IN THE SUPREME COURT OF BELIZE, A.D. 2002

ACTION NO. 418 OF 2003

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ADOPTING ORDER 53 OF THE RULES OF THE SUPREME COURT (UK) BY OSCAR SELGADO

	(OSCAR SELGADO	APPLICANT
	(	
BETWEEN	(and	
	(	
	(ATTORNEY GENERAL	
	(MINISTER OF DEFENCE	
	(SECURITY SERVICES COMMISSION	RESPONDENTS

Mr. D. Lindo S.C., for the Applicant
Mr. E. Kaseke, Solicitor General, for all three respondents.

AWICH, J.

6. 2004 JUDGMENT

1. Notes: *Appointment and disciplinary measures against public officers are no longer at the pleasure of the Crown in Belize. Disciplinary Action: a charge that included incidents previously tried is illegal on the ground of res judicata. Retirement in public interest under regulations 22, 26 and 29(2)b of the Services Commissions Regulations. Fair hearing: whether denying crossexamination to applicant on statements of witnesses is denial of fair hearing. Relief in judicial review is at the discretion of the Court; failure to appeal in accordance with the Constitution and Regulations is a consideration and there must be exceptional circumstances for judicial review proceeding or relief to be granted despite*

right of appeal; Court exercised discretion and granted damages only, not reinstatement to post.
Attorney General was not a necessary or proper party in the judicial review proceeding concerning the decision taken by the Security Services Commission.

2. In this judicial review case, Mr. D. Lindo SC, learned counsel for Captain Oscar Selgado, the applicant, filed 15 affidavits in support of his case; the learned Solicitor General, Mr. L. Kaseke for the respondents, filed 8 in defence. Several of the affidavits were further affidavits upon further affidavits of the same deponents. Much of each affidavit was argumentative, and submissions as to legal principles, the sort of materials not proper for an affidavit.

3. Notwithstanding the muddle, the basic case of the applicant was a straightforward complaint that the decision of the Security Services Commission taken on 18.7.2002, " retiring the applicant from the Belize Defence Force, in public interest" with effect from 1.8.2002, was unlawful. He asked for court order of *certiorari* to quash the decision, and for orders that he be reinstated and promoted to the post of major, and also for damages and costs.

4. It is common ground that Captain Selgado, a very young man, was retired prematurely as a disciplinary measure, and that the reason for his retirement was that he had performed unwanted homosexual acts and had made

homosexual advances to soldiers in his charge, something the Commission politely described as, “fraternising male officers” and “unnatural sexual proclivity.” The unwanted and unconsented homosexual acts were alleged to be disciplinary wrongs referred to generally as misconducts. Captain Selgado denied the homosexual incidents and thus homosexuality. His denial removed the case from the purview of discrimination on account of sex, a highly controversial contemporary topic when gay inclination is involved. Given the tendency of attorneys and judges in Belize of accepting without questioning, what is considered legally right in the USA, Canada and especially England, despite vast differences in social views, Captain Selgado might have put up a formidable sex discrimination case under ***S: 16 of the Constitution of Belize,*** even a constitutional motion case, had he owned up to homosexuality.

5. *The Grounds Relied on by the Applicant.*

As far as I could peace together out of the affidavits for the applicants and the submission by Mr Lindo, the applicant fought his case on the grounds that: (1) the incidents the subject of the charge, did not take place; (2) he had been charged, tried and found guilty by the Commission on an earlier occasion, 8.1.2000, for the same alleged incidents of improper sexual misconduct, but he was exonerated on appeal to the Belize Advisory Council, so the latter trial, the subject of this case, exposed him to “double jeopardy”; (3) the proceedings were conducted under the Services Regulations 2001, which came into effect only after the alleged incidents so the Regulations were inapplicable; and (4) there were breaches of “natural justice” in the proceeding at the Commission because there were incidents of

bias, namely: the Commission itself, not the Ministry of Defence, drew up the charge and the Commission tried the applicant on it, “the Commission was the prosecutor and the adjudicator”; the Solicitor General was attorney for the Commission as well as for the respondents; the chairman was a shareholder and contributor of articles to a newspaper whose report was used as evidence; and the Commission denied the applicant opportunity to crossexamine “his accusers”.

6. *The Grounds Relied on by the Respondents.*

The respondents’ replies to the applicant’s case were that: (1) the incidents for which the applicant was charged and tried on 18.7.2002, were different from the incidents the subject of the earlier trial in which the applicant had succeeded on appeal to the Belize Advisory Council;(2) the applicant was given opportunity to be heard, both his attorney Mr. Lindo and the applicant were heard on 18.7.2002; (3) the Commission had power under S; 48 of the Interpretation Act “ to regulate its own procedure ...” and under regulation 31 of the Security Services Regulations 2001, the Commission, “may inform itself in such manner as it thinks fit, without regard to the rules of evidence or to other legal technicalities and form”, so the Commission could decline request for crossexamination of witnesses; and (4) the applicant displayed hostile attitude towards the Belize Defence Force and that made him a risk to reinstate in the Force.

7. ***Determination.***

7(a) The application to crossexamine members of the Commission and witnesses.

7(b) The Contention that the incidents have not been proved.

During the hearing at this Court, the applicant applied for leave to crossexamine witnesses whose statements had been used at the hearing before the Commission on 18.7.2002, and to crossexamine members of the Commission. He said that the purposes were to disprove the facts which had been accepted by the Commission as incidents of the homosexual acts and advances alleged, and to prove that the applicant had been tried twice for the same incidents. I refused the application on the grounds that the crossexamination would not advance those purposes any further, and even if the applicant were to prove those facts, the facts would not help in the determination of this case which was a judicial review case and not an appeal. It was my view that the affidavits filed for the applicant adequately disclosed the facts relevant in this judicial review, namely, the dates of the disciplinary hearings, the subject matters of the charges and the notes of the proceeding on 18.7.2002. Judicial review proceeding is not a process intended to retry the facts on which the decision maker, in this case the Security Services Commission, had made its decision, nor is it an appeal from the decision. It was therefore not necessary and would be wrong for me, to rehear the witnesses prove or disprove the incidents.

8. Judicial review is concerned not with the merit of a decision, but with the decision making process. It is intended to redress an unlawful decision on the grounds of (1) illegality; (2) irrationality (including proportionality); and

(3) procedural impropriety - see ***Council of Civil Service Union v Minister for the Civil Service [1985] A.C. 374***, a case in which the House of Lords restated the scope of judicial review in great details, although the case was about whether the applicant had legitimate expectation to be consulted before instruction issued to alter conditions of their service by denying them membership of workers union outside their department and whether national security reason vitiated, that is overode, the unfairness.

9. Despite my ruling, Mr. Lindo devoted much of his time to submission about whether the facts proved the alleged homosexual acts and advances and very little time to the relevant questions of "double jeopardy" and procedural impropriety. As the result, Mr. Kaseke was drawn into the argument about facts and similarly spent too much time on the facts and very little on the question of law.

10. The facts were necessary only to a limited extent. I noted them for the purpose of determining whether all or some of them were used in the two disciplinary proceedings against the applicant, one on 8.1.2000, and the other, on 18.7.2002, relevant to the question of "double jeopardy". I prefer the expression *res judicata*. Double jeopardy connotes a criminal case trial. I also used the facts in deciding whether there had been procedural improprieties which would make the proceeding at the Commission on 18.7.2002, unfair to the applicant, and entitle him to redress by certiorari order of this Court.

11. As regards the applicant's ground that the incidents of homosexual acts did

not take place, I simply repeat that it is irrelevant in this proceeding which is a judicial review of the decision making process that took place at the Commission. The facts and the merit are appropriate grounds for appeal - hearing see ***Lloyd and Others V McMahon [1986] 1AC 692 (H.L)***.

12. There was in fact a statutory right of appeal to the Belize Advisory Council, - see ***S: 111 of the Constitution and regulation 23(3) of the Services Commissions Regulations, Statutory Instrument No. 159 Laws of Belize,*** which right if had been taken by the applicant, would have allowed for consideration of the case on the merit. In this judicial review proceeding, whether or not the incidents occurred, I have to limit my decision to the crucial question as to whether there had been illegality, irrationality or procedural impropriety in the proceeding at the Commission so as to decide whether the proceeding was bad and may be subjected to the review order of certiorari removing the proceeding and quashing the order retiring Captain Selgado.

13. Illegality

That civil servants were employed at the pleasure of the Crown (meaning the State of Belize), now belongs in the history of the Common Law of England and Wales. In all the common law countries terms and conditions of employment of civil servants, (also public servants), are now governed by statutory codes. According to ***S: 106 (3) of the Constitution of Belize,*** these codes or regulations are made or amended by the Governor General, acting on the advice of the Minister, given only after consultation with

representatives or groups of employees in the public service. Moreover, the rules about illegality, irrationality and procedural impropriety have now taken centre stage in matters of employment generally. Any disciplinary action such as demotion, penal retirement, and dismissal taken outside the codes (which usually include the provisions about irrationality and fair hearing) are regarded as unlawful.

14. In Belize the point that civil servants were no longer employed and dismissable at the pleasure of the Crown (represented by the Governor General), was emphatically made by the decision in, ***Card v Attorney General 1BZLR 270,*** a case in which the Governor General herself, was the "defendant" represented by the Attorney General. It was held against the Governor General, that her letter to the plaintiff, a senior economist public officer, suspending one- half of his salary pending dismissal decision was contrary to S: 106 of the Constitution, only the Public Services Commission had disciplinary power over public servants and only according to "the General Orders for the Public Service Regulations", as they were then known, and further, that the Governor General had only power to make the Regulations which she had already made. Another case in which dismissal from the Public Service was successfully impugned was, ***Jasson Guerrero v Attorney General 2 BZLR 1.*** The Supreme Court held that the requirements of natural justice, adopted in the Public Services Regulations; namely, that the grounds of the charge be made known to the plaintiff and that he be afforded opportunity to be heard had not been met. There had been exchanges of letters with Mr. Guerrero about a part time job as a disc jockey. After resistance he finally succumed to the instruction to stop.

Nonetheless he was dismissed. Mr. Guerrero had asked to be allowed to attend the disciplinary hearing. The Commission had not heard him when it confirmed the dismissal. The Supreme Court held that Mr. Guerrero having stopped the part-time job, he should have been made aware of the grounds for the intended dismissal and should have been granted a hearing; his dismissal was unlawful. In a recent case, ***Darrel Smith and others v Attorney General Action No. 488 of 2003,*** the applicants were given reason other than the true reason for retiring them in public interest. The Supreme Court ordered reinstatement into their public offices in Customs Department. ***In Duncan v Attorney General 3 LRC 1128*** Byron CJ of the Court of Appeal of the OECS made it clear that the Constitution of Grenada abolished "the concept of dismissal at pleasure".

15. ***The relevant parts of Sections 105 and 106 of the Constitution*** under which ***Card v Attorney General*** was decided in 1983, stated before they were amended as follows:

> "105. There shall be for Belize a Public Services Commission which shall consist of a chairman and eighteen other members who shall include as ex officio members, ...
>
> 106.-(1) The power to appoint persons to hold or act in offices in the public service(including the power to transfer or confirm appointments), and, subject to the provisions of section 111 of this Constitution, *the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such*

persons from office shall vest in the Public Services Commission constituted for each case as prescribed in section 105(11) of this Constitution.

(2) ....

(3) Subject to the provisions of this Constitution, the Governor-General, acting in accordance with the advice of the Minister or Ministers responsible for the public service given after consultation with the recognized representatives of the employees or other persons or groups within the public service as may be considered appropriate, may make regulations on any matter relating to -

...

(a) measures to ensure discipline, and to govern the dismissal and retirement of public officers, including the procedures to be followed;

(4) The Public Services Commission shall, in the exercise of its functions under this section, be governed by regulations made under subsection (3) of this section."

16. The detailed regulations, namely, ***"the General Orders for the Public Service Regulations", Cap 4 in the Subsidiary Legislations, Laws of Belize***, were made accordingly. They were revised in 1989, republished several times and amended extensively in 1991 and 2001. The current regulations are: ***(1) the Public Service Regulations 2001***, and (2) ***the***

Services Commissions Regulations 2001. Both came into effect on 15.11.2002.

17. Since Card v Attorney General, there have been many unreported cases pointing out that public servants can only be dismissed according to the Public Service Regulations, the rules that regulate the terms and conditions of their employment, and in accordance with the rules against illegality, irrationality and procedural impropriety. The only public officials, not civil servants, that I can think about that may be removed at pleasure, that is at the pleasure of the Governor General, acting in accordance with the advice of the Prime Minister, are "Ministers of the Government" - see ***S: 40 of Belize Constitution***. Any disciplinary action whether demotion, dismissal or penal early retirement in public interest, that has been carried out outside the law may be impugned and redressed. It has become a costly affair for the State to dismiss employees outside the rules applicable. Recently the Supreme Court awarded $150,000 compensation for wrongful dismissal of a single school teacher in a Catholic School for getting pregnant when not married. The school received financial aid from the State and had statutory rules governing dismissal. Those rules and the rules regarding fair hearing had not been complied with by servants of Christ's Ministry. - see ***Maria Roches,v Clement Wade, Supreme Court Action No.132 of 2003.*** The Court also held that there had been discrimination based on "description by sex" contrary to S: 16(3) of the Constitution.

18. It is not part of the applicants' case that his retirement was not dealt with by the right authority, the Security Services Commission, rather that the

Commission unlawfully reopened his case after it had been decided and closed, applied the wrong Regulations and acted unfairly in the process of hearing the case.

19. *About Wrong Regulations.*

In regard to the contention that the 2001 Regulations were not applicable, so the proceeding on 18.7.2002, was tainted with illegality, my first approach will be to assume for the moment that the 2001 Regulations should not have been applied to the proceeding on 18.7.2002. The question then is: In what way did the 2001 Regulations affect the proceedings and adversely prejudice the right or defence of the applicant?

20. The applicant did not point out the specific regulation or regulations in the 2001 Regulations that were applied and how the specific regulations affected the proceeding and prejudiced the applicant in a way that the earlier Regulations, the 1996 Regulations, would have not. For example, the applicant did not say whether the incidents of breaches of the Defence Act and of S: 121 of the Constitution that he was charged and tried for on 18.7.2002, in accordance with the 2001 Regulations had not been acts or omissions triable under the 1996 Regulations. He did not point out a procedural requirement under the 2001 Regulations that did not exist and would have not applied had the 1996 Regulations been applied. It seems to me that the applicant raised this point merely because the letter of the Director, Office of the Services Commission, dated 7.12.2001, addressed to him, referred to the "*Public Service Regulations (Statutory Instrument No.*

160 of 2001)", as the rules under which the applicant was being *"given opportunity to show cause in writing why [he] should not be retired in the public interest*." The applicant simply seized on that reference.

21. The amendments in 2001 to the Regulations were made so that the Regulations would conform to the amendments in the Constitution in Part VIII, which amendments created the Public Services Commission, the Security Services Commission and the Judicial and legal Services Commission as separate Commissions. Before the amendments the latter two were merely sections of the Public Service Commission. No changes were made to the substance in the earlier Regulations.

22. Assumption aside, it is my view that the correct position is that when the applicant was tried on 18.7.2002, the applicable Regulations were the 2001 Regulations which had replaced the 1996 Regulations. Procedures for trial from 15.11.2001, of any allegation including those that occurred prior to 2001, had to be in accordance with the 2001 Regulations, subject to an exception that the Regulations would not apply if the allegation charged was a new creature of the 2001 Regulations and had not been a public service punishable act at the time the applicant was alleged to have engaged in it. Charging a past lawful act as a punishable act under a new regulation would be contrary to retrospectivity rule. That however, was not part of the applicant's case.

23. The ground that the 2001 Regulations were wrongly applied instead of the earlier ones fails.

24. *Res judicata.*

That the incidents for which the applicant was tried on 18.7.2002, were *res judicata* is another question of illegality. It is an involved one. The subject matter or matters before the Commission on 18.7.2002, when it made the decision the subject of this proceedings, must be identified and considered whether they had been the subject matters of proceeding before the Commission on an earlier occasion. All the materials taken into consideration in connection with the subject matters must also be identified and examined to see whether any of them had been used in a previous disciplinary trial of the applicant. It is the rule that if irrelevant or extraneous fact, prejudicial to an applicant in a judicial review has been taken into account that is an instance of *ultra vires*, the decision must be quashed. In ***Anisminic Ltd v Foreign Compensation Commission [1969] 2 WLR 163,*** Lord Keith included that aspect of illegality in his sucinct explanation as follows:

> " It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. .... But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and

decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. *Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account.* I do not intend this list to be exhaustive. But if it [the tribunal] decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."

25. Another case in which the point was made that a tribunal must not take into consideration extraneous matter is, ***Associated Provincial Picture Houses Ltdv Wednesbury Corporation [1947] 2 ALL ER 680.***

26. In this case, I am concerned with whether the Commission included in its proceeding on 18.7.2002, incidents which had been to the Commission on an earlier occasion. Such earlier incidents would be *res judicata and* would be extraneous matters. Two difficulties arise when identifying the subject matters of the two trials. First no records of the proceeding at first instance at the Commission on 8.11.2000, and of the appeal at the Belize Advisory Council on 24.11.2000, have been put in evidence. So comparison with the notes of the proceeding on 18.7.2002, is not possible. Secondly, the set of charges against the applicant, in the earlier proceeding at the Commission on 8.11.2000, and the set of charges in the later proceeding at the Commission on 18.7.2002, were too general and vague. Dates or periods of the alleged breaches of the Defence Act, S: 121 of the Constitution, and of the Public Services Regulations, were not stated. The specific acts or omissions were

not spelt out with sufficient particularities. The charges on both occasions were omnibus. These deficiencies were surprising, given that on the later occasion the Solicitor General had given legal advice about the charges.

27. Given the lack of particulars of the incidents the subject of the charges, it is necessary to examine the events in the sequence they occured so as to determine whether there have been repetitions of disciplinary actions in regard to the incidents. It is a tedious exercise that could have been avoided had the specific dates and facts detailing names and places, been given in respect of each charge on both occasions. The facts in sequence are as follows:

27.1 On 21.1.1989, the applicant joined Belize Defence Force - the BDF.

27.2 In 1997, he attended at a course as an instructor in Barbados. There was allegation that he attempted to have unwanted homosexual act with a trainee from St. Kitt.

27.3 On 15.10.1997, he resigned from the BDF.

27.4 On 15.10.1998, he rejoined the BDF.

27.5 On 21.10.2000 he was in charge of soldiers on duty in Caye Caulker. It was alleged he engaged in unconsented homosexual act with one or more of the soldiers.

27.6 On 26.10.2000, he was charged with six charges before the Commandant of the BDF, who decided that the charges were proved. The six charges were:

> "(1) Negligently performing a duty contrary to Section 34(b) [of Defence Act].
>
> (2) Disobedience to standing orders contrary to section 40(1)[of Defence Act]
>
> (3) Negligently performing a duty contrary to Section 34(b)[of Defence Act]
>
> (4) Conduct to the prejudice of good order and military discipline contrary to Section 66 [of Defence Act]
>
> (5) Using insulting or provocative behaviour likely to cause a disturbance contrary to Section 46(b) [of Defence Act]
>
> (6) Using provocative behaviour likely to cause disturbance contrary to Section 46(b) [of Defence Act]".

The Commandant recommended to the Public Service Commission dismissal of the applicant. The proceeding at the Commission was according to the Regulations then prevailing.

27.7 On 8.11.2000, the Commission approved the dismissal.

27.8 On 9.11.2000, the applicant wrote a letter resigning from the BDF.

27.9 On 28.11.2000, the applicant appealed to the Belize Advisory Council.

27.10 On 24.10.2001, the Belize Advisory Council granted the appeal of the applicant and ordered reinstatement in the BDF. The applicant was not reinstated to duty, but was paid salary.

27.11 On 4.12.2001, the Chief Executive Officer, the Ministry of Defence, recommended to the Security Services Commission that the applicant be retired in public interest. (By amendment in the law the Public Services Commission had became three Commissions). The grounds for the recommendation were as follows:

> " Captain Selgado has *a history* of fraternisation with male officers leading to the embarrassment of the Force thereby losing the respect of his peers and the Force in general..."

27.12 By letter dated 7.12.2001, the Commission informed the applicant of the charges, and that he was given opportunity to reply in writing by 20.12.2001. The material parts of the letter stated:

> "The Ministry of Defence has made a recommendation

for your retirement in the public interest by reason of the following:-

a. You have a history of fraternisation with male officers leading to the embarrassment of the Force, thereby losing the respect of your peers and the Force in general.

b. The Belize Defence Force, which is responsible for defence and internal security support, needs to be viewed in the highest regard locally and abroad.

c. It would not be in the best interest of the Force or the country by extension to continue with your presence in such an esteemed organization.

The Ministry considers that as an officer of the Belize Defence Force, you have failed to demonstrate the highest level of professional conduct and personal integrity in the performance of your duties, and in serving your organization.

In accordance with section 121 of the Belize Constitution, you have breached the code of conduct in the following respects:-

a. To place yourself in positions in which you have or could have a conflict of interest;

d. To demean your office or position;

e. To allow your integrity to be called into question;

f. to endanger or diminish respect for, or confidence in, the integrity of the Government.

Subject to the Public Service Regulations(Statutory Instrument No. 160 of 2001), Section 29(1), you are hereby given an opportunity to show cause in writing why you should not be retired in the Public Interest.

Your reply should reach the Commission by 20th December, 2001."

27.13 On 10.1. 2002, the Commission held a hearing. A preliminary point was raised by attorney, Mr. O. Twist for the applicant, that the charges were *res judicata.* The hearing was adjourned to enable the Commission to seek legal advice.

27.14 On 15.4.2002, a new letter, signed by the Director, Office of the Services Commission, was sent to the applicant informing him that the Commission would hold a hearing on 9.5. 2002, to determine whether the applicant was to be *dismissed*. Note that the recommendation from the Ministry and the earlier letter from the Director were about *retirement not dismissal*. The letter dated 15.4.2002, gave the grounds and other requirements as follows:

"I write to you on the instruction of the Security Services Commission SSC, informing you that the Commission intends to hold a hearing on Thursday 9th May, 2002, in Belmopan at 10:00 am to determine whether you should

be dismissed from the rank of Captain, Belize Defence Force, for fraternizing male officers contrary to the Defence Act, and for demeaning your position or office, or endangering or diminishing respect for, or confidence in the integrity of the Government generally, and the Belize Defence Force specifically, contrary to Section 121 of the Belize Constitution.

Evidence in [the] possession of the Commission reveals that you have made several attempts and have *a history* of fraternization with male officers leading to the embarrassment of the Belize Defence Force, thereby losing the respect of your peers and the Belize Defence Force in general.

Pursuant to Regulation 27(1) of the Services Commission Regulations 2001 - Statutory Instrument No. 159 of 2001, you are hereby notified that the grounds set out in this letter shall be relied upon to seek your dismissal and to terminate your employment, and you are further hereby notified that the Commission has decided to grant you an opportunity to exculpate yourself in writing by showing cause why you should not be dismissed,

Your case was investigated pursuant to Regulation 29(1)(d) of the Services Commissions Regulations.

No witnesses will be called at the hearing of your case to give viva voce evidence, and you are hereby informed that only documentary evidence shall be used against you.

I am further directed to disclose and supply to you the following documentary evidence to be used against you:-

...."

There were postponements of hearing dates.

27.15 On 18.7.2002, the applicant was tried and the Commission decided that the charges were proved. The Commission stated that it excluded incidents that took place earlier than when the applicant was allowed to rejoin the BDF. That would be 15.10.1998. The reason given by the Commission was that the BDF had condoned all wrongs before the appellant rejoined the BDF. The Commission decided to retire the applicant in public interest with effect from 1.8.2002.

27.16 On 9.8.2002 a judge of the Supreme Court granted leave for this judicial review case to be filed at the Supreme Court. The case was subsequently tried by me.

28. So the grounds charged and tried on 18.7.2002, against the applicant were said to be a breach of the Defence Act (the section was not specified), and

breaches of S: 121 of the Constitution. An extract of the charges is this:

(2) "fraternising male officers, contrary to the Defence Act.

(3) "demeaning your position or office contrary to S: 121 of the Constitution" and,

(4) endangering or diminishing respect for, or confidence in the integrity of the Government, generally and the Belize Defence Force specifically contrary to S: 21 of the Belize Constitution."

29. So on the advice of the Solicitor General, the above three grounds or charges replaced the charges which had been convey by the Director to the applicant in the letter dated 7.12.2001. The three charges became the formal charges or grounds at the trial on 18.7.2002, the subject of this review case. I have to repeat that each of these very brief descriptions of the grounds, (the charges) was merely the equivalent of a bare statement of offence. Each did not spell out the specific acts or omissions which were said to be "fraternising", "demeaning", "endangering or diminishing respect for or confidence." Moreover, the ground at (3), stating several wrongs in the alternative could be viewed as extremely vague and uncertain. Which acts or omissions by the applicant were charged? It may be asked. They were not identified by particularising dates, names, places, and the nature of the acts. I think the applicant would have succeeded in this review case even if he simply contended that his trial on 18.7.2002,leading to his retirement was unfair because the grounds of the charges against him were so general and vague that he never could tell the incidents with which he was charged, he was not sufficiently made to know the case against him and so he was not

given a fair opportunity to controvert the case against him and put his own case to the Commission.

30. The respondents submitted that the incidents the subject of the above charges, had not been used in the earlier trial before the Commandant on 26.10.2000; and that the trial before the Commandant was only about the incident at Caye Caulker on 21.10.2000. But the second paragraph of the letter dated 4.12.2001, from the Chief Executive Officer stated the factual basis of the charges tried on 18.7.2002, as "attempts" and "history" of "fraternizations with male officers ..." The history must necessarily be incidents covering a period from some date to the date of the letter. If it excluded the events before the trial on 26.10.2000, before the Commandant, then why did the notes of the proceeding on 18.7.2002, exhibit JP9 to the affidavit of Justin Palacio, state at page 4, prior events as follows:

> "Questions were put to Captain Selgado based on the newspaper reports in the Barbados 'Weekend Investigator' and 'the Belize Amandala' and the statements of the following members of the Defence Force vig:
>
> Pte Bermudez. G.
>
> Pte Lougue. M.
>
> Pte Bermudez. D.
>
> Pte Gordon. K.
>
> Pte Rivas. T.
>
> It was noted that the statements were similar in that they alleged that Captain Selgado made advances to soldiers proposing that they engage in sexual acts with him."

31. The above extract showed that the incidents in Barbados in 1997, reported in the Weekend Investigator and the incidents in Caye Caulker reported in Amandala, were taken together with the statements from the named soldiers, into consideration in the decision of the Commission on 18.7.2002, as parts of the "history", and "attempts", yet the two incidents had taken place prior to the trial before the Commandant on 26.10.2000, and must have been part of the subject matters of the charges then. For example charge at (4), "conduct to the prejudice of good order and military discipline", might well have included some of the past sexual acts attributed to the applicant. Without the records of the proceeding before the Commandant, one cannot say that those charges were not about the same sexual incidents lumped as history, the factual basis of the three charges tried on 18.7.2002. The history certainly included extraneous matters.

32. Further, the Commission said it excluded from their decision, the incidents upto the time when the applicant was allowed to rejoin the BDF because they considered that BDF had condoned those incidents. The applicant rejoined BDF on 15.10.1998. Private Bermudez .E. made a statement about an incident "around 7th June 1997". So, the statement should have been irrelevant as an extraneous matter, but the Commission took it into account. Private Bermudez D, Private Loungue.M. and Private Rivas. T. did not give the dates of the incidents they recounted.

33. I am satisfied that there has been inclusion of incidents that were *res judicata* in the grounds on which the applicant was tried on 18.7.2002, and

punished with retirement in public interest. Accordingly the decision is subject to certiorari order of the Court.

34. *Duty to Act Fairly*.

The grounds that the Solicitor General was attorney for the Commission as well as for the respondents, and that the Chairman of the Commission contributed articles to Amandala Newspaper that reported one of the sexual incidents, are baseless as challenges to lack of fair trial. That the chairman had shares in the Amandala Newspaper was not insisted upon in Court.

35. The submission that the Commission drew up the charges and tried the applicant on them and so the Commission was the prosecutor as well as the adjudicator is mistaken. The recommendation to retire the applicant originated with the Commandant of the BDF, and was forwarded by the Chief Executive Officer of the Ministry of Defence to the Director, Office of the Services Commission. The matter was heard and decided by the Security Services Commission on 18.7.2002. The Commission members are statutory namely, Chairman of the Public Services Commission, a former senior officer of the Belize Police Department, a former senior officer of the Belize Defence Force, a person from the private sector, and a person nominated by the leader of the opposition. - see ***S: 106 of the Constitution***. There has been no evidence that the Commandant sat on the Commission on 18.7.2002.

36. *Denial of Crossexamination*

There was merit, however, in the ground that the trial was unfair because the

applicant was not allowed to crossexamine "his accusers." In the first step of the proceeding, the Commission notified the applicant in writing that witnesses would not be called for oral hearing, statements recorded from them would be considered. The statements were sent to the applicant. The applicant asked that there be oral hearing of the witnesses and that he be heard orally and be allowed to crossexamine certain witnesses. He was given opportunity to put his case orally. His attorney was present, and conducted the applicants' case. However, the Commission declined to call the relevant witnesses whose statements had been given to the applicant. So the witnesses could not be crossexamined. The Solicitor General's submission was that the Commission was entitled to decline the request because under S: 48 of the Interpretation Act, the Commission had power to, "regulate its own procedure", and that under regulation 31 of the Services Commissions Regulations the Commission could, "inform itself in such manner as it thinks fit, without regard to the rules of evidence or to other legal technicalities and form".

37. The full wording of S: 48 of the Interpretation Act is this:

> "Where any board, tribunal, commission, committee or similar body is established by or under any Act, then unless the contrary intention appears, such board, tribunal, commission, committee or similar body may regulate its own procedure by standing order".

Notwithstanding ***S:48 of the Interpretation Act***, the Commission had in fact not made any "standing orders", so that it could claim that it regulated

its procedure by “standing orders”. Yes, the Commission could regulate its procedure, but “ by standing orders”, S: 48 states. In regard to regulation 31, I do not think the applicant was claiming a right under any “rule of evidence or technicality or form”. The real issue there was a duty to act fairly. The question is whether the Commission acted fairly in all the circumstances when it declined the request of the applicant to have opportunity to crossexamine witnesses, or put another way, whether the applicant, in the circumstances obtaining when he was denied crossexamination of the witnesses, had a fair opportunity to contradict the witnesses and put his own case.

38. In any case, every lawyer, especially a practising attorney, knows that a provision in a statute is never read in isolation. In the first place, S: 48 of the Interpretation Act and regulation 31 of the Services Commissions Regulations must be read as applicable in as far as they are consistent with the Constitution and with the fundamental principles of justice that permeates the Common Law, and are the fundamental features of our law. ***Part II of the Constitution of Belize*** is a summary of most of those fundamental principles of justice. The provisions cited by Mr. Kaseke must be read, for example, subject to ***S:6(7) of the Constitution (in Part II)*** which states:

> “(7) Any court or other authority prescribed by law for the determination of the existence of any right or obligation shall be established by law and shall be independent and impartial; *and where proceedings for such a determination are instituted by any person*

before such a court or other authority, the case shall be given ***a fair hearing*** *within a reasonable time."*

39. I think it would be dangerous to advise members of administrative authorities or tribunal, many of whom may not be qualified lawyers, that they can regulate their own procedure, without pointing out to them the legal limit. That would invite many law suits.

40. I now return to answer the core question as to whether the Commission acted fairly in all the circumstances when it declined the applicant's request to crossexamine witnesses. There is no hard and fast rule that for a hearing by an administrative tribunal to be fair crossexamination must be afforded, or that whenever a party requests crossexamination it must be allowed. However, strong views have been expressed in past cases that generally crossexamination should not be refused if requested. A certain guide is, whether denial of crossexamination in the circumstances of the case would render the decision unfair see - ***Bushall v Secretary of State for the Environment [1981] AC, 75***. Examples of circumstances in which denial of crossexamination would render hearing unfair are in ***R v Hull Prison Board of Visitors (No2) [1979] 1WLR 1401.*** In the case it was held that denying crossexamination to prisoners who faced serious charges punishable with loss of remission of their prison terms, denied them fair trial, despite the fact that the board had discretion, and the rules of evidence did not apply.

41. The circumstances of the present review case are these: The applicant faced serious allegations of homosexual harassment of soldiers in his charge, it

was made clear to him that if the charges were proved he would be retired in public interest. That was changed to, he would be dismissed. He would lose his job, a very severe penalty. Three of the soldiers from whom statements had been obtained did not give dates to their allegations, one gave a date prior to an earlier trial. The applicant had made it known that his defence would be that the incidents never took place and that he had faced the same accusations before and had been exonerated on appeal. He specifically requested crossexamination. Would a denial of crossexamination be a denial of opportunity to correct or contradict his accusers and effectively put his side of the case? I think one has to be a stranger to liberty and justice to fail to see it as a denial of crucial opportunities to contradict or correct the witnesses' statements, and therefore a denial of a fair hearing. My conclusion is that there has been procedural impropriety during the hearing at the Commission on 18.7.2002, because of the denial of the request to crossexamine witnesses.

42. In the end it is my decision that the applicant has succeeded in his application for *certiorari order* of this Court. The order issues and quashes the decision on 18.7.2002, of the Security Services Commission that the case against Captain Selgado was proved, and retiring him in public interest.

43. ***Relief***

I have given great thought to what is the appropriate relief in the circumstances of this case and to the fact that the applicant did not avail himself of the statutory right of appeal given. He did not give any reason for preferring coming to this Court for review order instead. He had, on an

earlier occasion, successfully used the right to appeal on similar charges. Had this been sufficiently disclosed to the judge who granted leave, he might have declined leave. Moreover, at the hearing at the Commission, the applicant uttered words which may be regarded as threats to other members of the Belize Defence Force. Those make for special circumstances upon which this Court may wholly or partly deny relief to the applicant.

44. It is just in my view to exercise discretion and deny the relief to reinstate the applicant to the Belize Defence Force. I, however, order damages in his favour against the Security Services Commission and the Minister for Defence, the damages to be assessed. The Attorney General was not a necessary or proper party in this proceeding, the application to the extent that it was against the Attorney General is dismissed. No costs are awarded in favour of the Attorney General because the case against him was conducted as one with the cases against the other two respondents.

45. Not much evidence was made available from which the Court could make a just assessment of damages. For instance, the salary of the applicant and his age were not disclosed. I direct that parties file and exchange affidavits stating all evidence they consider relevant to the assessment of damages. The affidavits must be filed within 30 days of today, after which the applicant may request from the Registrar, a hearing date, unless parties agree damages, in which case proposed consent order will be filed for approval. Counsel will be allowed to address the Court on questions of remoteness and assessment.

46. The applicant is awarded one half of costs against the Services Commission and the Minister for Defence. Full costs are denied because the applicant did not give reason for not availing himself of the appeal avenue provided.

47. A summary of the orders the Court makes are:

47.1 The application of Captain Oscar Selgado for judicial review succeeds against the Security Services Commission and the Minister for Defence.

47.2 The application is dismissed against the Attorney General, he was not a proper party to the proceeding.

47.3 The decision of the Security Services Commission made on 18.7.2002 is quashed.

47.4 The prayer for reinstatement of Captain Selgado to the Belize Defence Force is refused.

47.5 The applicant is awarded damages to be assessed.

47.6 Costs to the applicant, to the extent of one-half.

46 Pronounced this Wednesday, the 14th day of July 2004,

At the Supreme Court

Belize City

Sam Lungole Awich

Judge

Supreme Court