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In the Supreme Court of Judicature of Jamaica

Suit No. M. 52 of 1976

Before : The Full Court

Melville, Willkie, Malcolm, JJ.

Regina vs. Minister of National Security

ex parte Olivia Grange

(Application for Mandamus)

Norman Hill, Q.C., instructed by Mr. Lazarus of Livingston, Alexander and Levy for the applicant.

Lloyd Ellis instructed by Crown Solicitor for the respondent.

November 8, 11, 12, December 3, 1976

Melville, J. :

Jamaica has been under a state of emergency since June 19, 1976. The reasons stated by the Governor-General for declaring the state of emergency were:

> " I am satisfied that action has been taken and is immediately threatened by persons or bodies of persons of such a nature and on so extensive a scale as to be likely to endanger the public safety and to deprive the community, or a substantial portion of the community of supplies or services essential to life; "

See Jamaica Gazette (Supplement) No. 68 of 19th June, 1976. On the same day Regulations under the Emergency Powers Act - Supplement No. 69 - were also published.

Regulation 35 (1) reads:

> " The Minister, if satisfied that any person has been concerned in acts prejudicial to public safety or public order or in the preparation or instigation of such acts and that, by reason thereof, it is necessary to exercise control over that person, may make an order (hereinafter referred to as a detention order) against that person directing that he be detained. "

Under the provisions of Reg. 39 a Tribunal of which the chairman must be an attorney-at-law, has been set up to which persons detained by the Minister's order may make objections against the detention order. Regulation 39 (6) is as follows:

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" Any meeting of the Tribunal held to consider any such objection as aforesaid shall be presided over by the chairman and it shall be the duty of the chairman to inform the objector of the grounds on which the order has been made against him and to furnish him with such particulars as are in the opinion of the chairman, sufficient to enable the objector to present his case. "

Reg. 39 (9) reads:

" The Minister shall as soon as practicable after an order is made under regulation 23, 34, or 35 of these Regulations furnish the person against whom such order was made with the necessary particulars to enable him to present his case to the Tribunal. "

Among the persons against whom detention orders have been made is Ms. Grange. The Minister as required by Reg. 39 (9) supplied her with the following particulars:

" It has been reported that you have been over a considerable period of time and up to the 11th March, 1976, associated with one Peter Whittingham in the illegal issuing of firearms to unauthorised persons. It has also been reported that you have been actively associated with the aforesaid Peter Whittingham in other activities prejudicial to the Public safety. "

Ms. Grange was not happy about the particulars supplied so through her attorneys-at-law she applied to the Minister for particulars. Their letter of 19th August, 1976, reads:

" We represent the abovenamed Olivia Grange, who has been served with a copy of what purports to be Particulars required by Regulation 39 of the Emergency Powers Regulations 1976.

Our client has now made an application to the Emergency Powers Tribunal to have her case reviewed and such Particulars as have been presented to her are not sufficient to enable her to present her case to the Tribunal.

We therefore request that you furnish her at the earliest possible time with such necessary particulars as will enable her to present her case to the Tribunal as is required by Regulation 39 (9) aforementioned and in particular that you provide her with the following particulars:

(a) By whom it has been reported that our client has been associated with one Peter Whittingham in the illegal issuing of firearms to unauthorised persons.

(b) By whom it has been reported that our client has been actively associated with the said Peter Whittingham in activities prejudicial to the public safety.

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" (c) Over what specific period of time our client is alleged to have been associated with the said Peter Whittingham in the acts mentioned in (a) and (b) above.

(d) What evidence is in your possession indicating that the said Peter Whittingham was involved in the illegal issuing of firearms to unauthorised persons and other activities prejudicial to the public safety.

(e) All dates, times and places at which our client was alleged to be associated in the illegal issuing of firearms to unauthorised persons.

(f) What activity or activities our client has been involved in which is prejudicial to the public safety.

(g) What time on the 11th March, 1976, was our client purported to be associated with the said Peter Whittingham in the illegal issuing of firearms to unauthorised persons.

(h) Where our client was purported to be on the 11th March, 1976, at the time that you alleged that she was associated with the said Peter Whittingham in the illegal issuing of firearms.

(i) The name or names of the persons to whom illegal firearms were allegedly issued by our client and the location of these firearms at the present time.

(j) All other information in your possession which will be necessary to enable our client to present her case to the Tribunal.

Your early attention to this matter will be greatly appreciated as our client has been in detention since Monday the 21st June, 1976. "

On 3rd September, 1976, the acting Permanent Secretary to the Minister replied thus:

" I refer to your letter addressed to the Minister, of the 19th August, 1976, requesting further particulars in respect of the detention of your client, Ms. Olivia Grange.

As I told you in my letter of the 1st September, the request was forwarded to the Attorney General for his advice, which has now been received.

The Attorney General has advised that I furnish you with the following answers to the questions raised in your letter under reference -

(a) Members of the Security Forces.

(b) As at (a) above.

(c) Over a considerable period. Substitute 'up to the date of your detention' for 'and up to 11th March 1976' in the particulars.

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"   (d) Confidential information from responsible persons whose duty it is to report to the Minister on such matters.

(e) Various dates, times and places, between April and June 1976 at McNeil Boulevard, Central Village.

(f) Issuing of unlicensed firearms to unauthorised persons.

(g) See amendment of particulars in (c) above.

(h) As in (g) above.

(i) Cannot reveal names of persons at this time. Firearms are with the Security Forces.

(j) No other information regarded as necessary. "

Still unhappy about the particulars, the attorneys on 6th September, 1976, wrote:

"   We have received your letter of the 3rd September, 1976, pertaining to the above.

The particulars which you have provided on the advice of the Attorney General are still not sufficient to enable the detainee to present her case to the Tribunal and in relation to the answers which you have given we must request the following additional information:

(d) Who are the 'responsible persons whose duty it is to report to the Minister.'

(e) What are the specific dates, times and places referred to.

(f) The original question relates to the 'other activities' mentioned in the second sentence of the particulars served on our client on the 7th July 1976.

(g) What specific time on the 11th March 1976 our client was purported to be involved in the illegal issuing of firearms to unauthorised persons.

(h) The answer which you have given appears to be irrelevant to question (h) contained in our letter of the 19th August 1976.

(i) The names of persons to whom illegal firearms were issued are most important in the presentation of our client's case to the Tribunal and we must again require this information from you.

(j) From information received by us, we have reason to believe that there are other allegations against our client which have not been stated in the particulars served upon her, or in the further particulars which you have supplied to us, and we again request <u>all other information</u> in your possession necessary to enable our client to present her case to the Tribunal.

"   Your most urgent reply to our enquiries is requested as the Tribunal is awaiting the fixing of a suitable date for the hearing of our client's application, to say nothing of the fact that our client has been in detention for seventy-four (74) days. "

The Permanent Secretary replied on 15th September, 1976, as follows:

"   I am directed by the Minister to refer to the correspondence ending with your letter of the 6th September, 1976, seeking further particulars in respect of your client, Ms. Olivia Grange.

He has directed that I furnish you with the following information in response to your request -

(d) The responsible persons whose duty it is to report to the Minister are members of the Security Forces.

(e) Between April and June 1976 at McNeil Boulevard, Central Village, St. Catherine. Information cannot be more specific.

(f) Securing young persons to use illegal firearms and teaching them subversion.

(g) This date is no longer applicable. Particulars amended by substitution of the words 'up to the date of your detention.'

(h) No longer applicable (see (g) above).

(i) These persons do not wish to have their names revealed.

(j) No further information seems necessary. "

A deadlock apparently having been reached Ms. Grange has moved this Court for an order of mandamus to compel the Minister to supply her with the name or names of persons to whom she allegedly issued firearms. The Minister has put in an affidavit, the relevant parts of which read:

" 2. I am the Minister of Government charged with the subject of National Security.

3. That in my capacity as the Minister in charge of National Security and the Administration of the Emergency Powers Regulations of 1976 I received Confidential reports and information from responsible persons whose duty it is to investigate the activities of persons whose behaviour gives reasonable grounds for suspecting them to be acting or to have acted in prejudice to the public safety.

4. That I received certain confidential reports that the Applicant Olivia Grange was associated with one Peter Whittingham in issuing firearms to unauthorised persons and that these reports were incorporated in particulars under Regulation 39 (9) of the Emergency Powers Regulations 1976 and served upon the Applicant.

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" 5. That on the 3rd of September 1976 in answer to the Applicant's Attorneys for further particulars the said Attorneys were advised that the names of the unauthorised persons to whom the Applicant issued firearms could not be revealed.

6. That on the 15th of September 1976 in answer to a further request for further particulars the Applicant was advised that the persons to whom the Applicant had issued firearms did not wish to have their names revealed.

7. That I gave no particulars as to the names of the persons who received firearms from the Applicant primarily in the interest of the public safety. Further I was reliably informed and I verily believe that any disclosure of the names of the persons is likely to be injurious to the physical safety of those persons. And that I refused to reveal the names in the exercise of my discretion as to what is good for the public safety. "

As I understand it, the burden of Mr. Hill's contention is that by virtue of our Constitutional provisions, the proceedings before the Tribunal should be equalled to that in proceedings before our ordinary courts. The rules of national justice apply with equal force to these proceedings as they do in the ordinary courts and to deny the applicant the particulars asked for would be denying the applicant the opportunity of presenting her case fully before the Tribunal. Indeed the applicant would be unable to properly present her case before the Tribunal if these particulars are not supplied and she would accordingly be denied the fair hearing to which she is constitutionally entitled. Reg. 39 (9), says Mr. Hill, gives the applicant an absolute and unconditional right that the Minister must provide her with the necessary particulars to enable her to present her case to the Tribunal.

Whilst conceding that the Minister is obliged to supply necessary particulars to the applicant, Mr. Ellis says firstly that these are not necessary particulars and secondly even if they are it is not in the public interest that the names should be disclosed to the applicant.

I do not think it can be seriously questioned that a State of Emergency was declared because among other things, of the serious outbreak of violence that has permeated the society for some time now. It is common knowledge that there has been a spate of burnings and killings, particularly by firearms in the hands of unauthorised persons; so much so that fear still stalks the land. In this state of affairs the Minister has in his affidavit, which has not been controverted, stated that he did not give the names of the persons who received

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firearms from the applicant primarily in the interest of the public safety. There seems, therefore, to be a clash between the public interest that harm should not be done to the nation by the disclosure of this information and the public interest that the administration of justice shall not be frustrated by the withholding of information which might be produced if justice is to be done. Which is to prevail in the circumstances?

In The King v. Secretary of State for Home Affairs ex parte Lees [1941] 1 K.B. 72 the applicant who had been detained under the Defence (General) Regulations 1939, applied to the Court for a writ of habeas corpus on the ground that the Home Secretary had no reasonable cause to detain him. In reply to that allegation the Home Secretary filed an affidavit in much the same form as that of the Minister in the present application. It was held:

> " that it was not the function of the Court to act as a court of appeal from the discretionary decision which had been made by the Home Secretary and to inquire into the grounds upon which he had come to his belief, and that the Court would not compel him to produce the confidential reports upon which he had come to his belief. The habeas corpus was accordingly refused. "

The words to be construed there in Reg. 18B were:

> " If the Secretary of State has reasonable cause to believe .... he may make an order against the person ordering that he be detained. "

Mr. Hill relied on this case more for the kind of particulars that were supplied to the applicant under the detention order than for what it actually decided. Humphreys, J. who delivered the judgment of the Divisional Court had this to say at p. 79:

> " So much was frankly admitted by the Solicitor General who, however, strongly contested the proposition advanced on behalf of the applicant that the Court is bound to have before it all the material upon which the belief of the Home Secretary was based - in order to arrive at a decision whether there was reasonable cause for the belief which the Home Secretary has expressed. The Secretary of State is bound, in such a case, to act, if at all, upon information supplied to him by others. Such information is necessarily confidential. The disclosure to the applicant and to the public of such confidential information, together with the identity of the informants, might well be highly prejudicial to the interests of the State. "

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This regulation was again considered in Liversidge v. Anderson [1941] 3 A.E.R. 388 by the House of Lords. The applicant had claimed a declaration that his detention was unlawful and damages for false imprisonment. The defence was that the applicant was detained under the regulation. Whereupon the applicant applied for certain particulars which the House refused to grant. Lord Atkin on whose speech Mr. Hill relied was the only dissenting voice - albeit a powerful dissenting voice. As I understand that case Lord Atkin's dissent was as to what was the proper construction of the regulation in question. I think it instructive to look at two of the speeches in that case. Lord Atkin is reported as saying at p. 353:

> " In the first place, when the decision is left to the Minister or other executive authority without qualification, the words omit the reference to 'reasonable cause.' 'If it appears to the Secretary of State that a person is concerned' etc .... The wording is sometimes varied with the same result. 'If the Secretary of State is satisfied' (publication in newspaper 2D)................... In all these cases, it is plain that unlimited discretion is given to the Secretary of State, assuming, as everyone does, that he is acting in good faith. "

Lord Atkin was of the view that an 'objective test' was the proper one to be applied in construing Reg. 18B (1) and in the passage quoted above he was contrasting other sections of the regulation in which there was no reference to 'reasonable cause.' Our Emergency Powers Regulations are more or less patterned after the English Defence (General) Regulations 1939 with exceptions, of course. For present purposes I need refer to only two such differences in the Regulations. Under our regulations the duty of supplying particulars to the person detained is on the Minister in the first place whilst that duty is placed on an Advisory Committee under the English regulations. Secondly, the English Regulation 18B (1) is:

> " If the Secretary of State has reasonable cause to believe .... "

Whereas our Regulation 35 (1) is:

> " The Minister, if satisfied .... "

Applying Lord Atkin's words to our Regulation 35, it seems clear that our Minister was intended to have an unlimited discretion in so far as

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detentions under the Emergency Powers Regulations are concerned. No question of the Minister's good faith has been raised in the issue before us.

To continue the quotations from Liversidge's case, at p. 359, Lord Atkin said:

> " It is obvious that no important reasons of state prevented the Home Secretary from disclosing the causes of his belief, but it is said that the sources of his information may be confidential. I think that this in some cases is likely to be so, but I cannot think that this creates any difficulty. The Home Secretary has the right to withhold evidence which he can assure the court is confidential and cannot, in the public interest, be disclosed. He has in this case and in others sworn affidavits to the effect that the information he acted on was the result of reports and information from persons in responsible positions experienced in investigating matters of this kind and that he accepted their information. "

I pause to say that on the facts before us, public interest is claimed not on the ground of confidentiality but rather on the ground of public safety. And again at p.362, Lord Atkin said:

> " The defendant (meaning in the case before us the Minister) has to justify with particulars. If the defendant were able to satisfy the Court that he could not give particulars, in the public interest, the Court either would not order particulars, or, if the objection came after the order, would not enforce it. "

Lord MacMillan, at p. 366, said:

> " Holding, then, as I do, that the opening words of the regulation are open to interpretation, I now propose to seek what aid I can from the permissible sources of guidance. In the first place, it is important to have in mind that the regulation in question is a war measure. This is not to say that the courts ought to adopt in wartime canons of construction different from those which they follow in peace time. The fact that the nation is at war is no justification for any relaxation of the vigilance of the courts in seeing that the law is duly observed, especially in a matter so fundamental as the liberty of the subject. Rather the contrary. However, in a time of emergency, when the life of the whole nation is at stake, it may well be that a regulation for the defence of the realm may quite properly have a meaning, which, because of its drastic invasion of the liberty of the subject, the courts would be slow to attribute to a peacetime measure. The purpose of the regulation is to ensure public safety, and it is right so to interpret emergency legislation as to promote, rather than to defeat, its efficacy for the defence of the realm. That is in accordance with a general rule applicable to the interpretation of all statutes or statutory regulations in peacetime as well as in war time. "

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And again at pp. 367 - 368

"I turn now to the nature of the topics as to which the Secretary of State is, under the regulation, to have reasonable cause of belief. They fall into two categories. The Secretary of State has to decide (i) whether the person proposed to be detained is a person of hostile origin or associations or has been recently concerned in certain activities, but he has also to make up his mind (ii) whether by reason thereof it is necessary to exercise control over that person. The first of these requirements relates to matters of fact, and it may be that a court of law, if it could have before it all the Secretary of State's information - an important 'if' - might be able to say whether such information would to an ordinary reasonable man constitute a reasonable cause of belief. How could a court of law, however, deal with the question whether there was reasonable cause to believe that it was necessary to exercise control over the person proposed to be detained, which is a matter of opinion and policy, and not one of fact? A decision on this question can manifestly be taken only by one who has both knowledge and responsibility which no court can share. As LORD PARKER said in The Zamora (18), at p. 107:

'Those who are responsible for the national security must be the sole judges of what the national security requires. It would obviously be undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.'

I may also quote the words of LORD FINLAY, L.C. in R. v. Halliday, Ex p. Zadig (3), at p. 269:

'It seems obvious that no tribunal for investigating the question whether circumstances of suspicion exist warranting some restraint can be imagined less appropriate than a court of law.'

The question is one of preventive detention justified by reasonable probability, not of criminal conviction, which can only be justified by legal evidence.

As I have indicated, a court of law manifestly could not pronounce upon the reasonableness of the Secretary of State's cause of belief unless it were able to place itself in the position of the Secretary of State and were put in possession of all the knowledge, both of facts and of policy, which he had. However, the public interest must, by the nature of things, frequently preclude the Secretary of State from disclosing to a court or to anyone else the facts and reasons which have actuated him. What is to happen then? The appellant says that the court is entitled, and has a duty, to examine the grounds of the Secretary of State's belief. The Court, however, is also bound to accept a statement by the Secretary of State that he cannot, consistently with the public interest, divulge these grounds. Here is indeed an impasse. The appellant's solution has the merit of courage, not to say audacity. He says that, where the Secretary of State, by declining to disclose his information, has failed, through no fault of his own, to justify the detention, he must be held confessed of having falsely imprisoned the detained person, and must be mulcted in damages. It will naturally be in the most dangerous cases, where detention is most essential to the public safety, that the information before the Secretary of State is most likely to be of a confidential character, precluding its disclosure, yet the court is

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> " to be constrained, where detention is most justifiable, to find the detention unjustified. I decline to accept an interpretation of the regulation which leads to so fantastic a result. "

I make no apologies for having quoted at such length from the speech of Lord MacMillan because, after the necessary substitutions are made - for example for 'war or wartime' is substituted 'state of public emergency;' 'reasonable cause for belief' of the Secretary of State and the matters in Reg. 18B (1) which the Secretary of State had to consider for those which the Minister has to be 'satisfied' about in Regulation 35 - it expresses, in my view, very aptly the law applicable to the particulars applied for here.

Duncan v. Cammell, Laird and Company (1942) A.C. 624 was concerned with a summons for inspection of documents to which objection was taken on the ground that disclosure would be injurious to the public interest. Viscount Simon L.C. with whom the other six Law Lords expressed their concurrence had this to say at pp. 641 - 643:

> " Priviledge, in relation to discovery, is for the protection of the litigant and could be waived by him, but the rule that the interest of the state must not be put in jeopardy by producing documents which would injure it is a principle to be observed in administering justice, quite unconnected with the interests or claims of the particular parties in litigation, and, indeed, is a rule on which the judge should, if necessary, insist, even though no objection is taken at all. This has been pointed out in several cases, e.g., in Chatterton v. Secretary of State for India, per A.L. Smith L.J.
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> Although an objection validly taken to production, on the ground that this would be injurious to the public interest, is conclusive, it is important to remember that the decision ruling out such documents is the decision of the judge. Thus, in the present case, the objection raised in the respondents' affidavit is properly expressed to be an objection to produce "except under the order of this honourable court.' It is the judge who is in control of the trial, not the executive, but the proper ruling for the judge to give is as above expressed. In this connection, I do not think it is out of place to indicate the sort of grounds which would not afford to the minister adequate justification for objecting to production. It is not a sufficient ground that the documents are "State documents' or 'official' or are marked 'confidential.' It would not be a good ground that, if they were produced, the consequences might involve the department or the government in parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficency in the administration or tend to lay the department open to

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> " claims for compensation. In a word, it is not enough that the minister of the department does not want to have the documents produced. The minister, in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified, for example, where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service. When these conditions are satisfied and the minister feels it is his duty to deny access to material which would otherwise be available, there is no question but that the public interest must be preferred to any private consideration. The present opinion is concerned only with the production of documents, but it seems to me that the same principle must also apply to the exclusion of oral evidence which, if given, would jeopardize the interests of the community. Indeed, Lord Eldon's language, already quoted, implies this. After all, the public interest is also the interest of every subject of the realm, and while, in these exceptional cases, the private citizen may seem to be denied what is to his immediate advantage, he, like the rest of us, would suffer if the needs of protecting the interests of the country as a whole were not ranked as a prior obligation. "

In Conway v. Rimmer (1968) A.C. 910 it was held that certain "class documents" may be produced. Part of the headnote reads:

> " When there is a clash between the public interest (1) that harm should not be done to the nation or the public service by the disclosure of certain documents and (2) that the administration of justice should not be frustrated by the withholding of them, their production will not be ordered if the possible injury to the nation or the public service is so grave that no other interest should be allowed to prevail over it, but, where the possible injury is substantially less, the court must balance against each other the two public interests involved. When the Minister's certificate suggests that the document belongs to a class which ought to be withheld, then, unless his reasons are of a kind that judicial experience is not competent to weigh, the proper test is whether the withholding of a document of that particular class is really necessary for the functioning of the public service. If on balance, considering the likely importance of the document in the case before it, the court considers that it should probably be produced, it should generally examine the document before ordering the production. "

Although Conway v. Rimmer has somewhat opened the field in which documents formerly held not liable to production, as being against the public interest, are now liable to be produced yet it has left untouched, to my mind, the principle that where disclosure would be injurious to

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the national interest or public safety they ought not to be produced.

At p. 950 Lord Reid said:

> " I do not doubt that it is proper to prevent the use of any document, wherever it comes from, if disclosure of its contents would really injure the national interest, and I do not doubt that it is proper to prevent any witness, whoever he may be, from disclosing facts which in the national interest ought not to be disclosed. Moreover, it is the duty of the court to do this without the intervention of any Minister if possible serious injury to the national interest is readily apparent. "

Lord Morris of Borth-Y-Gest said at pp. 955 and 956:

> " Some aspects of the public interest are chiefly within the knowledge of some Minister and can best be assessed by him. I see no reason to fear that the courts would not in regard to them be fully and readily receptive to all representations made in appropriate form and with reasonable sufficiency. If a responsible Minister stated that production of a document would jeopardise public safety it is inconceivable that any court would make an order for its production. The desirability of refusing production would heavily outweight the desirability of requiring it. Other examples will readily come to mind of claims to production from production which would at once be fully conceded. "

I do not think it can be seriously questioned that the state of emergency under which we are existing at the moment is but one step removed from an actual state of war. Nor do I doubt the statement of Scott L.J. when he said in Regina v. Home Secretary ex parte Green (1941) 3 A.E.R. 104, 115:

> " The liberty of the subject is only one degree less important than the safety of the nation. "

It is a well known fact throughout the country that witnesses and potential witnesses to serious crimes have been silenced mainly by the 'bark of the gun.'

Apart from merely saying in her affidavit:

> " I verily believe that the names of the unauthorised persons to whom I have allegedly distributed illegal firearms is a particular which is necessary and vital to enable me to present my case to the Tribunal. "

the applicant has not advanced a scintilla of reasoning why these particulars are necessary and/or vital to her case.

Would the applicant be without a remedy if her prayer was refused? Regulation 39 (6) makes it plain that the chairman of the

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Tribunal is to provide her with particulars also. We were referred to an official press release dated 24th August, 1976, apparently issued by or with the approval of the Tribunal. That release makes it abundantly clear that the particulars supplied by the chairman of the Tribunal will be in addition to those supplied by the Minister under Regulation 39 (9).

In conclusion it seems to me that the applicant is not without remedy elsewhere. It is still open to her to apply to the Tribunal where the proceedings are "in Camera." The Minister has indicated that the particulars ought not to be disclosed as the safety of the public may be endangered. As I earlier indicated, there is no suggestion here that the Minister is not acting in good faith in coming to his decision. To my mind nothing has been put before us outweighing the Minister's views and I would accordingly refuse the order prayed.

/jvb

Willkie, J.

(1) Oliva Grange, the applicant, was on 21st June, 1976 detained by the Security Forces and lodged at a detention camp prescribed for that purpose under the Emergency Powers Act.

(2) On 25th June, 1976 she was served with a Detention Order under the Emergency Powers Regulations 1976.

(3) On 2nd July, 1976 she was served with another Detention Order under the said Regulations.

(4) On 7th July, 1976 she was served with Particulars as required under Regulation 39 (9) of the said Regulation

(5) On 19th August, 1976 the applicant's Attorneys-at-Law filed an application in her behalf for a review of her detention with the Chairman of the Review Tribunal established as required under the Jamaica Constitution to review cases of detention under the state of Public Emergency.

(6) On that date the applicant's Attorneys-at-Law requested of the Minister further particulars which, they submitted, are necessary to enable applicant to present her case to the Tribunal in accordance with the provisions of Regulations 39 (9) of the Emergency Powers Regulations 1976. This request was framed in the form of questions to the Minister, the obvious intendment being that the Minister's replies will form the basis of the further 'necessary particulars'.

(7) By letter dated 3rd September, 1976 the Minister's Permanent Secretary replied and purported to supply these further particulars and inter alia informed the applicant's Attorneys-at-Law that he could not reveal names of the unauthorised persons to whom applicant had allegedly issued illegal firearms. This answer, was apparently found to be unsatisfactory for -

(8) By letter dated 6th September, 1976 applicant's

Attorneys-at-Law again requested further particulars; and in particular, the names of the unauthorised persons to whom the applicant allegedly issued illegal firearms.

(9) By letter dated 15th September, 1976 the Minister's Permanent Secretary replied to the Attorneys-at-Law and informed them, inter alia, that the unauthorised persons to whom applicant had allegedly issued illegal firearms did not wish to have their names revealed.

(10) At that point the matter rested and on 21st September, 1976 the applicant filed in the Supreme Court for leave to issue Order of Mandamus to compel the Minister to produce to the applicant the name or names of the unauthorised persons to whom she allegedly issued illegal firearms.

(11) Leave was granted by Malcolm, J. for issue of the Writ and Monday 1st November, 1976 was fixed as the appointed day for the Court to be so moved.

(12) On 1st November, 1976 the matter, not having been reached, was adjourned to 8th November, 1976 when the matter came before this Court. Arguments were heard on the 8th November, 1976 and further arguments on 11th, 12th November, 1976.

(13) It was during the course of the arguments that it was brought to the attention of the Court that an affidavit had been filed by the Minister.
This affidavit was not included in the Judge's Bundle until later that day.

(14) This affidavit was sworn on 29th October, 1976 and filed in the Supreme Court on 1st November, 1976.

(15) In paragraph 7 of the affidavit the Minister deponed that he gave no particulars as to the names of the persons who allegedly received firearms from the applicant primarily in the interest of public safety; and the Minister further deponed that he is reliably informed

and verily believe that any disclosure of the names of the persons is likely to be injurious to the physical safety of those persons and that he refused to reveal the names in the exercise of his discretion as to what is good for the public safety.

The issues before us, therefore, are:-

(1) Are the names of the persons to whom the applicant allegedly issued illegal firearms 'necessary particulars' within the meaning of Section 39 (9)?

(2) If yes, is the Minister obliged to supply them? i.e. is the section directory or mandatory?

(3) If mandatory, would the Minister be empowered to refuse disclosure of the names in the public interest?

(1) Necessary Particulars

Mr. Hill for applicant submitted that under the State of Emergency the detainee is protected by the provisions of Section 15 of the Constitution in her fundamental rights and freedoms and cited Section 15 and Section 20 of the Constitution and Section 39 (9) of the Regulations in support.

Section 15 (1) Reads:

"No person shall be deprived of his personal liberty save as may in any of the following cases be authorised by Law -."

It then sets out a number of exceptions in sub-paragraphs 2, 3, 4, 5, 6, 7.

Section 15 (5), (6), (7) deals with public emergencies and reads:-

(5) "Nothing contained in or done under the authority of any Law shall be held to be inconsistent with or in contravention of this section to the extent that the Law in question authorises the taking during a period of public emergency of measures that are reasonably justifiable for the purpose of dealing with the situation

that exists during that period of public emergency."

(6) "If any person who is lawfully detained by virtue only if such a law as is referred to in sub-section (5) of this section so requests at any time during the period of that detention not earlier than 6 months after he last made such a request during that period, his case shall be reviewed by an independent and impartial Tribunal established by law and presided over by a person appointed by the Chief Justice of Jamaica from among the persons entitled to practise or to be admitted to practise in Jamaica as Barristers or Solicitors."

(7) "On any review by a Tribunal in pursuance of sub-section (6) of this section of the case of any detained person the Tribunal may make recommendations covering the necessity or expediency of continuing his detention to the authority by whom it is ordered but, unless it is otherwise provided by Law that authority shall not be obliged to act in accordance with any such recommendations."

Section 20 (2) of the Constitution reads:-

"Any Court or other authority prescribed by Law for the determination of the existence or the extent of a person's civil rights or obligations 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."

It will be seen, therefore, that Section 15 (5), (6), (7) and Section 20 sets out the:

(a) parameters of the powers to detain in a public emergency

(b) sets up an independent and impartial Tribunal to which the detainee may have his case reviewed under a legally qualified Chairman.

(c) on review the Tribunal may make recommendations and

(d) that the Tribunal shall give the detainee's case a fair hearing.

The Governor-General in the exercise of his powers declared a state of emergency, and in the exercise of his powers under section 3 of The Emergency Powers Act Regulations were enacted to implement the state of public emergency.

It is in the carrying into effect of the terms of the Emergency Powers and at the same time preserving the safe-guards of a detainee's constitutional rights as defined by section 15 and section 20 of the Constitution, is seen reflected in section 39 of the Emergency Powers Regulations.

Section 39 (1) (a) establishes the Tribunal and provides for the appointment of its members, the regulation of its proceedings; provisions for objections to detention by detainees etc. This conforms with section 15 (6) of the Constitution and it is clear that certain constitutional safeguards are available to a detainee as section 39 of the Regulation particularly dictates this.

The applicant having been detained in the manner described above has requested further particulars under section 39 (9) of the regulations which reads:

> "(9) The Minister shall as soon as practicable after an order is made under regulation 23, 34 or 35 of these regulations forward the person against whom such order was made with the necessary particulars to enable him to present his case to the Tribunal."

What then is 'necessary particulars'? What does it encompass?

Each case has to be examined on its own and must be dependent upon the allegations made i.e. the grounds on which

the detention order was made in order to ascertain what are the 'necessary particulars' relating to that particular case.

'Necessary particulars' must include all information in the possession of the Minister which warranted the Minister in making the Detention Order and which would facilitate the detainee in preparing and formulating the detainee's case as an answer to each and every allegation made against the detainee.

We come now to examine the evidence that has been adduced by the Minister in order to ascertain:

(a) what are the allegations made against the applicant, and

(b) on the basis of which the 'necessary particulars', which the Minister must furnish the detainee may be ascertained.

THE EVIDENCE:

(1) The applicant was detained under the provisions of section 35 of the Emergency Powers Regulations 1976.

(2) On 7th July, 1976, the detainee was served with particulars in conformity with regulation 39 (9). These particulars read:

> "It has been reported that you have been over a considerable period of time and up to the 11th March, 1976, associated with one Peter Whittingham in the illegal issuing of firearms to unauthorised persons. It has also been reported that you have been actively associated with the aforesaid Peter Whittingham in other activities prejudicial to the public safety."

(3) On 19th May, 1976, the detainee's Attorneys-at-Law by letter requested further particulars, exhibit 4, in the form of specific questions.

(4) The Minister replied to those questions, exhibit 5.

(5) A further letter, exhibit 6, from detainee's Attorneys-at-Law requested further particulars in the form of specific questions.

(6) The Minister replied to these questions in exhibit 7.

Shortly put the allegations made against the detainee may be summarised as follows:

(a) That members of the Security Forces have reported that the detainee has been associated with one Peter Whittingham in the illegal issuing of firearms to unauthorised persons and such activities are prejudicial to public safety.

(b) That this was done over a considerable period of time on various dates, times and places between April - June, 1976, at McNeil Boulevard, Central Village, Saint Catherine and that this information cannot be more specific (i.e. as to time, dates and places.)

(c) That the evidence in the possession of the Minister to support these allegations is based on confidential information from responsible persons whose duty it is to report to the Minister on such matters and that these persons are members of the Security Forces.

(d) That the names of the persons to whom the illegal firearms were allegedly issued by detainee:-

(a) cannot be revealed at this time i.e. 3rd September, 1976 and that to date

(b) these persons do not wish to have their names revealed i.e. 15th September, 1976

(e) that the said firearms are now with the Security Forces.

The issue for this Court is whether, in view of the allegations made, the names of the persons to whom firearms were allegedly illegally issued are 'necessary particulars' within the meaning of Section 39 (9) of the regulations:

Would these names facilitate the detainee in the preparation and formulation of her case as an answer to these allegations made?

the names and the onus is on the applicant to show the necessity. That the persons involved did not wish to have their names revealed.

That mandamus is discretionary; and he questions why these names are 'necessary particulars' in these particular circumstances.

Mr. Hill submitted that the reason given by the Minister i.e. that the person does not wish to have their names revealed would and could not be allowed to relieve the Minister from carrying out his duty under Section 39 (9) to give the necessary particulars. That if these were not so the absence of the information would render the constitutional rights of the detainee to a fair review before the Tribunal with a view to obtaining her release nugatory or non existent. He submitted that the duty in Section 39 (9) imposed on the Minister is mandatory and not discretionary as appears from Section 39 (6) in the case of the Chairman of the Tribunal. That for these reasons he invited the Court to accept the jurisprudential basis for ordering the particulars as appear in election cases. That this basis has been accepted as being consonant with the requirements of natural justice in Canada.

(He cited - Canadian abridgment Vol. 17 dealing with elections p. 551 in which particulars of alleged fraud and bribery were ordered given).

He further submitted that the fact that persons do not wish to have their names revealed in neither here nor there i.e. this cannot be a ground to deny the detainee of her constitutional rights.

Clearly the particulars supplied by the Minister in detailing the subversive transactions stipulate as the times that they were committed as follows:-

"Over a considerable period of time on various dates, times and places between April - June 1976 at McNeil Boulevard AND THAT THE INFORMATION CANNOT BE MORE SPECIFIC."

Implicit in this reply is that the Minister has no information

which can particularize the dates and times of days when these transactions are alleged to have been carried out.

What case could the detainee then present to negate these allegations? How could the detainee commence to refute these allegations if she is wholly ignorant of the precise dates and times when she is alleged to have done these acts.

Further particulars in this regard is unavailable to the Minister, he has so stated.

It seem to me that on this information the detainee would be placed in an impossible situation and would be unable to prepare a case for presentation to the Tribunal to refute these allegations. The only other information available which, if revealed, would facilitate the detainee in preparing a case to negative these allegations would be the names of the persons to whom she is alleged to have issued these firearms.

With those names the detainee could:

(a) identify the persons

(b) lead evidence as to her relationship or lack of relationship with them

(c) dates and times and manner of such relationship, if any,

(d) evidence, if any, to discredit those persons.

I can see no other way in which the detainee could hope to prepare and present a case to the Tribunal without this information.

Mr. Ellis suggested that she could just deny the allegations.

I am of the view that such an exercise would be worthless.

It is clear that implicit in the words in Section 39 (9)

> "with the 'necessary particulars' to enable him to present his case to the Tribunal," envisages a situation in which the detainee, who is already detained, bears the onus to present a case to show why she should not have been detained and so seek to persuade the Tribunal to a favourable recommendation in her behalf. A blanket denial by the detainee without some evidence to support her case would, in

my view, not assist her in discharging this onus placed on her.

I, therefore hold, for the reasons I have given above, that the names of the persons to whom it is alleged that the detainee issued illegal firearms are 'Necessary Particulars'- to enable her to present her case to the Tribunal, within the meaning of Section 39 (9).

I am further of the view that on a true construction of Section 39 (9) of the Regulations the Minister has no discretion in the matter and is obliged to give the 'necessary particulars'. The language of Section 39 (9) i.e. "The Minister shall" admits of no discretion and I hold it to be imperative. The Minister, therefore, is obliged to give to the detainee all the information in his possession which would be necessary i.e. which would facilitate the detainee in formulating her case as an answer to each and every allegation made against her. Provided that these particulars do not offend against Public Policy.

(2) We come to deal with Mr. Ellis' second submission that the applicant should go to the Tribunal, and if found necessary may get the further particulars under Section 39 (6).

He submitted that even if the applicant considered the particulars insufficient she would have suffered no injustice or be taken by surprise in going before the Tribunal without the names because Section 39 (6) is in the Regulations to meet such a situation; otherwise Section 39 (6) would be merely surplussage; and this would be a ground for refusing mandamus.

<u>Section 39 (6) reads</u>:

"Any meeting of the Tribunal held to consider any such objections as aforesaid shall be presided over by the Chairman and it shall be the duty of the Chairman to inform the objector of the grounds on which the order has been made against him and to furnish him with such particulars as are in the opinion of the Chairman sufficient to enable the objector to present his case."

It is apparent that what Mr. Ellis is saying is that the applicant should wait until she is before the Tribunal and if it is necessary to have the names as her case develops she can apply to the Chairman for these particulars and the Chairman may supply those particulars as are in his opinion sufficient to enable the detainee to present her case.

Of course mandamus is a discretionary remedy and the Court can refuse mandamus if a person has an alternative remedy.

Mr. Ellis cited Beale vs Smith, L.R.C.P. Vol. 4, p. 145; Judgment of Bovels CJ, to illustrate the point that if a discretion is in a Tribunal then this Court must assume that the discretion will be judicially exercised.

Mr. Hill, in reply, submitted that in order to apply the Beale case, Mr. Ellis has to ask this Court to say as a matter of construction that if one goes to the Tribunal for particulars he has to say it is not competent for the Tribunal to tell the applicant it is not their duty to supply particulars, it is the Minister's. He submitted that no basis exist for saying that the Tribunal must exercise its discretion in favour of the applicant. Tribunal may refuse and if that were so what then would happen to applicant.

He submitted that under Regulation 39 (9) the Minister is obliged to supply all necessary particulars.

It is apparent Mr. Hill is saying: surely the Court cannot ask the applicant to abandon the course of asking the Minister for 'necessary particulars' in circumstances in which he is obliged to give it; and substitute therefor an application to the Chairman of the Tribunal, which is at most discretionary; as the grant of particulars rests on the opinion of the Chairman that the particulars required are sufficient to enable applicant to present her case.

He further submitted that in Reg. v. Lewis Justices ex parte Secretary of State for Home Department 1972 3 WLR p.279 to illustrate that in the United Kingdon the applicant is tried in

a Court of Law and is liable to be convicted or acquitted while in Jamaica you go before a Tribunal; and even with a favourable recommendation by the Tribunal you may not be released. (See Section 15 (7) Constitution).

Consequently, strict adherence to the Regulations are required in this jurisdiction and there can be no construction that can allow for imperfect obligation, that all this Court has to consider and be satisfied about is whether the particulars are necessary for the proceedings and they must be supplied.

I cannot but agree with Mr. Hill's submissions in this regard.

The provisions made in the Constitution with regard to a State of Emergency, see (Section 15 (5), (6), (7). Sec.20) grant specific rights to detainees and the Emergency Powers Regulations seek to implement those rights. It is in keeping with this that Section 39 (9) should be construed.

It places a particular statutory obligation on the Minister in the supplying of 'necessary particulars' to a detainee. It admits of no discretion. It is an inalienable right in a detainee to demand from the Minister all the 'necessary particulars' and he is obliged to furnish same.

To abandon such a right and instead to rely upon the Chairman of the Tribunal who, at most, has only a discretion in the matter under Section 39 (6) cannot be held by this Court to be an alternative legal remedy. The Queen vs Leicester Guardians 1899, 2QBD, p. 632 is instructive.

This was a case in which the Vaccination Officer for the Parish of Leicester resigned, and the office became vacant. The guardians resolved to defer consideration of a new appointment. The Local Government Board wrote asking the guardians whether they had appointed a Vaccination Officer and they replied that they had not. The Board wrote the guardians and pointed out that it was their duty to appoint a Vaccination Officer without delay and calling upon them to do so. The guardians made no appointment. By Section 5 (1) of the Vaccination Act it is rendered

obligatory on the guardians to appoint and pay a Vaccination Officer and this Law also provides that the Board after the expiration of a certain time shall have power to appoint a person to be such officer.

The Board brought mandamus proceedings against the guardians to compel them to make the appointment.

In his judgment Darling J had this to say:- "It must be rendered that this prerogative Writ of Mandamus is in the discretion of the Court." p. 637. He further stated at page 638:

> "Now I take it the kind of remedy spoken of is the kind of remedy referred to by Lord Ellenborough in Regina vs Archbishop of Canterbury where he says, "There have been many dicta of Judges cited from none of which am I prepared to differ, or to deny to any of them their proper weight and authority: the result of them is in effect this, that this Court in the exercise of it authority to grant the Writ of Mandamus, will render it as far as it can the suppletory means of substantive justice in every case where there is no other specific legal remedy for a legal right." What other "specific legal remedy for a legal right" is suggested in this case? I can see none.

The legal wrong is that the guardians will not perform their statutory duty. What legal right or way of compelling the guardians to perform that duty is there except this? There is none. What is suggested is, not that there is another remedy to compel the guardians to do their duty, but that there is another means of getting done that which the guardians have refused to do, or something which will do as well. That is not, however, the same thing as another 'specific legal remedy for a legal right to have the guardians do that which the statute has ordered them to do. It seems to me, therefore, that an appointment by the Local Government Board after the guardians have failed to do their duty is not a remedy in the sense of any of the judgments cited. With regard to this, I should like to

adopt the words of Hill, J. in Re: Barlow, "It is well settled that where there is a remedy equally convenient, beneficial and effectual a mandamus will not be granted. This is not a rule of Law; but a rule regulating the discretion of the Court in granting Writ of Mandamus, and unless the Court can see clearly that there is another remedy equally convenient, beneficial and effectual, the Writ of Mandamus will be granted provided the circumstances are such in other respects as to warrant the granting of the Writ."

I would adopt these words of Darling J.

In applying these principles to the facts of this case it is clear:-

> that a statutory duty is imposed on the Minister under Section 39 (9), to give the 'necessary particulars'.

It is no answer to the Minister's failure to do so by saying, 'go to the Tribunal'. This would not be a 'specific legal remedy for a legal right'. It is not equally convenient, beneficial and effectual.

Implicit in Regulation 39 (9) the detainee has a legal right to have the 'necessary particulars' from the Minister. She has no such right in the Tribunal under Regulation 39 (6).

It also follows that a specific statutory duty is imposed on the Minister to supply the 'necessary particulars' and mandamus will run to ensure that this duty is carried out if the justice of the case warrants it, as there is no other means available of obtaining justice.

I am also of the view that the intendment of Section 39 (9) is to put the detainee in a position to prepare her case so she may be able to present it to the Tribunal.

It is the detainee who has to lead evidence before the Tribunal to show cause why she should not be detained. How is she going to commence, if, as Mr. Ellis suggests, she goes to the Tribunal to get 'necessary particulars'.

Nothing in Section 39 (6) stipulates anything about

'necessary particulars'. This can come only from the Minister under Section 39 (9) who must furnish same. The Chairman of the Tribunal under Section 39 (6) has a discretion as the case proceeds to furnish the detainee 'such particulars' which in his opinion is sufficient to enable her to present her case. This must relate to some element in her case that may arise ex improviso and cannot mean that she should go to the Tribunal to get 'necessary particulars' in order to prepare and present her case. Under the Regulation it is ONLY the Minister who must supply 'necessary particulars'.

Again as Mr. Hill pointed out, what is detainee's position if a request is made of the Tribunal for 'particulars' and it is refused? She would have to return to this Court and hope by Mandamus to secure the information providing that it is available to the Tribunal.

I would, therefore, hold that this Court could not sanction a detainee's constitutional right being subordinated to the hope of a favourable response from some other Tribunal whose Chairman is vested with a discretion.

One other point made by Mr. Ellis warrants comment. In urging this Court to refuse mandamus on the ground that applicant can go to the Tribunal and get the particulars he suggested that consideration should be given to the fact that under Section 15 (7) of the Constitution the Minister is not obliged to accept a favourable recommendation if given by the Tribunal.

I am of the view that this cannot be part of the consideration of this Court and is wholly irrelevant in any decision to grant or refuse mandamus.

The Constitutional provisions establish an independent and impartial Tribunal to review detentions. This Tribunal is entirely divorced from the Executive and is a constitutional safeguard for any detainee. Its function is, in essence, judicial, and not political. If having reviewed a detention the Tribunal made a favourable recommendation, the Minister

must have regard to such a recommendation; and although not obliged to act in accordance with any such recommendation the ultimate sanction, if any, will be political; and Parliament may seek answers from the Minister in this regard.

This, however, cannot be justification for this Court to disregard the plain and imperative safeguard structured into the Emergency Powers for the protection of the citizen. This Court is obliged to give effect to such a safeguard, therefore, I reject Mr. Ellis' submission.

We come now to deal with Mr. Ellis' submissions (3) and (4):-that the Minister in exercise of his discretion refused to give the names on the ground of public interest i.e. in that they are:-

(a) informers and

(b) on the ground of National Security i.e. public safety.

I shall deal firstly with the legal situation in regard to the application of the Principles of Public Policy.

THE LAW - PUBLIC POLICY

The basic principles of the law relating to Crown Privilege are to be found in the opinion delivered by Viscount Simon in 'Duncan v Cammell Laird 1942 A.C. 624.

The law as there stated may be summarized as follows:-

> No matter whether the Crown is or is not a party to the proceedings - documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. This test may be found to be satisfied either -
>
> (a) by having regard to the contents of a particular document
>
> (b) by the fact that the document belongs to a class which, on grounds of public interest, must as a class be withheld from production.

For this purpose the sole arbiter of the public interest was to be a Minister of the Crown. If the objection to the production

of a document were taken by a Minister after personal scrutiny and in the proper manner and form his affidavit or certificate that its production would be contrary to the public interest had to be accepted by the Court as conclusive. A Court was not entitled to inspect the document in order to determine whether there is any reasonable ground for the assertion that its production would be contrary to the public interest or for any other purposes. Examples of situations in which a Minister could reasonably object to disclosure were where disclosure, "would be injurious to",

(a) National Defence

(b) or to good diplomatic relations

(c) or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service.

A particular illustration of this last ground of objection was "that the candour and completeness of communications with or within a public department might be prejudiced if they were ever liable to be disclosed in subsequent ligigation".

See Duncan vs Cammell Laird, 1942 AC 642.

The rule as to conclusiveness of the responsible Minister's objection extended to the disallowance of oral evidence with respect to the contents of documents concerned.

Although it has been accepted that the Duncan's case was properly decided on its particular facts (i.e. the documents which the Admiralty sought to withhold from production included blue-prints of a new type of submarine, and the proceedings had been instituted in war time); the broad proposition enunciated in this case has been criticised i.e. "that a Minister by virtue of his ipse dixit, could made an unreviewable pronouncement excluding relevant evidence merely because, in his opinion, it fell within a class of document which it would be contrary to the public interest to disclose in Court. The Court it was asserted, had fallen over backwards in their desire not to embarrass

the Executive provided that a Minister performed the suitably elaborate ritual beforehand, he would be allowed in substance to do as he thought fit. The interests of the ligigants, and the public interest in securing the due and the manifestly impartial administration of justice had thus been subordinated to executive discretion subject only to extra legal checks and all this in a case where a general abdication by the Courts had been unnecessary for a decision (see Smith's Judicial Review of Administrative Action 2nd Edition p. 601).

The Commonwealth Courts have never suffered this disability.

In the case of Robinson vs South Australia (NO. 2) 1931 AC 704 the Privy Council had held that the Courts DID HAVE a reserve power exercisable in exceptional circumstances, to call for production of documents for which privelege had been claimed and after inspection of the documents, to disallow the claim if it were clearly unreasonable. (This decision was disapproved by the House of Lords in Duncan's case).

The Courts in a number of Commonwealth jurisdictions were persuaded that the rule in Duncan's case imposed an undue restraint on the role of the judiciary. In Scotland, Canada, New Zealand, Australia, Jamaica and other Commonwealth countries the unqualified proposition laid down in Duncan's case was rejected and residual power to over-rule the claim of Crown Privilege was reasserted. (See ibid p. 604. See cases in footnote p. 604).

Of course the judgments of the Privy Council are binding on us although in some cases they were given in cases coming from another jursidiction; as the issues of law and these cases are the same. (See Fatuma Binti Mohamed, Bin Salim Bakhshuwen v Mohamed Bin Salim Bakhshuwen 1952 AC 1).

However, in Allen vs Byfield No. 2 1964 7 WIR 69 at 71 the situation was resolved beyond doubt in this jurisdiction. This was a case in which a claim of privilege was asserted by the Minister of Education in respect of the production of

certain documents set out in a subpoena duces tecum and in a notice to produce was made in two certificates signed by the applicant as Minister of Education. The Court rejected the claim of privilege and ordered that the documents be produced for inspection as prayed.

The matter was appealed and in the course of his Judgment, Duffus P. said:-

"It is thought that little argument could be produced to show that the local Courts are not bound by the decisions of the Privy Council. However we have listened to very interesting arguments on both sides.

We desire to pronounce that this Court is bound by the decisions of the Privy Council and that this Court whilst bound by the decisions of the Privy Council, are only too glad to accept the authority and decisions of the House of Lords. But where there is conflict, regretfully, between those eminent high judicial authorities, this Court however is bound by the decisions of the Privy Council.

Consequently we are bound by the decision in the Robinson case. Clearly in Robinson v the State of South Australia No. 2 (1931) AC. 704, the Privy Council had declared that the Court had always in reserve the power of inspecting documents in order to determine whether the facts discoverable by their production would be prejudicial or detrimental to the public welfare in any contestable case. Equally, clearly in Duncan v Cammell Laird (2) the House of Lords had held that the objection to production supported by such an affidavit in proper form sworn to by the political head of the department concerned was conclusive. The House of Lords had thus clearly rejected the earlier Privy Council proposition of law. Nevertheless we are bound by the decisions of the Privy Council".

So in Jamaica privilege cannot be upheld merely upon the

the Minister's ipse dixit. It is reviewable by the Courts. It is therefore quite unnecessary to review the several English authoritites cited but out of respect for the industry, detailed and interesting submissions made by both Counsels, I believe the Court should refer, briefly, to two of these. However, the English authorities cited in this case are not binding on this Court and are merely of a persuasive nature. The illustrate the development of some flexibility in the approach of both the Executive and Judiciary in the mitigation of conclusiveness by virtue of the Minister's ipse dixit which unquestionably can give rise to injustice; and a final resolution of the situation in harmony with that obtaining in the Commonwealth.

GROSVENOR HOTEL, London No. 2, 1964 3 W.L.R., p. 992. This case concerned an application for a new lease and the objection to production of documents was based on the fact that they related to the formulation of the policy of the Ministry of Transport and ought not to be produced because production of documents of that class would inhibit candour among civil servants. No order was made for production in this case as the Court of Appeal did not consider it necessary in the interest of justice. The members of the Court expressed slightly differing views but the judgment may be summarized thus:-

> That the Court have an over-riding power to over-rule a claim which it does not consider to be made in good faith. The Minister's objections based on the contents of a particular document or its membership of a class of documents concerned with national security or diplomatic relations will be treated as final. Where the objection is based not on contents of a particular document but on the documents membership of a class, disclosure of which may affect adversely the smooth running of the public service, the Court may inspect the document and in a proper case over-rule the Minister's objection provided however that the objection is taken in the proper form.

Then there is the case of Conway v Rimmer 1968 AC 910 in which all the relevant authorities were reviewed in the House of Lords. Viscount Simons dicta in Duncans' case was finally put at rest. It over-ruled the broader proposition laid down in Duncan's case and the law in England is now the same as the Commonwealth countries i.e. the Court has the power to review Crown's Claim to Privilege.

How does the law affect proceedings such as this matter under review? Are these criminal or civil proceedings?

Was Crown privilege ever applicable to criminal proceedings?

The Duncan's case was clearly confined to civil proceedings. Lord Simon saying that: "The practice as applied in criminal trials where an individual's life or liberty may be at stake is not necessarily the same."

In the Conway vs Rimmer case, Lord Reid in his judgment at page 1006 made reference to the statement by the Lord Chancellor outlining areas in which Crown Privilege would not be claimed. The Lord Chancellor stated: "We propose that if medical documents or indeed other documents are relevant to the defence in criminal proceedings, Crown privilege should not be claimed." Continuing Lord Reid said, "The only exception specifically mentioned is statements by informers".

The Courts, however have applied the doctrine of public policy in relation to disclosure of informants or information.

In Marks vs Beyfus 1890, 25 L.R. QBD p. 494 it was held that a prosecution instituted or carried on by the Director of Public Prosecution is a public prosecution and the Director of Public Prosecution if called as a witness at the trial or during any proceedings arising out of the trial is entitled to refuse to disclose the names of persons from whom he has received information and the nature of the information received unless upon the trial of a prisoner, the judge is of opinion that the disclosure of the name of the informant or of the nature of the information is necessary or desirable in order to show the prisoner's innocence.

Lord Esher's M.R. judgment in Marks vs Beyfus is of particular significance. I quote from the Judgment at page 498,

"What then is the rule as to the disclosrue of the names of the informants, and the information given by them in the case of a public prosecution? In the case of A. G. v Briant Pollock C. B. discussing the case of Rex v Hardy says that on all hands it is agreed in that case that the informer in the case of a public prosecution, should not be disclosed, and later on in his judgment, Pollock C. B. says, "The rule clearly established and acted on is this, that in a public prosecution a witness cannot be asked such questions as will disclose the informer, if he be a third person, and we think the principle of the rule applies to the case where a witness is asked if he himself is the informer. Now this rule, as to public prosecutions was founded on grounds of public policy and if this prosecution is a public prosecution the rule attaches. I think it is a public prosecution; and that the rule applies. I do not say it is a rule which can never be departed from, if upon the trial of a person the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to show the prisoner's innocence, then one public policy is in conflict with another public policy, <u>and that which says that an innocent man is not to be comdemned when his innocence can be proved is the policy that must prevail</u>. But except in that case, this rule of public policy is not a matter of discretion; it is a rule of Law and as such should be applied by the judge at the trial who should not treat it as a matter of discretion whether he should tell the witness to answer or not."

Again Regina vs Lewis JJ exparte, Home Secretary 1972 3 W.L.R. p. 279. Lord Reid in his judgment at p. 283 said:

"It has long been recognised that the identity of Police

> informers must in the public interest be kept secret and the same considerations must apply to those who volunteer information to the board. Indeed, it is in evidence that many refuse to speak unless assured of absolute secrecy."

It will be seen, therefore, that a long line of authorities seek to protect the identity of informants in the public interest, provided it does not out-weight the public interest in seeing that justice is done to persons charged with crime.

As to whether the present proceedings can be viewed in the same light as criminal proceedings, we only have to examine the real situation of the applicant to conclude that these proceedings may be described for purposes of applying the rules as being analogous to criminal proceedings.

There can be no question that these entire proceedings affect the liberty of the subject. The applicant is detained under the Emergency Regulations and will remain so. Her only opportunity to regain her liberty is if she succeeds in obtaining from the Tribunal a favourable recommendation that her detention should cease. The Tribunal's proceedings are, in essence, quasi judicial proceedings; and its status, is not quite, but is comparable to a Court of Law. Its constitutional genesis ensures that it is an entity separate from, and independent of, the Executive; and the Tribunal is required to give detainees who come to it a fair hearing.

The fact that the Minister may ultimately disregard a favourable recommendation from the Tribunal cannot be given cognisance by this Court as a consideration in examining the evidence to determine the balance of public policy in favour of the crown or of the applicant.

The only concern of this Court must be to see if the persons to whom the detainee is alleged to have issued firearms are held on the one hand to be informers as Mr. Ellis contends; and, if they are found to be informers whether public policy

insists that the disclosure of their names be protected or whether public policy demands that these names be revealed in the interest of justice; and also whether non-disclosure of the names should be upheld on grounds of public safety.

We come now to consider this aspect of the case, having regard to the legal situation outlined above.

We must, therefore, examine the reasons given by the Minister for his refusal to give the names of those persons:

THE EVIDENCE

(1) The detainee's Attorneys-at-Law by letter exhibit 4 dated 19th August, 1976 to the Minister requesting particulars paragraph (i) requests the names of the persons. The Minister's reply exhibit 5 dated 3rd September, 1976 is as follows:-

(i) cannot reveal names of persons at this time.

(2) Detainee's Attorneys-at-Law's second letter, exhibit 6 at paragraph (i) repeats the request for the names of the persons. The Minister's reply, exhibit 7 dated 15th September, 1976 is as follows -

(i) 'These persons do not wish to have their names revealed.'

It is clear that up to this stage the Minister is not claiming non disclosure of these names on the ground of public interest; he is merely conforming with the request of the persons not to reveal their names.

(3) The Minister filed an affidavit dated 29th October, 1976.

I shall deal with this under a separate heading.

It is my view that the answers of the Minister as contained in exhibit 5 (cannot reveal names of persons at this time) and in exhibit 7 (these persons do not wish to have their names revealed.) merely indicate a desire on the part of the Minister to honour the request of the persons for anonymity.

Commendable as this sentiment may be I am of the view

that it cannot, by itself, be relied upon to defeat the clear constitutional rights of the detainee to be given the 'necessary particulars' in conformity with Section 39 (9) of the Regulations.

I hold that these names are 'necessary particulars' and the Minister would be obliged to supply these names if reliance was being placed on these grounds for refusal i.e., the Minister's answers in exhibit 5 and exhibit 7.

The Minister refuses to give the names also on the ground of public policy in that it was not in the national interest. This arose on the basis of affidavit dated 29th October, 1976 and filed by the Minister on 1st November, 1976.

This comes now to be examined.

EVIDENCE

The Minister deponed in his affidavit that he is the Minister of Government charged with the subject of National Security and the administration of the Emergency Powers Regulations of 1976; and as such he receives confidential reports and information from responsible persons whose duty it is to investigate the activities of persons whose behaviour gives reasonable grounds for suspecting them to be acting or to have acted in prejudice to public safety. That he has received certain confidential reports that the applicant was associated with one Peter Whittingham in issuing firearms to unauthorised persons and that these reports were incorporated in particulars under Section 39 (9) of the Regulations and served upon the applicant. That on 3rd September, 1976 in answer to applicant's Attorneys for further particulars the said Attorneys were advised that the names of the unauthorised persons to whom applicant issued firearms could not be revealed, exhibit 5.

That on the 15th September, 1976 in answer to a further request for further particulars the applicant was advised that the persons to whom the applicant had issued firearms did not wish to have their names revealed, exhibit 7. That he gave no particulars as to the names of the persons who received

firearms from the applicant previously in the interest of the public safety. Further, that he was reliably informed and verily believe that any disclosrue of the names of the persons is likely to be injurious to the physical safety of those persons. That he refused to reveal the names in the exercise of his discretion as to what is good for the public safety.

It will be seen that the affidavit refers to and encompass the previous correspondence, exhibit 5 and exhibit 7 between the Minister and applicant's Attorneys and in this affidavit the now advance other reasons for his refusal to disclose the names of the persons.

"INFORMERS"

Mr. Hill on this point submitted:

(1) That the nature of the constitutional right given applicant in Section 39 (9) is absolute and unconditional and so the Minister must produce the 'necessary particulars' to enable applicant to present her case before the Tribunal.

(2) If one comes to apply consideration of public interest to that right then one must consider that the legislature has already taken into consideration all the factors that may be contained in the phrase public interest because the right given by Regulation 39 (9) is contained in the Emergency Power Regulations which themselves flow from the exemptions contained in the constitutional provisions which confers full constitutional rights on the applicant in the fundamental rights chapter of the constitution and her detention is deemed to be in the public interest, so having suspended her rights by virtue of the exemptions the legislature must have contemplated that notwithstanding the consideration of public interest she should get the necessary particulars to enable her to present her case. That the

legislature did not add in Regulation 39 (9) words such as 'subject to the Minister's view as to whether it is in the public interest to give the 'necessary particulars.'

He further submitted that all the prerogative Writs originated for the express purpose of doing justice and this is the nature of Mandamus.

That this is the position here as there is no other remedy available which can require the specific necessary information be given.

Mr. Hill further submitted that the Court should not lose sight that the provision was intended to give effect to the rules of natural justice and to provide a limited constitutional protection for the applicant i.e. to give the applicant a fair opportunity to present her case before the review Tribunal thus enabling her to correct, contradict or rebut, by calling witnesses any relevant statements prejudicial to her with a view to her obtaining a favourable recommendation from the Tribunal. That the requirements relating to the discretionary nature of Writ of Mandamus are clearly circumscribed by authority and common sense.

By the Court

Mr. Hill was asked by the Court if having regard to Minister's replies in exhibit 5 and 7 and Minister's affidavit the persons to whom it is alleged the applicant handed illegal guns were not informers? He replied, 'No, they are not informers'.

He submitted that answers in letters (i) in exhibit 5 and 7 do not indicate that it is informers to whom the guns were given. That nowhere has the Minister stated that his informants are the persons who got the guns.

That from the replies given by the Minister in the letters the inference cannot be drawn that they are informants.

He stated that the Minister's replies under (d) in the letter dated 3rd September, 1976, exhibit 5 shows that the

Minister is not treating the persons in (a) and (i) as being the same persons.

That it would be a strained and unwarranted inference that persons mentioned in (a) and (d) are NOT the same category of person being mentioned in (i) as the Minister would say in (i) what he said in (a) and (d).

He further submitted that even if the question of the identity of informers arose this would not be a basis for denying Mandamus, because in a case where the particular charge is of giving firearms to unauthorised persons if the argument being put forward is that the veil of informant is material consideration then there could never be compliance with 39 (9) and it might as well be said to be nonexistent having regard to the nature of the Tribunal, the way in which the Emergency Powers have been structured, the powers given the security forces in relation to protection of people; all of those things are already taken care of in the scheme that the legislature puts down when they made these powers mandatory.

Public Policy does not arise. It is nowhere raised in the affidavit what the Minister says is about Public Safety.

Public Policy as applied in the Marks' case as to the identity of informers is not necessarily the same as public interest in the context of the safety raised in paragraph 7 of the affidavit.

He submitted that they are not asking for names of informers but of persons who can be described as witnesses. If the witness and the informer are the same person, the name of the witness would have to be given but what could not be told or allowed to be told is that that witness was also the informer. This would be in accordance with Marks' case and the qualification and the Public Policy question as in the Mark's case do not arise as they are not asking the Court to direct the Minister to give the names of informers.

He further submitted that where the right of the applicant

seeks to enforce is the performance of a duty of a public character which cannot be enforced at all if Mandamus is refused and the duty to be performed are only Ministerial the issue of the Writ is NOT DISCRETIONARY.

This applies to this case. Minister is obliged to give the information. It is ministerial and Mandamus must be granted - no discretion.

Public Policy dictates that Mandamus should issue.

Mr. Ellis submitted that:

(1) Mr. Hill's argument that these persons were not informers cannot be maintained. He submitted that no police were present and that it is obvious that if persons are found with guns and members of the Security Forces which apprehended these persons were not present when they were placed in possession if it is alleged as in this case that the applicant gave those persons the guns it needs no mental exertion to say that the informants in that case were actual recipients or the persons found with the guns.

(2) That a witness (and in this matter the Minister is included as he is a potential witness and he has given evidence) may not be asked and if asked will not be allowed to state facts or produce documents the disclosure of which would be to the prejudice of the public interest, and accordingly even if there is a necessity for disclosure if such disclosure would be prejudicial to the public interest disclosure should be disallowed.

That unless it can be shown clearly and truly that it is necessary to the investigation of the truth that the name of an informant should be disclosed the Court should be reluctant to order disclosure since there is a rule universally accepted because of its importance to the public for the

detection of crime that those persons who are informers and who facilitate in the detection of crime by information should not be disclosed.

That the Minister has to rely upon information and should their identities be disclosed then information would dry up. That Public Policy dictates that information of informants be treated with confidence as well as their identities.

He further submitted that the decision of the Minister not to disclose the informants' names is a ministerial decision. His duty is not to give all particulars but 'necessary particulars'. His duty is not to determine any issue between the interest of Public Administration and the interest of justice. His duty is merely ministerial with all the considerations of political policy as distinct from a judicial duty, since he in this sense exercise a ministerial duty accompanied by consideration of public policy he is answerable to Parliament rather than to the Courts for the exercise of that duty. That this is so having regard to the state of emergency, consequently strong reliance is being placed on public policy.

He further submitted that Court must look at the Emergency Regulations and in the reasons for the declaration of State of Emergency and relate the application to it. That judicial notice should be taken of them and further Minister has no competence to disclose name of informer if he is a third person.

Finally he submitted that the point that <u>Minister Made No Express Mention of Informers</u> cannot stand.

That from the authorities and particulars or history of the matter the parties seeking protection of non disclosure, no one expressly said they were seeking the protection because they were informers. It is the Court in all the cases which deduced and used this - that they were informers.

It is usual to exclude the name of an informant if asked

in criminal proceedings as a matter of public policy.

It is clear, however, that Lord Esher is plainly of the opinion that the names of the informant should be disclosed in a criminal case if disclosure were necessary in the interest of justice. See Marks vs Beyfus 1890, 25 QBD 494. See also 1959 CLR p. 10.

Mr. Ellis submitted that the names are those of informers and Mr. Hill submits that they are not. I shall deal with this now.

THE EVIDENCE

A detailed examination of the evidence, reveals:-

Exhibit 3 reads:-

> "It has been reported that you have been over a considerable period of time and up to the 11th March, 1976 associated with one Peter Whittingham in the illegal issuing of firearms to unauthorised persons. It has also been reported that you have actively associated with the aforesaid Peter Whittingham in other activities prejudicial to the public safety."

It is my view that this report does not reveal who is the Minister's informant.

The further particulars requested by applicant reads; in exhibit 4 and exhibit 6 paragraph (i):

> "The name or names of the persons to whom illegal firearms were allegedly issued by our client and the location of these firearms at the present time."

The replies of the Minister read inter alia. Exhibit 5 paragraph (i) "cannot reveal names of persons at this time. Firearms are with the Security Forces," and exhibit 7 paragraph (i) "These persons do not wish to have their names revealed."

Can it be said having regard to the information made available to the applicant in exhibit 3, exhibit 5 and 7 paragraph (i) that the persons whose names are requested have been identified either explicitly or inferentially as the

Minister's informants?

I would submit no. It seems to me that nothing on the face of the information revealed can be held to identify these persons as the Minister's informants.

Not even in his affidavit does the Minister aver that these persons were his informants; indeed, in paragraph 3 of his affidavit the Minister positively identify his informants and if one compares paragraph 3 of the affidavit and paragraph (d) of exhibit 4 (letter of request for particulars dated 19th August, 1976); which reads:

"(d) What evidence is in your possession indicating that the said Peter Whittingham was involved in the illegal issuing of firearms to unauthorised persons and also activities prejudicial to the public safety."

The Minister's reply in exhibit 5 reads:

(d) "Confidential information from responsible persons whose duty it is to report to the Minister on such matters."

In exhibit 6, letter of request dated 6th September, 1976 reads:

"(d) Who are the responsible persons whose duty it is to report to the Minister?"

Minister's reply in exhibit 7:

(d) "The responsible persons whose duty it is to report to the Minister are members of the Security Forces."

In effect what the Minister is saying is that:

(a) The reports he received

(b) The confidential information he received,

<u>all</u> emanated from the members of the Security Forces. These are the informants. How then can one say that on this evidence, the names of these persons are the names of informants.

I hold that they are not informants and there can be no justification for holding on this evidence that they are

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informants and I so rule.

We come now to consider the question of National Security.

Mr. Ellis submitted

That the Minister is charged not only with giving particulars but he is also charged with that in giving particulars he does not put in peril the safety of other persons.

That he is charged with the duty of National Security and his responsibility is to those who give confidential information to the Minister.

He further submitted that the Minister can say he is not answering at all or give any particular if it is in the interest of National Security. That as Minister of National Security he is not only in charge of detainees - he must have a measure of discretion which he must exercise for the common good. If Minister says it's National Security then that is the end of it.

It will be seen that on the state of the authorities the Minister's statement is not final and conclusive as Mr. Ellis submitted. This Court's powers may best be described in the speech of Lord Reid in Conway v Rimmer page 1014 H and A.

> "I would therefore propose that the House ought now to decide that Courts have and are entitled to exercise a power and duty to hold a balance between the public interest, as expressed by, a Minister to withhold certain documents or other evidence, and the public interest in ensuring the proper administration of justice."

I adopt these words.

Lord Reid further stated p. 1015 A:

> "That does not mean that a Court would reject a Minister's view: full weight must be given to it in every case and if the Minister's reasons are of a character which judicial experience is not competent to weigh then the Minister's view must prevail. But experience has shown that reasons given for withholding whole classes of

documents are often not of that character."

It is in this light that the Minister's affidavit must be construed.

In examining the Minister's affidavit at paragraph 7 the Minister stated that he gave no particulars of the names of the persons in the interest of public safety. That he was informed and believe that disclosure of the names is likely to be injurious to the physical sefety of those persons; and that he refused to reveal the names in the exercise of his discretion as to what is good for public safety.

What in effect the Minister is saying is that if the names of these people are disclosed they are likely to be attacked, injured or killed and it is in the public interest that this likely event should be prevented by non-disclosure.

The privilege claimed by the Minister is not in the nature of injury that would do grave injury to the nation i.e. the effects of it could cause a war, or the disruption of diplomatic relations, or the disclosure of state secrets in a political sense.

What it has baldly put is the possibility of injury to certain persons.

In his affidavit the Minister does not say why such a likelihood exists.

There is nothing in the affidavit from which this Court can conclude as to why this should be so. In his affidavit the Minister deponed that he was informed and verily believe that any disclosure of the names of the persons is likely to be injurious to their physical safety. It seems to me that the affidavit merely states that that is the Minister's view, and it is clear that it is so formulated in the belief that on this point whatever the Minister states is conclusive.

As I have said before the Law is not so.

In the words of Lord Reid in the Conway v Rimmer case at page 1005 A he states:-

"It is universally recognised that here there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done. There are many cases where the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private can be allowed to prevail over it. With regard to such cases it would be proper to say, as Lord Simon did, that to order production of the documents in question would put the interest of the state in jeopardy. But there are many other cases where the possible injury to the public service is much less and there one would think that it would be proper to balance the public interests involved. I do not believe that Lord Simon really meant that the smallest probability of injury to the public service must always outweigh the gravest frustration of the administration of Justice."

Accordingly, let us examine the competing interests involved; on the one hand the Minister's affidavit of his information and belief that disclosure of the names is likely to be injurious to the physical safety of those persons.

It is obvious that the proceedings before the Tribunal is 'in camera'. The public have no access thereto. The applicant is undergoing detention in circumstances where her movements, contact with visitors etc. are circumscribed, i.e. they are monitored and subject to scrutiny, which would be normally expected in the interest of security in any centre of detention. It surely cannot be suggested that applicant's

Attorneys would pass on this information to unauthorised persons. In other words, she is in no position to pass on this information to unauthorised persons; so the chances of this information being public knowledge seem remote. On the applicant's side:-

There are the constitutional safeguards specifically afforded to persons detained under a State of Emergency. Under section 15 of the Constitution and under the Emergency Powers Regulations Section 39 (9); the imperative obligation on the Minister to furnish the 'necessary particulars' to enable the detainee to present her case to the Tribunal; in addition, the view I hold that this information is a 'necessary particular' to enable the detainee to present her case. I am of the view that in balancing the competing public interests involved, in this instance, the public interest that the administration of justice shall not be frustrated by the withholding of evidence which must be produced if justice is to be done must prevail and I so hold.

I would therefore order that the order nisi be made absolute.

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Malcolm, J. :

I need not refer to the facts as they have been fully stated already.

The questions that fall for our determination are:

(a) Is the information sought by the applicant necessary particulars to enable her to present her case to the Tribunal?

(b) Can the Minister in the public interest refuse to supply the particulars asked for?

Mr. Hill, Attorney for the applicant, submitted that without these names, she would be unable to prepare and present her case to the Tribunal. It was his view that the particulars sought were necessary and that the Minister was obliged to disclose it. The Minister, he submitted, had no discretion in deciding what disclosure he would or would not make in giving the particulars.

Mr. Ellis agreed that Reg. 39 (9) places some duty on the Minister but he said that that duty was one of imperfect obligation. He could not see the necessity for the applicant to know the names of the persons to whom it was alleged that she gave firearms. In any event, he submitted, under sec. 39 (6) of the Regulations the applicant could go before the Tribunal and the chairman could furnish the particulars sought ....

It is my view that on the peculiar facts of this case and in the light of the charges made against the applicant the information sought are "necessary particulars" within the meaning of sec. 39 (9).

Now, to the second question posed. The Governor-General declared a state of emergency because he was satisfied "that action has been taken and is immediately threatened by persons or bodies of persons of such a nature and on so extensive a scale as to be likely to endanger the public safety and to deprive the community or a substantial portion of the community of supplies or services essential to life."

Gunmen stalked the streets by day a d night and the

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incidence of gun-crimes soared to alarming proportions. It is against this back-ground that we must dispassionately view the acts and utterances of the Minister.

In Liversidge v, Anderson and another [1941] 3 A.E.R. Viscount Maugham at p. 344 said:

> " The appellants' counsel truly say that the liberty of the subject is involved. They refer in emphatic terms to Magna Carta and the Bill of Rights and they contend that legislation dealing with the liberty of the subject must be construed, if possible, in favour of the subject and against the Crown ....
> I hold that the suggested rule has no relevance in dealing with an executive measure by way of preventing a public danger when the safety of the state is involved. The language of the act shows beyond a doubt that defence regulations may be made which must deprive the subject 'whose detention appears to the Secretary of State to be expedient in the interests of the public safety' of all his liberty of movement while the regulations remain in force. There can plainly be no presumption applicable to a regulation made under this extra-ordinary power that the liberty of the person in question will be interfered with, and equally no presumption that the detention must not be made to depend (as the terms of the Act indeed suggest) on the unchallengeable opinion of the Secretary of State. "

At. p. 346, Viscount Maugham proceed thus:

> " It is obvious that in many cases he will be acting on information of the most confidential character, which could not be communicated to the person detained or disclosed in court without the greatest risk of prejudicing the future efforts of the Secretary of State in this matter and in like matters for the defence of realm. "

Lord Wright at p. 375 of the said judgment had this to say:

> " The regulation places on the Secretary a public duty and trust of the gravest national importance. As I understand the regulation it is a duty which he must discharge on his own responsibility to the utmost of his ability, weighing on the one hand the suspect's right to personal liberty and on the other hand the safety of the state. "

The case of Duncan v. Cammell, Laird and Company [1942] A.C. p. 624 is of much assistance on the question of disclosures which are injurious to public interest. It was here held that a court of law should uphold an objection taken by a department called on to produce documents in a suit between private citizens, if on grounds of public policy they ought not to be produced. An objection validly taken to

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production on the grounds that it would be injurious to public interest is conclusive. The mere fact that the Minister or the Department does not wish the documents to be produced is not an adequate justification for objecting to their production. Production should only be withheld when the public interest would otherwise be damnified. At p. 643 Viscount Simon L.C. had this to say:

> " After all, the public interest is also the interest of every subject of the realm. "

In the case before us, there are two competing interests. On one side the Minister has stated on oath that he "gave no particulars as to the names of the persons who received firearms from the applicant primarily in the interest of the public safety" and he goes on to say "that any disclosure of the names of the persons is likely to be injurious to the physical safety of the persons." Against this I balance the rights of the applicant and I hold that the need of protecting the interests of the public and of the country must rank "as a prior obligation."

I too would refuse the application.

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Mr. Hill submitted yes, that without this information there is no way in which the detainee could refute these allegations. That once it is found that the information are 'necessary particulars' within the meaning of Section 39 (9) of the Regulation, the Minister is obliged to give it, that it is not within the Minister's discretion to decide what information he may or may not give in supplying the 'necessary particulars'.

Mr. Ellis on the other hand submitted that the Minister is not obliged to give the names for the following reasons:

(1) That this information does not come within the definition of 'necessary particulars' i.e. that the information is not necessary to enable the detainee to prepare and present her case to the Tribunal.

(2) That the detainee should go to the Tribunal and under Section 39 (6) the Chairman, if detainee found it necessary and applied, would supply the information if in his opinion detainee's particulars were found insufficient to present her case.

(3) In the Public Interest:

(a) In that the persons named are informers and

(b) Because of National Security.

Let us examine these grounds:-

<u>Ground (1)</u>:

That the names of the persons are not 'necessary particulars' within the meaning of Section 39 (9).

Mr. Ellis submitted that he agreed that Section (39) (9) confers some duty on the Minister to give 'necessary particulars' to enable the detainee to present her case to the Tribunal, but that that duty is one of imperfect obligation. That some discretion comes into it. That the Minister in giving his first set of particulars and further particulars has given satisfaction under Section 39 (9). That he cannot see the necessity for the applicant to have