

**IN THE SUPREME COURT OF BELIZE, A.D. 2016**

**CLAIM NO. 601 of 2012**

**ELROY AWARDO  
DAMIAN AMAYA**

**CLAIMANTS**

**AND**

**THE SECURITY SERVICES COMMISSION  
THE ATTORNEY GENERAL**

**DEFENDANTS**

**BEFORE the Honourable Madam Justice Sonya Young**

Hearings

2016

18<sup>th</sup> February

Closing Submissions

2<sup>nd</sup> March – Claimants

9<sup>th</sup> March – Defendants

Decision

5<sup>th</sup> May

Mr. Dean R. Lindo, SC for the Claimants.

Mr. Nigel Hawke along Ms. Trienia Young for the Defendants.

**Keywords: Administrative Law – Declaration – Discharge from the Belize Defence Force (The Force/The BDF) – Security Grounds – Disciplinary Measure – Whether Procedure Ultra Vires The Regulations – Natural Justice – Whether Natural Justice exempt – The Defence Act Cap 135 (The Act) – Services Commission Regulations 2001 (The Regulations) – The Belize Constitution Cap 4 (The Constitution)**

**JUDGMENT**

1. Around the 12<sup>th</sup> October, 2011 it was discovered that some forty-two

weapons had been stolen from the BDF's Armoury in Price Barracks, Ladyville. The Ministry of Defence issued a press release which indicated that the Police Force and the BDF had both launched investigations. Among the missing or stolen were 22 M16 A1 rifles (unserviceable), 02 x M4 Colt commando rifles (unserviceable), 11 x 9 mm Beretta Pistols (serviceable) and 7 x 74 calibre rifles (serviceable). A reward of \$30,000 was offered but the weapons were never recovered.

2. On the 13<sup>th</sup> October, 2011, Elroy Awardo, who was then a Lieutenant in The BDF, attached to Headquarters in Price Barracks, Ladyville wrote and submitted to the Commandant, a report on the changing of the Force Field Officer on the 28<sup>th</sup> September, 2011. He offers nothing on the circumstances which may have prompted this report; whether it had been requested or prepared through his own volition. However, on the 17<sup>th</sup> November, 2011 he received a force routine order of even date on the BDF's letterhead and addressed to him in terms restated in their entirety below:

**"ADMINISTRATIVE LEAVE"**

References: Force Standing Orders No. 123 Para (9)

Force Standing Orders Serial 84, Order No. 1018/11

In accordance with above references the Defence Board has approved that you be Placed on Administrative Leave effective 15 November 2011, until further notice. Thanks.

Signed RICARDO LEAL  
Major  
For Commander  
Force Adjutant  
Force Headquarters  
Belize Defence Force”

3. On the 16<sup>th</sup> November Damian Amaya, then a Captain in The BDF also attached to Headquarters in Price Barracks, Ladyville, received the following memorandum of even date. It was addressed to Commander, BDF

and was stated to have come from the Chief Executive Officer, Ministry of Defence and Immigration. I have chosen to repeat it in its entirety:

*"Reference is being made to your FHQ/1200 dated 14<sup>th</sup> November 2011 on the above captioned subject.*

*This is to inform that the Defence Board has approved that the following officers be placed on Administrative Leave with effect from after duties on the 15<sup>th</sup> November 2011 until further notice:*

*Captain Damien Amaya*

*Lt. Elroy Awardo*

*W02 Roy Flores*

*Submitted for your information and necessary action.*

*Signed: Jennifer Saldivar Ramirez (Mrs.)*

***FOR CHIEF EXECUTIVE OFFICER***

4. Both men immediately proceeded on leave as directed. That next day Mr. Awardo wrote to the Chief Executive Officer in the Ministry of Defence requesting the reason for his having been placed on leave and whether any allegations had been made against him. He also informed that he intended to seek legal recourse if necessary. He received no response.
  
5. They remained on leave until the 23<sup>rd</sup> December, 2011 when they received letters from the BDF with an attached memorandum confirming that they had been discharged from The BDF effective the 23<sup>rd</sup> December, 2011. The memorandum came from the Secretary, Security Services Commission (The SSC) and was addressed to the Chief Executive Officer, Ministry of Defence & Immigration:

***"SUBJECT: DISCHARGE – BELIZE DEFENCE FORCE PERSONNEL***

***DATE: 22<sup>ND</sup> December 2011.***

*Reference your Memorandum CON/BDF/01/11(11) dated 24<sup>th</sup> November 2011 on the afore-mentioned subject.*

*The Security Services Commission has approved that the below listed Belize Defence Force Personnel be discharged with effect from the dates cited:-*

1. *Colonel Javier Castellanos – with effect from 23<sup>rd</sup> December 2011.*
2. *Captain Damian Amaya – with effect from 23<sup>rd</sup> December 2011*
3. *Lieutenant Elroy Awardo – with effect from 23<sup>rd</sup> December 2011.*
4. *Warrant Officer Class 11 Roy Flores – with effect from 23<sup>rd</sup> December 2011.*

*Signed (JUSTIN A. PALACIO)  
Secretary  
Security Services Commission  
c. Commander, Belize Defence Force”*

6. Subsequently, on the 4<sup>th</sup> January, 2012, they again received correspondence from The BDF with an attachment from The SSC. Mr. Amaya did not exhibit his letter but one can perhaps accept that it was in similar terms as the one exhibited by Mr. Awardo. That letter was on The BDF's letterhead and is of even date:

**“DISCHARGE”**

References:

- A. P/F 227283 dated 23 December 2011.
- B. CON/COM/2/04/2011 VOL.1V (15)

Further to the above references kindly find attached a Memorandum from the Security Services Commission confirming your discharge from the Belize Defence Force under Section 25(1)(f) of the Defence Act effective 23 December 2011.

Submitted for your information.

Signed: R LEAL  
Major  
For Commander  
Force Adjutant  
Force Headquarters  
Belize Defence Force”

7. Both men say that they were never informed of any reasons for their discharge, they were never charged for any wrong doing, they were never called to answer any charge or make any representations to The SSC. This, they say, is in direct contravention of The Regulations which outline the procedure for their removal. They feel that they have been denied the right to a fair hearing.

8. Further, on the 9<sup>th</sup> January, 2012, Mr. Awardo through his Attorney, made a written request to the Secretary of The SSC for, inter alia, the transcript of the court of inquiry, the charges which were levelled against him, the board's approval of his administrative leave and their recommendation. He received a reply from the Chief Executive Officer in the Ministry of Defence on the 23<sup>rd</sup> January, 2012. It informed that his correspondence had been forwarded to the Solicitor General's for perusal and legal guidance. He heard nothing further. On the 4<sup>th</sup> July, 2012 both men wrote separate correspondence, through their attorney, requesting the transcript from the Inquiries. Mr. Awardo's gave a deadline of the 11<sup>th</sup> July for receipt. Mr. Amaya's asked that they be sent as a matter of urgency. Those too went unanswered. Their counsel again wrote on the 9<sup>th</sup> July, 2012. This time a joint letter, he repeated his request for notes of evidence and reasons for decision and offered to pay the fees associated with obtaining same. There was no response, prompt (as he requested) or otherwise.
9. Ergo, they remain ignorant of the reason for their discharge and have come by way of an administrative declaratory action pursuant to Rule 56.7(1) (c) seeking:

- "a. A declaration that the decision of the Security Services Commission dated the 22<sup>nd</sup> December, 2011 terminating the Claimants from the Belize Defence Force is ultra vires the Services Commission Regulations and is therefore null and void and of no legal effect;*
- b. A declaration that the Claimants are entitle to their full salary together with all allowances and benefits in the event that the Court determines the dismissal unlawful;*
- c. General Damages for the unlawful termination of the Claimants who were appointed as Permanent Regular Commission Officers in the Belize Defence Force.*
- d. An Order that the Claimants shall be at liberty to apply for any further consequential relief as may be necessary to secure the effect of the declarations made herein;*
- e. Interest on sums found to be due;*

- f. Costs;*
- g. Such further and/or other relief as the Court deems just.”*

10. The Defendants resist the application. They urge that no such declarations be made and maintain that Mr. Awardo and Mr. Amaya had both been properly discharged on national security grounds. They contend that in accordance with The Act, the details surrounding the discharge ought not to be disclosed. Furthermore, natural justice is exempted once matters arise which touch and concern national security. They also urge that the court ought not to interfere in areas of military law. By way of submissions they raised the issue of the procedure followed in bringing this matter. However, they have never sought to have the matter struck out during the management of the case or even to raise it as a point in limine.

### **The Issues:**

11. This is an inherited matter where two other judges had previous conduct. It was transferred to this court at the very point when it was very trial ready. The parties helpfully and in compliance with a pretrial review order filed the following agreed list of issues for determination:

- “1) *Whether the Claimants were subject to military law?*
- 2) *Whether the rules of Natural Justice apply because of National Security?*
- 3) *Whether the decision of the 1<sup>st</sup> Defendant to terminate the Claimants from the Belize Defence Force without first affording them a hearing is ultra vires the Services Commission Regulations, S.I. No. 159 of 2001, and therefore rendering the dismissal unlawful;*
- 4) *Whether the Claimants are entitled to their full salary, that is, from the date of dismissal up to date of their retirement, should the Court find the dismissal to be unlawful;*
- 5) *If the Court is to determine the dismissal was improper what effect will the declaratory order have?*
- 6) *The quantum of general damages, should the Court find the dismissal to be unlawful, due to the Claimants as a result of the actions of the 1<sup>st</sup> Defendant.”*

12. The court has reworked these issues as it deemed necessary and has changed the position of some issues to make the judgment more comprehensible.

**Whether the Claimants were subject to military law and whether the internal workings of the BDF is non-justiciable:**

13. Military law is all the body of law and procedures concerned with the maintenance of order and discipline in the armed forces. Whether the Claimants were subject to same cannot be in issue and much time will not be wasted on this discussion. They both admitted this and section 164(1) of The Act clearly states:

*“Subject to the provisions of the following section, the following persons are subject to military law-*

- (a) officers and soldiers of the regular force;
- (b) officers and soldiers attached to the Force or any part thereof;
- (c) officers of the volunteer element;
- (d) soldiers of the volunteer element when called out on permanent service or temporary service or when undergoing or performing any training or other duty (whether in pursuance of an obligation or not) or when serving on the permanent staff of the volunteer element;
- (e) members of the reserve when called out on permanent service.

14. The Claimants undoubtedly fall within the ambit of this section. Further, Section 20(1) bolsters the above as follows:

*“Save as in this Act provided, every soldier of the regular force upon becoming entitled to be discharged shall be discharged with all convenient speed, but until discharged shall remain subject to military law.*

15. Counsel for the defence submitted that “*the internal workings of the military and defence force is (sic) not subject to judicial review and is non-justiciable.*” He relies on ***Re Clarke [1994] Jamaican Supreme Court 71*** which reaffirmed ***Re Mansergh (1861) 764 ER 767*** where Lord Cockburn opined,

*“I quite agree that where the civil rights of a person in military service are affected by the judgment of a military tribunal, in pronouncing which the tribunal*

*has either acted without jurisdiction or has exceeded its jurisdiction, this Court ought to interfere to protect the civil rights: e.g. where the rights of life, liberty or property are involved, although I do not know whether the latter case could occur. Here, however, there was nothing of the sort, and the only matter involved was [407] the military status of the applicant-a thing which depends entirely on the Crown, seeing that every person who enters into military service engages to be entirely at the will and pleasure of the Sovereign.”*

16. Years later Lord **Goddard** in *R v Metropolitan Police Commission Ex parte Parker* [1953] 2 All ER 717 at p 721 observed:

*“... where a person, whether he is a military officer, a police officer, or any other person whose duty it is to act in matters of discipline, is exercising disciplinary powers, it is most undesirable, in my opinion, that he should be fettered by threats of orders of “certiorari” and so forth, because that interferes with the free and proper exercise of the disciplinary powers which he has.”*

17. The Claimants have not responded to these submission in any way.

However Sir Clive Lewis in **Judicial Remedies in Public Law 5<sup>th</sup> Ed** at paragraph **6-014** surmised:

*“There is old authority stating that the courts cannot intervene in matters of military conduct and purely military law affecting military rules for the guidance of officers on matters of discipline unless the actions of military authorities affected the ordinary civil rights of the soldiers. That approach does not reflect the modern attitude of the courts. In general, the courts are likely to be prepared to review exercises of statutory powers or prerogative power relating to the armed forces, even in matters involving questions of discipline and conduct, providing that the issues raised are justiciable ones. ... The courts will judicially review the decisions of the Defence Council. The Divisional court has for example, granted a quashing order to quash a decision of the Army Board, acting for the Defence Council, dismissing an allegation of racial discrimination as the board had failed to observe the requirements of national justice in carrying out its statutory obligations ... In the area of military discipline, the courts have granted judicial review of a decision of the Admiralty Board of the Defence Council rejecting a petition against the severity of a sentence imposed by a court martial which had found a sailor guilty of misconduct and ordered that he be dismissed from the navy.”*

18. The latter matter referred to being *R v Admiralty Board of the Defence*

*Council Exp. Coupland [190] C.O.D. 147.* Moreover, cases such as *In the matter of BW for Judicial Review [2007] NICA 44* deal specifically with a challenge to the legality of a discharge from the army on security grounds. The issue of jurisdiction was not even raised, far less considered. It shows the direction the courts have taken and the progress made since 1861.

19. This court has considered the authorities and the changes that have occurred since *Re Mansergh*. I am not prepared to follow the old path which seem to be grounded on principles which no longer hold much credence (for e.g. dismissal at pleasure which is discussed later in this judgment). In fact, the old vestiges are discarded without remorse.
20. The SSC is a body that can be sued. When discussing Trinidad's equivalent to The SSC Justice Pemberton in the case *of Ramdeo Ramtahal v Defence Council Claim No CV 2008-03436* stated "... *I understand that the Defence Council is a creature of statute entrusted with responsibilities inter alia, "the command, administration and discipline of and all other matters relating to the force." It is clear to me that the Defence Council is a "public authority" acting in the exercise of a "public duty" and must act "in accordance with any law."*" A decision made by that body is therefore amendable to judicial review."
21. This court could find no statutory bar to the claim. Discharge of an officer of The BDF falls well within the scope of public law and is justiciable. As I see it the statutory guarantees and safeguards against removal have been provided for all public officer including those of The BDF. This court does not consider this determination to be an intervention in any way, but rather attendance to the very execution of its duty.

**Whether the decision of the 1<sup>st</sup> Defendant to terminate the Claimants from the Belize Defence Force without first affording them a hearing is ultra vires The Regulations:**

22. The police service maintains internal security, while The BDF is responsible for external security. The BDF also has certain domestic security responsibilities and such other duties as may be defined from time to time by the Governor General. These responsibilities are by no means insubstantial. They demand seriousness and discipline which is incomparable with any existing in the civilian realm.
23. An independent body The SSC makes appointment, disciplinary and removal decisions for both by virtue of section 110D(1)(2) and (3) of The Constitution of Belize:

*“110D.-(1) Subject to the provisions of this section the power to appoint persons to hold or act in offices in the security services, including the power to make appointments, and to deal with all matters relating to the conditions of service of such officers 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 shall vest in the Security Services Commission established under section 110C of this Constitution.*

*(2) In this section “security services” means service in the Belize Police Department, the Belize National Coast Guard Service, and in the military service as defined in subsection (3) of this section:*

*Provided that the provisions of this Part shall not apply to the Commissioner of Police, the Commander Belize Defence Force or the Commandant, Belize national Coast Guard Service.*

*(3) For the purpose of this section, “military service” means service in the Belize Defence Force or in any other military, naval or air force established for Belize.”*

24. The Act, which establishes and maintains The BDF, provides for the discharge of its members by section 25(1):

*“Any member of the Force, other than the Commandant, may at any time be discharged by the Public Services Commission on the advice of the Belize Defence Board -*

- (a) on compassionate grounds;
- (b) on appointment to a commission in the Force;
- (c) for inefficiency or unsuitability for military service;
- (d) on the ground that he is medically unfit for service;
- (e) upon his conviction for any offence by the Commandant, a court of criminal jurisdiction outside Belize);
- (f) on security grounds; or
- (g) for any other fit and proper cause.

(2) Notwithstanding anything contained in this Act, where a member of the Force is discharged on the ground specified in paragraph (f) of subsection (1), it shall not be necessary for the Public Services Commission to disclose to such member the details for his discharge if the Public Services Commission, on the advice of the Belize Defence Board, is satisfied that it would not be in the public interest so to do.”

25. The Act itself is clear that discharge may be made for a number of reasons and at any time, however, discharge is not at pleasure. In **Marks v The Commonwealth** Windeyer J explained the notion of dismissal at pleasure:

*“Servants of the Crown, Civil and Military, are by the common law employed only during the pleasure of the crown. Except when modified by statute, that rule has an overriding place in all engagements to serve the Crown. All officers under the Crown are so held at common law, except some ancient officers of inheritance and certain officers created by patent with a tenure for life or during good behaviour, as in the case of judges of superior courts ..... Its consequences is that the Crown may dismiss its servants at will, without notice at any time.”*

26. Although in The Act the words “may at any time” bring to mind appointment at pleasure of the crown **Oscar Selgado v The Attorney General et al Claim No. 418 of 2003** which relied on **Card v Attorney General 1 BZLR 270** and **Jasson Guerrero v Attorney General 2 BZLR 1** accepted that public officers (a term which includes members of The BDF) are no longer dismissible at the pleasure of the crown. This concept has been abolished by virtue of section 110 D (1) of The Constitution (ibid). Discharge could be at any time, but the power to remove is not exercisable at will nor is it to be capricious or arbitrary. It is regulated and must be made by reference to a particular provision of The Act authorising

such discharge. It is dependent upon certain procedures being followed by the Belize Defence Board (The BDB) who would then advise the Public Services Commission i.e The SSC.

27. In section 25, save for the basis on which details of the discharge may or may not be disclosed in certain proceedings, the statute does not speak to the manner in which the power of discharge is to be exercised. The claimants contend that, in the present situation, this procedure is expressly provided in The Regulations. Their claim form does not state precisely what section of The Regulations. However, from their affidavits and the submissions made on their behalf by counsel, one is able to glean that they assert that their termination ought to have been done in accordance with Regulation 29 which provides for dismissal as part of disciplinary proceedings.
28. The Regulations are made pursuant to the Governor General's power under Section 106 of The Constitution. Such power is exercised in accordance with the advice of the Minister responsible for the Public Service, after consultation with certain named key players. The Regulations are predominantly for the general management and control of the public service. They are not specific to the Security Services.
29. The Regulations at section 22(1) sets out the various modes by which a Public Officer (including a member of The Force) may leave the Public Service and introduces the concept of dismissal (not discharge) on security grounds.

*"22.(1) The modes by which a Public Officer may leave the Public Service are:-*

- (a) on dismissal or removal in consequence of disciplinary proceedings;*
- (b) on compulsory retirement due to age;*
- (c) on voluntary retirement;*
- (d) on retirement on medical grounds;*

(e) on the expiry or other termination of an appointment for a specified period;

(f) on the abolition of his office;

(g) in the case of a Public Officer on probation, on the termination of his appointment;

(h) on compulsory retirement for the purpose of facilitating improvement in the organization of his Ministry or Department; or

(i) on abandonment of office;

(j) on dismissal on security grounds.

(2) Notwithstanding anything contained in these Regulations, where a Public Officer is dismissed on the ground specified in paragraph (j) of regulation (1), it shall not be necessary for the Commission to disclose to such officer the details of his dismissal if the Commission, on the advice of the relevant Ministry or Department, is satisfied that it would not be in the public interest so to do.”

30. When The Act is considered, a distinct difference between discharge and dismissal is revealed. Dismissal appears as a form of punishment under sections 68 and 69 of The Act - where it is referred to as ‘dismissal with disgrace.’ It is a punishment awarded by a court martial only. Although a commandant has jurisdiction to try certain offences summarily, he does not have the jurisdiction to dismiss as a form of punishment. However, under section 25(1)-(e) of The Act a member of The Force may be discharged by the Public Services Commission The (SSC) on the advice of the BDB upon his conviction for any offence by the commandant, a court martial or a civil court.
31. Section 13(1) of The Act is side noted as ‘Resignation and Dismissal of officers’. It however deals with the Governor General’s power to either permit an officer of the force to resign or to terminate their commission for inefficiency or for any other cause. It has nothing to do with the powers of The SSC.

32. The distinction is important because dismissal always implies a measure of punishment and is in fact one of the more serious punishments which a court martial could impose under The Act. It lies within the domain of the employer and there is no control imputed to the employed. Whereas, discharge is the termination of the agreement of employment, the reasons for which need not have anything to do with punishment at all. For the employed it could be voluntary or involuntary. The use of the word dismissal in relation to security grounds imputes that the termination is always as a result of some misconduct, violation of the rules or inadequate performance. But in the case of security this need not be so. A member whose retention is inconsistent with (rather than prejudicial to) the interest of national security, for example, may be discharged. Such having nothing whatsoever to do with discipline and punishment.
33. One is unsure whether the distinction between dismissal and discharge simply did not translate in The Regulations (the later in time) because they were geared towards all public officers rather than being specifically formulated for The Force. Or whether the drafters considered dismissal and discharge to be one and the same, being unaware that dismissal had a specific meaning under The Act. Whatever the reason, this court could find no power given to anyone or any body to dismiss any member of The Force on security grounds. I am of the view that ‘dismissal on security grounds’ in The Regulations creates confusion and is inconsistent with The Act.
34. Notwithstanding, it must be accepted that in both The Act and The Regulations, discharge from The Force could be effected on a number of grounds. Moreover, discharge as a consequence of disciplinary proceedings

is distinct and separate from discharge on security grounds. Under certain circumstances, there may be an overlap.

35. The Claimants maintain that they have both been exemplary members of The Force. Well trained and well disciplined. Certificates and diplomas, achievements and accolades are exhibited in support. They claim that they have done nothing to warrant discipline in anyway and most definitely nothing which could amount to some serious inefficiency or misconduct. They accept that they have never been reprimanded or charged. However, having not been given any details of their discharge they are unaware of the true reason. But in their opinion, where the discharge came so close on the heels of the missing or stolen weaponry they could only assume that it must be part of some disciplinary measure arising therefrom.
36. Mr. Amaya goes further. In an exhibited letter from his attorney, addressed to the Secretary of The SSC, and dated 4<sup>th</sup> July, 2012, he indicated that he had been pressed into attending a board of inquiry on or about the 11<sup>th</sup> October, 2011. Thereafter, another investigation was conducted on the 13<sup>th</sup> October, 2011 and on the 27<sup>th</sup> October, 2011, he was subjected to a polygraph test. What concerns the court is that no reference is made to any of this in Mr. Amaya's affidavits. An applicant for an administrative order is required to show great care and candour in the presentation of his evidence in support. Be that as it may, that letter makes a request for the report or transcripts of the investigations as a matter of urgency. Mr. Amaya says there was no response.
37. I am uncertain what a board of inquiry is and can only assume that a court of inquiry was what was intended. Such a court investigates and reports on the

facts relating to certain military issues such as the absence of any member of the force, their capture by the enemy, and any matter referred to the court by The Defence Services Commission (The SSC). Mr. Amaya never indicated for what purpose the court was convened although this court appreciates that that was noticeably not one of the many issues raised by his counsel in the letter.

38. In furtherance of their argument (that they were dismissed as a disciplinary measure), the Claimants contend that when they were placed on administrative leave, they were in fact suspended. Now suspension can only be effected pursuant to section 112 of The Act and section 37 of The Regulations as a preliminary step in disciplinary proceedings. However, I could find nothing in either The Act or The Regulations which equate administrative leave with suspension. What is more instructive is that while on suspension the affected person ought to receive no more than half of their regular pay (section 112(2) of The Act). Neither Claimant has offered any evidence to support such a fact. The letters which informed them of their having been placed on leave does not indicate such a state of affairs either. The evidence from the Defendant supports the view that the Claimants had been placed on administrative leave. Mr. Justin Palacio Secretary to The SSC states at paragraphs 9 – 11 of his only affidavit:

*“9. On or around the 12<sup>th</sup> October, 2011 it was discovered that there was a significant breach of the Belize Defence Force armory which resulted in forty two (42) military weapons going missing from Price Barracks, Ladyville, Defence Force headquarters.*

*10. This was categorized as a serious security breach and a National security matter and as a result an investigation was launched into what caused the breach and whether there was on the part of Belize Defence Force personnel any culpability in respect of dereliction of duties.*

*11. After the investigation was completed all personnel affected by the*

*investigation were written to and placed on administrative leave pending any further action that was contemplated by the Defence Board.”*

39. It seems that The BDB determined administrative leave to be a temporary solution where the Claimants maintained a paid, non-duty status while the administration contemplated what action ought to be taken. That action could be along various paths - removal proceedings, suspension, or even a directive to return to work (by way of example only).
40. I am compelled to hold that the Claimants were never suspended in accordance with The Act, The Regulations or in fact. Furthermore, their being placed on leave was in the nature of an interim action and not a final determination. The application of principles of natural justice may therefore be excluded.
41. Nonetheless, in keeping with that view, the Claimants urge now that the procedure under The Regulations was not followed. There is nothing in The Regulations that indicates that the procedure for dismissal on disciplinary grounds is the same for discharge for security reasons. There is conceivably an overlap where the discharge for security reasons is in fact a punishment. To my mind this would be so where the person discharged will lose benefits already earned and accrued. Regulation 27(3) states:

*“An officer who is dismissed forfeits all claims to retirement benefits.”*
42. Both Claimants lament the fact that two other persons who were discharged with them have been reinstated then retired with all their benefits. My understanding is that the Claimants have lost all their benefits. That is certainly a punishment. Removal by way of punishment must be a dismissal

and can only be effected through the procedure established in The Regulations for the discipline of public officers. More specifically, Regulation 29 must apply.

43. Section 29 reads:

*29.(1) In cases of serious inefficiency or misconduct for which dismissal or retirement may be considered the appropriate penalty, the following procedures apply:-*

- (a) *the officer shall be notified in writing of the grounds upon which it is intended to dismiss him and he shall be given full opportunity of exculpating himself;*
  - (b) *the Head of Department shall forward to the relevant Services Commission a copy of the allegation and the officer's explanation together with the Head of Department's own report on the matter and such other reports as the Head of department considers relevant to the matter;*
  - (c) *where the officer fails to respond or acts in such a manner as to obstruct the matter, the Head of department may advise the Services Commission accordingly in his report;*
  - (d) *upon receipt of the report, the Services Commission may cause further investigation to be made into the matter with the aid of the Head of Department or such other person as the Services Commission may appoint;*
  - (e) *if the Services Commission is satisfied that sufficient investigation has already taken place, it may institute disciplinary proceedings;*
  - (f) *the officer may, if he wishes, request that he appears before and be heard by the Services Commission with or without a Union representative, an attorney-at-law or some other person to assist him at the hearing, and such request shall be granted;*
  - (g) *if any witnesses are called to give evidence, the officer, his union representative, attorney-at-law or such other person shall be entitled to be present and to put questions to the witnesses;*
  - (h) *no documentary evidence shall be used against the officer unless he has previously been supplied with a copy thereof or given access thereto.*
- (2) *If, on the conclusion of the disciplinary proceedings, the Services Commission is of the opinion that:-*
- (a) *the officer should be exonerated, it shall exonerate the officer and dismiss the case;*
  - (b) *the officer should be dismissed or retired, it shall dismiss or retire the officer; or*
  - (c) *some lesser penalty other than the penalties referred to in paragraph (b) should be imposed on the officer, the Services Commission may impose such lesser penalty, such a caution, reprimand, fine or demotion."*

44. This Regulation is clearly grounded on strong principles of natural justice and procedural fairness and is constrained only by the proviso in Regulation 22(2) or section 25(2) of The Act where it is applicable. That proviso excludes the Commission's need to disclose details of the discharge/dismissal (respectively) if it is advised by The BDB (The Act) or the relevant ministry or department (The Regulations) that it would not be in the public interest so to do.
45. Natural justice is only excluded through the operation of a statutory power. Therefore, in the absence of expressed words or the unambiguous intendment of parliament, natural justice requirements must apply. Having considered The Act as it pertains to discharge on security grounds I can find nothing which plainly exempts natural justice; except the need to disclose the details of the discharge. According to the Oxford dictionary to give details is to describe something fully. A gist is clearly not precluded. The subsection simply allows for the details to be kept secret if it is in the public interest so to do. The legislation has exempted this particular class of decision after consultation. The proviso does envisage circumstances where natural justice protections may be impinged upon. However, it does not give a clear legislative intent to exclude natural justice in its entirety. It ought to be construed no wider than is necessary to achieve its purpose and its effect on the person concerned ought not to be disproportionate – ***R v Oakes [1986] 1 SCR 103***.
46. The Claimants here are not only complaining about being denied full reasons or details of the discharge which I hold to be one and the same. They also complain that they were denied due process. I find the Claimants

were entitled to the observation of the procedural rules. The content of that obligation being that the Claimants ought to have been given a generalized written statement or a gist of the circumstances which formed the basis of the dismissal proceeding. The specifications being restricted on the grounds of national security; if same is deemed necessary by The SSC, on the advice of The BDB. Such restriction should have likewise been communication to the Claimants. They were also owed an opportunity to be heard and to make representations. Furthermore, those representations should have been taken into consideration by The SSC before a final decision was made. Once that decision was made the Claimants should have been notified of the type of discharge, the particular section of The Act under which it was effected, their right of appeal to the Belize Advisory Council and any time limit placed thereon.

47. It is accepted that without being informed of the full grounds for discharge proceedings one may not be able to make a full response. But by giving a gist the Claimants would have at least been allowed the opportunity to comment - make observations or submissions on the matters. In *Ex parte Doody [1994] 1 AC 531*, **Lord Mustill at p560** explains that in most cases the gist of the allegations against the person concerned should be made known to him. He continues:

*“It has frequently been stated that the right to make representations is of little value unless the maker has knowledge in advance of the considerations which, unless effectively challenged, will or may lead to an adverse decision.”*

48. The opinion of the *Army Council in Kanda v Government of Malaya [1961] AC 322, 327* is often quoted to this effect.
49. This court finds that there were irregularities. The procedure prescribed in The Regulations was not followed. The minimum standards of procedural fairness were not observed. The protection intended to be given thereby has been denied to the Claimants. The defendants say they were denied because of national security. However, as stated by the authors of **Judicial Remedies in Public Law 5<sup>th</sup> Ed** at parag **4-085**.

*"An exercise of power based on consideration of national security has been described as raising "par excellence a non-justiciable issue "**Council of Civil Service Unions v Minister of the Civil Service [1985] A.C. 374** per Lord Diplock at 412. The courts will not review the assessment of the responsible public body as to what action is required to protect national security. The courts will, however require evidence that the particular decision under review was in fact based on national security grounds and will require evidence that a genuine issue of national security is in issue. The evidential threshold is unclear but does not seem a difficult one for the executive to cross. It is important that the courts do not allow initial incantations of the words "national security" to bar judicial review."*

50. Public policy demands that certain information in the possession of the State shall not be disclose as it is in the interest of national security. To my mind natural justice is not exempted simply because national security issues are raised. I agree with the Claimants' submission that the mere raising of the flag does not conclude the matter. They quote from *Administrative Law, Wade & Forsyth, 8<sup>th</sup> Ed.* pg 545 as follows:

*"The Crown must, however, satisfy the court that national security is at risk. Despite the constantly repeated dictum that "those who are responsible for the national security must be the sole judges of what the national security requires", the court will insist upon evidence that an issue of national security arises, and only then will it accept the opinion of the Crown that it should prevail over some legal right."*

51. Limitation on rights need to be justified and the rights of individuals can be limited without being undermined. This remains true even where there is a risk to national security. I have strong reservations that national security considerations were proven to have existed here. The defence provided no proper evidence that The BDB had informed The SSC in accordance with section 25(2) of The Act. The board was not represented by a witness, not even a document was exhibited from them. The only witness for the defence, Mr. Justin Palacio, Secretary to The SSC, admitted to only repeating what he had been told. He seemed to know very little about the matter before the court and in particular whether security issues really did exist. He provided no evidence that the retention of Mr. Awardo and Mr. Amaya would prove to be prejudicial to the interest of national security, hence the need for their discharge. What he did provide is that there existed a serious national security issue in that forty-two guns had gone missing and the potential also existed for mayhem if they ended up in the hands of gang members in Belize. But precisely how this related to the Claimants and their discharge was not demonstrated or even alluded to. That glaring gap means that the rationality or legality of the decision could not be determined. Nor could the court properly determine whether or not a security issue really existed in relation to the Claimants' discharge.
52. Nonetheless why the Claimants were denied is not as important now as what action the Claimants have taken and the effect it may have on this claim. Therefore, without venturing into any further discussion about natural justice being otherwise exempted this court will now consider the claim itself.

### **The Procedure and its effects:**

53. It has always been clear law that judicial review is concerned specifically with the review of the decision making process and not the merits of the decision. It demands the exercise of the court's supervisory jurisdiction over that decision making process. The review is made under three distinct heads illegality (unlawfulness), irrationality (unreasonableness) and procedural impropriety (unfairness).
54. This claim concerns unfairness and an administrative body's failure to comply with The Regulations and principles of national justice. Proof of which could indeed render the decision invalid on the ground of procedural ultra vires.
55. It is now quite settled that the CPR has opened a new avenue to the courts which in effect allows a party to circumvent the requirements of a judicial review application. By doing this Belize has rejected the rule of procedural exclusivity expounded on in *O'Reiley v Mackman [1983] 2 AC 237*- see Court of Appeal decision in *Security Board et al v Glenn Tillett Civil Appeal No. 20 of 2011*.
56. The readiness of courts (for e.g. Australia) to accept the availability of this remedy in a wide range of circumstances makes it almost a certainty that in this jurisdiction greater reliance will be placed on it as time progresses. Perhaps even to the exclusion of more traditional causes of action. Although, there are no stated limitations to the use of the declaratory route in the CPR, litigants must nonetheless be cognizant that certain rules still apply.

57. A declaration is a discretionary remedy and may be refused by a court even in circumstances where a public authority has been proven to have acted unlawfully. Such refusal allows the unlawful act to be treated as if it were lawful. To my mind, all the usual discretionary considerations remain significant. Therefore the policy which informs the time limit for judicial review ought to be a determining factor. Likewise, abuse of process and the requirements of good administration.
58. The Claimants presented the case of *Credit Suisse v Allerdale Borough Council [1997] QB 306 at 3551D* where Lord Justice Hobhouse said and I agree entirely:
- “The discretion of the court in deciding whether to grant any remedy is a wide one. It can take into account many considerations, including the needs of good administration, delay, the effect on third parties, the utility of granting the relevant remedy.”*
59. When this court considers the conduct of the Claimants prior to the filing of this claim alarm bells begin to sound.
60. The very Regulations on which the Claimants ground their claim allows for an appeal to the Belize Advisory Council from the decision of The SSC. The Claimants did not avail themselves of this avenue. In fact, this right of appeal prescribed by the Constitution under Section 111(1)(a). Rather, they contend that they had not been informed of their right to appeal. I state simply that ignorance of the law is never an excuse. I state further that under such an appeal they could have easily and equally raised the very issues of procedural unfairness which they are now raising. The issues may have been addressed a long time ago. A statutory remedy existed which the Claimants failed to use. Instead, the Claimants waited for almost a year

before approaching the court to ask that it exercise its discretion. They ask the court to make a declaratory judgment indicating that the impugned decision was unlawful on account of a breach of The Regulations.

61. There can be no doubt that The SSC, in law, has the power to discharge a member of The Force for security reasons. The nature of the error committed here was procedural. Ordinarily, breaches of procedural rules are dealt with on appeal where such a process is set out in the statute - **R v Secretary of State for the Home Department Ex p Swati [1986] 1 WLR 477.**
62. In principle, if the error arises out of the application of the specialized legislative code that the appellate system is set up to deal with, the matter should normally go on appeal not review. I cannot imagine that any other principle would apply for a declaratory action.
63. Perhaps the Claimants also had available to them an application for Judicial Review of the decision making process but this would have had to have been done within 3 months of the discharge. The Claimants speak about being out of time for Judicial Review but they never discuss why they did not appeal the decision of The SSC. Nor have they discussed why it ought to be acceptable to the court that they could completely ignore that procedure. The Claimants seem to be acting not only contrary to The Regulations but also The Constitution. There would be a certain detriment to good administration if a public officer could by his own determination decide that the procedure properly laid out under the Constitution need not be followed. Then having so decided, approach the court seeking declarations against a

decision which should have been otherwise appealed. I find this to be a distinct abuse of process.

64. Where Parliament has put in place an adequate system for challenging and reviewing decisions it is not appropriate to provide an additional means of challenge by way of judicial review or an administrative application save in exceptional circumstances. As stated by Sir John Donaldson M.R. in ***R v Epping and Harlow General Commissions Ex p Goldstraw [1983] 3 ALL ER 257:***

*“.... Save in the most exceptional circumstances that [judicial review] jurisdiction will not be exercised where other remedies were available and have not been used.”*

65. The Statutory procedure was set up to specifically deal with the sorts of issues raised by the Claimants and this court has no intention of usurping the functions of that appellate body.
66. There is also a principle of promptness in any application for an administrative order. To my mind the Claimants have waited for almost one full year without showing good reason. They have never explained why, although they both knew that the decision was potentially flawed, they delayed in challenging it in any meaningful way. I agree that letters were written but that was the full extent of their action. They slept on their rights without offering any reason whatsoever. In fact, they have filed their claim with the same limited information which they had at the time they were discharged. There has been no change.
67. Having considered all this, this court declines to exercise its discretion to grant the declaratory reliefs sought. The claim for damages must

consequently fail. This court also finds that an application ought to have been made by the other side to have the claim struck out long before it even got to trial. As a result each party shall bear its own costs.

**SONYA YOUNG  
JUDGE OF THE SUPREME COURT**