In The Supreme Court of Bermuda

CIVIL JURISDICTION
2010: 404
(Consolidated)

IN THE MATTER OF ORDER 53 OF THE RULES OF THE SUPREME COURT OF BERMUDA

IN THE MATTER OF THE ADMINISTRATION OF JUSTICE (PREROGATIVE WRITS) ACT 1978

AND IN THE MATTER OF THE PRISON OFFICERS (DISCIPLINE, ETC.) RULES, 1981

AND IN THE MATTER OF THE PUBLIC SERVICE COMMSSION REGULATIONS 2001

AND IN THE MATTER OF THE DECISION OF THE COMMISSIONER OF CORRECTIONS DATED 28 JULY 2009

AND IN THE MATTER OF THE DECISION OF THE PUBLIC SERVICE COMMISSION DATED 3 AUGUST 2009

BETWEEN:

DARREN PITCHER

Applicant

-v-

THE COMMISSIONER OF CORRECTIONS
-and-

PUBLIC SERVICE COMMISSION

Respondents

JUDGMENT

Date of Hearing: November 7-8, 2011
Date of Judgment: November 25, 2011

Ms. Lauren Sadler-Best and Mr. Alan Doughty, Trott & Duncan, for the Applicant
Mr. M. Anthony Cottle, Attorney-General's Chambers, for the Respondents

Introductory

1. The Applicant, by decision of the Commissioner of Prisons[1] ("COP") dated July 28, 2009 and of the Public Service Commission ("PSC") dated October 7, 2009 was dismissed from his position as a Prison Officer ("PO") for having a cell-phone in his possession in a sensitive area of Westgate Correctional Facility on February 18, 2009. He was a PO of five years standing with a clean record and was the first PO to be dismissed for the offence of breaching the COP's blanket policy prohibiting possession of unauthorised cell phones within the confines of the Facility which was aimed at addressing the well-recognised and serious problem of such items being illicitly supplied to prison inmates.

2. By Notice of Application dated November 10, 2010 filed on November 19, 2010, the Applicant sought leave to seek judicial review[2] of these decisions on the grounds that, *inter alia*, the penalty of dismissal was so harsh and disproportionate that it was a decision which no reasonable disciplinary authority properly directing itself could lawfully reach. On the same date the Applicant filed an Originating Summons dated November 10, 2010 pursuant to Order 114 of the Rules of the Supreme Court. This Summons sought to quash the impugned decisions on the grounds that the Applicant's implied right to legal representation was infringed in the disciplinary proceedings and sought an order of reinstatement.

3. The Applicant's application for judicial review was not filed until over a year after the PSC dismissed his appeal because no one saw fit to supply him with a copy of the October 7, 2009 decision letter which was addressed to the COP as the applicable Discipline Rules, curiously, expressly mandated. He was first officially notified of the decision by letter dated August 3, 2010 which was only sent by the PSC in response to a query from the Applicant's attorneys (by letter dated July 7, 2010) as to the result of the appeal. This correspondence was initiated because, in December 2009, he had been verbally told by a representative of the Prison Officers Association ("POA") that the appeal had been dismissed.

4. The Chief Justice granted leave to seek judicial review on April 8, 2011, a mere two days after the Applicant's counsel pointed out that the leave application had been

[1] Although the Commissioner styles himself (and is described in the title to this action) as the 'Commissioner of Corrections', he is described herein using the title of his legal office: Prisons Act 1979, section 4(1).
[2] Although the action heading, perhaps cut and pasted from an old precedent, refers to the now-repealed Administration of Justice (Prerogative Writs) Act 1978, the current statutory source of the Court's jurisdiction to grant relief by way of judicial review is now found in sections 64-66 of the Supreme Court Act 1905 as of July 7, 2009.

overlooked. On August 4, 2011 I directed that the constitutional and judicial review applications should be consolidated and gave directions for the filing of evidence; the Registrar fixed the hearing of the applications by Notice of Hearing dated September 23, 2011.

5. This series of unfortunate administrative events explains why this matter is only being adjudicated two years after the Applicant's appeal against his dismissal was refused by the PSC, and more than two and a half years after the impugned disciplinary penalty was first "imposed"[3].

The constitutional application

6. It became obvious in the course of the hearing that the constitutional application fell to be dismissed for two reasons. Firstly, and more fundamentally, because section 16 of the Constitution itself makes it clear that section 6 (8) and its constitutional fair hearing protections do not apply to disciplinary proceedings involving members of, *inter alia*, the prison service. Secondly, and more prosaically, because on the facts there was no credible evidence that the Respondents had denied the Applicant the right to engage legal counsel in the course of the relevant disciplinary proceedings.

7. The Applicant's counsel opened her submissions by relying heavily on my own observations about the potential availability of relief for breach of section 6(8) rights in the context of a case dealing with a member of another disciplined force to which section 16 of the Constitution applies, the Police Force: *Thomas-v- Commissioner of Police* [2006] Bda LR 54 at paragraphs 34 to 40. Those observations were clearly erroneous because both I and counsel in that case were blissfully unaware of, and did not avert to, the following constitutional provisions to which Mr. Cottle referred:

> "**Interpretation**
> *16 (1) In this Chapter, unless it is otherwise expressly provided or required by the context—*
>
> *"contravention" in relation to any requirement includes a failure to comply with that requirement, and cognate expressions shall be construed accordingly; "court" means any court of law having jurisdiction in Bermuda, including Her Majesty in Council, but excepting, save in sections 2 and 4 of this Constitution, a court constituted by or under disciplinary law; "disciplinary law" means a law regulating the discipline of any disciplined force; "disciplined force" means—*
>
> *(a) a naval, military or air force;*
> *(b) any police force of Bermuda;*
> *(c) the prison service of Bermuda;*

[3] Technically, of course, the penalty pronounced by the COP in March 2009 only took effect four months later.

"member" in relation to a disciplined force includes any person who, under the law regulating the discipline of that force, is subject to that discipline.

(2) In relation to any person who is a member of a disciplined force raised under the law of Bermuda, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of the provisions of this Chapter other than sections 2, 3 and 4.

(3) In relation to any person who is a member of a disciplined force raised otherwise than as aforesaid and lawfully present in Bermuda nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of this Chapter."

8. Section 16 governs the interpretation of Chapter 1 of the Constitution, which contains Bermuda's 'Bill' of Fundamental Rights and Freedoms. Subsection (1) deals with the interpretation of Part 1 and the following subsections of section 16 itself. The following terms of section 16(2) unarguably have the effect that members of a disciplined force cannot advance a claim for an alleged contravention of, *inter alia*, their section 6(8) rights: "*nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of the provisions of this Chapter other than sections 2, 3 and 4."* The constitutional protections for the right to life (section 2), protection from inhuman or degrading treatment (section 3) and protection from forced labour or slavery (section 4) remain available.

9. Without deciding at this stage what the implications of section 16(2) are on the common law rules of natural justice in the prison disciplinary proceeding context, and whether or not section 16(2) is inconsistent with Article 6 of the European Convention on Human Rights ("ECHR"), I find that the Applicant's Originating Summons seeking relief under section 6 of the Constitution must be dismissed.

10. A PO has no right under the Constitution itself to complain that disciplinary action taken against him under the authority of the disciplinary law of the prison service contravenes section 6 of the Constitution. No need to decide whether section 6(8) of the Constitution incorporates an implied right to legal representation in civil cases arises. However, even if such right was found to exist, there is no basis for a factual finding that it was infringed in the present case. The Applicant elected to be represented by the POA. He never asked for, and accordingly was never refused, legal representation.

Findings: the disciplinary legal framework

11. Mr. Cottle's typically thorough and careful analysis of almost every nook and cranny of the relevant statutory provisions and rules greatly assisted the Court to make sense of an unfamiliar (and in one instance surprising) disciplinary framework. In summary:

    (a) the Prisons Act 1979 empowers the Minister to make rules relating to disciplinary matters;

    (b) the relevant rules are the Prison Officers (Discipline, etc.) Rules 1981 ("the Rules");

    (c) the Rules create various disciplinary offences and disciplinary penalties;

    (d) the Rules provide that offences are to be tried by an Adjudicating Officer, who recommends the penalty for an admitted or proved offence to the COP. Where the proposed penalty is more serious than an admonition, reprimand or serious reprimand, the Commissioner in turn decides whether to recommend the same or a different penalty to the PSC. The penalty is only finally imposed by the COP if the approval of the PSC is obtained;

    (e) a PO (surprisingly) has a right of appeal to the same tribunal, the PSC, which in the case of most penalties (including dismissal) has supported the initial penalty appealed against.

12. Because the Applicant complains that the penalty of dismissal for his first offence was legally irrational and disproportionate, it is important to understand the scheme of the disciplinary code in order to assess the gravity of the offence in **legal** terms. Most disciplinary codes, mirroring the criminal law, grade offences in terms of gravity so that more trivial offences attract lesser penalties and more serious offences greater penalties. Proportionality thus falls to be determined by reference to both (1) gravity of the offence as legally defined, and (2) gravity the particular offence in factual terms.

13. Although section 7 of the Act confers a broad rule-making power on the Minister in respect of both prisons generally and prisoner discipline, the following rule-making power is germane for present purposes:

> "***Rules for discipline of prison officers***
> *32 (1) Without prejudice to anything in this Act relating to the making of prison rules, the Minister may make rules with respect to the duties, obligations and discipline of prison officers; and, without prejudice to the generality of the foregoing provision, rules made under this section shall*

set out the offences against discipline, the procedure for dealing therewith, and the punishments therefor.

(2) Rules made under this section shall be subject to the negative resolution procedure."

14. The first substantive provision of the Rules and upon which the Respondents' counsel relied upon was the following:

> "***General obligations of officers***
> *3 (1) Every officer shall conform to these Rules and to the Prison Rules 1980 [title 10 item 32(a)] and to the administrative regulations of each prison, and shall support the Commissioner in the maintenance thereof.*
>
> *(2) Every officer shall obey the lawful instructions of the Commissioner and any officer whose orders it is for the time being his duty to obey.*
>
> *(3) Every officer shall at once communicate to the Commissioner or the senior officer any abuses or impropriety which come to his notice.*"

15. It was common ground that the next central provision in the Rules for present purposes is rule 12, which provides as follows:

> "**Offences against discipline by officers**
> *12 An officer shall be guilty of an offence against discipline—*
>
> (a) *if he fails to conform to these Rules or to the Prison Rules 1980 [title 10 item 32(a)];*
> (b) *if he, without good and sufficient cause, fails to carry out any lawful order, whether or not the order is in writing;*
> (c) *if he is insubordinate towards any officer whose orders it is for the time being his duty to obey;*
> (d) *if he neglects, or without good and sufficient cause fails, promptly and diligently to do anything which it is his duty as an officer to do;*
> (e) *if he by carelessness or neglect in the course of his duty contributes to the occurrence of any loss, damage or injury to any person or to any property;*
> (f) *if he knowingly makes any false, misleading or inaccurate statement in connection with the performance of this duties, either orally or in any official document or book, or if he signs any such statement, or if he, with intent to deceive, destroys or mutilates any such document or book or alters or erases any entry therein;*
> (g) *if he without proper authority—*
> *(i)divulges any matter which it is his duty to keep secret;*

(ii) directly or indirectly communicates to any representative of the press or to any other person any matter which has become known to him in the course of his duty; or (iii) publishes any matter or makes any public pronouncement relating to prisons or to prisoners or to ex-prisoners, or relating to the administration of the Department of Corrections;

(h) *if he solicits, accepts or receives any unauthorized fee, gratuity or other consideration in connection with the performance of his duties;*

(i) *if he fails to account for, or to make a prompt and true return of, money or other property for which he is responsible, whether in connection with the performance of his duties as an officer, or with any club or fund connected with a prison or the members of the staff of the prison;*

(j) *if he improperly uses his position as an officer for his private advantage;*

(k) *if he without proper authority—*

(i) knowingly carries out any pecuniary or business transaction with or on behalf of a prisoner or ex-prisoner; or

(ii) brings in or carries out, or attempts to bring in or carry out, or knowingly allows to be brought in or carried out, to or for any prisoner any article or thing whatsoever; or

(iii) accepts any present or consideration from any prisoner or ex-prisoner or from a friend or relative of any prisoner or ex-prisoner;

(l) if he without proper authority—

(i) knowingly communicates with any ex-prisoner;

(ii) knowingly takes into his employment an ex-prisoner;

(m) if he communicates with a prisoner for an improper purpose;

(n) if he allows any undue familiarity between a prisoner and himself or any other officer or other member of the staff of the prison;

(o) if he discusses his duties, or any matters of discipline or prison administration, within the hearing of a prisoner;

(p) if he deliberately acts in a manner calculated to provoke a prisoner;

(q) if he, in dealing with a prisoner, uses force unnecessarily or, where the application of force to a prisoner is necessary, uses undue force;

(r) if he, without proper authority or reasonable excuse—

(i) is absent from the prison or from any parade or place of duty; or

(ii) is late for any duty or parade;

(s) if he wilfully or negligently damages or loses any article of clothing or personal equipment with which he has been provided or entrusted or if he fails to take proper care thereof;

(t) if he neglects to report any damage to, or loss of, any article of clothing or personal equipment with which he has been provided or entrusted, however such damage or loss was caused;
(u) if he, when on duty or liable to be called upon for duty is unfit for duty through the effect of intoxicating liquor;
(v) if he, while on or off duty, acts in a disorderly manner, or in any manner prejudicial to discipline, or likely to bring discredit on the Department of Corrections;
(w) if he smokes or drinks intoxicating liquor, either while within a prison (except under such restrictions as may from time to time be ordered by the senior officer), or while on duty in a court, or while in charge of prisoners outside a prison;
(x) if he borrows money from an officer subordinate or junior to him in rank, or lends money to his superior officer or becomes security for a fellow officer in borrowing money;
(y) if he persistently fails to discharge his personal indebtedness to any club or fund connected with any prison or the staff of any prison. [Regulation 12(g)(iii) & 12(v) amended by 2002:17 s.4 effective 14 December 2002]"

16. It is immediately obvious that rule 12 sets out both general offences (failure to comply with the Rules or the Prison Rules-12(a)) and specific offences. The scheme of the Rules is not to designate which offences warrant summary dismissal and which do not. Section 18(1) simply provides as follows:

> "***Disciplinary awards***
> *18 (1) The adjudicating officer may recommend to the commissioner the making of any of the following disciplinary awards, that is to say—*
> *(a) admonition;*
> *(b) reprimand;*
> *(c) severe reprimand;*
> *(d) special probation in accordance with rule 29 for a term not exceeding twelve months;*
> *(e) fine not exceeding two hundred and fifty dollars;*
> *(f) reduction in rank; or*
> *(g) dismissal, and shall announce to the accused officer at the close of the proceedings the nature of his recommendation.*"

17. It is, in my judgment, self-evident that certain offences are more serious than others. Rule 12(f) creates a disciplinary offence involving dishonesty; 12(g)(i) prohibits the disclosure of secret information; 12(k) prohibits various unauthorized dealings with prisoners, including bringing articles into prison for them. As far as 12(k)(ii) is concerned, proof is required that an unauthorized object was brought in for a prisoner, or that the PO concerned knowingly allowed it to be brought in. The Prison Rules 1980 contain a similar offence which appears primarily designed to govern conduct by

prisoners, but which is created as a disciplinary offence for POs by rule 12(a) of the Rules as well:

> "***Prohibited articles***
> *42 (1) No person shall without authority convey into or deposit in a prison, or convey out of a prison, or convey to a prisoner, or deposit in any place with the intent that it shall come into the possession of a prisoner, any money, clothing, food, drink, tobacco, letter, paper, book, tool or other commodity or article whatsoever.*
>
> *(2) Without prejudice to any proceedings which may be taken against any person in respect of a contravention of' this rule, anything so conveyed or deposited may be confiscated by order of the Commissioner.*"

18. The inherent gravity of the disciplinary offences under rule 12(a) of the Rules as read with rule 42 of the Prison Rules 1980 and rule 12(k)(ii), respectively, is further illustrated by a provision of the Act which was not referred to in argument. Sections 25 and 26 of the Prisons Act make it a criminal offence for "*any person*" to, *inter alia*, (a) take any article into prison to assist an escape, (b)take any article into prison in breach of prison rules, and (c) to take any article into prison for a prisoner in breach of prison rules[4]. The relevant provisions are as follows:

> "***Aiding escape from prison***
> *25 Any person—*
>
> *(a) who aids any prisoner (whether or not within a prison) in escaping or attempting to escape from lawful custody; or*
>
> *(b) who conveys, or causes to be conveyed, any instrument or article into a prison or into any other place in which a prisoner is for the time being in lawful custody, with intent to facilitate the escape of such prisoner therefrom,*
>
> *commits an offence against this Act:*
>
> *Punishment on summary conviction: imprisonment for 12 months or a fine of $1,000 or both such imprisonment and fine;*
>
> *Punishment on conviction on indictment: imprisonment for 3 years.*
>
> **Conveying prohibited articles into prison**
> 26 Any person—
> *(a) who conveys, introduces, or attempts to convey or introduce, or causes to be conveyed or introduced, any article, commodity or thing into a prison in contravention of prison rules; or*

[4] Section 2 of the Act provides as follows: "'*prison rules' means rules made by the Minister under this Act*".

(b) who conveys or attempts to convey, or causes to be conveyed, any article, commodity or thing to a prisoner (whether or not within a prison) in contravention of prison rules; or

(c) who enters or attempts to enter into communication with a prisoner (whether or not within a prison) in contravention of prison rules,

commits an offence against this Act:

Punishment on summary conviction: imprisonment for 6 months or a fine of $500 or both such imprisonment and fine;

Punishment on conviction on indictment: imprisonment for 12 months.

Sections 26 and 27; interpretation
27 For the purposes of sections 25 and 26, a person shall be deemed to convey or introduce an article into a prison if he conveys it to a prisoner outside the prison, or deposits it outside the prison with intent that it shall come into the possession of a prisoner."

19. In terms of these criminal sanctions, which apply to civilians and POs alike, bringing in articles to aid an escape contrary to section 25 has a maximum penalty on indictment three times as severe as that applicable to bringing in prohibited articles generally or bringing in prohibited articles for a prisoner specifically. Section 26 would appear on its face to contemplate two alternative scenarios which are pertinent for present purposes: (a) bringing in a prohibited article in circumstances where an intent that the item should come into the possession of a prisoner cannot be proved, and (b) bringing a prohibited article into prison in aggravated circumstances where an intent to supply the item to a prisoner can be proved. It is entirely logical and consistent with broad legal principle and common sense, that in the disciplinary context and the criminal context, where an offence may be committed with or without aggravating features, the aggravated version of the offence is more serious and deserving of a harsher penalty than when the aggravating circumstances have not been made out.

20. The written charge in the present case referred somewhat ambiguously to a breach of rule 12(a), without spelling out what specific provision of the Rules or the Prison Rules was engaged. Mr. Cottle submitted that the charge was based on a breach of either rule 42 of the Prison Rules or the COP's cell-phone policy rules, which were administrative regulations of the prison made under rule 3(1) of the Rules. The cell phone policy was apparently implemented by way of, *inter alia*, a March 12, 2008 Notice ("*No electronic items allowed in the facility*") addressed to staff at Westgate Correctional Facility. The March 12 Notice stated in material respects as follows:

> "*This is to advise you that effective immediately the Department of Corrections policy regarding the ban on electronic items into the facility by staff will be reinforced. The Commissioner has directed that staff will not be*

allowed to bring into the facility any electronic items which include, but is not limited to:

Cell phones…

Staff who do not comply with this directive will face disciplinary measures under the Prison Officers (Discipline, Etc.) Rules 1981…"

21. These 'regulations' were amended in a 'STAFF NOTICE (Amended) dated May 1, 2008, and provided as follows:

> "*Further to the Notice to Staff dated 12th March and 15th April, 2008, please be informed that* ***Department issued pagers and cell phones (Black Berries) will be the only exceptions*** *and allowed in to correctional Facilities. All other cell phones, Black Berries, laptop computers, DVD players, pagers and other electronic items are NOT allowed.*"

22. Having regard to the fact that the power to create offences and mandate punishments was vested in the Minister under the Act, it is unsurprising that these Notices did not purport to modify the disciplinary code contained in the Rules and merely created an absolute prohibition on bringing, *inter alia*, personal cell phones onto prison premises. This left open for charging officers to determine, based on the facts and in accordance with the Rules, what disciplinary charges to bring in respect of infractions of the administrative regulations in question. The main options open to the prison authorities, depending on the circumstances of the relevant case, would include (in descending order of gravity):

    (a) a disciplinary charge of contravening rule 12(a) of the Rules as read with rule 42 of the 1980 Prison Rules alternatively, rule 12 (k)(ii) of the Rules (both of which charges would require proof that the phone was brought in for a prisoner); and/or
    (b) A disciplinary charge of failing to comply with the administrative regulations banning bringing cell phones into Westgate, contrary to rule 12(a) as read with rule 3(1) of the Rules.

23. So although the statutory scheme did not contain a tariff of penalties for various disciplinary offences, it created a range of offences and a range of penalties, including simple and aggravated forms of the offence of bringing prohibited articles onto prison premises. But to the extent that bringing articles into prison in breach of the Rules without any aggravating improper intent was potentially a criminal offence, the disciplinary offence with which the Applicant was charged could logically give rise (depending on the nature of the offending item in question) to the full range of disciplinary penalties provided for under the disciplinary code.

Factual findings: what disciplinary offence was the Applicant charged with?

24. It was not suggested that the disciplinary process in any way failed to conform to the strict requirements of the Rules. As far as the formulation of a charge is concerned, rule 13(2) provides:

> "*The charge sheet shall specify the sub-paragraph of rule 12 under which the charge is laid and the charge shall include sufficient particulars to inform the accused officer of the specific act or omission in respect of which the charge is laid.*"

25. The Charge Sheet described the offence as arising under rule 12(a) of the Rules "*in that* [h]*e had in his possession a RED BLACKBERRY CELL PHONE.*" Having regard to the disciplinary scheme, it is obvious that the charge was not laid under rule 12(k) as that sub-paragraph ought to have been mentioned instead of sub-paragraph (a). In my judgment it is only marginally less obvious, when one considers the particulars of charge and the fuller "*Statement by Officer Reporting the Offence*", that the Applicant was not charged with contravening rule 42 of the Prison Rules. That offence requires proof of an intention to supply an item to a prisoner, and no such allegation was made:

> "*On Wednesday February 18th 2009 at approximately 09:18hrs, P.O. Bailey Shaun and I.C.O. Wilkinson Charles was in the canteen office to conduct a search of the area. During this search one (1) RED BLACKBERRY CELL PHONE was found in Officer Pitcher Darren's possession.*
>
> *The red blackberry cell phone was confiscated, photographed and then returned to the officer Pitcher Darren. Officer Pitcher Darren was informed that he would be placed on charge.*"

26. That the Applicant was charged with "simple possession" of a prohibited item as opposed to "possession with intent to supply" is further confirmed by the plea entered by him on March 3, 2009, the same day he was charged :

> "*I officer Darren Pitcher plead guilty. This was an honest mistake due to problems arising at home when I arrived for duty at Westgate. I give my sincere apology for my oversight.*"

27. It is true that the fuller Officer's Report describing the "target search" of the Canteen Office where the Applicant was seated at his desk while two prisoners were in the room contains material would at a minimum support reasonable grounds for suspecting that either (a) the cell phone was intended for supply to the prisoners in question, and/or (b)

the Applicant was engaged in some illicit transaction with the prisoners in question. It was asserted that when told that a search would be conducted (after the prisoners had been asked to leave the office), the Applicant stated: "*You don't have to search me, what you want is right here.*" He stood up, reached into his trouser pocket and produced the cell phone and a prison envelope containing $1500. However, the detailed Officer's Report dated March 3, 2009, describing the events of February 18, 2009, does not expressly assert that the investigating officers suspected or believed that the cell phone was intended for supply to prisoners.

28. All of the contemporaneous documents relating to the charge point unequivocally to the conclusion that the Applicant was consciously and deliberately charged with simply possessing the cell phone in violation of the policy and that it was to this charge that he pleaded guilty.

Factual findings: can the Court resolve the factual dispute as to whether the circumstances of the Applicant's offence were comparable or more serious than the circumstances of other cases where lesser penalties were imposed?

29. I accept, as a matter of broad principle, Mr. Cottle's submission that this Court could not, in the absence of oral evidence and cross-examination, challenge the PSC's acceptance of the COP's case that the circumstances of the Applicant's case were more serious than those of other cases where lesser penalties were imposed. This assumes that the evidence before the Court demonstrates, directly or inferentially, that the PSC preferred the COP's views on relative severity to those advanced by the Applicant on appeal.

30. In the context of a disciplined force such as the prison service, the Court should be reluctant to challenge the judgment of the COP on the purely factual dimensions of the comparative gravity of different disciplinary cases. However, the Court is bound to note that the following aspect the Applicant's own evidence (First Affidavit, paragraph 6) was not challenged:

> "*I know of several previous incidents where officers had been found with cellular phones on the compound and have received penalties either of a fine or a period of probation, or both.*"

31. The Respondents conceded that the Applicant was the first PO to be dismissed for bringing a cell phone on to prison premises. And, for the reasons set out below, the material before the Court does not support an evidential finding that the PSC did make a conscious factual finding that the location of the Applicant's offence made it more serious than the other cases he contended for the purposes of his PSC appeal were comparable cases in factual terms.

The Applicant's judicial review complaint and the governing legal principles

32. The Applicant seeks to quash the decisions of the COP and the PSC on the following grounds:

    (a) the decisions were unreasonable;

    (b) the penalty of dismissal was disproportionate;

    (c) no reasons were given by the COP for the decision;

    (d) insufficient reasons were given for the decision of the PSC;

    (e) no reasonable authority could have come to the conclusions reached; and

    (f) the Applicant was not aware that dismissal was being considered and ought to have been given the opportunity to obtain legal representation.

33. Mr. Cottle invited the Court to find that the penalty of dismissal fell within the range of penalties which a reasonable disciplinary authority would impose and was, accordingly, reasonable in a public law sense. However, a decision may be unreasonable in a public law sense if it is rational in general terms but was made in circumstances which make it clear that the relevant statutory power has been misused in legal terms. The most significant authority cited by Ms. Sadler-Best in this regard was Meerabux J's judgment for this Court in *Barnes-v-The Minister of the Environment* [1994] Bda LR 61 where he approved the following famous dictum of Lord Greene MR in *Associated Provincial Picture Homes Ltd-v- Wednesbury Corporation* [1947] All ER 680 at 685:

> "*I do not wish to repeat what I have said, but it might be useful to summarise once again the principle, which seems to me to be that the court is entitled to investigate the action of the local authority with a view to seeking whether it has taken into account matters which it ought not to take into account, or, conversely, has refused to take into account. Once that question is answered in favour of the local authority, it may still be possible that the local authority nevertheless, have come to a conclusion so unreasonable that no reasonable authority could ever have come to it.*
>
> *In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not that of an appellate authority to override a decision of the local authority, but is that of a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in it.*" [emphasis added]

34. This Court's decision in *Barnes* makes it clear that at common law there is no independent principle of proportionality. A judicial review applicant may only complain of a disproportionate penalty if it was one that no reasonable authority could ever have imposed. This requires analysis not just of the factual circumstances of the relevant offence, but also its legal character in the applicable disciplinary context. The applicant's counsel also cited *R-v- Secretary of State for the Home Department ex parte Benwell* [1984] 3 W.L.R. 843 where the impugned dismissal of a prison officer for disobedience was quashed by the English High Court. Hodgson J in that case cited an earlier and less famous passage in Lord Greene's judgment in the *Wednesbury* case[5] where he noted, after itemizing various grounds for challenging the legality of a decision including absurdity: "*in fact, all of these things run into one another.*" He concluded that it was impossible to attack the penalty as so disproportionate as to be perverse; instead he found that the Home Secretary erred in law by taking into account matters which the applicant was unable to address.

35. The threshold for impugning a decision as irrational independently of any misdirection as to the law or relevant facts is a high one.

36. The only other pleaded complaint is the assertion that the Applicant was not given sufficient notice of the fact that dismissal was being contemplated to be able to adequately present his mitigation. Reading his judicial review grounds liberally, this implicitly incorporates the complaint that prior notice ought to have been given by the COP of his decision to treat a simple offence as attracting the sort of penalty which might be considered reasonable for an aggravated form of the offence actually charged. One obvious legal principle which would support such a basis for invalidating the decision is the doctrine of legitimate expectation. This doctrine was neither invoked in the pleadings nor addressed in the evidence. The only other public law basis for complaining of a lack of notice is essentially another aspect of illegality; the penalty of dismissal was so inconsistent with the statutory scheme or previous penalties in similar cases that it could not lawfully (i.e. fairly) have been imposed without either giving prior notice of a new 'sentencing' approach or altering the scheme itself. This point was raised by the Court in the course of argument and put to the Respondent's counsel.

37. Apart from the proportionality and perversity complaints, the only pleaded complaint about the legality of the decisions is the absence of any or any sufficient reasons. Neither the COP nor the PSC are required by the Rules to give reasons for their decisions. In my judgment it is obvious that the requirements of fairness created a common law duty for the PSC in its appellate capacity to provide reasons for an unprecedented decision to dismiss the Applicant for breach of the cell phone policy. Brief reasons were given. Can the Court take into account reasons supplied by the Respondents after the fact in their evidence filed in the present proceedings? The Respondents can in my judgment rely on the evidence filed in support of the application to justify the decision. As Fordham has observed: "*there are two intimately-*

[5] [1948] 1 K.B.223 at 229.

related solutions: (a) reasons given at the time of the decision, and (b) reasons given in Review proceedings (i.e. by discovery or in evidence."[6]

38. It remains to consider whether these traditional judicial review principles are diluted and, if so, to what extent by section 16 of the Constitution which deprives POs of the right to rely on section 6(8) in relation to disciplinary proceedings brought against them.

The impact of section 16 of the Constitution on the scope of judicial review of disciplinary proceedings

39. Mr. Cottle submitted that the scope of judicial review was significantly narrowed by the fact that in the context of any qualifying disciplined force, section 16 of the Constitution expressly provided that section 6 did not apply to disciplinary proceedings. This required the Court to give considerable deference to the judgment of the COP and to be more reluctant to scrutinize the impugned decisions than in the traditional administrative law context.

40. Ms. Sadler-Best invited the Court to formally declare, at best, and to take into account at least, that section 16(2) of the Bermuda Constitution was inconsistent with article 6 of ECHR. Article 6 (1) provides as follows:

> "***ARTICLE 6***
>
> *1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*"

41. The Scheme of Section I of ECHR, like (section 16 (2) apart) Part I of the Bermuda Constitution, is that the fundamental right "*to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*" cannot be departed from on national or public interest grounds. Mr. Cottle did not dissent when I suggested in the course of the hearing that it seemed quite probable that the exemption of disciplinary proceedings involving members of disciplined forces from the fair trial protections of section 6(8) of the Constitution was inconsistent with the European Convention. What flows from this?

[6] '*Judicial Review Handbook*' (Wiley Chancery Law: Chichester/Colorado Springs, 1994), paragraph 25.7.

42. The European Convention creates obligations at the public international law level for the United Kingdom Government in respect Bermuda. This is because the United Kingdom Government has expressly agreed to extend the operation of the Convention to Bermuda[7]. The right to petition the European Court has also been extended to Bermuda; but the Convention has not been incorporated into Bermudian domestic law. The Bermuda Constitution has primacy over ECHR for domestic law purposes. However, in determining the effect of section 16(2) of the Constitution, regard must be had to two important canons of constitutional and statutory interpretation:

    (1) as the Applicant's counsel submitted, that fundamental rights and freedoms provisions must be construed broadly, guided by the "*principle of giving full recognition and effect to those fundamental right and freedoms*"[8];

    (2) the interpretative presumption that Parliament does not intend to legislate inconsistently with applicable international obligations.

43. Section 16(2) must accordingly be construed as narrowly as possible, so as to minimize the extent to which it dilutes fundamental fair hearing rights in relation to disciplinary proceedings involving the members of a disciplinary force. There are two obvious opposing interpretations, one which would intrude minimally and one which would intrude more extensively with fundamental fair hearing rights. Firstly, section 16(2) may be construed narrowly as designed primarily to permit disciplined forces to operate disciplinary systems administered by tribunals which are:

    (a) neither "independent" of the investigative/prosecuting body nor of the Executive; and
    (b) not liable to be declared unlawful (either in terms of the invalidity of statutory rules or executive action) for breach of section 6 of the Constitution.

44. Secondly, section 16(2) could be construed more broadly as not simply exempting disciplinary proceedings in relation to disciplined forces from constitutional scrutiny, but also exempting such disciplinary regimes from the less onerous requirements of the common law rules of natural justice altogether. I have no hesitation in rejecting this broader interpretation which is inconsistent with the spirit of the Constitution as a whole and the natural and ordinary meaning of the provision's terms:

    > "*(2) In relation to any person who is a member of a disciplined force raised under the law of Bermuda, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of the provisions of this Chapter other than sections 2, 3 and 4.*"

[7] With effect from October 10, 1953: www.fco.gov.uk.
[8] *Minister of Home Affairs-v- Fisher* [1980] AC 319 at page 329F (per Lord Wilberforce).

45. This provision does no more than to deprive members of a disciplined force of the ability to seek relief for contraventions of (*inter alia*) section 6 of the Constitution occurring in the course of disciplinary proceedings. In my judgment it does not dilute altogether the common law rules of natural justice as applied by the courts in the context of judicial review applications under Order 53 of the Rules of the Supreme Court. It does modify those common law rules in a significant way, however.

46. The Applicant cannot complain that his rights under section 6(8) of the Constitution to a hearing before an independent and impartial tribunal are contravened by the fact that the statutory disciplinary scheme provides for:

    (a) an initial adjudication by senior members of the same body (the Prison Service) which investigates and charges offences (lack of independence);
    (b) an appeal before the same tribunal (the PSC) which has imposed the primary disciplinary penalty (lack of impartiality).

47. However, I find no justification for <u>not</u> concluding that, subject to the extent to which the Act and Rules expressly limit the right to a fair hearing, POs continue to be entitled at common law to a fair hearing of disciplinary complaints. The ability of the Prison Service and the Department of Corrections to attract and/or retain appropriate staff to fulfil their statutory mandate would obviously be impaired if POs could be disciplined and dismissed by procedures which were unfair. The qualities of integrity and loyalty upon which disciplined forces depend , it seems obvious, will only be fostered by disciplinary processes which are firm, fair and which are likely to command the respect of members of the relevant force. In construing all legislation, there is not only a presumption that Parliament does not intend to legislate contrary to Her Majesty's international obligations in respect of Bermuda. There is also a presumption that Parliament does not intend to enact legislation which, having regard to the applicable statutory objects, is likely to lead to absurd or inconvenient results[9].

Findings: adequacy of reasons for the decision

<u>Evidential findings</u>

48. The POA appealed on behalf of the Applicant and the main grounds of appeal centred on (a) the inconsistency of the penalty he received as compared with other penalties in cases where officers had cell phones in areas to which prisoners had access, and (b) the resultant appearance of bias. The PSC "*agreed to uphold the decision to dismiss Mr. Darren Pitcher based on the fact that he had a cellular telephone in a very sensitive area of the prison where inmates are allowed.*"

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[9] "*In terms of case law, the applicability of the presumption against absurdity or inconvenience in Bermuda law was supported by reference to <u>Hope Bowker Real Estate v Roderick De Couto</u> <u>[1986] Bda LR 19</u> , where the Court of Appeal for Bermuda (at pages 4–5 of the Court's Judgment) gave a statutory provision a restricted meaning to avoid* "*an untoward result which does nothing towards achieving the object of the legislation*": *Minister of the Environment-v-Rodrigues Trucking and Excavating* [2004] Bda LR 39.

49. Bearing in mind that the POA had listed at least two other offences not punished with dismissal said to have also occurred in areas where inmates are allowed (including a phone being charged inside a cell and an officer found in the Intake area with a phone), these reasons were insufficient to demonstrate that the impugned decision was a lawful one. These reasons do not signify why the area where the Applicant had his phone was considered to be more "sensitive" than the locations in which other similar offences occurred to which prisoners also had access. Had the explanation for the decision rested there, the insufficiency of the reasons might in and of itself have justified the view that the penalty of dismissal was not reached in a lawful manner.

50. From the COP's evidence, however, it is clear that the Applicant's case was considered, by him, to be more serious than other cases because, *inter alia*:

    (1) prisoners were actually present when the Applicant was searched;

    (2) the other offences all involved cell phones in the Administration area to which inmates did not have access. The presence of a cell phone in an area to which inmates have access "*is significantly more dangerous*" (paragraph 10);

    (3) the fact that the Applicant had a large quantity of cash on him "*alone is cause enough for serious concern in a maximum security jail and shows extremely poor judgment, along with gross negligence, on the part of Mr. Pitcher*" (paragraph 8) The COP earlier described the Applicant's admission that he inadvertently taking a cell phone into the prison as demonstrating "*gross negligence on his part*".

51. This evidence does not convincingly support a significant difference between the gravity of the circumstances of the Applicant's case and that of the other cases. Firstly, without more, the fact that prisoners happened to be present in the Applicant's own working area seems fortuitous; it would be different if it was alleged that the parties were behaving in a suspicious manner. Secondly, and most importantly, it is unclear that the COP understood and rejected the POA's case that two earlier offences occurred in areas which were arguably far more sensitive and to which prisoners routinely had access, if they were not actually present at the relevant time. There is no or no clear evidence that the COP either (a) saw the POA's appeal letter; (b) commented on the appeal letter; and/or (c) even attended the appeal hearing on September 21, 2009. Accordingly, the only clear aggravating factors in the Applicant's case were (a) "*extremely poor judgment*" in having a large amount of cash on his person[10], and (b) the need for an exemplary punishment because of the security risks posed by cell phones reaching prisoners against a background of recurring offences in the face of lighter punishments in previous cases. There is no credible evidence that these

[10] The Applicant's evidence that to the effect that he satisfied the COP that this was the Applicant's own cash withdrawn from his own bank account for use on vacation the following day was not challenged.

considerations were placed before the PSC to consider in the course of adjudicating the Applicant's appeal, however.

52. The PSC's Secretary's evidence seems very carefully to set out the various stages of the disciplinary process and to describe which parties appeared before the PSC on which dates. Not only does the relevant affidavit not state or imply that the COP was asked to comment on the POA's August 4, 2009 appeal letter; there is no suggestion that the COP even appeared at either the abortive September 14 or effective September 21 hearing. The appeal letter itself was apparently copied to the Secretary to the Cabinet and the Permanent Secretary of the Ministry of Labour, Home Affairs & Housing, but not (on the face of the letter) to the COP himself. The COP's own affidavit, which deals in detail with various points made by the Applicant in the present application, makes no reference to the August 4, 2009 letter whatsoever.

53. The general tenor of the COP's evidence in dealing with the disparity argument suggest that, two years later, he may still not yet have appreciated the detailed basis of the POA's support for the Applicant's case. The COP's evidence is, incidentally, entirely consistent with responding to the Applicant's April 16, 2009 letter to the PSC, which was presumably considered by the PSC before it confirmed the initial penalty in July, which made a passing and generalized reference to the fact that "*in the past other officers have been found with cell phones <u>in the facility</u>*" (April 16, 2009) emphasis added.

54. What appears to have been the predominant reason for the dismissal decision was the cumulative effect of yet another breach of the cell phone policy and the perceived need for a deterrent penalty. The COP deposed as follows:

> "*15. I eventually came to the conclusion that there was simply no latitude for tolerance of such a serious act of negligence and breach of security. Lives are put in danger when a cell phone is present in a prison setting, especially in the presence of inmates, as was the case with Mr. Pitcher. For quite a while, it has been alleged that officers have been smuggling cell phones to inmates and the award of dismissal for Mr. Pitcher is not only just and reasonable given the offence but, also a message to the entire Department that we are not going to tolerate acts that are grossly negligent or nefarious, or both.*"

55. Mr. Cottle quite rightly relied upon these reasons as strong and rational factual grounds explaining and justifying the impugned decision. The COP also justified the reasonableness of the penalty on the grounds that the March 12, 2008 policy memo "*warned of dire consequences for any staff found with an unauthorized cell phone*" (paragraph 20). This was factually inaccurate; the memo gave no indication of how infringing the cell phone policy would be punished, merely warning that "*Staff who do not comply with this directive will face disciplinary measures*".

56. The main difficulties with this evidence, sworn on September 21, 2011 one week short of two years after the Applicant's PSC appeal was heard, is that it merely explains and justifies the initial decisions made by the Adjudicating Officer and the COP. It does not in any way demonstrate that the COP's analysis (in response to the disproportionate penalty arguments raised by the POA) was accepted by the PSC. As mentioned above, there is no or no credible evidence that COP saw and responded to the Applicant's appeal letter so that the PSC can be deemed to have (a) considered, and (b) accepted the COP's analysis of why the Applicant (as opposed to previous officers, whose offences were first described with particularity in the August 4, 2008 POA letter) deserved dismissal.

57. On balance, I would find that adequate reasons have now been provided through the COP's evidence in these proceedings for the initial decision reached by the COP and ratified by the PSC to dismiss the Applicant. Namely, that the relevant offences were occurring too frequently despite lesser penalties and that a deterrent sentence was called for in particular to alleviate the perceived problem of cell phones being smuggled to prisoners. However, it is impossible to fairly find that these reasons formed the basis of the crucial decision of the PSC to dismiss the Applicant's appeal on the following narrow articulated ground:

> "*based on the fact that Officer Pitcher had a cell phone in an area frequented by inmates in comparison with previous cases which officers had cell phones in the administrative areas, i.e. areas away from inmates.*"

58. No reasons were provided by the PSC for rejecting the POA's assertion that in at least two other cases where dismissal was not imposed cell phones officers had cell phones in "*an area frequented by inmates*". While the absence of sufficient reasons alone is not sufficient to justify quashing the decision, it makes it difficult for the Court to confidently find that the PSC took into account all relevant considerations in arriving at its decision. On the contrary the insufficiency of reasons makes it possible for the Court to find that the PSC either (a) failed to have regard to, and/or (b) failed to consider and properly reject the Applicant's disparity arguments based on the alleged fact that two other previous cases also involved areas "*frequented by inmates*", namely (1) inside a cell, and (2) in the prisoner's reception area. Nor is there anything in the contemporaneous documentation nor in the subsequent evidence filed in support of the impugned decision to explain:

    (a) why the leap from fine and/or probation (two and three penalty levels below dismissal) over reduction in rank to dismissal was considered warranted;
    (b) why the ultimate penalty had to be imposed (or could fairly be imposed) without first issuing the sort of warning that the COP believed had been issued ("*dire consequences for any staff found with an unauthorized cell phone*"); and/or

(c) why dismissal as a first penalty for a PO of five years standing was considered necessary in the absence of proof (or even the articulated suspicion) of an intent to supply the cell phone to prisoners.

59. Although the PSC had two opportunities to explain its decision before the present proceedings commenced, and a third in the context of the present proceedings, no sufficient explanation as to why the Applicant was treated more harshly than other POs allegedly guilty of offences of comparable severity has ever been proffered. The COP's original case appears to have been that the Applicant's offence was committed in an area of the prison more sensitive than the areas involving previous offenders. The Applicant appealed citing two specific instances of POs disciplined otherwise than by way of dismissal for offences committed in arguably more sensitive areas (and unarguably as sensitive). The PSC's only stated reason for dismissing the appeal was that the Applicant's offence occurred in a sensitive area of the prison. This in no way justified the dismissal of his appeal.

60. Although the COP has suggested other reasons for the apparently disproportionate sentence (gross negligence in carrying large amounts of cash-not seemingly in breach of any rule- and the need for a deterrent sentence), there is no suggestion in the Respondents' evidence that these considerations informed the PSC decision. The absence of sufficient reasons for the decision in the abstract is an element of unfairness, especially since the Applicant was not even formally notified of the dismissal of his appeal until over 10 months after it was made. However to my mind the main legal significance of the absence of adequate reasons for the PSC decision is that it leads to the inevitable inference that the PSC (in its appellate capacity) failed to consider the crucial factual issue of whether or not the POA were right to assert that lesser penalties were imposed for other officers found with cell phones (a) inside a cell, and (b) in the prisoners' reception area.

Legal findings: sufficiency of reasons

61. In the absence of any reasons, either by way of the original decision or by way of evidence and taking into account the fact that it appears the COP never responded to the POA appeal letter, it is impossible to conclude that the PSC adequately considered this important matter. The presumption of regularity upon which Mr. Cottle, very much in straw-clutching mode, frequently relied to fill gaps in the evidence, is clearly displaced on this issue. The Applicant's counsel aptly relied, by way of analogy, upon the House of Lords decision of *In Re Duffy (Northern Ireland)* [2008] UKHL 4 where Lord Bingham, in concluding that no properly directed tribunal would have reached the decision the committee in question reached noted (at paragraph 27): "*There is nothing in the papers which suggests that the interviewing panel recognised this problem at all, and I share the judge's doubt…whether they understood the nature of the task upon which they were engaged.*" In her submissions, the appellant's counsel also relied upon Lord Carswell's *dictum* later in the same case (at paragraph 53): "*In making his decision the Secretary of State was bound to have regard to the proper factors, and not*

to have regard to any other improper factors, in reaching his decision." These citations also illustrate how various grounds of impugning a public law decision are usually intertwined.

62. I find that the Applicant has established that the PSC failed to give sufficient reasons for its decision to dismiss the Applicant's appeal in that the failure complained of establishes a failure to consider the main issue which fell for determination adequately or at all.

63. The Applicant's complaint that the COP failed to give any reasons for the decision was not made out in light of the evidence adduced by him in these proceedings. However, his evidence did not cure the complaint made about the PSC decision because he also failed to consider the specific proportionality complaints which formed the subject of an appeal the evidence suggests he did not even participate in.

Legal findings: was the Applicant's dismissal irrational in purely factual terms?

64. Assuming the penalty to have been imposed as a result of a legally valid process, I would not find that dismissal for a first offence of bringing a cell phone into a prison in breach of a policy designed to prevent such items being smuggled to prisoners, in circumstances where comparable previous offences had been treated more leniently, was liable to be quashed on the grounds of irrationality or perversity alone. The penalty, to use Mr. Cottle's phrase, fell within the range of penalties that the COP could properly impose. After all, bringing an item onto prison premises in breach of Rules made under the Act is a criminal offence: Prisons Act 1979, section 26(a).

Legal findings: is the dismissal penalty legally invalid on procedural invalidity grounds?

Key elements of the statutory scheme

65. The statutory scheme has the following key elements to it:

    (a) it is a disciplinary (and criminal) offence to bring prohibited articles into the prison (simple form) and to bring prohibited articles into the prison for prisoners (aggravated form);
    (b) it is a general legal principle of sentencing that aggravated forms of an offence attract more severe penalties than simple forms of the same compound offence;
    (c) under section 32 of the Act, it is for the Minister to makes rules setting out "*offences against discipline, the procedure for dealing therewith, and the punishments therefor*";
    (d) while the COP is empowered by rule 3 of the Rules to make "*administrative regulations*" in relation to each prison, the breach of which

may be an offence under rule 12(a), he is not empowered to effectively create new offences and/or a new procedural and punishment scheme.

Was the dismissal decision made in way which was consistent with the proper exercise of the statutory disciplinary powers?

66. Although the statutory scheme for the discipline of prison officers leaves open what type of penalty may be imposed for what offence, where a PO pleads guilty to a breach of mere administrative regulations with a clean record, the penalty of dismissal would not, absent clearly articulated exceptional circumstances, be consistent with the statutory scheme. Where a sentencing tariff involving the imposition of penalties of probation and/or fines is established (according to the case of the Applicant in his PSC appeal which has never been expressly refuted by the Respondents), a dramatic departure from the "usual tariff" cannot fairly be made without prior notice-unless the exigencies of the situation make such notice impossible or impracticable.

67. In the present case, it was submitted that the COP could not stand by and watch the cell phone smuggling problem mushroom and wait for the Minister to create a new disciplinary offence. Although there was not an iota of evidence to suggest that the Minister would not have, with due despatch, amended the Rules upon the COP's request, Mr. Cottle submission was-in general terms- fundamentally sound. The COP must have the power to respond instantly and appropriately to unexpected disciplinary dilemmas as they arise.

68. Thus it is indeed a general rule, as Ms. Sadler-Best submitted, that "*in principle the law should seek to treat like cases alike*": *N (FC)-v-Secretary of State for the Home Department (Respondent)* [2005] UKHL 31 at paragraph 9 (per Lord Nicholls). A national outbreak of rioting and disorder may, however, create circumstances justifying a departure from the normal sentencing rules of proportionality in criminal cases. As the Lord Chief Justice of England and Wales recently opined in *Blackshaw et al-v-R* [2011] EWCA Crim at paragraph 16:

> "*However none of these guidelines contemplated the offences with which they are concerned would take place within the context of the nationwide public disorder to which we have referred. Therefore sentences beyond the range in the guidelines for conventional offending (i.e. offending which lacked the aggravating features of widespread public disorder common to these appeals) were not only appropriate, but for the reasons we have already given, inevitable. As we have explained these principles are long established. Nothing in any sentencing guideline undermines them or reduces their application.*"

69. One can imagine equivalently extraordinary conditions in a prison where the COP would reasonably be expected to impose, without prior notice or warning, what would

ordinarily be considered to be draconian sentences for what are normally classified as minor offences. There is no suggestion that such circumstances existed in the present case. Nor is there any evidence that the COP, after realizing that penalties of probation and/or fines were not serving as a sufficient deterrent in circumstances where the smuggling of cell phones had become a serious security issue, could not issue a warning that any further offences would be treated as gross misconduct ordinarily warranting dismissal irrespective of the circumstances-*before imposing such a penalty for the very first time*- as fairness ideally required.

70. That such a warning of a new disciplinary penalty approach would have been required to adequately meet the needs of procedural fairness is best demonstrated by the fact that according to his own evidence, the COP believed that he had put POs on notice that any further breaches of the cell phone policy would be visited with "*dire consequences*". Perhaps he gave instructions to this effect in or about March 2008; if this was the case, any such instructions were considerably watered down when the policy was formally enunciated. However, bearing in mind the fact that it ought to have been obvious to any PO that no reasonable COP was likely to continue indefinitely to treat repeated cell phone policy infringements lightly, on balance I am unable to find that it was not lawfully open to the COP to impose dismissal as a penalty solely due to his failure to give prior notice of a new "sentencing" approach. While the COP's failure to give prior warning of "*dire consequences*" for any breach of the cell phone policy was to some extent unfair, the degree of unfairness was not sufficient to invalidate the decision altogether. However, the disciplinary process must be looked at as whole.

71. The statutory regime creates two tiers of adjudication of disciplinary offences: (1) "trial" and/or plea and sentence before an adjudicator (with the penalty confirmed by the COP and PSC); and (2) appeal to the PSC. As has already been recorded above, it appears more likely than not based on the uncontroversial evidence before the Court that the PSC failed to consider (or to adequately consider) the principal ground of the appeal. In addition, (a free-standing ground of complaint in its own right) no or no sufficient reasons have been given by the PSC, either at the time of the relevant decision, or by way of evidence in response to the present application, to explain why the Applicant's case was considered to warrant a penalty so disproportionate to cases which he tenably contended appeared to be at least as serious as his own.

72. These additional dimensions of unfairness flowing from the PSC's decision, combined with the failure of the COP to give warning that a simple breach of the cell phone policy would, going forward, be treated as serious misconduct before imposing the first penalty of dismissal justify the finding that the penalty of dismissal was imposed as a result of a procedure that entailed a misuse of the statutory disciplinary powers in question and/or was fundamentally unfair.

73. The Applicant's counsel did not expressly formulate a complaint in these terms. However, in my judgment, this analysis arises from and is inextricably intertwined with the pleaded complaints that (a) no reasons were given by the PSC for the decision

dismissing the appeal; (b) insufficient reasons were given by the COP for recommending dismissal; and (c) the penalty imposed was unreasonable.

74. To my mind, the starting point for any analysis of whether the impugned decision was reached lawfully, in terms of the decision-maker applying the law correctly and proceeding in a fair manner, is the identification of the main elements of the statutory power or powers pursuant to which the relevant decision has purportedly been made. This analysis is undertaken with a view to elucidating the interrelated factors of (a) how the power may lawfully be exercised, and (b) what essential aspects of fairness the statutory procedure requires. Sometimes this will be an exercise of pure statutory analysis; more often than not, the statutory analysis must be married to an analysis of the relevant facts. This is because ensuring that statutory powers have been properly exercised is not just germane to judicial review of specific instances of administrative action; this task is an incident of ensuring respect for the rule of law. As Lord Bingham, writing extra-judicially, has opined[11]:

> "*Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred and not unreasonably. This rule recognizes, as did Magna Carter, that public power is held on trust, not as a privilege conferred on its possessor. So while we would readily accept that in a complex society such as ours power must necessarily be conferred on many ministers, officials, administrators and judges, we do not give any of them, ever, a blank cheque to draw on as they choose. The power is given for a purpose, which must be honoured.*"

75. The next stage of analysis is to consider the reasons given for the decision. Where such reasons are lacking altogether or deficient, it is easier for an applicant to invite the Court to conclude that the decision under attack is unlawful on some other substantive ground. In rare cases, the absence of reasons will in and of itself constitute a basis for concluding that the decision is invalid, for instance on the ground of being irrational. In the present case, the Applicant understandably focused on his sense of grievance that the penalty was, absent any explanation, disproportionate to the penalties opposed in other similar cases. This was, before the present proceedings were commenced, the essence of his case on appeal to the PSC. But one cannot conclude that reasons are deficient without considering, by careful analysis of the relevant statutory context, whether and if so what form of reasons are required.

76. The third logical step in the analysis is to consider, assuming that there were no errors in law or errors of procedure, the impugned decision may be said to be unreasonable or irrational in the sense that no reasonable tribunal, properly directing itself, could have made the decision in question. This head of complaint necessarily requires regard to how a reasonable tribunal would properly direct itself and what range of decisions was reasonably open to a decision-maker properly exercising the relevant statutory powers.

[11] '*Lives of the Law: Selected Essays and Speeches 2000-2010*' (Oxford University Press: Oxford, 2011), page 11.

77. So in my judgment the failure of the Applicant to formally complain of any misdirection in law or procedural unfairness cannot constitute a bar to the Court upholding a complaint which fairly and necessarily arises from the pleaded judicial review application. In *Reg-v- Home Secretary, Ex parte Benwell* [1984] 3W.L.R 843, on which Ms. Sadler-Best (for general purposes) relied, Hodgson J quashed a decision dismissing a prison officer on the grounds that improper material was taken into account, even though the formal application had focused on unreasonableness, and the additional ground of complaint was (as a result of an objection) added by way of amendment in the course of the hearing.

78. I did not understand the Respondents' counsel to be pressing for an amendment of the Applicant's grounds to embrace the wider analysis raised by the Court on the first day of the present case during the course of his own helpful exegis on the statutory regime. And in the post-Overriding Objective era, such an amendment would not have been necessary to do justice in any event.

Conclusion: was the penalty of dismissal unlawful on procedural invalidity grounds?

79. As I have already indicated above, the Applicant has failed to meet the high threshold for establishing that the penalty of dismissal was one which a reasonable tribunal, properly directing itself, could not have reached. Had the decisions not been vitiated by the elements of unfairness described above, it is possible that the penalty of dismissal could have been justified.

80. However in light of the procedural deficiencies identified above, most crucially the failure of the PSC to adequately consider the main issue raised on appeal (or, to put it another way, the PSC's failure to give sufficient reasons for its decision), I am bound to find that the penalty imposed upon the Applicant was unlawful and liable to be quashed.

The Court's discretion: do public policy grounds for declining to grant the relief sought exist?

81. No case was advanced for declining to grant the relief sought on discretionary grounds even if the Court found that the impugned decisions were liable to be quashed. Nevertheless, I have considered whether any of the distinctive features of the Prison Service as a disciplined force justify such a course. I found two features of the evidence significant in pointing to a conclusion that no relevant distinctive features exist.

82. Firstly, the COP himself did not assert that any security or other public policy objections to the Applicant returning to his employment existed. Secondly, the Applicant himself appeared to almost bend over backwards in his own evidence to be respectful to the COP and respectful of the cell phone policy which he admits he foolishly breached. In these circumstances it is impossible to see why the Applicant should not be granted relief on discretionary grounds. The Applicant admitted an

accidental breach of the cell phone policy, and there is no (or no clear) evidence that the impugned penalty was imposed on the basis that he was proved or even suspected of a deliberate breach of security.

The specific form of relief

83. Neither I nor counsel identified as an issue warranting discrete consideration the question of whether the appropriate form of relief was to either:

    (a) quash the penalty of dismissal and remit the matter to the adjudicator and/or the COP to reconsider a penalty other than dismissal, or

    (b) to reconsider the case generally in accordance with law.

84. Having regard to the nature of the findings which I have reached, combined with the passage of 2 ½ years since the relevant offence, it is difficult to imagine how a fair "re-trial" with the possibility of the same disciplinary penalty could now take place. This consideration takes into account the unusual statutory framework, created by subsidiary rather than primary legislation, according to which the PSC is involved in both ratifying the initial penalty and then adjudicating an appeal against its imposition. Nevertheless, as the centre-piece of judicial review applications is fairness, I will hear counsel before deciding what specific form of order should be drawn up to give effect to an order of certiorari quashing the impugned decisions of the COP and PSC.

Conclusion

85. For the above reasons, the Applicant is granted an Order of Certiorari quashing the decisions of the COP and the PSC to dismiss him for breach of an administrative policy banning prison officers from bringing personal cell phones onto prison premises. I will hear counsel as to the precise terms on which the matter of the appropriate penalty should be remitted to the disciplinary authorities for reconsideration, and as to costs.

86. Nothing in this decision should be construed as undermining in any way the operational judgment of the COP that the risk of cell phones being smuggled to inmates requires severe deterrent penalties in respect of breaches of the policy which are neither proved nor suspected to have been improperly motivated. The legal argument that no reasonable tribunal properly directing itself could impose such a penalty in such circumstances was expressly rejected.

87. The disciplinary processes were subjected to careful scrutiny in the present case (and found wanting) because: (a) the penalty imposed without prior warning (the first of its kind) was markedly more severe than penalties imposed in other cases which appeared similar; and (b) the evidence placed before the Court (i) provided no basis for the

conclusion that the Applicant's appeal to the PSC had been fairly and fully heard, and (ii) failed to explain adequately or at all on what factual grounds the Applicant's case was considered by the PSC to be more serious than other apparently similar cases[12]. Although the constitutional fair hearing protections in section 6(8) of the Constitution are not available to prison officers[13] in respect of disciplinary proceedings as Mr. Cottle rightly submitted, the common law rules of natural justice still apply.

88. The procedural structure of the Rules makes it extremely difficult for the COP and the PSC to efficiently and effectively play their statutory roles in the disciplinary process. The Prison Officers (Discipline) Rules 1981 contain some odd features (notably the dual role of the PSC in imposing certain levels of disciplinary penalties and hearing appeals against their own decisions) which may merit legislative reconsideration.

[*After hearing counsel, the Court remitted the matter of the penalty to be imposed on the Applicant for the relevant disciplinary offence to the prison disciplinary authorities to be dealt with according to law. The Court accepted the Respondents' submission that the interests of good administration would be best served by the relevant authorities deciding the appropriate penalty unconstrained by any formal direction from this Court as to what that appropriate penalty might be. The Court noted that it was difficult to imagine how, in the unique circumstances of the present case, a fresh penalty of dismissal could be re-imposed. The Applicant was awarded the costs of the judicial review proceedings; no order was made as to the costs of the constitutional application.*]

Dated this 25th day of November, 2011 _____
KAWALEY J

[12] Although ordinarily the Court would assume that the COP's view of the case was accepted by the PSC, in the present case the evidence suggested that the COP neither had notice of nor responded to the crucial points upon which the Applicant relied at the appeal stage.
[13] Nor indeed does section 6(8) apply to police officers or members of the Bermuda Regiment.