the relevant legislation under which they take place, the common law and where applicable, the Judges' Rules. The right against self incrimination has different dimensions which are not the same in all contexts. Therefore whenever this right is being discussed it is important to know the context and which dimension of the right is in view.

[266] Indecom is not a criminal investigative agency in the way that a police force is. It is an independent agency designed to conduct a thorough, impartial and independent investigation into allegations of misconduct alleged against state agents named in section 2 of the Act. Indecom is not a prosecutorial agency and does not function as an evidence gathering entity for the purpose of prosecuting persons.

[267] Indecom has the power to summon persons in order to examine them under oath. Section 21 of the ICIA does not infringe any fundamental right of the Charter of Rights. Section 25 (5) provides statutory protection for Lord Mustill's category three dimension of the right to silence. This protection exists even if it is found that category three has not received constitutional protection. Whether it does is for another day. If it has, then the statute has strengthened rather than undermined the right.

[268] The decision of whether to use any information gathered during the compulsory questioning of any person who may be subsequently charged is a matter for the prosecuting authorities. The admissibility and use of the evidence gathered is to be determined by the trial court where all the circumstances can be explored.

[269] Paragraphs 4 and 5 of Indecom's caution do not infringe the Charter of Rights but should be amended to include the right of the person to seek judicial review of the Commissioner's decision. This reminder should be highlighted in such a manner that the reasonably prudent reader of the document would be alerted by it. Indecom's conduct in relation to his case has not breached any fundamental right guaranteed by the Charter. It follows from all that has gone before that the entire claim is dismissed.

F. Williams J

[270] The right to silence and the right (or privilege) against self-incrimination, from one perspective, are two separate and discrete rights. From another perspective, the right to silence is but a part, and a means of asserting the broader right against self-incrimination. Both perspectives see these rights as being underpinned by the presumption of innocence and the placing of the burden of proof on the prosecution. Additionally, according to some historical accounts, these rights arose from a rejection of the harrowing, inquisitorial procedures of the Star Chamber of ancient times. However, whether the right to silence and the right against self-incrimination are two concepts or one; and whatever their provenance, their primacy of place and tremendous importance in the law today cannot be denied. They are reflected in constitutions and charters of rights in countries as far-flung as South Africa (see section 35 of the South African Constitution of 1996); Pakistan (see article 13 of the 1973 Constitution of Pakistan); the United States (see the Fifth Amendment to the American Constitution); and Jamaica – the relevant provisions of which will shortly be set out.

The Right to Silence

[271] One of the most instructive starting points in any discussion of the right to silence has to be the speech of Lord Mustill in the case of **R v Director of Serious Fraud Office, Ex parte Smith**, [1993] AC 1. In that case, Lord Mustill made, *inter alia*, the following observations on the right to silence at pages 30 - 31:

> *This expression arouses strong but unfocused feelings. In truth it does not denote any single right, but rather refers to a disparate group of immunities, which differ in nature, origin, incidence and importance, and also as to the extent to which they have already been encroached upon by statute. Amongst these may be identified:*

(1) A general immunity, possessed by all persons *and bodies, from being compelled on pain or punishment to answer questions posed by other persons or bodies.*

(2) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them.

(3) A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.

(4) A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock.

(5) A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority.

(6) A specific immunity (at least in certain circumstances, which it is unnecessary to explore), possessed by accused persons undergoing trial, from having adverse comment made on any failure (a) to answer questions

before the trial, or (b) to give evidence at the trial.

Each of these immunities is of great importance, but the fact that they are all important and that they are all concerned with the protection of citizens against the abuse of powers by those investigating crimes makes it easy to assume that they are all different ways of expressing the same principle, whereas in fact they are not.

The Privilege against Self-Incrimination

[272] In the ancient case of **Lamb v Munster** (1882-1883) 10 QBD 110, Field, J said at page 111:

…the principle of our law right or wrong is that a man shall not be compelled to say anything which criminates him. Such is the language in which the maxim is expressed. The words "criminate himself" may have several meanings, but my interpretation of them is "may tend to bring him into the peril and possibility of being convicted as a criminal". It is said that a man is not bound so to do.

[273] Stephen, J, in the said case, at page 113, also made the following observation:-

The extent of the privilege is I think this: the man may say, "If you are going to bring a criminal charge, or if I have reason to think a criminal charge is going to be brought against me, I will hold my tongue. Prove what you can, but I am protected from furnishing evidence against myself out of my own mouth.

[274] In the case of **Lam Chi-ming v R** [1991] 2 A.C. 212, 222, Lord Griffiths described the privilege against self-incrimination as being "deep rooted in English law."

Nature of Application

[275] This matter involves the interpretation and application of, in the main, (for there are several others of lesser importance), five legal provisions: three statutory and two constitutional; and an examination of their interplay with one another.

Provisions of the Indecom Act

[276] The statutory provisions are sections 21 (1), 21 (5) and 33 (b) (ii) of the Independent Commission of Investigations Act (hereafter referred to as "the Act"). These are as follows:-

> *(1) Subject to subsection (5), the Commission may at any time require any member of the Security Forces, a specified official or any other person who, in its opinion is able to give assistance to an investigation under this Act, to furnish a statement of such information and produce any document or thing in connection with the investigation that may be in the possession or under the control of that member, official or other person.*
>
> *(2) The statements referred to in subsection (1) shall be signed before a Justice of the Peace.*
>
> *(3) Subject to subsection (4), the Commission may summon before it and examine on oath-*
>
> *(a) any complainant; or*
>
> *(b) any member of the Security Forces, any specified official or any other person who, in the opinion of the Commission, is able to furnish information relating to the investigation.*

(4) For the purposes of an investigation under this Act, the Commission shall have the same powers as a Judge of the Supreme Court in respect of the attendance and examination of witnesses and the production of documents.

(5) A person shall not, for the purpose of an investigation, be compelled to give any evidence or produce any document or thing which he could not be compelled to give or produce in proceedings in any court of law.

33. Offences

33. Every person who-

(a) willfully makes any false statement to mislead or misleads or attempts to mislead the Commission, an investigator or any other person in the execution of functions under this Act;

(b) without lawful justification or excuse-

(i) obstructs, hinders or resists the Commission or any other person in the exercise of functions under this Act; or

(ii) fails to comply with any lawful requirement of the Commission or any other person under this Act; or

(iii) willfully refuses or neglects to carry out any duty required to be performed by him under this Act; or

(c) deals with documents, information or things mentioned in section 28 in a manner inconsistent with his duty under that section, commits an offence and shall be liable on summary conviction in a Resident Magistrate's Court to a fine not exceeding three million dollars or to imprisonment for a term not exceeding three years or to both such fine and imprisonment.

Provisions of the Charter

[277] The provisions of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 (hereafter referred to as "the Charter"), that are relevant are as follows:-

First there is section 13 (2), which sets out what might be described as the general right:-

> *Subject to sections 18 and 49, and to subsection (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society*
>
> *(a) This Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and sections 14, 15, 16 and 17; and*
>
> *(b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights.*

[278] Next are the provisions that set out what might be regarded as the specific rights that are the bone of contention in this matter. Section 13 (3) (f) and (g) state:

> *(f) the right to freedom of movement, that is to say, the right-*
>
> *(i) of every citizen of Jamaica to enter Jamaica; and*
>
> *(ii) of every person lawfully in Jamaica, to move around freely throughout Jamaica, to reside in any part of Jamaica and to leave Jamaica;*
>
> *(g) the right to equality before the law;*

Section 16 (6) (f) reads:

> *Every person charged with a criminal offence shall-*
>
> *(f) not to be compelled to testify against himself or to make any statement amounting to a confession or admission of guilt.*

[279] These, then, are the main provisions on which most of the issues in this matter are centred. Section 19 of the Charter is also of some importance, but its provisions will be set out and its terms discussed later in this judgment when the issue of whether there is adequate alternative redress is discussed.

Factual Background to the Claimants' Case

[280] The eight claimants in this case (seven males and one female – in the person of the 6th claimant, Petro Greene) are members of the Jamaica Constabulary Force (the JCF), and so, policemen and a policewoman.

[281] On August 13, 2010 they were part of a joint police and military party which was involved in the fatal shooting of two citizens in the vicinity of the community of Tredegar Park, Spanish Town, in the parish of St. Catherine. The two citizens killed were Mr. Derrick Bolton and Mr. Rohan Dixon.

[282] Sergeant Kerron Chambers of the JCF's Bureau of Special Investigations (the BSI), which is the arm of the JCF tasked with the responsibility of investigating police shootings, commenced investigations into the matter. These investigations were taken over by the Independent Commission of Investigations (Indecom).

[283] Shortly after taking over the investigations, Indecom caused the claimants to be served with notices dated the 1st day of September, 2010. These notices (an example of which may be found at page 12 of the bundle of affidavits), were issued pursuant to section 21 of the Act and required the claimants to:-

> *…attend at Video Identification Unit (beside Central Police Station) at East Queen Street Kingston on 2010 September 14th at 9:00 a.m. and report to Mr. Isaiah Simms and other officers of the Independent Commission of Investigations to furnish to them a statement, and to answer questions touching and concerning your actions, and the actions of other members of the JCF and JDF and, all the occurrences witnessed by you in the vicinity of Tredegar Park, Lauriston, Brooklyn and Spanish Town, St. Catherine between 8:00 p.m. and 8:00 a.m. 13th August 2010, including the circumstances that lead (sic) to the death of Mr. Derrick Bolton and Mr. Rohan Dixon.*

[284] The notice continued by noting the formalities to be observed in the making of the statement and, *inter alia*, reminded the addressee of the notice of the sanction that would be visited upon anyone who was notified and who, "without justification or excuse":-

> *"fails to comply with any lawful requirement of the Commission or any other person under this Act".*

[285] The sanction which might be imposed upon summary conviction is a fine not exceeding three million dollars or imprisonment not exceeding three years; or both.

[286] It is not in dispute that none of the claimants attended the Video Identification Unit (the VIU) on the 14th September, 2010. It is also not in dispute that neither did they submit themselves for questioning or provide statements on that date.

Their non-attendance appears to have had something to do with the intervention by two attorneys-at-law on their behalf. By letters dated September 14, 2010 to Indecom, Mrs. Valerie Neita-Robertson (writing on behalf of the claimants Hutchinson, Noble and Williamson); and Mr. Peter Champagnie (writing on

behalf of the claimants Williams, Greene, Reynolds and Daley), informed Indecom of their clients' reliance on section 21 (5) of the Act; in their view, rendering their clients not compellable in respect of statements (Mr. Champagnie); and statements and questioning (Mrs. Neita-Robertson), as to all intents and purposes, their clients were "suspects". The clients would, however, be willing to participate in identification parades, another date for which was requested. These letters are exhibits and may be found at pages 21 and 94 of the bundle of affidavits. No mention is made in these letters of the 7th claimant, Marcell Dixon.

[287] Two other sets of notices were issued: - one set dated the 20th December, 2010; and another set dated the 3rd January, 2011.

The claimants attended at the offices of Indecom on the 3rd January, 2011. At that time the 6th claimant, woman constable Petro Greene, was accompanied and represented by Mrs. Michelle Champagnie of counsel, standing in for Mr. Peter Champagnie who was otherwise engaged. The woman constable was cautioned and asked to sign a copy of the written caution. She at first refused, contending that the terms of the caution were too wide and seemingly in conflict with her rights under s. 21 (5) of the Act. She, however, later relented somewhat and signed to the fact that the caution had been read to her. She was then questioned by the Commissioner of Indecom. In response to these questions she gave her name and station and thereafter refused to answer any further questions, relying on what she said was legal advice and her rights under section 21 (5) of the Act. The other claimants, without being sworn, indicated to the Commissioner that they would be adopting a similar course. Thereafter the proceedings were abandoned.

[288] Within a relatively-short time, informations were laid against the claimants and they were summoned to appear in the Corporate Area Resident Magistrates Court (the R.M. Court) for breaching section 21 (1) of the Act – specifically for not attending the VIU on the 14th September, 2010 and not giving statements

and answering questions pursuant to the Act. The claimants were charged based on a ruling by the Director of Public Prosecutions (DPP).

Points of law were taken by the attorneys-at-law representing the claimants before the Resident Magistrate; but these were overruled and the trial commenced. No details are available as to the exact points taken. This claim was then filed on October 12 of 2011.

[289] In this claim the claimants seek a number of declarations, as well as an order of prohibition against the learned Resident Magistrate's continuing with the trial; and, in particular, a declaration (the prayer for which was added on the very day this matter commenced), in the following terms:

> *A Declaration that the requirements by the Commissioner under s 21(1) and (5) of the Indecom Act that the police furnish statement is null and void by virtue of section 2 of the Constitution since it breaches the right to equality of treatment under 13(3)(g) of the said Constitution.*

All the other orders sought have been set out in paragraph [8] of the judgment of this court, in the reasons of Lawrence-Beswick, J.

The Issues In The Case

[290] The main issues that fall for determination in this case may be stated as follows:-

(a) Whether there has been a breach of the claimants' right to freedom of movement.

(b) Whether there has been a breach of the claimants' right to equality before the law.

(c) Whether the claimants have adequate alternative remedies.

(d) Whether the Act, and in particular, section 21 (1) of the Act, is in contravention of the provisions of the Charter.

(e) Whether there has been a breach of the claimants' right to silence and privilege against self-incrimination.

We may now proceed to examine these issues seriatim.

Freedom of Movement

Summary of the Claimants' Contention

[291] The claimants' contention in respect of this ground appears to be that, by issuing notices pursuant to section 21 (1) of the Act, requiring them to attend at the VIU, Indecom has, in effect curtailed the claimants' movement. This amounts to a violation of their right to freedom of movement that is guaranteed under the Charter. No authorities were cited in support of this contention.

Summary of the 1st Respondent's Contention

[292] The 1st respondent contended that the notices were validly issued pursuant to what is a valid section of the Act (section 21 (1)). As such, there is no violation of the claimants' rights. No authorities were cited in support of this contention.

Analysis

[293] There are two aspects to this issue. First, if, at the end of the day, section 21 (1) is found to be in contravention of the Charter, then the claimants' submissions

on this issue would have succeeded. If, on the other hand, the said section 21(1) is not struck down, then what we are left with is an examination of the second aspect of the matter. That second aspect is to approach the matter from the point of view of interpretation of the section itself: - what does the section itself say or mean?

[294] As is well known, the first rule of statutory interpretation is to give the words that fall for interpretation their natural and ordinary meaning. If supporting authority be needed for this rule, then that support might be found in the case of **Attorney-General v Mutual Tontine Westminster Chambers Association** (1876) 1 Ex D 469 at pages 475 – 476. In that case, Sir George Jessel M.R., in construing the meaning of the word "house" in the legislation that fell for consideration before the English Court of Appeal, made the following remarks:

> *…before considering the statute, it may be as well to say a word or two upon what I think are the established rules of construction, which, whether forgotten or not, are often disregarded in argument, and I am afraid sometimes even in judgments. Those rules, I take it, are these: In construing legal instruments, whether Acts of Parliament or not, it is the duty of the Court to give to every term used its ordinary and legal meaning, unless there is something either in the nature of the subject-matter or in the context which compels the Court to come to a different conclusion.*

It may also become necessary, later in this judgment, to have recourse to two other principles of statutory interpretation: One is the purposive approach, described by the learned author, Elmer Driedger, in **The Construction of Statutes** (2nd edition, 1983), at page 87 thus:

> *The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.*

[295] To the same effect in respect of the purposive approach is the case of **Pepper v Hart** [1993] AC 593, in which Lord Griffiths, at page 617, described the essence of the rule as one which:-

> *... seeks to give effect to the true purpose of legislation and [the courts] are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.*

[296] Not dissimilar from the purposive approach is the mischief rule, which is thought to have had its origins in **Heydon's Case** (1584) 76 ER 637. In that case the court stated that in approaching the interpretation of a statute, the court ought to consider and discern four matters: - (i) what was the common law (or previous law) before the statute in question was enacted; (ii) what was the mischief and defect for which the previous dispensation did not provide; (iii) what was the remedy that Parliament had appointed to cure the "disease"; (iv) what is the true reason for the remedy. It is the office of all judges, the judgment continued, to interpret statutes so as to suppress the mischief and advance the remedy; adding force and life to the cure and remedy according to the intention of Parliament, for the public good. Some say, however, that this approach or rule should only be applied where a statute has been enacted to cure a defect in the common law (and not in previous legislation); and, for this reason, the purposive approach is often preferred.

[297] There is also the particular approach to the interpretation of constitutional provisions. In **Minister of Home Affairs v Fisher** [1980] AC 319, Lord Wilberforce (at page 329) propounded the view (which has since been followed in several other cases – such as **Huntley v Attorney-General for Jamaica** [1995] 2 AC, 1, and **Ong Ah Chuan v Public Prosecutor** [1981] AC 648), that in interpreting written constitutions, a generous and flexible approach should be adopted. In that case the Privy Council considered the meaning of "child" in the Constitution of Bermuda and whether that word meant a legitimate and/or an illegitimate child. Lord Wilberforce observed that there were two approaches, adopting the second at the end of the day. He said:-

> *The first would be to say that, recognising the status of the Constitution as, in effect, an Act of Parliament, there is room for interpreting it with less rigidity, and greater generosity, than other Acts, such as those which are concerned with property, or succession, or citizenship. On the particular question this would require the court to accept as a starting point the general presumption that 'child' means 'legitimate child' but to recognise that this presumption may be more easily displaced. The second would be more radical: it would be to treat a constitutional instrument such as this as sui generis, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law.*
>
> *It is possible that, as regards the question now for decision, either method would lead to the same result. But their Lordships prefer the second. This is in no way to say that there are no rules of law which should apply to the interpretation of a constitution. A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this,*

> *and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences.*

[298] Applying these rules (and, of course, primarily that propounded in **Minister of Home Affairs v Fisher**) to the construction of section 13 (3) (f) of the Charter which deals with the citizen's freedom of movement, it becomes apparent that that section deals with the citizen's right to enter and leave Jamaica and, if lawfully in Jamaica, to "move around freely throughout Jamaica". Can it be successfully argued that the section-21 notices, requiring the claimants to attend the VIU violated their rights to "move around freely throughout Jamaica"? If we assume that the legislation (and, in particular, section 21 (1)) is valid, then the answer to this question must be "no"; as the notices in question do not hinder or prevent them from travelling throughout Jamaica: it merely requires them to attend at a particular place to do certain things, which requirement, on the face of it, is permissible under the Act and the particular section. The claimants could only succeed on this ground, therefore, if the particular section or the Act itself should be, at the end of the day, struck down. As indicated previously, the question of the validity of the section or otherwise will be examined later in this judgment.

[299] The approach taken in **Minister of Home Affairs v Fisher** will be also be primarily applied to the consideration of the other constitutional provisions throughout this judgment.

Equality before the Law

Summary of the Claimants' Submissions

[300] The essence of the claimants' contention on this issue is to the effect that Indecom, (and indeed the Act itself), seeks to treat them differently from the ordinary citizen by imposing on them alone these requirements to report to Indecom when served with a notice and provide statements and answers to such questions as Indecom might wish to ask.

Summary of the 1st Respondent's Submissions

[301] On a literal construction of the relevant section of the Charter, (the 1st respondent's submission ran), the requirements that are being complained about are not limited in their application to members of the JCF specifically, or to the security forces generally; but affect or extend to all citizens who, Indecom might believe, possess information that might be of assistance in an investigation.

Summary of the 2nd Respondent's Submissions

[302] It was also submitted on behalf of the 2nd respondent that a literal interpretation of the relevant section would be sufficient to show that the claimants' position in this regard is not maintainable: - the particular section of the Act extends the requirements to all persons. The court was also invited to look at the definitions in section 2 of the Act of the terms "security forces" (which includes special constables, district constables and soldiers), and "specified official" (which includes correctional officers and is also in fairly wide terms). The court was, therefore, urged to reject the claimant's contention on this issue.

Analysis

[303] Again applying the plain-meaning rule or adopting a literal-construction approach to the relevant section of the Act, it will be seen that there is considerable merit in the submissions of both the 1st and 2nd respondents. For example, the exact words that are contained in section 21 (1) of the Act, dealing with the requirement to give statements, states that the Commission may impose this requirement on "any member of the Security Forces, a specified official or any other person…" (emphasis added). Section 21 (3) (b), which deals with the Commission's powers to summon persons for the purpose of examining them on oath is worded almost identically, extending the Commission's powers to "any member of the Security Forces, any specified official or any other person…". (emphasis added)

[304] Accepting (as I must) the submissions of counsel for the 1st and 2nd respondents on this issue, considering the wide terms of section 21 (1) and (3); and, having particular regard to the use of the phrase "any other person" in those sections, I find that the claimants' arguments in relation to this issue must fail. Their arguments stand no better chance of succeeding when a general and purposive approach to the interpretation of the section is taken, in keeping with **Minister of Home Affairs v Fisher.**

Adequate Alternative Remedies?

Summary of the Claimants' Submissions

[305] For the claimants it was submitted that the R.M. court was not the proper venue for the ventilation of the issues and for obtaining the nature of relief that is being sought in this claim. The resident magistrate (R.M.) cannot grant declarations and could not deal with the matters in the way in which this court can.

Summary of the 1st Respondent's Submissions

[306] On behalf of the 1st respondent, it was submitted that the claimants have more-than-adequate alternative remedies. In the first place counsel referred to paragraph 17 of the affidavit of Krystle Diana Blackwood – pages 140-147B of the bundle of affidavits - which reads as follows:

> *17. That submissions were made by Counsel acting on behalf of each of the accused in respect of the constitutionality of the relevant provisions of the Act…"*

[307] Reference was also made to paragraph 13 of the affidavit of Peter Craig Champagnie (pages 86-139 of the bundle of affidavits), which, so far as is material, reads as follows:-

> *Before the commencement of the said trial, all Counsel in the matter made submissions in limine as to why the trial should not proceed and the charges should be dismissed…*

[308] These paragraphs, dealing with the proceedings before the R. M. court, were referred to as a prelude to the submission that points relating to the purported unconstitutionality of legislation, such as is being contended in this matter, could properly have been taken and indeed were taken (according to the submission), in the R. M. court. The matter has come to this court, it was further argued, only because the learned resident magistrate's ruling on the preliminary points went against the claimants. The claimant's proper recourse, the submission further went, was for them (if the outcome of the substantive trial was not in their favour), to have taken the matter to the Court of Appeal. That court has the

power to deal with matters relating to the constitutionality or otherwise of legislation and has the power (and has exercised that power before) to strike down sections of an Act or an Act in its entirety for being unconstitutional. The resident magistrate, however, does not have the power to grant declaratory relief as is being sought in this claim.

Analysis

[309] It is best, in a consideration of this issue, to set out the relevant provision of the Charter governing the grant or otherwise of relief under the Charter and the question of adequate alternative remedies. That provision is section 19; and its terms, so far as is relevant, are as follows:

> *19(1) If any person alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.*
>
> *(2) Any person authorized by law, or, with the leave of the Court, a public or civic organization, may initiate an application to the Supreme Court on behalf of persons who are entitled to apply under subsection (1) for a declaration that any legislative or executive act contravenes the provisions of this Chapter.*
>
> *(3) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled.*
>
> *(4) 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.*

[310] The sub-section that is most directly relevant and that is the best starting point for this analysis is sub-section (4). That sub-section uses the permissive (as opposed to mandatory) phrases "may decline" and "may remit", indicating that the exercise by the court of the power whether to remit a matter or deal with it itself, is an entirely discretionary matter. This suggests that, even where adequate means of redress exist, this court is not obliged to remit or otherwise decide not to hear a matter, but may nevertheless deal with it if it is of the view that good and sufficient reasons exist for it to do so.

[311] There are two other parts of this sub-section that are in need of examination:- these are (i) that part requiring the court to consider whether "adequate means of redress" are available "under any other law" to the claimant for the "contraventions alleged"; and (ii) that part referring to the matter being remitted to "the appropriate court".

[312] What are the contraventions being alleged in this case? The substance of the claim before the court is allegations of breaches of the claimants' constitutional rights.

[313] What is the redress being sought in the Further Amended Fixed Date Claim Form? Some 15 orders are being sought. Of these, what is being prayed for as order "o" is an order of prohibition. What is being prayed for as orders "m" and "n" are (i) an order that the proceedings in the R.M. court be discontinued and (in the alternative) (ii) a stay of proceedings, respectively. All the remaining 12 or so orders that are being sought by the claimants are in the form of declarations of their rights under the constitution vis-à-vis the Indecom Act.

[314] What kind of redress, if any, exists under "any other law"? It might be recalled that one of the points being made by the 1st respondent is that constitutional points could have been made before the R.M. court. The R.M. court must be regarded as being the "appropriate court". That court functions pursuant to the provisions of the Judicature (Resident Magistrates) Act. This point cannot be said to be without merit. It has support in the landmark precedent of **Hinds v R** [1977] A.C. 195. It will be remembered that in that case, the appellants, who had been convicted in the Resident Magistrate's Division of the Gun Court pursuant to the provisions of the Gun Court Act of 1974, appealed their conviction and sentence. The main grounds of their appeal were to the effect that the Gun Court Act itself or, at the very least, those sections under which they had been tried, convicted and sentenced, contravened the provisions of the Constitution and so were null and void. The Privy Council, after a lengthy examination of the Constitution and its interaction with the Gun Court Act, held, by a majority, that those sections of the Gun Court Act creating the Full Court Division of the Gun Court were in conflict with Chapter VII of the Constitution and thereby void. In doing so, their lordships embarked upon a wide-ranging and detailed examination of the Constitution, its history and of the provisions and scheme of the Gun Court Act; Lord Diplock (who delivered the majority opinion), opining (at page 210 C-D), that:

> *…when the constitutional validity of an Act passed by the Parliament of Jamaica is in issue, the problem cannot be solved by the court's confining its attention to those specific provisions of the Act that are directly applicable to the particular case.*

[315] Experience also shows that our Court of Appeal, when dealing with novel and interesting points and subject matter, is relatively and reasonably generous in granting to appellants' counsel leave to amend their grounds of appeal and to argue same, if by doing so, as many relevant issues as possible might be

decided with finality in one appeal, thus ultimately saving time and expense. If the claimants in this case had proceeded as did the appellants in the **Hinds** case, (by appealing to the Court of Appeal after a trial – if they had been convicted), would that not have ensured that fewer tiers of the court system were likely to be utilized? (that is, from the R.M. court to the Court of Appeal to the Privy Council – if thought fit). As appellate proceedings lie from this court to the Court of Appeal and then to the Privy Council; and, as proceedings have already been commenced in the R.M. court, does this not raise the possibility of four tiers in the court system being utilized in this matter?

[316] Interestingly, however, an issue arose in the **Hinds** case between the majority and the minority as to whether some of the rulings made by the majority on some aspects of the relevant legislation were to be characterized as *obiter dicta*. Is this issue likely to have arisen if the matter had proceeded as an application to the constitutional court, seeking clearly-defined declaratory relief?

[317] In my view the matter is not without difficulty and the answers to these various questions can by no means be said to be crystal clear or easy to discern. However, looking at section 19 of the Charter again – and in particular section 19 (1), I am struck by the part of that subsection which entitles a claimant to bring a claim in the constitutional court "…without prejudice to any other action with respect to the same matter which is lawfully available…" This to my mind reinforces the view of the entirely discretionary nature of the court's treatment of the question of whether to remit a matter or hear it itself. In these circumstances, although inclining towards the view of the adequacy of the existence of alternative remedies, I would be most reluctant to dismiss the matter on this sole relatively-technical ground, when there is a need to resolve other issues, whose resolution now may help to save time and costs by preventing them from being brought in other proceedings in the future.

We may now go on to consider those other issues.

Other Issues

[318] Convenience suggests that we deal with the two remaining issues together, that is:- Whether the Act, and in particular, section 21 (1) thereof, and the actions of the Commissioner thereunder are in contravention of the provisions of the Charter; and whether there has been a breach of the claimants' right to silence and privilege against self-incrimination.

Summary of the Claimants' Submission

[319] Relying very heavily on such cases as: **R v Oakes** [1986] 1 SCR, 103, counsel for the claimants submitted that whilst it is permissible for a statute to derogate from or abrogate to a certain extent the fundamental rights enshrined in the charter, such a law must be shown to be "demonstrably justified in a free and democratic society". Also, it is for the person who is seeking to uphold the validity of such legislation to show the particular statute to be such. The Act was passed as a result of certain societal concerns and the passing of the Act (along with the formation of Indecom), by itself met and addressed these concerns. It was further submitted that the serving of the notices on the claimants immediately implicated their rights to remain silent and not to incriminate themselves. Their non-attendance in response to the notices was a manifestation of their asserting their rights aforesaid. Section 25 (1) seeks to build on the common-law right to silence and protection against self-incrimination. Before 2010, a suspect had the right to remain silent. The charter deals with a person "charged". The Act deals with a person under investigation.

[320] It was further submitted that, from the wording of the notices and the documents exhibited, it is clear that the claimants were regarded by Indecom as suspects. As such, they have a right to remain silent during questioning (relying on **Saunders v U.K.** (1997) 23 EHRR 313; Case 43/1994/490/572).

Summary of Submissions for the 1st Respondent

[321] On behalf of the 1st respondent, it was argued that, the actions of Indecom in this matter cannot be faulted and are quite permissible under the Act. Indecom's entry into the matter is a normal procedure, which the Act empowers it to do.

[322] By having refused to attend on September 14, 2010, the claimants are clearly in breach of section 21 (1) of the Act. The claim to the right to silence or the privilege against self-incrimination, cannot be made through an attorney-at-law, but must be made by the person seeking to assert the right(s) himself or herself (citing **H.M. Coroner, Lincolnshire, ex parte Hay** [1999] EWHC 115).

[323] This matter concerns the claimants' failure to attend the VIU on September 14, 2010; and so any evidence in respect to other notices (and in particular, the notice dated January 3, 2011) is of no relevance to this matter. Any such evidence would be ruled inadmissible in any proceedings relating to the claimants' failure to attend on September 14, 2010.

[324] The claimants were not regarded as suspects by Indecom. References to them as such appear on printed forms issued by the JCF which, for convenience, were simply used in the proceedings initiated by Indecom. An identification parade is not necessarily held to identify a suspect; but can be used to either include or eliminate persons in investigations. It is a tool both of investigation and elimination. The investigative powers of Indecom are wider than just investigation for the purpose of criminal prosecution. There is no evidence in this case that the Commissioner had started any criminal investigation. Even if he had, the protection of the right to silence is only available to either someone charged or who is reasonably suspected of having committed a criminal offence. Any other person who can assist the Commissioner in an investigation into the events is not entitled to claim the protection of the law to the right to silence or against self-incrimination. However, even if they are suspects, their rights are protected in the trial process.

[325] Referring to section 21 (4), which gives to the Commissioner powers of a judge in an investigation; and to cases such as **Downie & ors v Coe & ors** EWCA Civ 2648; (1997) Times, 28 November; (unreported) (November 5, 1997) it was further submitted that these cases indicate that the claimants should have attended the hearing to which they were summoned and there attempt to exercise the right to claim the privilege against self-incrimination and the right to silence.

[326] If the Act derogates from the claimants' rights, all the court has to determine is whether the Act is reasonably justified in a democratic society. The test is beyond reasonable doubt; and it is for the claimants to show that it offends against the constitution.

Summary of Submissions of the 2nd Respondent

[327] For the 2nd respondent, it was submitted, *inter alia*, that sections 21 (1) and (5) of the Act do not conflict with section 16 (6) (f) or 13 (3) (g) of the constitution.

The proceedings before the Commissioner were not criminal proceedings, but investigative proceedings. Those proceedings cannot be equated with a trial. If an attempt should be made to use any answers obtained in this process in a trial, the trial process itself would take care of the claimants' concerns.

[328] Adopting cases cited on behalf of the 1st respondent on this point, and citing, *inter alia*, the case of **Allhusen v Labouchere** (1878) 3 QBD 654; and **R v Boyes** (1861-1873) All ER Rep. 172, it was further submitted that the claimants needed to have attended in compliance with the notices in order to assert the rights they are claiming. By not attending, they breached the Act.

Analysis

Background to the Passing of the Act

[329] The Act came into force on April 15, 2010 after what might be regarded as a turbulent passage through Parliament. The bill was the subject of 67 amendments in the Senate; then 33 amendments in the House of Representatives before it became law. (See the Houses of Parliament Report on Acts Passed in Parliament for the Legislative Year 2010/2011). It seeks to up-end a long-standing status quo of ineffective investigations into questionable shootings and allegations of excesses by agents of the state, and to address certain controversial societal concerns. It was meant to represent a paradigm shift from what obtained before. In light of its subject-matter and history, therefore, it is perhaps not surprising that it would be the subject of contentious litigation.

[330] Indecom was established to replace the Police Public Complaints Authority (the PPCA), whose performance was the subject of considerable criticism (not much of which could honestly be said to have been unjustified).

[331] Among the societal concerns that the creation of Indecom was intended to address (as was pointed out by the claimants' attorneys-at-law) were:-

a. The perceived ineffectiveness of the PPCA.

b. The need for investigations into police fatal shootings to be conducted by an independent civilian body.

c. The desirability for the independent civilian body to issue recommendations on how to prevent or minimize instances of use of excessive force by agents of the state.

d. The need for speedy and transparent investigations into cases of the alleged use of excessive force by agents of the state.

e. The high number of police killings (some 2000 between 1999 and 2010).

[332] However, it is noted that there is one concern (very important in my view) that is not listed here. It has a very important bearing on this case – especially on the question of whether, with the passage of the Act and the implementation of Indecom, all the societal concerns have been addressed. Perhaps more pointedly, a consideration of this concern also requires us to look at the ills with which the Act and the creation of Indecom were intended to deal.

[333] This important concern is reflected in paragraph 96 of the report of the Inter-American Commission on Human Rights (IACHR), (dated October 24, 2005), in respect of the death of Mr. Michael Gayle, which is found at pages 205-206 of the bundle of affidavits. The report shows that a very important concern of that international body (which it adopted from a report on Jamaica by the U.N. Special Rapporteur for Extrajudicial, Summary or Arbitrary Executions) was:

> *…information presented to the Commission also indicates that the PPCA suffers from weaknesses relating to its funding and authority. The U.N. Special Rapporteur for Extrajudicial, Summary or Arbitrary Executions observed of the PPCA that:*
>
> > *[l]egally, it does not have sufficiently strong powers to ensure that police officers who are requested to give a statement before the PPCA actually do so, as the current penalties for not cooperating with the PPCA are very weak. The current Police Public Complaints Act would benefit from a review and strengthening.*

(See the exhibit "TFW 3" to the affidavit of Terrence Williams, sworn to on January 5, 2012).

[334] Exhibit "TFW 2" – part of a report from Amnesty International dated April 2001 on police killings in Jamaica- is also instructive. The relevant section of that report (to be found at page 171 of the bundle of affidavits), reads as follows:-

> *…there remains a widespread lack of public confidence in the credibility, independence and transparency of the PPCA.*
>
> *Disciplinary and criminal proceedings against officers alleged to have committed abuses are frequently hampered through lack of evidence, with officers unwilling to provide information. The PPCA has stated that a major factor preventing the full and thorough investigation and supervision of complaints is the failure by police who are the subject of complaints to respond promptly to requests for information…*

[335] When this concern is examined against the background of the terms of section 21 (1) of the Act, then it reinforces the arguments and submissions of counsel for the 1st and 2nd respondents that the Act was intended to give to the body that it created (i.e., Indecom), greater powers or more efficacy than existed before in relation to the collecting of statements (and evidence generally), in the course of its investigations. This was a "mischief" that the passing of the Act and the establishing of Indecom were clearly meant to cure; or, put another way, one of the purposes for which the Act was passed. In light of this the argument advanced on behalf of the claimants that the passing of the Act and the setting up of Indecom by themselves addressed all the societal concerns must be rejected. Whether it is the purposive approach that is applied or the mischief rule that is adopted, or a broad and flexible approach (as in the **Fisher** case), it is clear that the intention of Parliament was to give Indecom what the PPCA lacked – that is, the capacity to undertake efficacious investigations.

The Construction of Section 21 of the Act vis-à-vis the Constitution

[336] The case of **Hinds** offers useful guidance on a number of areas of the law, other than that referred to earlier in this judgment. Particularly, it gives guidance on the approach that should be taken in examining legislation when a challenge is being made to its constitutionality.

[337] In that case, Lord Diplock, speaking for the majority of the Privy Council, stated at page 224:-

> *In considering the constitutionality of the provisions of section 13(1) of the Act, a court should start with the presumption that the circumstances existing in Jamaica are such that hearings in camera are reasonably required in the interests of "public safety, public order or the protection of the private lives of persons concerned in the proceedings.*
>
> *The presumption is rebuttable. Parliament cannot evade a constitutional restriction by a colourable device:* ***Ladore v Bennett*** *[1939] A.C. 468, 482.*
>
> *But in order to rebut the presumption their Lordships would have to be satisfied that no reasonable member of the Parliament who understood correctly the meaning of the relevant provisions of the Constitution could have supposed that hearings in camera were reasonably required for the protection of any of the interests referred to; or, in other words, that Parliament in so declaring was either acting in bad faith or had misinterpreted the provisions of section 20 (4) of the Constitution under which it purported to act.*

[338] What this passage illustrates is that in construing legislation, the constitutionality of which is under challenge, the starting point is a presumption of

constitutionality and that the legislation in question is reasonably required. This presumption is rebuttable. However, in order to rebut the presumption, matters akin either to *mala fides* or to a misinterpretation by Parliament of the section of the Constitution under which it purported to act, would have to be proven.

[339] In my view, these considerations must always remain in the background and similarly always inform a consideration of any other test that might also be used – such as, for example, whether the particular legislation under challenge, if it derogates from a constitutional right, can be said to be "demonstrably justified in a free and democratic society".

Does Section 21 (1) Derogate From the Claimants' Rights?

[340] In an examination of this question, it will be important to start from the premise (in respect of which there was no issue joined among the parties) that by no means are the right to silence and the privilege against self-incrimination absolute. Statute and case law abound, demonstrating that this is not so. As Lord Mustill observed in the previously-cited case of **ex parte Smith** at page 40:-

> *… it is clear that statutory interference with the right is almost as old as the right itself*

He also stated at page 40:-

> *… the legislature has not shrunk, where it has seemed appropriate, from interfering in a greater or lesser degree with the immunities grouped under the title of the right to silence.*

The specific legislative provision in this case (section 21(1)), sets out the parameters of the right to which the claimants lay claim. Its terms, (we might remind ourselves) are to give to persons requested by Indecom to assist in investigations, the protection against being:-

> ... compelled to give any evidence or produce any *document or thing which he could not be compelled to give or produce in proceedings in the court of law.*

In light of this, it might be useful to see what restrictions exist on compulsion to give evidence and produce documents or other things in court proceedings.

Restrictions on Compulsion of Witnesses in Court Proceedings

[341] Undergirding the law on this subject is, of course, section 16(6)(f) of the Charter, which protects the citizen who is charged with a criminal offence from being:-

> *Compelled to testify against himself or to make any statement amounting to a confession or admission of guilt.*

[342] This itself has its foundation in section 16(5) of the Charter which protects every person charged with a criminal offence with the presumption of innocence until that person has either pleaded or been proven guilty.

[343] These constitutional provisions apart, the courts in this jurisdiction have consistently been guided by common-law and other rules, including what are commonly referred to as The Judges' Rules [**Practice Note (Judges' Rules)** [1964] 1 WLR 152]. In the Privy Council decision of **Shabadine Peart v R** (2006) 68 WIR 372 Lord Carswell, delivering the decision of the court, made the

following observations, giving an insight into the substance of the Judges' Rules said at paragraph [1]:-

> *The Judges' Rules constitute a striking example of judge-made law. Although classed formally as administrative directions for the guidance of police officers interviewing suspects, they were afforded over time a higher status, and a general requirement became established that police officers had to observe them if confessions received were to be admitted in evidence. ... [I]n jurisdictions such as Jamaica which have not replaced them by legislative provisions the Judges' Rules retain considerable importance.*

[344] For present purposes, the aspect of the Judges' Rules which is of importance is that governing the admissibility of statements, which is at paragraph [24] [iii]:-

> *The criterion for admission of a statement is fairness. The voluntary nature of the statement is the major factor in determining fairness. If it is not voluntary, it will not be admitted. If it is voluntary, that constitutes a strong reason in favour of admitting it, notwithstanding a breach of the Judges' Rules; but the court may rule that it would be unfair to do so even if the statement was voluntary.*

[345] This position is also reflected in the common law – see, for example, the Privy Council case of **Ibrahim v R** [1944] AC 599, in which Lord Sumner set out the position as follows at pages 609 - 610:

> *It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained*

from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale.

[346] Rules I and II of the Judges' Rules also address the matter of questioning before a person has been charged, indicating, in summary, that a person may be questioned, whether a suspect or not; and that where reasonable grounds exist for a person to be regarded as a suspect, then a caution in certain terms needs to be administered before the suspect might be questioned.

Were the Claimants Regarded as Suspects?

[347] The evidence in this case made the matter of whether the claimants were suspects or not, an interesting question. Whilst the printed contents of the JCF forms used in the matter might be inconclusive, (see, for example, exhibits DH1a and DH1b of the affidavit of David Hutchinson, sworn to on October 12, 2011); there is a hand-written reference to one of the claimants on the said form as a "suspect". It appears (although the evidence is not conclusive), that this was inserted by an officer of Indecom. These references to "suspect" were made in connection with the holding of an identification parade. Is this sufficient for one to conclude that the claimants were suspects- and further, that they were all suspects (and not just the one(s) referred to as such in the JCF forms? In my view, it is not; and there does not emerge from the evidence presented to the court any clear and reliable material on the basis of which one could safely and definitively conclude that the claimants were in fact suspects or that in seeking to question them, Indecom was engaged in something in the nature of a criminal investigation.

[348] The case of **R v Shillibier** [2006] All E.R 86 (Court of Appeal), although not exactly on all fours with the instant case, (as it concerns the Police and Criminal Evidence Act, which has no counterpart legislation in this jurisdiction), might, nonetheless be used as a useful, general guide to show how a court of superior jurisdiction elsewhere has dealt with the distinction between a suspect and a

non-suspect in questioning in relation to the commission of a crime. The head note to the case reads as follows:-

> *The defendant was charged with murder. Two witnesses gave evidence as to the deceased's movements in the hours before her death, in particular, they described that a male (allegedly the defendant) had met the deceased and [she] had gone with him. At an early stage of the police investigation, officers had laid down a policy for the investigation, in relation to which three categories were entered onto a policy file, namely, 'significant witnesses'; 'TIE (trace, interview, eliminate) individuals', and 'suspects'. TIE individuals related to any person who was judged to have particular relevance to the enquiry but who was not at that stage a suspect. It had been decided that the two witnesses were to be treated as significant witnesses; however, the evidence that the officers had obtained was contradictory. In due course, a decision was taken to treat the then unknown male referred to by the men as a TIE, on the basis that he was the 'last person to see the deceased alive and in her company', and, subsequently, the defendant was contacted as a TIE individual. A warrant was also obtained to search the address where he had been lodging. He was questioned, having been given a short caution, which did not include the words 'it may harm your defence if you do not mention when questioned something which you later rely on in court'. Subsequently, a decision was taken to arrest the defendant and he was formally interviewed. At trial the prosecution sought to rely on lies and inconsistencies told by the defendant in the course of questioning before he was arrested and interviewed under caution. The defendant applied to exclude the entirety of the questioning conducted before his arrest, pursuant to s 78 of the Police and Criminal Evidence Act 1984. The judge rejected the*

submission that the defendant should have been treated as a suspect at the time when he was taken to the police station as a volunteer, as there had been no reasonable grounds to suspect him of murder, and therefore no requirement that he should be cautioned in accordance with the Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, paras C10.1 to 10.4. The defendant was convicted. He appealed against conviction. The court considered whether the judge had erred in admitting into evidence the police questioning of the defendant that had been conducted at a time when he was being treated as a volunteer rather than as a suspect, and when he had not been fully cautioned.

[349] The appeal would be dismissed.

(1) A TIE policy did not cut across or undermine the essential distinction between suspects and non-suspects for the purposes of Code C but rather applied to persons who were not at the stage of questioning them regarded as suspects. There could be no objection in principle to taking, for operational purposes, a number of categorizations for persons that police officers wished to question. The adoption of those categories did not affect the requirement under the Code to caution suspects or the absence of a requirement to caution non-suspects.

As to the circumstances in which Code C required a caution to be given, the essential distinction under the Code was between those who were questioned as suspects within para 10.1 and those who were questioned as non-suspects. A caution was required in the case of the former but not in the case of the latter, and where a caution was required, it had to be in the terms of para 10.5.

(2) The obtaining of the search warrant did not mean that the defendant fell necessarily to be treated as a suspect.

[350] What the **Shillibier** case poignantly illustrates is that in the circumstances of that case where a criminal investigation by the police was in progress; where Shillibier was the person in whose company the deceased was last seen; where a search warrant was issued in respect of his property; and where the police knew that he had been charged with and acquitted of murder before; all those facts did not suffice to make him a suspect. In fact the category in which he fell was somewhere between a suspect and a non-suspect: that is a trace, interview and eliminate (TIE) individual, who was not a suspect and in respect of whom the caution required to be given to a suspect was not necessary. Richards, LJ observed at paragraph 65 of the judgment in relation to the search warrant:-

> *The criteria for obtaining a search warrant are different from the criterion under paragraph 10.1 of Code C; and, as the judge pointed out, they relate to the existence of material of potential value to the* investigation *and they apply as much to the elimination of persons from the inquiry as to proving their involvement in an offence. We accept that the fact that search warrants are obtained is a relevant consideration, but we reject the contention that there is an automatic read-over such that the person in relation to whom a warrant is obtained must be treated as a suspect*. (emphasis added).

[351] It seems to me that the comments of Richards, LJ in relation to the search warrant may be assimilated to the use by the 1st respondent of the procedure of questioning that he adopted in the instant case. If in the circumstances of the **Shillibier** case, the type of information known to the police (who were engaged in a criminal investigation), could not have compelled the court to the conclusion that **Shillibier** was a suspect, then in the instant case in which much less objective information was available about the claimants; and given the very wide mandate of Indecom, there is, in my view, not sufficient material to conclude that these claimants were suspects.

[352] If they were suspects, however, (which, in my view, they were not), the requirement in the Judges' Rules that a suspect be cautioned, appears to have been met as can be seen in the affidavit of Petro Greene, sworn to on October 12, 2011 and exhibit MEC 2 of the affidavit of Michelle Champagnie, sworn to on the said date (page 74 of the bundle of affidavits). Among other things, the caution informed that claimant that:-

> *...you cannot be compelled to give any evidence which you could not be compelled to give in proceedings in any court of law. This includes the right not to answer questions that may incriminate you...*

How Should the Rights be Asserted?

[353] The gravamen of the complaint about the caution related to paragraphs 4 and 5 thereof, which, in essence, indicated that Indecom had a right to determine whether the claim to the rights should be upheld. This appears to have clashed with the claimant's view that the assertion of the rights by itself granted her blanket immunity and could not be questioned.

[354] It is interesting to note that the claimant Greene refused to answer questions which on their face seem innocuous, such as: - (i) "In what department do you work in (sic) at the Spanish Town Police Station?" (ii) "What is your rank in the police force?"; (iii) "How long is your service in the police force?" (see exhibit MEC 2). Could answering these questions be said to tend toward the claimant Greene's incriminating herself?

[355] In my view the way in which the rights to silence and the privilege against self-incrimination are to be asserted and dealt with is correctly set out in the cases that were cited by counsel for the 1st and 2nd respondents. Let us start with the case of **Downie & ors v Coe & ors**. (cited by counsel for the 1st respondent). In that case, there was an attempt to claim the privilege against self-incrimination

by way of an affidavit by a solicitor on behalf of his client. The Court of Appeal held that that method of attempting to claim the privilege was not permissible; and that the privilege:

> *...whether as protection against answering a question in the witness box or an interrogator or against disclosing a document on discovery, had to be claimed on oath by the person who sought to rely on it, even if support and substantiation for the claim might come from elsewhere.*

[356] The Court found that that was the established practice, as was reflected in a number of cases that were cited to the court, going back to the case of **Webb v East** (1880) 5 Exch D 108.

[357] Similarly, looking at the case of **R v Boyes,** cited by counsel for the 2nd respondent, that case appears to lend support to submissions made by the respondents' counsel that the procedure adopted by the 1st respondent in his attempt to question the claimant Petro Greene, (along with the caution used), was unobjectionable. In that case, Sir Alexander Cockburn CJ, delivering the judgment of the court, stated, at page 174, that:

> *... to entitle a party called as a witness to the privilege of silence, the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer.*
>
> *...*
>
> *A merely remote and naked possibility, out of the ordinary course of the law and such as no reasonable man would be affected by, should not be suffered to*

> *obstruct the administration of justice. The object of the law is to afford to a party, called upon to give evidence in a proceeding inter alias, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice.*

[358] In light of these dicta, it is difficult to see what could have been the claimant Greene's justification for refusing to answer some of the questions posed by the 1st respondent, some of which were set out above. What could have been the possibility of danger that this claimant apprehended that informed her refusal to respond to these questions? The answer to these questions is the more difficult to discern when one considers that the claimants and other members of the JCF are required to submit reports to their superiors in respect of violent confrontations such as the one resulting in the deaths in this case.

The Test of Constitutionality in R v Oakes

[359] In **R v Oakes** (a decision of the Supreme Court of Canada), the court considered the constitutionality of a "reverse-onus" provision in the Narcotic Control Act. In the head note to the case, the court propounded the following test in dealing with a statutory provision the constitutionality of which was under challenge and an issue raised as to whether a provision is reasonable and demonstrably justified in a free and democratic society:-

> *Two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the objective to be served by the measures limiting a Charter right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The*

> *standard must be high to ensure that trivial* objectives *or those discordant with the principles of a free and democratic society do not gain protection.*
>
> *At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, the party invoking s. 1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components. To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be proportionality between the effects of the limiting measure and the objective --the more severe the deleterious effects of a measure, the more important the objective must be.*

Have the Tests Been Met?

[360] In relation to the first criterion, it is by no means clear to me that section 21 (1) of the Act impinges significantly (or at all) on the claimants' right to silence and against self-incrimination; as the rights available to them under the common law appear to remain intact. In my view, it does not. If it does, however, then, in light of the considerable societal concerns (which are pressing and substantial), born of the relatively-high incidence of police fatal shootings and the clear need to address these concerns, the objective to be served by limiting the rights are, I am driven to hold, unquestionably of sufficient importance to justify the said rights being limited. The objectives that the Act and the particular section seek to meet could never be said to be trivial or discordant with principles in a free and democratic society. On the contrary, effective, transparent investigations into allegations of any excess on the part of agents of the state must be of paramount importance to, and accord with, the rule of law and other principles governing a free and democratic society.

[361] In my view, therefore, the first limb of the test has been met.

[362] In relation to the second criterion, where something in the nature of a proportionality test is required with some three sub-tests, the following might be said: - (i) Are the measures fair or arbitrary? In my view, they are fair, seeking to attain the objective of obtaining information for Indecom's investigations, which was a challenge faced by the PPCA, on whose track record and performance Indecom was created to improve. Additionally, giving to Indecom the power to summon persons and request them to give statements and other material that might be pertinent to the investigations, is clearly rationally connected to the attaining of the objective. Indeed, it might be difficult to attain the objective without it. (ii) Do the means impair the right as little as possible? From the previous discussion it will have been seen that it remains extremely doubtful that the means impair the claimants' rights at all; but, if they do, it seems to me that that impairment is minimal. (iii) Is there proportionality between the effects of the measure and the objective? When we bear in mind that the objective is to have proper and transparent investigations into the high number of police killings and other alleged excesses by agents of the state; and when we consider the obstacles that have, over the years, stood in the way of the attainment of this objective, and when we compare the measures implemented to assist in the realization of that objective, then there is clear proportionality between the measures and the objective.

[363] Hence, the tests under the second criterion have also all been met.

[364] It might also be said (applying the test outlined in the **Hinds** case), that the claimants have failed to satisfy the requirement that is necessary to rebut the presumption of constitutionality and that the legislation is reasonably required, by showing either *mala fides* or error on the part of Parliament in passing the Act.

Conclusion and Disposition

[365] In conclusion, whichever approach to statutory and constitutional interpretation one uses to analyze the issues in this matter, (and whichever test of constitutionality is applied), the result is the same: - that is, that the 1st respondent acted entirely within his powers pursuant to a valid section of the Act. The Act was passed in an attempt to address woeful shortcomings in the previous dispensation and to bring the country into compliance with international human-rights standards where investigations into allegations of excessive use of force by the state are concerned; and has been shown to be demonstrably justified in a free and democratic society.

[366] It is noteworthy that at the time of the writing of this judgment, and, coincidentally, giving greater poignancy to the issues in this case, there has been growing concern about the number of police fatal shootings. Concern about what some perceive to be the high incidence of these killings has come from all quarters (including from the JCF high command). And, the perceived high incidence apart, some of the killings have been viewed as questionable by some members of the public. The JCF itself has also already sought to implement measures to address the issue. Does all of this not underscore the need for effective legislation and the need for an investigative body to be equipped with sufficient powers to conduct efficient, effective and transparent investigations in a way that its predecessor could not? I hold to the opinion that it most certainly does.

[367] In my considered view, no sustainable objections can be taken in respect of the actions of the 1st respondent in this matter. The claimants' rights remain protected, and will be further protected during the trial process. The claimants must co-operate to the extent that they can (and as the Act requires them to do), with this body (a commission of Parliament); set up ultimately to safeguard the rights of all the citizens of this country.

[368] There is no merit in any of the substantive grounds advanced by the claimants. In the result, their claim must be dismissed.

Order

Lawrence - Beswick J

Claim dismissed. No order as to costs