

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGUILLA CIRCUIT
(CIVIL)
AD 2020**

CLAIM NO. AXAHCV 2019/0047

BETWEEN:

ALLIN DURAND

Applicant

and

**(1) THE SUPERINTENDENT OF PRISONS
(2) THE ATTORNEY GENERAL OF ANGUILLA**

Respondents

Appearances:

Ms. Merlanih Lim appearing amicus

Mr. Dwight Horsford, Honourable Attorney General, with him Mrs. Nakishma Rogers-Hull for the Respondents

2020: February 5;
May 8.

Application for leave to apply for judicial review – CPR 56. Section 41 (2) (a) (i) and (g) Prison Regulations – Sections 5 (1), 7 (2), 14 (1) Prison Rules – Prison Officer – Laying of charges against prison officer pursuant to Prison Regulations – Decision by Acting Superintendent of Prisons to suspend prison officer – Referral of Charges by Acting Superintendent of Prisons to Governor – Whether referral of charges by Superintendent of Prisons to the Governor purportedly pursuant to section 7 (2) of the Code of Discipline for Prison Officers unlawful – Whether necessity for a hearing before the Superintendent of Prisons in accordance with section 5 (1) of the Code of Discipline for Prison Officers mandatory prior to referral to Governor – Whether decision to suspend Prison Officer pursuant to section 14 (1) of the Code of Discipline for Prisoners can only be effected after a hearing pursuant to section 5 (1) and referral of the charges to the Governor – Whether decision to suspend Prison Officer unlawful – Whether referral of charges to the Governor premature – Whether referral of charges to the Governor in the absence of a hearing pursuant to section 5 (1) of the Code of Discipline for Prisoners amounts to an infringement of the applicant's to procedural fairness and natural justice – Whether Governor's decision to convene a hearing of the charges wrong in law – Whether good arguable case with a reasonable prospect of success

JUDGMENT

- [1] **INNOCENT, J.:** Mr. Allin Durand ('Mr. Durand'), the Applicant, is a Prison Officer employed with Her Majesty's Prison ('HMP') in Anguilla. The Superintendent of Prisons (the 'Superintendent') is appointed by the Governor pursuant to section 6(1) of the Prison Act and is responsible for superintending and managing HMP, including administering and adjudicating upon charges against prison discipline brought against prison officers under the Code of Discipline for Prison Officers (the 'Disciplinary Code') made pursuant to section 41 of the Prison Regulations.
- [2] Disciplinary charges were brought against Mr. Durand on 15th March 2019 in relation to certain breaches of the provisions of Regulation 2(a) (i) and (g) of the Disciplinary Code, being discreditable conduct and breach of confidence respectively.
- [3] By memorandum dated 8th April 2019, Mr. Durand was informed of his immediate suspension from duty as a prison officer in light of disciplinary charges laid against him that had been referred to the Governor. The decision to suspend Mr. Durand was purported to be effected pursuant to the Superintendent's powers under sections 14(1) and 14(2) of the Prison Regulations and was with immediate effect.
- [4] The Governor wrote to Mr. Durand by letter dated 30th July 2019 informing him that the Acting Superintendent was on leave and that the matter of the disciplinary charges against him had been referred to the Governor. This letter also informed that the Governor had as of 28th July 2019 considered the papers related to the two charges of discreditable conduct and breach of conduct. Mr. Durand was also advised of his right under section 41(4) of the Disciplinary Code.
- [5] By the same letter of 30th July 2019, Mr. Durand was also informed to either attend at the Governor's Office to indicate whether he admitted or denied the charges, or, to reply to the charges and to provide the names of any witnesses whom he

intended to call at the hearing. Mr. Durand was also directed to respond to the letter by no later than 16th August 2019.

[6] Mr. Durand replied by letter dated 15th August 2019 to the Governor's letter of 30th July 2019.

[7] By a further letter dated 19th August 2019 Mr. Durand wrote to the Governor in the following terms:

"Section 14(1) of the Code does not enable the Superintendent of Prisons to suspend an officer and section 14(2) speaks to what is to happen to the pay and allowances of the suspended officer...

However, section 14 must be read together with the preceding section 7 of the Code which is consonant with the entire procedural provisions under Part 3 of the Code, provides that any charge that is preferred against an officer requires that there must first be a hearing on the evidence related to such charge. The requirement to have a hearing is central to the entire procedure following the laying of a charge against an officer and is mandatory."

[8] Mr. Durand also stated in his letter of 19th August 2019 that:

"Any procedure in this matter being before the Governor will necessarily imply that the matter has been fully determined below. Usually such matters are before the Governor for the purpose of an appeal ... and it appears to my mind (that) there is no role for the Governor in the hearing of a charge. That function rest with the Superintendent."

[9] In various subsequent written exchanges between Mr. Durand and the Governor's Office, Mr. Durand continued to maintain his position that his suspension and the referral upwards to the Governor of the charges against him by the Acting Superintendent were both unlawful.

[10] On 28th October 2019, Mr. Durand filed a notice of application for leave to apply for judicial review. The notice of application sought to obtain leave without notice. The court, in the exercise of its powers pursuant to CPR 56.4 (3), ordered that the matter be heard in open court and that the other parties to the proceedings be served. The proceedings then proceeded inter partes.

- [11] Mr. Durand, was initially unrepresented by counsel at the commencement of these proceedings; however, during the hearing of the leave application, the court was ably assisted by Ms. Merlanih Lim who appeared *amicus curiae*.
- [12] By virtue of the leave application Mr. Durand seeks the following relief:
- (a) A Declaration that the decision of the Acting Superintendent of Prisons contained in a paper writing dated 8th April 2019 to suspend him from his duties as a prison officer at HMP is unlawful and invalid.
 - (b) An order that the decision of the Acting Superintendent of Prisons to suspend him from duty be quashed, and that he is entitled to the full remuneration emoluments of his office.
 - (c) A Declaration that the decision of the Governor to convene and conduct a hearing on 28th October 2019 to hear the disciplinary charges laid against him under the Prisons Regulations is *ultra vires* and unlawful and otherwise contrary to law.
 - (d) An order of certiorari to remove into the High Court to be quashed, the decision of the Acting Superintendent of Prisons dated 8th April 2019 suspending him from his duties in the prison service of Anguilla; and that he be reinstated to his normal duties as a prison officer at HMP.
- [13] Mr. Durand proffered the following grounds in support of his application for leave. In summary, Mr. Durand contended firstly, that whereas section 5(1) of Part 3 of the Disciplinary Code sets out the applicable procedure following the laying of charges against a prison officer and mandates that the Superintendent of Prisons “shall, as soon as possible, hear the case and shall take or cause to be taken a full record of the proceedings, and the witnesses and shall sign such parts of the record as comprise evidence given by them, and the accused Officer shall be shown the full record and sign it”, and whereas section 7(2) of the Disciplinary Code sets out the circumstances in which the Superintendent of Prisons may refer

any charge to the Governor, such referral to the Governor shall only occur after the Superintendent of Prisons has heard the evidence.

- [14] According to Mr. Durand, since there was no hearing of the charges before the Acting Superintendent of Prisons there was no lawful basis upon which the Acting Superintendent of Prisons could have referred the charges to the Governor in accordance with section 7(2) of the Disciplinary Code.
- [15] In the circumstances, Mr. Durand says that the referral of the charges to the Governor by the Acting Superintendent of Prisons was wrong in law and premature, there having been no hearing of the charges before the Acting Superintendent of Prisons.
- [16] Secondly, Mr. Durand contended that there having been no hearing of the charges before the Acting Superintendent of Prisons and the matter wrongfully and/or unlawfully referred to the Governor, the decision of the Superintendent of Prisons to suspend him was unlawful to the extent that it infringed the provisions of section 14(1) of the Disciplinary Code insofar as section 14(1) provides that "Where under section 7 the Superintendent refers a case to the Governor, he may suspend from duty the accused officer, if in his opinion, the offence charged is so grave that the officer should not continue on duty".
- [17] Therefore, Mr. Durand says that an officer's suspension can only be lawful after the referral of a charge to the Governor; and that such referral may only be effected if it follows a hearing before the Superintendent of Prisons in accordance with section 5(1) of the Disciplinary Code. On this basis, Mr. Durand contends that the referral of the charges to the Governor, being unlawful, meant that his suspension was pro tanto unlawful.
- [18] Thirdly, Mr. Durand contended that since there was no hearing before the Acting Superintendent of Prisons prior to the referral to the Governor, the charges are not

properly laid before the Governor and accordingly, the Governor has no jurisdiction to hear the charges.

- [19] The court also understands Mr. Durand's argument to be that the premature laying of the charges before the Governor and the failure of the Superintendent of Prisons to conduct a hearing, coupled with the decision to suspend him, resulted in procedural unfairness to him and a breach of his right to natural justice.
- [20] The respondents oppose Mr. Durand's application for leave on the following grounds. Firstly, the respondents argue that Mr. Durand's complaint centers around the interpretation of the provisions of section 7(2) of the Disciplinary Code and that such complaint is unmeritorious because, the correct and proper interpretation to be ascribed to section 7(2) has already been settled by the Privy Council's decision in **Superintendent of Prisons and another v Hamilton**¹ and runs contrary to Mr. Durand's argument.
- [21] According to the respondents, Mr. Durand's interpretation is erroneous to the extent that he interprets the words "after hearing the evidence" contained in section 7(2) of the Disciplinary Code to mean that the Superintendent of Prisons must in all cases hold a hearing as a precondition to the exercise of the discretion which the Superintendent of Prisons possesses to refer upwards any disciplinary charge to the Governor. The respondent contended that the words "after hearing the evidence" are not confined to an adjudication on the merits or a hearing on the merits, and therefore should be interpreted to mean the consideration of evidentiary material upon which the decision to refer to the Governor is made.
- [22] Therefore, the respondents argued that the construction which Mr. Durand places on section 7(2) of the Disciplinary Code does not meet the required threshold for the grant of leave since the decision of the Acting Superintendent of Prisons to refer the disciplinary charges against Mr. Durand is not trumped by the unlawful

¹ [2016] UKPC 23

exercise of the Superintendent's discretionary power to refer the disciplinary charges to the Governor.

[23] In the circumstances, the respondent argued that Mr. Durand's application for leave to bring a claim for judicial review ought to be dismissed as it raises no arguable case with a reasonable prospect of success.

[24] In the court's view, the three distinct, yet related issues, which arise for the court's consideration and determination are as follows:

(1) Whether the provisions of section 7(2) of the Disciplinary Code requires that the Superintendent of Prisons conduct a "hearing", in the strictest sense of the word, of a disciplinary charge brought against an officer prior to referral of the disciplinary charge to the Governor.

(2) Whether, assuming that the Acting Superintendent of Prisons acted unlawfully and/or ultra vires the provisions of section 7(2), does the Governor have jurisdiction to hear the disciplinary charges brought against Mr. Durand.

(3) Whether the Acting Superintendent of Prisons acted unlawfully and contrary to section 14(1) of the Disciplinary Code, thereby rendering Mr. Durand's suspension from duty unlawful.

Issue (1) – Referral of the Charges to the Governor

[25] For the purpose of exposition the court will deal with the first issue raised by Mr. Durand. This is simply because the first issue has the tendency to inform the court's decision in relation to the other two issues.

[26] Part 3 of the Prison Regulations sets out the procedure to be observed in the case of disciplinary charges brought against a prison officer. Section 1(2) and section 2 of the Disciplinary Code provides for disciplinary offences. Section 1(2) provides:

"A Prison Officer shall be guilty of an offence against discipline if he fails to conform to this Code."

[27] Section 2 of the Disciplinary Code deals with what it describes as “Discreditable Conduct” and sets out a list of offences (‘Listed Offences’). The provisions of section 2 of the Disciplinary Code that are relevant to these proceedings are contained at sections 2(a)(i) and 2(g). Those were the provisions of the Disciplinary Code under which the charges against Mr. Durand were laid. Section 2 (a) (i) reads:

“A Prison Officer to whom this Code applies commits an offence against discipline if guilty of—

(a) **Discreditable conduct**, that is to say, if a Prison Officer—

(i) while on or off duty acts in a disorderly manner or any manner prejudicial to discipline or likely to bring discredit on the Prison Service”

Section 2(g) reads:

“(g) **Breach of confidence**, that is to say, if a Prison Officer without proper authority—

(i) divulges any matter which it is his duty to keep secret,

(ii) communicates directly or indirectly to the press or to any unauthorised person any matter which may have become known to him in the course of his public duties, or

(iii) publishes any matter or makes any public pronouncement relating to the administration of the prison”

[28] Sections 3 to 5 of the Disciplinary Code set out the procedure to be followed when a complaint is made against a prison officer for an offence under the Disciplinary Code. Section 3(1) provides:

“A charge against an Officer for an offence against discipline as defined in sections 1(2) or 2 of this Code shall be entered on a charge sheet as soon as possible after consideration of the evidence on which the charge is based.”

Section 5(1) reads:

“The Superintendent shall, as soon as possible, hear the case and shall take or cause to be taken a full record of the proceedings, and the witnesses and shall sign such parts of the record as comprise evidence given by them, and the accused Officer shall be shown the full record and sign it.”

[29] Section 6 of the Disciplinary Code² sets out the procedure to be followed on the hearing of the case against the prison officer before the Superintendent of Prisons.

[30] The provisions of the Disciplinary Code that are particularly relevant to resolving the current issue are sections 5 (1), section 7, section 10 and section 11. Section 7 sets out the powers that can be exercised by the Superintendent of Prisons once disciplinary charges have been laid and have been heard by the Superintendent of Prisons. It will be necessary for the present purposes to set out the full text of the section. Section 7 reads:

“7. (1) The Superintendent may dismiss any charge after hearing the evidence.

(2) The Superintendent may, after hearing the evidence, refer any charge to the Governor and, unless he dismisses it, shall so refer a charge under section 1(2) or any provision of section 2 of this Code, other than the following sections—

2(a)(i), (iii), (b), (c), (d), (h)(ii), (l)(i), (m) or (n).

(3) Where the Superintendent refers a charge to the Governor, he shall inform the accused Officer.

(4) Where the Superintendent does not refer a charge to the Governor, he shall, unless he dismisses it, either—

(a) caution the accused Officer;

(b) make one of the following disciplinary awards—

(i) admonition,

(ii) reprimand, or

(iii) severe reprimand.

[31] Mr. Durand's complaint does not appear to be with the Superintendent's discretionary right to refer the charges up to the Governor per se. Mr. Durand relies on the aforementioned provisions of the Disciplinary Code in support of the following arguments.

² 6. (1) The accused Officer shall be entitled at the hearing to hear the case against him and to have an opportunity of cross-examining the witnesses called in support of the case against him and of giving evidence, calling witnesses and making representation in his defence.

(2) If the accused Officer so desires, he shall be allowed, in proceedings before the Superintendent, to have as a friend to assist him in the presentation of his case, a Prison Officer, selected by himself, who shall be a member of the staff at the prison at which the accused Officer is serving.

(3) The friend of the accused Officer may advise him on all points and suggest questions to be put to the witnesses and may, if desired by the accused Officer, examine or cross-examine the witnesses and address the Superintendent on behalf of the accused Officer.

- [32] Relying on the provisions of section 5(1) of the Disciplinary Code, Mr. Durand argued that the clear wording of the section expressly mandates, by virtue of the word “shall” appearing therein, that the Superintendent must “hear the charges”. Mr. Durand took objection with the fact, as it appeared to him, that the reason proffered for the charges being referred up to the Governor by the Acting Superintendent, purportedly due to the absence of the Superintendent, did not prevent the Superintendent from hearing the matter upon her return to office. Mr. Durand contended that the failure of the Superintendent to conduct a hearing, which he argued ought to have been in conformity with the provisions of section 5(1), was procedurally improper, unlawful and ultra vires the provisions of section 5(1) itself.
- [33] Mr. Durand further argued that, by extension, the procedural requirements for a hearing by the Superintendent under section 5(1) must first be complied with before there can be any referral of the charges to the Governor pursuant to section 7(2).
- [34] According to Mr. Durand, the legislation specifically requires that a hearing be conducted by the Superintendent before any referral upwards to the Governor is made in the exercise of the Superintendent’s discretion pursuant to section 7(2). In the circumstances, Mr. Durand contended that the referral upwards by the Acting Superintendent and the Governor’s decision to exercise the powers conferred on him by virtue of section 9 of the Disciplinary Code³ are both unlawful.

³ 9. (1) An Officer may within 14 days from the determination of a case by the Superintendent appeal in writing to the Governor, and shall hand his appeal to the Superintendent to be forwarded.

(2) The Superintendent shall forward to the Governor with the appeal the record of the proceedings taken under section 5(1) of this Code together with all statements taken into consideration during the proceedings, and his own observations on the case. The Superintendent’s observations and other documents to be forwarded under this section shall be shown to and initialled by the Officer and he shall be provided with copies if he so requests.

(3) The Governor may allow the appeal and dismiss the charge, or he may confirm the award or substitute a caution or any disciplinary award within the powers of the Superintendent.

(4) The Governor may in connection with any appeal appoint a suitable person to hold an inquiry. At any such inquiry, the appellant shall be allowed all the facilities allowed by section 6 of this Code and may have as his friend under section 6(2) any serving Officer in the prison service.

- [35] In support of the aforementioned argument, Mr. Durand further contends that his right to appeal to the Governor has been abrogated by the referral of the charges to the Governor by the Acting Superintendent. The court understands Mr. Durand's argument to be that the procedural requirements of the Disciplinary Code particularly what is contained in sections 9(1), 9(2) and 9(4), which guarantees him a right to appeal to the Governor, has been contravened by the Acting Superintendent's or the Superintendent's failure to convene a hearing in the manner contemplated by section 5(1). According to Mr. Durand, this was a procedural irregularity which operated unfairly in relation to him. Essentially, Mr. Durand argued that he has been deprived of his right to avail himself of the procedure set out in section 9 of the Disciplinary Code.
- [36] In further support of his argument, Mr. Durand contends that he has been deprived of his right to a hearing before the Superintendent in conformity with section 6(1) of the Disciplinary Code. Mr. Durand contended that he is entitled to the full gamut of rights guaranteed to him by section 6(1). As a result, Mr. Durand argued that the referral up to the Governor without there being a "hearing" before the Superintendent is in contravention of the law as the Disciplinary Code contemplates that the appellate process is triggered after a "hearing" held in accordance with sections 5(1) and section 6.
- [37] In the alternative, Mr. Durand contends that the Governor could only exercise his powers under section 11(3) of the Disciplinary Code⁴ after the charges were first heard by the Superintendent. In addition, Mr. Durand attempted to buttress his argument that the purported exercise of the Governor's powers under section 11 of the Disciplinary Code were either premature or unlawfully exercised. He contended that since no hearing was conducted by the Superintendent there cannot be compliance with the provisions of sections 10(1) of the Disciplinary

⁴ 11. (3) Where a charge is referred to the Governor, he may, in any case, and shall, if the accused Officer denies the charge, direct an inquiry to be held.

Code, which stipulates that where a charge is referred to the Governor under section 7(2) the Superintendent shall forward an explanatory statement and also the record of the proceedings taken under section 5(1) together with all statements taken into consideration during the proceedings at the hearing by the Superintendent. This requirement, Mr. Durand says, is mandatory as implied by the use of the word “shall” in the provision.

[38] In addition, Mr. Durand contended that the charges against him ought to be dismissed in light of what he has highlighted as a material irregularity in the procedure adopted in the referral up to the Governor. In fact, Mr. Durand went on further to argue that notwithstanding the Governor’s right under section 11(2) to remit the matter to the Superintendent of Prisons to be dealt with by her, this would be undesirable because such remittal would operate prejudicially and unfairly against him.

[39] The arguments advanced by Mr. Durand under this ground raises several issues. Firstly, whether the Acting Superintendent of Prisons had a discretion to either hear the charges herself or refer them up to the Governor. Secondly, whether the conduct of a hearing in the strictest sense of the word is a precondition to referral up of the charges to the Governor. Thirdly, whether Mr. Durand would be prejudiced or suffer from procedural unfairness if the charges are remitted to the Superintendent of Prisons and he subsequently appeals to the Governor pursuant to section 9(1) of the Disciplinary Code.

[40] The respondents have relied on the decision in **Superintendent of Prisons v Hamilton** to support their contention that ultimately there is no requirement for “hearing” in the formal sense which requires all of the formalities contemplated by section 5(1). According to the respondents, all that is required is that the Superintendent considers the material before her prior to arriving at a decision whether to refer up to the Governor or not. It appears that the respondents’ submission is that ultimately the Superintendent has a discretion whether to

conduct a formal hearing herself or whether, for whatever reason, if she is unable to do so, to refer the charges up to the Governor; in other words, that there is no mandatory requirement to conduct a formal hearing prior to referral up to the Governor. The court also gleaned from the respondents' argument on this point that the provisions of section 5(1) would only be applicable if indeed the Superintendent heard the disciplinary charges herself, and then decided to refer the charges up to the Governor.

[41] On the other hand, Mr. Durand contends in relation to the respondents' arguments on this point that whereas the case of **Superintendent of Prisons v Hamilton** has settled the law in relation to the exercise of the Superintendent's discretion under section 7(2) to refer charges upwards to the Governor, the case does not focus on the central issue raised in the present proceedings which is, whether a "hearing" must first be conducted by the Superintendent prior to any referral up of the charges to the Governor. Mr. Durand submitted that the case of **Hamilton** is distinguishable from the present case on its facts.

[42] According to Mr. Durand, in the case of **Hamilton**, the charges laid against the officer were in fact heard by the Superintendent before the referral had been made. Therefore, says Mr. Durand, this distinction is crucial in the court's consideration of the extent to which the **Hamilton's** case is relevant in determining the present issues arising on this application. Mr. Durand also sought to distinguish the case of **Carl Palmer v Superintendent of Prisons and another**,⁵ relied on by the respondents in the same manner.

[43] In **Hamilton's** case, the respondent was a serving prison officer with the rank of Deputy Superintendent. He faced a total of nine disciplinary charges laid under the Code. All but one were laid under section 2(d) (i): neglect, without good and sufficient cause, promptly and diligently to perform his duty. The exception was laid under section 2(c): disobedience to orders. The Superintendent dismissed one

⁵ [2018] ECSCJ No. 213

charge (No 8). He referred up to the Governor six of the others (Nos 1, 2, 5, 6, 7 & 9 - all laid under section 2(d)(i)), where one or more hearings ensued before a person nominated by the Governor for the purpose. The outcome of those hearings was that the Governor dismissed him, Mr. Hamilton brought proceedings to challenge the power of the Superintendent to refer these charges up. It was and remains his contention that section 7 gave the Superintendent no power to refer up charges laid under the subsections or those sub-subsections of the Disciplinary Code which are listed in section 7(2). Everything which happened after the referral up was accordingly, in his submission, ultra vires and of no effect.

- [44] The construction given to section 7(2) of the Disciplinary Code in **Hamilton** is not in dispute in the present proceedings. The court agrees with Mr. Durand's argument that the case of **Hamilton** is indeed distinguishable from the present application. However, what is also not in dispute is the fact that the disciplinary charges in this case were listed charges. The principle to be distilled from the case of **Hamilton** is well set out in the judgment where at paragraph 22 of the judgment their Lordships said:

"There being no persuasive argument to the contrary, it is appropriate to return to the words used by the drafter of section 7(2). In the end, if there is ever a statutory word which normally constitutes a reliable indication of the creation of a discretion it is the word "may". Where "may" is contrasted in the same subsection with "shall", its meaning is, if anything, even clearer. The alternative construction put upon the section by Mr. Hamilton involves reading "may ... refer any charge" in the first part, as "may not refer" the listed charges. That is simply an impossible construction. The sense of section 7(2) is not only apparent from its wording; it also achieves a perfectly rational common sense result. The potentially more serious (non-listed) charges have to be referred to the Governor unless the Superintendent dismisses them on his consideration of the evidence. The potentially less serious (listed) charges can be dealt with by the Superintendent without referral, but if he thinks that there is a good reason for referral up, he is entitled to take that course. Circumstances justifying referral up would include such gravity of alleged offence(s) that his powers of punishment were likely to be inadequate, but are not confined to such a consideration."

[45] The court has formed the view that the answer to the issues raised by Mr. Durand on the present application are implicit in the general construction of the Disciplinary Code itself and as such much can be gleaned from the case of **Hamilton**.

[46] The respondent's contentions in **Hamilton** were that the Superintendent must refer up charges, but he may not refer up the listed charges. Conversely, the appellants argued that the Superintendent may refer up any charges, but he must refer up non-listed charges. In dismissing the appeal, their Lordships held:

"Questions of construction begin with the ordinary and grammatical meaning of the words used. As everyone agrees, section 7(2) has two operative parts, providing for different rules for two classes of charge. Essentially the question is whether the closing words of section 7(2) - "other than the following sections [and the numbered list]" govern the whole of section 7(2) or the second part dealing with mandatory referral up. The Board entertains not the slightest doubt that on its face section 7(2) has the meaning for which the Superintendent contends (see para 9 above). The contrary contention, of Mr. Hamilton, requires a quite unnatural reading of the words. It requires the section to be read, so far as concerns the listed offences, as if it said:

"The Superintendent may, after hearing the evidence, refer any charge to the Governor ... other than the following sections [and then the numbered list]."

This is, however, simply ungrammatical. "Any charge ... other than the following sections" is contrasting "charge" with "section". If section 7(2) were to mean what Mr. Hamilton contends for, it would have contained at least the word "under", so as to read "any charge ... other than under the following sections ...". Conversely, the syntax is perfectly properly aligned with the Superintendent's proposed construction. The part of the section which catalogues the numbered listed charges relates to the immediately preceding words, which is what one would expect. It thus reads "... and, unless he dismisses it, shall so refer a charge under section 1(2) or any provision of section 2 of this Code, other than the following sections ...".

This is also consistent with other provisions of the Code. Section 11 sets out the powers of the Governor, other than as to sentence, when a charge is referred to him. Section 11(2) provides:

"(2) Where the Superintendent has referred to the Governor a charge that he had power to deal with by himself, the Governor may remit the case to the Superintendent to be dealt with by him."

Thus this subsection contemplates a situation where the Superintendent has referred a charge up, but the Governor disagrees and thinks it could

and should be dealt with by the Superintendent. Because it contemplates a situation in which the Superintendent has referred up a charge which he could have dealt with himself (“that he had power to deal with by himself”), it is simply inconsistent with Mr. Hamilton’s suggested construction of section 7(2). If Mr. Hamilton were right about section 7(2) there could be no charge which the Superintendent could have dealt with by himself but which he had nevertheless chosen to refer up. So far as the Superintendent is concerned, on Mr. Hamilton’s construction, charges are binary. Either they cannot be referred to the Governor or they have to be.”⁶

- [47] In light of the decision in **Hamilton**, the court has taken the following view of Mr. Durand’s argument on this ground in support of his application for leave. Simply put, the Acting Superintendent had the discretion to refer the listed charges up or deal with them herself. Had she decided to deal with them herself, then, there would inevitably have been the necessity to conduct a “hearing” in accordance with the procedure set out in sections 5 and 6 of the Disciplinary Code.
- [48] The court finds nothing contained in the Disciplinary Code that requires the Superintendent to conduct a “hearing” before referral up of the charges to the Governor. It is quite clear that the Superintendent, on consideration of the evidence, may exercise her discretion to either refer the charges up to the Governor or hear them herself. There is no need for the court to expound on this any further.
- [49] The court is also fortified in this view by the decision in **Carl Palmer v Superintendent of Prisons**. In **Palmer**, one of the claimant’s complaints was that the Superintendent of Prisons had failed to exercise his discretion properly and acted unreasonably in laying charges and referring charges to the Governor. However, in the present case, it is noteworthy that Mr. Durand has not mounted any challenge to the reasons why the Superintendent exercised her discretion in the manner in which she did.

⁶ At paras 15-16

[50] In delivering the judgment of the court in **Palmer**, Ramdhani J. (Ag.) painstakingly set out the purport and effect of the legislative framework of the Disciplinary Code in respect of the general procedure to be employed once a disciplinary charge is laid. The court is of the considered view that the passages cited from the judgment of Ramdhani J. (Ag.) below can comfortably put to rest the issues raised by Mr. Durand on this application. In delivering his judgment, Ramdhani J. (Ag.) said:

[26] "Section 3 to 15 of the Code sets out the procedure to be adopted when complaint is made of an offence against a prison officer. It is undisputed that the initial responsibility for hearing any charge is laid upon the Superintendent. By section 5, the Superintendent shall, as soon as possible hear the case, take a full record of the proceedings, sign such parts of the proceedings which comprise evidence and the prison officer shall be shown this and sign it.

[27] There are two categories of offences which are covered by the Code. These are now referred to as 'listed offences' and 'non-listed offences'. It is now well established by the Privy Council that the Superintendent, if he does not dismiss any charge before him, has a discretion under the Code to refer up any charge to the Governor but must refer up 'non-listed charges'; there is no discretion in relation to the latter.

[28] The discretion given to the Superintendent to refer up 'listed charges' is an open discretion and matters which may affect this discretion would include questions as to whether the Superintendent may himself be a witness, actual or perceived conflicts of interests, and where he may consider that his power of punishment may not be adequate. There is nothing preventing the Superintendent, in my view, from dealing with a listed charge against a prison officer in a case where a non-listed charge has been referred up to the Governor. There may equally be cases where he might properly refer up the listed charges together with those that he must refer up. (emphasis added)

[29] When a matter is referred up, the Governor may actually consider that the matter may be better dealt with by the Superintendent and resend it to him. Where the Governor retains the matter and the accused prison officer denies the charge, the Governor shall direct that an inquiry be held by a suitable person. If the person upholds the charges or any of them, the Governor may either caution the prison officer or impose other sanctions which are set out in section 12(1) and which includes dismissal. Where the Governor proposes to impose one of the statutory sanctions, he must in accordance with section 12(3) notify the prison officer concerned of his

intent to impose such a sanction. The notice must advise the prison officer that he shall have a right to a 'personal hearing' before a person suitably qualified (other than the person who held the first inquiry). At this hearing, the prison officer may be accompanied by any serving officer of the prison service. The prison officer has within seven days to request such a hearing.

[30] Where the Governor has sent out a notice of proposed sanctions, the prison officer may also, within 14 days of the notice or such longer period as the Governor may allow, make representations in writing to the Governor, whether in defence or mitigation and whether or not he has any personal hearing.

[31] Section 12(5) provides that the Governor may, as a result of any representation made under this section direct a person nominated by him to hold an 'inquiry, rehearing or further inquiry'. The prison officer is entitled to be represented at this hearing.

[32] The Code does not define what each of these types of hearing entail, but it is clear that it envisages several distinct types of hearings. The words 'inquiry' and 'rehearing' may often be used interchangeably, but it must be accepted that parliament in using three separate words must have intended each of these words to mean a different kind of hearing. A 'rehearing' would have to mean a full blown new inquiry where everything is at large, and that all evidence is to be retaken, and perhaps even new evidence led; a re-investigation see *Yeung v Capstone Care Ltd* UK Employment Appeal Tribunal /0161//13/DA.

[33] An 'inquiry' when placed opposite 'rehearing' and 'further inquiry' would in my view envisage investigation of a narrow issue or matter. In this context, a 'further inquiry' may include those inquiries which involve investigating matters which go beyond the scope of the first hearing.

[34] If after, any of these kinds of hearing is employed, the prison officer is again found to be guilty of the charge or charges, the Governor is then entitled to proceed with the relevant sanction. It is open to the Governor at this stage to impose the sanction of which he had given notice, and in my view, he is only allowed to vary that sanction at this stage where such substituted punishment is lesser or not any more adverse than which had been originally proposed.”⁷

⁷ At paras 26-34

- [51] The court, unavoidably could not resist the urge to cite extensively from the decision in **Palmer** simply because **Palmer's** case, particularly the portions of the judgment highlighted above, answers nearly every complaint made by Mr. Durand on his application for leave.
- [52] The court is of the considered view that none of Mr. Durand's complaints on the leave application have been properly made out. Mr. Durand's complaint that he was denied his right to natural justice, or the observance of procedural fairness in relation to him in the absence of a hearing before the Superintendent prior to the referral up of the charges to the Governor, is clearly devoid of merit. The court makes this finding in reliance upon the decisions in **Palmer** and **Hamilton**.
- [53] As can be gleaned from the judgment in **Palmer**,⁸ the relevant portions of which have been cited above, the legislative scheme of the Disciplinary Code provides sufficient and adequate safeguards to ensure procedural fairness and the observance of the principles of natural justice in relation to Mr. Durand.
- [54] Given the court's findings in relation to issue (1), there appears to be no need for the court to go on to consider any of the other issues raised by Mr. Durand in his application for leave.
- [55] In the circumstances, and for the reasons already set out in this judgment, the court finds that Mr. Durand has not met the threshold test of a good arguable case with a reasonable prospect of success warranting the grant of leave to file a claim for judicial review.

⁸ At paras 37-46

[56] Therefore, Mr. Durand's application for leave to make a claim for judicial review is dismissed. The court makes no order as to costs. The court expresses no views as to the consequences that are likely to emanate from this judgment in relation to the disciplinary charges that presently exist against Mr. Durand.

Shawn Innocent
High Court Judge

By the Court

Registrar