IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 03801/2007

BETWEEN	MAXINE RILEY	CLAIMANT
AND	THE BOARD OF YORK CASTLE HIGH SCHOOL	1ST DEFENDANT
AND	THE PRINCIPAL YORK CASTLE HIGH SCHOOL	2ND DEFENDANT
AND	MINISTRY OF EDUCATION AND YOUTH	3RD DEFENDANT
AND	THE ATTORNEY GENERAL	4TH DEFENDANT

HEARD: October 2, 3, 21 and 22, 2008.

Mr. O. Senior-Smith instructed by Oswest Senior-Smith and Co. for the Claimant/Applicant

Miss Tasha. Manley and Mrs. Trudy-Ann Dixon-Frith instructed by the Director of State Proceedings for the Respondents

Judicial Review of Ministerial Decision under Regulation 36 of the Education Regulations under the Education Act. Whether procedural fairness observed by the Minister; whether Minister's decision tainted by any procedural unfairness of Board of Management proceedings.

CORAM: ANDERSON J.

On the 17th of January 2007, the then Minister of Education, the Hon. Maxine Henry-Wilson (hereinafter the Minister) handed down a decision in a matter involving Orane Riley, a former student at the York Castle High School. The student's purported expulsion from York Castle was appealed under the provisions of the Education Regulations, promulgated pursuant to the Education Act. The appeal was brought by the Applicant herein, Mrs. Maxine Riley, mother of Orane, as next friend, against a decision of the Board of Management of the school and the principal of the said school that the child be expelled from the school where he had hitherto, for a relatively short period, been a student.

The appeal to the Minister under the Education Act and Regulations was directed at alleged procedural failures by the school and its Board of Management in arriving at the decision to suspend and then expel Orane. The decision of the Minister handed down on May 27, 2007, upheld the earlier decision of the school board which had been made on the 28 January, 2006. As part of the documents in these proceedings, the Court has been provided with a copy of the transcript of the appeal before the minister as well as the minister's Reason for the decision at which she arrived. That decision of the Minister thereafter set in train an application for leave to apply for judicial review and upon the grant of leave, the filing of an application for judicial review of the Minister's decision. The Fixed Date Claim Form dated April 14, 2008 and filed on the 15th April 2008, seeking the review of the Minister's decision, is in the following terms:

> The name (sic) Applicant, Maxine Riley (Next Friend of Orane Riley) of 510 Monza Avenue, Greater Portmore in the Parish of Saint Catherine seeks a Judicial Review of the decision of the Respondents, namely The Board of The York Castle High School, The Principal of The York Castle High School both of 6 York Castle Drive, Brown's Town in the parish of Saint Ann and the Minister of Education & Youth of 2 National Heroes Circle, Kingston 4 in the parish of Saint Andrew. The Attorney General's Department is also a Respondent.
>
> (a) The Applicant, Maxine Riley (Next Friend of Orane Riley) of 510 Monza Avenue, Greater Portmore in the parish of St. Catherine seeks the following Orders:
>
> (b) The relief sought is as follows:
>
> i. A declaration that the decision of the Minister and by extension the decision of the 1st and 2nd Respondent is null and void.
>
> ii. An order of Certiorari to quash the decision of the Minister of Education made on the 17th January, 2007 set out in the Record of Proceedings sent to the Applicant's Attorney-at-Law on the 2nd May, 2007 to permanently exclude Orane Riley from The York Castle High School.
>
> iii. No Order as to Costs.
>
> iv. Such further and order relief as to this Honourable Court may deem just.

(e) The grounds on which such relief is sought are as follows:

i. The 1st and 2nd Respondents acted improperly, unlawfully, and in breach of the rules of natural justice and the Regulation 30 of Subsidiary Legislation of the Education Act.

ii. The 1st and 2nd Respondents did not act with procedural fairness in carrying out its duty to Orane Riley.

iii. The decision of the 3rd Respondent is not in keeping with the rules of natural justice and the Education Act and Regulations.

iv. That there is no alternative form of redress available."

Factual Background.

Before examining the affidavit evidence which has been filed in these proceedings, I think it is useful to set out the history as to how the matter developed and reached the Minister for final determination. It is common ground that on the 20th March, 2006, a letter signed by the Reverend Michael Graham, as vice chairman of the school's Board of Management, and addressed to Mr. Leslie Riley, the father of Orane, was prepared. This letter is set out below.

> Re: Invitation to Personnel Committee Meeting.
> The School Board in a meeting on March 14, 2006, to decide on a disciplinary matter regarding a student who was found with a firearm in his possession, received a written statement from your son Orane Riley about their knowledge of the weapon.
>
> There was consensus by the Board to invite you and your son to a personnel committee for a further investigation of the matter.
>
> Hence, you and your son, Orane Riley are being invited to this meeting on Wednesday March 22, 2006 at 11:00 a.m.

The letter of March 20, 2006 was followed by another letter dated March 21, 2006, signed by Mrs. B. Hawthorne, principal of York Castle High School. It was also addressed to Mr. Riley who was the principal of the Marcus Garvey High School in

St. Ann's Bay and, as noted above, Orane's father. That letter was in somewhat similar terms to that of March 20 and its contents are set out hereunder:

> Dear Mr. Riley,
>
> Your son Orane Riley has been suspended from school for five days beginning today, March 21, to March 28, 2006.
>
> A personnel committee meeting will be held to conduct investigations into the case involving Jacques Neukens. You are required to attend the investigation as the letter states. First, the personnel committee meeting at 9:00 a.m. and later the Board Meeting at 11:00 a.m.
>
> We must uphold discipline so that our children will be the greater beneficiaries.
>
> Respectfully
>
> B. Hawthorne (Mrs)
> Principal

It should be noted en passant, that while Mrs. Hawthorne's letter states that, "you are required to attend the investigation as the letter states", it seems to me that the reference, "investigation as the letter states" must be a reference, not to her own letter of March 21, but to the letter of the previous day (March 20) signed by the vice chairman. Further, although the letter of the 20th referred to a meeting to take place on the 22nd March 2006, it is common ground that no meeting took place on that day. Instead, the evidence which I accept is that the only meetings in question, were held on Tuesday, March 28, 2006.

By a further letter of March 29, 2006, Mr. Riley was advised of the decision of The Board to expel Orane from the school. In the words of the letter "The Board came to the painful decision after studying the issues that Orane has to be expelled in the best interest of the school." The full text of that letter is set out below.

> The Board of Management had its meeting on Tuesday, March 28, 2006, and you were invited to appear regarding the conduct of your son Orane Riley.

The concerns are:

a) A set of guidelines, laid down by the school was given to your son, and a copy given to you, since you were to work with us in his transformation. Orane failed to follow the guidelines. He never reported to the principal on Fridays and he was still late for classes.

b) Orane attempted to set up a gang here at York Castle High School and the names of the prospective members were given.

c) Orane also attempted to purchase the gun for $1200.00 after he bargained for a reduction in price from $5000.00. This gun, Orane said he would take to the gang in Spanish Town.

The Board having deliberated on the matter thought a more serious approach had to be taken because of Orane's knowledge of the gun brought to school to be sold to him (Orane)

Consequent upon the receipt of the letter advising of Orane's permanent separation from York Castle, Attorneys-at-Law for the Applicant wrote both to the school and to the Minister in relation to this matter. It appears that no response was ever received from the school. However, the Applicant was subsequently notified of an invitation by the Ministry of Education to attend a hearing at the Ministry on the October 4, 2006.

One of the complaints of the Applicant as set out in her first affidavit, and pursued in this forum by counsel, was that the hearing before the Minister paid attention to extraneous and irrelevant matters which were not strictly relevant to the basis of the school's decision to expel Orane. It was also suggested that the Minister had fallen into error in requesting of and receiving from the principal at the school, information concerning the student's prior history before the 20th March 2008. Further, it was submitted that in light of the text of the letters received by his father, Orane had been punished not just once or twice but three times. These were by way of a suspension for five (5) days according the first letter, second by an additional day and third, thereafter, by expulsion.

The Applicant, in the written submissions presented by her attorney-at-law, argued that the Minister of Education, in coming to her decision to uphold the decision of the Board of Management of the school (the "Board") had shown procedural unfairness. This was in breach of the rules of natural justice and the Minister's decision must be quashed. Interestingly, the Claimant also asserts that since the Minister's decision is in breach of the rules of natural justice and should be quashed by an Order in Certiorari, by implication the decision of the Principal and the Board must also be quashed.

Before dealing with the substantive issues raised by this application, I believe that it would be appropriate to deal with a preliminary issue. It is noted that the Further Amended Notice of Application for Court Orders filed April 4, 2008 on behalf of the Applicant, seeking leave to apply for judicial review, sought relief in the following terms.

1. Leave to apply for judicial review for an order of Certiorari to quash the decision of the Minister of Education made on the 17th of January 2007 set out in the Record of Proceedings sent to the Applicant's attorney at law on the 2nd of May 2007 to permanently exclude Orane Riley from the York Castle High School.
2. A declaration that the decision of the Minister is null and void.
3. No order as to costs.

The grounds on which that application was based were stated to be that:

1. The 1st and 2nd Respondents acted improperly, unlawfully and in breach of the rules of natural justice and the Regulation 30 of the subsidiary legislation of the Education Act.
2. The 1st and 2nd Respondents did not act with procedural fairness in carrying out its (sic) duty to Orane Riley.
3. The decision of the 3rd Respondent is not in keeping with the rules of natural justice and the Education Act and Regulations.

It is to be noted that the application for leave to apply for certiorari was directed at quashing **the Minister's** decision. However, the Fixed Date Claim Form which was filed on April 14, 2008, consequent upon the grant of leave by Order of his Lordship, Courtney Daye, J, was in the terms set out above, in that it sought

1. A declaration that the decision of the Minister **and by extension the decision of the 1st and 2nd Respondents** is null and void.
2. An Order of Certiorari to quash the decision of the Minister of Education..... from the York Castle High School.

Equally, the grounds on which the reliefs were sought were stated to be

1. The 1st and 2nd Respondents acted improperly, unlawfully and in breach of the rules of natural justice and the Regulation 30 of subsidiary legislation of the Education Act.
2. The 1st and 2nd Respondent did not act with procedural fairness in carrying out its duty to Orane Riley.
3. [illegible] justice and the Education Act and Regulations.

It is clear that the terms with respect to which leave was granted, are different to those now contained in the Fixed Date Claim Form. In particular, the grant of leave was to allow the Applicant to seek "judicial review for an order of certiorari to quash the decision of the Minister of Education made January 17, 2007". On the other hand, the application for the review sought a declaration "that the decision of the Minister and by extension the decision of the 1st and 2nd Respondents is null and void". It is possible to argue that to the extent that the decisions of the 1st and 2nd respondents are being called into question, this must have been applied for within the period of ninety (90) days mandated by CPR Rule C.P.R 56.6(1). At the same time, since the appeal to the Minister was permissible under the Act and the regulations, it would not have been possible to say that judicial review was the only remedy available. Be those questions as they may, I am satisfied that the application is properly before this court and that the matter ought to be determined here

<u>The Applicant's case.</u>

The grounds on which the Applicant bases this application are as follows.

i. The 1st and 2nd Respondents acted improperly, unlawfully and in breach of the rules of Natural Justice and Regulations 30 of the Education Regulations.
ii. That the 1st and 2nd Respondents did not act with procedural fairness in carrying out their duty to Orane Riley.
iii. That the 3rd Respondent's decision was not within the rules of Natural Justice and the Edueation Act and 1980 Education Regulations; and
iv. That there is no alternative form of redress available.

The specific complaints of the Applicant were that the Minister's decision, as well as those of the Board of Management and the Principal, were not arrived at consistent with the rules of Natural Justice and the Education Act and 1980 Education Regulations. As part of the grounds of the complaint the Applicant's attorney also submitted that the Principal and the Board, the 1st and 2nd Respondents, had acted improperly and unlawfully, had also breached the principles of Natural Justice and the

Education Act and Education Regulations, in particular Regulation 30 of the said regulations. It was also said that the principal and the Board had not acted with procedural fairness in their duty to Orane Riley. It was submitted that the report provided for under regulation 30, should be in writing but there was no indication that this had been done.

It will be a useful point of departure to set out here the provisions of the regulation in question.

30. (1) The principal of a public education institution may suspend from the institution, for a period not exceeding ten days, any student –

> (a) whose conduct in his opinion is of such nature that his presence in that institution is having or is likely to have a detrimental effect on the discipline of the institution;
> (b) who commits any act which causes injury to any member of staff or to any other student in that institution.

(2) Where the principal suspends a student, he shall forthwith –

> (a) give notice of the suspension to the student council and the parent or guardian of that student; and
> (b) make a Report to the Board, stating the reasons for the suspension.

(3) On receipt of the report referred to in paragraph (2) (b), the Board of a public educational institution shall, during the period of the suspension, investigate the matter and may, after investigation –

> (a) reinstate the student with or without a reprimand or a warning to the student, and where appropriate, to his parent or guardian;
> (b) suspend the student for a further period, not exceeding five school days beyond the period of suspension already given; or
> (c) instruct the principal to exclude permanently the student from attending that institution and shall inform the Minister of such action

(4) At any hearing by the Board into the conduct of a student who has been suspended, the student and parent shall have the right to be present, and, if the student is aggrieved by a decision of the Board, he may appeal to the Minister.

(5) A student who has been permanently excluded for disciplinary reasons from a public educational institution may be admitted to another public education institution if a confidential report of the circumstances

surrounding the exclusion is given to the principle of that other institution.

(6) Where, in the opinion of the principal, the behaviour of the student appears to be abnormal, the principal may, with the approval of the parent or guardian, report the matter to the Minister who shall take steps to ensure that specialist opinion and treatment is obtained for the student.

(7) Except in special cases, a student may only be suspended or excluded from a public educational institution after other efforts have been made to effect an improvement in the conduct of the student.

Among the specific matters complained of by the Applicant in her affidavit evidence is that the letter of March 21, 2006 addressed to her husband and which advised of Orane's suspension "for five days from March 21 to March 28 was unlawful". That was the letter which had also invited Mr. Riley to attend meetings of the Personnel Committee and the Board of Management which were to inquire into matters involving his son. She avers that the letter was void because it was equivocal and "lacked certitude". It was uncertain in that it said the suspension was stated to be for five days but the period cited was actually six days.

It was also submitted by counsel that the principles of Natural Justice were "grossly abridged by the School Board thereby exposing the young boy to severe prejudice" in that "in neither of these pieces of correspondence did the School formally and/or at all apprise the father and/or son that the Personnel Committee's investigations were into or against Orane Riley; thereby focusing their (and especially the father's) minds to the excruciating need for the preparation and presentation of any defence or mitigation for lenience". Counsel conceded that the proceedings in which the Orane was involved at the meetings of the Personnel Committee and the Board of Governors were not the same as facing a criminal charge. However, he submitted that it was incumbent upon the school to formalize the nature of the "charge" which the student was facing as well as the probable consequences of the hearing. This, in his view, amounted to procedural unfairness in breach of the rules of natural justice.

Another of the complaints in the applicant's affidavits was that up to the date set for the hearing before the Minister, October 4, 2006, the applicant had not been provided with the student's school records and "material relied upon to support his expulsion". The material was subsequently provided by the school on the prompting of the

Minister although it did not contain verbatim transcripts of the meetings which took place on March 28, 2006. These were provided by the time the hearing resumed before the Minister. Based upon this, the applicant's attorney submitted rather coyly, I think, that one is "unable to say otherwise, than that there was an unfairness in the procedure of the approach of the School towards young Orane". It is worth noting that the affidavits in support of the applicant's contentions were only provided by the student's mother and not by his father, himself a principal of a school in the public school system, who had in fact attended the meetings and who would naturally have been in a position to better relay to his counsel, what had transpired.

It was also submitted, though without adducing evidence to support this, that the school board "apparently placed undue weight and reliance (without prudent safeguards)" on the statement of the student which implicated him in knowledge about the possession by another student of a gun. Based upon this unproven premise, it was in turn submitted that "the extraction or securing of this statement from the boy *must have been, and inevitably was in the circumstances that bowdlerized the minor's rights*". (My emphasis) As a consequence, the School was precluded in those circumstances from taking this latter statement into consideration in terms of the boy's eventual permanent separation from the school. The case of **[Weekes (1993) 97 Cr. App. R. 222]** was cited as authority for this proposition.

It was also submitted that the Minister had wrongly considered matters which were extraneous and that the Orane might have been further prejudiced by his case being considered along with that of another student, one Andrew Spencer, a fact which only came to the knowledge of counsel at the hearing before the Minister. Insofar as the Minister's decision was concerned, counsel submitted that she had failed to appreciate that the principal and the Board had acted in an ultra vires manner with respect to the need for the principal to provide "forthwith", a report to the board whenever a student is suspended. It seems to be the view of counsel for the applicant that such a report would have to be in writing.

Finally, the applicant takes issue with two (2) aspects of the Minister's decision. Firstly, applicant's counsel is critical of the conclusion, stated in the Minister's Reasons, that there were not different periods of suspension and no double or triple

penalty had been imposed by virtue of the suspension and the subsequent expulsion. Secondly, he was also critical of the Minister's view that correspondence between the school and the student's parent, formed part of the context in which the expulsion took place and was part of the decision-making by the school's Board of Governors.

The Case for the Respondents

The approach taken in the response submissions provided by the Respondents' counsel, was to group, for purposes of dealing with the grounds of the application, grounds (a) and (b) together and to deal with ground (c) separately. Counsel for the Respondent, Ms. Manley, set out the allegations which the Applicant put forward to demonstrate that there had been procedural unfairness. I will not repeat them here as I have already detailed them above in considering the Applicant's submissions. She then asks the question whether these allegations amount to procedural unfairness. She properly concedes that it is trite that a common law duty of procedural fairness is owed someone in this student's position. She posits, however, that the law does not give rise to such a duty without more and she puts forward the proposition that "the existence of a duty of procedural fairness, simpliciter, does not determine what requirements will be applicable in any given set of circumstances. Among the factors relevant are

(1) the nature of the decision being made and the process followed in making it;
(2) the nature of the statutory scheme and the terms of the statute pursuant to which the body making the decision being questioned, operates;
(3) the importance of the decision to the individual affected;
(4) the legitimate expectation of the person challenging the decision; and
(5) the choice of procedure made by the agency itself.

In support of this submission, counsel cited the Canadian case of **Baker v Minister of Citizenship and Immigration (1999) 2 S.C.R. 817.** There the court, in considering whether the duty of procedural fairness was an absolute one, said:

> The duty of procedural fairness is both flexible and variable and depends upon an appreciation of the context of the particular statute and the rights affected."

The Applicant sought to respond to the **Baker v Minister of Citizenship and Immigration** authority by suggesting that Respondents' citation does not go far

enough and so misses the support the case actually gives to the Applicant's case. In particular he refers to the dicta of the trial judge, part of which was cited by Respondents' attorney, in that case to the following effect:

> "The duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected. The purpose of the participatory rights contained within it is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and it statutory, institutional and social context with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision maker".

Counsel then cites the factors set out in the Respondents' submission above. It seems to me that the response submission made by the Applicant in relation to this authority, does not assist the Applicant.

Counsel for the Respondents, while conceding that there is a duty to particularize any charge one is being called upon to answer and an obligation to grant such a person an opportunity to present such evidence as he may have available, submitted that the lack of "detailed charges" was not fatal to a claim that there was procedural fairness. In any event, such allegations as were necessary were made known both at the hearings before the personnel committee and board, and in the Appeal before the Minister. Further, Respondent contends that it is not true that the period of Orane's suspension was "void for uncertainty". It is correct to note that the letter from the principal, Mrs. Hawthorne, did say that Orane was being suspended for five days from March 21 to March 28. Counsel submits that the Education Regulations do permit suspension for a period of up to 10 days and that even were Orane suspended for six days as the Applicant contended, that would still have been within the regulations.

The measurement of any period has also to be seen in the context of the Interpretation Act, section 8(1), which provides with respect to computing periods of time, that "a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day in which the event happens or the act or thing is done". Moreover, pursuant to the Education Regulations, Fridays and Saturdays are not counted as "school days" for the purposes of the suspension. It was accordingly argued that the Minister's conclusion that the period of suspension commenced, not

on the 21st March but on March 22, was correct. This was because on the 21st, Orane was in fact in school and so could not have been treated as being suspended from that day but only from the next succeeding day. The period was therefore five (5) days only. There was no uncertainty.

It is conceded by the Respondents that Orane was entitled to a fair hearing including being accorded notice and a right to be heard in his own defence. (Cooper v Wandsworth (1863) 14 CB NS 180) It was submitted that Ridge v Baldwin (1964) A.C. page 40, established the twin principles that a person was entitled to be given notice of the charge against him and that he had a right to be heard in his own defence in relation to such charge. Counsel for the Respondents posited that there was adequate notice of the nature of what was being investigated in respect of Orane by virtue of the March 20 letter from the school. The letter spoke of Orane's agreeing that he knew about a gun which was in the possession of another student at the school. It was this knowledge and admission which was being "investigated". But counsel also emphasized that this had to be seen within the context of behavioural issues which had been observed in relation to Orane and which had been communicated to his father. These included his not attending classes and allegations of his attempting to recruit other students for gang membership. Indeed, the father did agree that he had had meetings about Orane with the principal. When taken together, counsel says they show that there had been adequate notice of what Orane was facing in the letters to his father.

Did the Applicant have an opportunity to be heard?

The letter of March 21 invited Mr. Riley to attend the meeting of the Personnel Committee on March 28 as well as the meeting of the board of Governors on the same date. It is common ground that Mr. Riley did attend and participate in the meetings and that Orane himself was there. He was given an opportunity to speak. Orane himself admitted that he was not obeying school rules. It appears that Mr. Riley accepted that the behaviour of Orane was unacceptable and that the child was not observing the rules of the school. However, from the meeting notes of the father's contribution to the deliberations, the opportunity was not taken to deny any allegations. It appears that he asked for more "patience" with his son and sought to portray Orane's behaviour as the result of his "attention-seeking" and his own absence

from Orane's life. It is not without relevance that at the meeting with the Board of Governors, Orane appeared to be defiant and without remorse and seemed to question why he had been brought before the board. In these circumstances, counsel for the Respondents says that there can be no question of Orane not having been given a chance to be herd in his own defence.

In support of this submission, counsel cited the case of the **University of Ceylon v Fernando (1960) 1 W.L.R 233**. There the Claimant who had been a candidate for the Bachelor of Science degree at the University. He was accused of having had prior knowledge of certain parts of an examination paper. The evidence against him was taken from witnesses in a commission of enquiry. He was later interviewed by the commission. It was held that he had been given a reasonable chance to be heard in his defence. It was the Respondents' position that this Applicant found himself in an analogous position. Further in response to the Applicant's submission that he had not been provided (in the letters to his father), with sufficient particularity, the details of the accusations which he was to meet, counsel was of the view that it was not necessary, in every case, to quote chapter and verse of every allegation as "an outline of the charge will usually suffice". (See the dicta of Lord Denning, M.R in **Re Pergamon Press 1971 Ch.388** to this effect). In the context of this matter, the Respondent are content to rely upon the view of the authors of Wade, Administrative Law, that what is required is substantial adherence to the principles of procedural fairness. Thus, one of the complaints by the Applicant that the failure to provide his school records to his counsel before the hearing, ought not to be seen as breaching the principle of procedural fairness, since the records were, in fact, provided before the resumption of the adjourned hearing before the Minister

In **George v Secretary of State for the Environment 1979 37 P. &C. R. 188,** the principle that there must be substantial compliance with the rules of procedural fairness was re-iterated. In that case, the applicant and her husband owned property which the local authority wished to compulsorily acquire. A requisition for information was served on the husband and he provided the information without advising of his wife's interest in the property. The property was acquired over the objections of the husband at a hearing which the applicant did not attend. She applied for an order to quash the acquisition on the basis that her interest had been. It was

refused because, although she had not been served with the notice of requisition, she had been aware of and had done nothing before the acquisition order was made.

With respect to the submission by Applicant's counsel, Mr. Senior-Smith that the Minister erred in finding that the report submitted by the principal pursuant to Regulation 30(2)(a), could be an oral report, Ms. Manley for the Respondents disagreed. She cited the relevant part of the regulation which is set out below,

(2) Where the principal suspends a student, he shall forthwith

(a) give notice of the suspension to the student council and the parent or guardian of that student; and
(b) make a Report to the Board, stating the reasons for the suspension.

In the course of the hearing by the Minister, she had heard that submission and the submission by counsel for the Board who advanced the view that there was nothing in the regulation on its face that required that the report be in writing. The Minister had agreed with the latter submission and in Respondents' counsel's view, there was no procedural impropriety here, such as to form the basis of invalidating the Minister's decision. In his response submissions Mr. Senior-Smith suggested that there was support in the Baker case cited by Respondent, for the view that the report of the principal should be in writing. Applicant's counsel cited addition dicta of the court which suggested that procedural fairness would require a written explanation for a decision, this presumably with a view to calling into question the lack of a written report by the Principal pursuant to Education Regulation 30(2). The trial judge had said there that it was:

> ".....now appropriate to recognize that, in certain circumstances, including when the decision has important significance for the individual, or when there is a statutory right of appeal, the duty of procedural fairness will require a written explanation for a decision. Reasons are required here given the profound importance of this decision to those affected".

As I indicate below, my view is that the written Reasons for Decision provided by the Minister fulfils the obligation for such a report, if indeed one does exist, for it provides the Applicant with the material upon which his application may be based.

The third ground of the application for certiorari to quash the decision of the Minister as advanced by the Applicant was that the Minister has breached the rules of natural justice and ignored or misunderstood the Education Act and Regulations. There is a raft of specific allegations which were put forward as providing the substratum for this conclusion. These include the assertion that the appeal process and the Minister's decision took into account irrelevant matters, that Orane's two written statements were relied upon; that the decision of the Board was unreasonable in that it failed to take into account the fact that Orane had only been at the school for a short time and had not had time to be properly assimilated into the school community; that the Minister's decision was a mere rubber stamp of the Board's decision; that the Minister failed to appreciate the meaning of Regulation 39(2)(b) in accepting that the report required thereunder, could be an oral one. I have not adverted to the criticism as to the reference to regulation 38 of the Education Regulations as it seems to me that that was clearly a mistake in reference. (There is no evidence that there was any reference to the provision in regulation 38 in any of the deliberations). Some of these allegations have in fact been mentioned above. Taken together, they represent an assertion that the Minister's decision was one that no reasonable decision maker in that position could have arrived at, and therefore represented an unlawful exercise of discretion. Counsel for the Respondents suggested that the court ought not to accept this ground as a basis for granting certiorari and cited the well-known case, **Associated Provincial Picture Theatres v Wednesbury Corporation (1948) 1 K.B. 223**, as the *locus classicus* in respect of the test of reasonableness. It was submitted that once the act being called into question was not unreasonable in the sense that "no reasonable person could have arrived at the decision", ("Wednesbury unreasonableness" per Lord Diplock) then it was not open to the court to second guess the decision. The court is not sitting in an appellate capacity. It is a court of review. Thus, says counsel for the Respondents, the dictum of Lord Greene, M.R. is instructive. The learned Master of the Rolls in considering the discretionary exercise of powers conferred by a statute said:

> "It is true that the discretion must be exercised reasonably. Now, what does that mean? It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a decision must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey

> these rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warmington L.J. in Short v Poole Corporation gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is unreasonable that it might almost be described as being done in bad faith and, in fact, all these things run into one another".

Counsel rejects the submission by the Applicant that it was wrong for Orane's antecedents to be considered in coming to a decision as to whether he should be expelled. Indeed, it was submitted that it having been raised by counsel, it was incumbent upon the Minister to consider those antecedents. Nor, it was suggested, was there any merit in the submission that the reason communicated by the Board as to the reason for the expulsion, that it was in the best interest of the school, was ultra vires. I accept that the Minister's decision in upholding the expulsion cannot, in any event, be compromised by the fact of a reason given by the Board. It is essentially the decision of the Minister which is being called into question. This must be the case as judicial review does not lie where there is an alternate remedy. So the decision of the Board could not itself be subject of an application for judicial review since there was a right of appeal to the Minister. Further, and in any event, regulation 30(1) implicitly recognizes the right to take into consideration of the interests of the school. It provides that a principal may suspend a student for up to 10 days where the student's conduct "in his opinion is of such nature that his presence in that institution is having or is likely to have a detrimental effect on the discipline of the institution". The interests of the school are therefore clearly part of the remit of the principal in making a decision on suspension. It is also worth noting that the exercise of the discretion depends upon the principal forming an opinion which he bona fide holds

One issue which the Applicant's attorney stressed was the proposition that the statements made by the minor child ought to have been excluded in determining whether Orane should be suspended and/or expelled. Counsel had argued that the Minister's conclusion that the statements were properly considered and that they were voluntary and not coerced, was "dismissive of the sacrosanct rights of the child". It was conceded by counsel for the Respondents that were this a criminal case, that may have been a more tenable position However, in **Mahon v Air New Zealand (1984) 3**

W.L.R. 884. Lord Diplock in the Privy Council, seemed to put the issue beyond doubt when he distinguished the approaches to the rules of evidence as they applied to civil or criminal cases on the one hand, and disciplinary proceedings, on the other. He said at page 814 of the report:

> An investigative enquiry into facts by a tribunal of enquiry is in marked contrast to a judicial "lis" litigation, the conduct of which constitutes the regular tasks of High court Judges.

And at page 820, he stated that the rules of natural justice can:

> "be reduced to those two that were referred to by the Court of Appeal of England in **Reg v Deputy Industrial Injuries Commissioner Ex Parte Moore [1965] 1 Q.B. 456** ....The first rule is that the person making a finding in the exercise of such a jurisdiction must base his decision upon evidence that has some probative value in the sense described below. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the enquiry whose interests... may be adversely affected by it, may wish to place before him....."

At page 821, he continued:

> The technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice. What is required by the first rule is that the decision to make the finding must be based upon *some* material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory."

It was Respondents' counsel's view that there had been no breach of w either of these principle as articulated by the learned law lord.

It is necessary to treat with one more aspect of the Applicant's case given the way the amended Fixed Date Claim Form has been drafted. It will be recalled that the Applicant sought a declaration that the Minister's decision "and by extension the decision of the 1st and 2nd Respondents was null and void" and should be quashed because it was arrived at by a process which was procedurally flawed by unfairness. Respondents' reply to this is that the appeal before the Minister gave the Applicant a second and "curative" chance with, essentially, a de novo hearing of the entire issue before the Minister. It was submitted that this would have been sufficient to cure any defect in the earlier proceedings. This view is supported by the Privy Council case of

Calvin v Carr (1979) 2 All E.R. 444, a case followed in the Jamaican Court of Appeal decision of **James Zaidie v Jamaica Racing Commission (1981) 18 JLR 131** to which I refer in greater detail below. It probably should also be noted, en passant, that if the Minister's decision is to be overturned on the basis of procedural unfairness, I would hold that [illegible] reversal of the earlier decisions at the level of the school, given my view that both are part of the same process.

Court's Decision

In looking at the affidavit evidence presented by the respective parties, there is not a lot of dispute over the facts. Rather, the issue between the parties turns essentially upon the view which is taken of the legal effect of the evidence accepted. The questions to be answered by this court are whether the decisions of the board of governors and subsequently the Minister, or either of them, are flawed by unfairness in the procedure by which they were arrived at. In particular, the court must determine whether there was, multiple punishments; failure to sufficiently detail the "charges" which Orane faced as well as the possible consequences of being found "guilty" of those charges; a failure to give Orane a chance to be heard that is a breach of the *audi alterem partem* rule.

For the reasons set out herein, I have formed the view that there has been no breach of the rules of natural justice either in the behaviour of the principal and board of governors or that of the Minister of Education. I believe that the communication between the school and the father of the child may have indeed been more explicit in terms of setting out the extent of the concern the school had with Orane's behaviour. At the same time, it must be recognized that the letters of March 20 and 21, were sent at a time before the investigation and report required by the Education Regulations would have been complete. It seems to me that to have outlined in more specific and detailed terms what were the "charges" being faced before the investigation was done, may have opened the school to a credible charge of having decided, a priori, on the student's guilt even before investigation was done. As it was, the investigation required by the regulations could proceed in an objective way. I also accept the submission of the Respondents that the entire context in which the letters were written and the ultimate decisions taken must be taken into account. It is therefore quite

relevant to recall that the person with whom the school had been in contact and to whom the letters which are central to this case had been sent, Orane's father, was himself a principal of a public educational institution. It is also clear from the totality of the evidence that Mr. Riley was well aware of the problems which the school was having with Orane and of the efforts to have him behave in a more acceptable manner, to set rules to which he should adhere and which he failed to do. These are not extraneous matters, but rather, within the context of a school environment, proper matters to be taken into account. I would observe that discipline in the student population cannot vary with the particular family circumstances of each child. It must be normative.

I also do not accept that there was more than one period of suspension or that the suspension and the decision to expel were effectively double or triple punishments. In that regard, the Minister's interpretation as set out in her decision with respect to the effective period of suspension commencing on a day after the day at which the student was at school, is correct both in fact and in law. In that regard, I accept the submission of counsel for the Respondents as to the consequences of section 8(1) of the Interpretation Act. Whatever may have been intended by the writer of the letter, it is to the law as spelt out in that Act that we must look for the effect of the words used. The terms of the regulations also make it clear that the school's principal has a duty under the regulations to conduct investigations and that he may suspend a student during the currency of those investigations. It must therefore be in the contemplation of the rules that the findings of those investigations may be such as to so endanger the prospects of proper discipline in the school, that the correct decision is to permanently separate the student from the school. I find nothing unfair in this procedure. Nor do I find any basis for a conclusion that there was more than one punishment. I also find it instructive that in Regulation 30 (1) (a) allows the principal to suspend a student where, "*in his opinion*" the presence of that student *is having or is likely to have a detrimental impact* upon discipline in the institution. I believe that the effect of this is two-fold: first, it allows for the proper exercise of the principal's discretion and secondly, it defeats the argument made by the Applicant's counsel, that expulsion "in the interest of the school" provided an improper basis for the action.

Despite the protestations of Mr. Senior Smith to the contrary, I regret that I cannot agree with the submission that the Minister merely rubber-stamped a decision of the Board of Governors of the school. On the contrary, it is clear that the Minister was punctilious in ensuring that all matters of relevance were put before her. Indeed, the first hearing of the appeal had to be adjourned [illegible] to allow Orane's counsel to be provided with his school records and to make additional submissions based thereon, should that be found to be advisable. In this context, it is difficult to conclude that the Minister merely acted as a rubber stamp. Based upon the foregoing findings of fact, I do not believe that there was any unreasonableness in either the decision of the Board of Governors or of the Minister. Those decisions are therefore not reviewable on the basis that they are so unreasonable that no reasonable person or body could have come to them.

Nor do I believe that there was any unfairness in the procedure in arriving at the Minister's decision. I hold that there was nothing improper in taking into account the fact of Orane's written statements in which he acknowledged his involvement in unsavoury behaviour, including attempts at recruiting other students to be members of criminal gangs, and the attempt to purchase a gun. I also accept that his father had been made aware, in sufficient detail, of the things of which Orane was being accused. Moreover, he was given a chance to present Orane's side at the meetings of the Personnel Committee and the Board on March 28 and indeed at the appeal before the Minister where counsel was also present. There is, therefore, in my view, no unfairness in the processes, therefore, to give rise to a reviewable breach of the rules of natural justice and particularly the rules relating to being aware of the charges being made against one, and the right to be heard. It was the essence of the Applicant's position that there was "unfairness" by reason of the breach of the rules of natural justice.

In coming to the determination recorded in the preceding paragraph, it is useful to bear in mind, as counsel for the Respondents submitted, that the concept of "unfairness" is not a strict and absolute one. Particularly in matters such as discipline in educational institutions, one has to be cognizant of the legislation which is being considered as well as the context. In this regard, it is correct to start with the proposition that, as a matter of law, a person is entitled to be told the nature of the

charges that he is facing and be given the right to be heard, and in the case of minors, to have someone in loco parentis, put his case forward. (See **Ridge v Baldwin** cited above.) Given this premise, I believe that it is incumbent upon this court to show why, even if I am wrong in saying that there has been no unfairness, the decision arrived at by the Minister in the exercise of her independent discretion ought not to be disturbed.

In a paper on "**Discipline and Procedural Fairness**" delivered to the **University of New South Wales' School Law Alert Seminar in June 2008**, Australian education law specialist **David Ford**, explored the concept of fairness as it was accepted in different Commonwealth jurisdictions. He characterized the paper as being "about school discipline and the need to afford students procedural fairness when administering discipline". The learned attorney had this to say:

> School discipline, or student management as some schools refer to it, generally is aimed at providing a safe, caring and happy school environment in which students can learn and grow. Schools use discipline not only to demonstrate that there are consequences for unacceptable behaviour but also to help their students to become self-disciplined. The consequences of breaking the rules can range from minor punishments through to suspension and expulsion. My focus in this paper will be the need for procedural fairness when considering suspension or expulsion.
>
> What is procedural fairness?
> Procedural fairness (or natural justice, as many lawyers prefer to call it) refers to a body of principles that have evolved to provide fairness to people who are being investigated or charged or who are the subject of administrative action which may adversely affect them. While these principles are generally becoming better known, it seems that, almost as a result of this familiarity, people are losing sight of the fact that procedural fairness usually means simply observing practical fairness. In other words, as Young CJ said in **Hedges v Australasian Conference Association Limited: {(2003) NSWSC p. 107 at page 121}**
>
> > Different situations will give rise to requirements of satisfying the general principle of natural justice in different ways.

He continued:

> "Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern

of the law is to avoid practical injustice. Mason J. in the High Court's decision in Kioa v West, {(1985) 159 CLR 550 at page 585}, said:

> The expression "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case.

He also said:

> The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case?

In R v Governors of Dunraven School, ex p B, {(English CA, Civil Division, December 15, 1999, reported The Times January 3, 2000)} Sedley LJ of the English Court of Appeal said:

> It is a proposition too obvious to require authority that what fairness demands in a particular situation will depend on the circumstances.

All these Judges are underlining the importance of the particular situation when determining the content of procedural fairness. This is especially important in schools where the circumstances may relate to very trivial allegations or to very serious ones.

I adopt as a correct statement of the emerging law on principles of procedural fairness in school expulsions, the views of the learned author of the paper. Procedural fairness is a basic right of all individuals dealing with authorities. All individuals should have a legitimate expectation that in dealing with authorities such as the Ministry of Education, they will be accorded procedural fairness.

Lord Diplock in Council For Civil Service Unions v Minister For The Civil Service [1985] AC 374. At pp. 410-411 of the judgment he defined the three modern jurisprudential bases of actions for judicial review of administrative action. These he said, were "illegality, irrationality and procedural impropriety"

He said this:

> By 'irrationality' I mean what can by now be succinctly referred to as '*Wednesbury* unreasonableness' (ASSOCIATED PROVINCIAL PICTURE HOUSES LTD v WEDNESBURY CORPORATION [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible

person who had applied his mind to the question to be decided could have arrived at it. ..

It will be clear from my reasoning above, that I reject this as a basis for overturning the decision of the Minister. It is in relation to the third head articulated by Lord Diplock that much of the Applicant's argument has been directed. The learned Law lord had this to say on that head:

> I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because *susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred even where such failure does not involve any denial of natural justice."* (My emphasis)

I am satisfied that under either "limb of susceptibility" in Lord Diplock's formulation of this basis, that is, the failure to observe procedural rules laid down by the Education Act and Regulations, or the demands of natural justice, the application by this Applicant must fail. I find no area in which the Minister has contravened the regulations. For example, the reference to "section 38" of the regulations in the report of the Personnel Committee to the Board of Governors is clearly, as I have suggested above, an error in giving he correct reference. The report, in relevant part, says:
"After going through the regulation, section 38 under disciplinary action to be taken against students, the board unanimously voted for the expulsion of both students"
The regulation which deals with this is in fact regulation 30 and not 38. I have also already intimated that I agree with the minister's finding that the report required to be presented under regulation 30(2)(b), consequent on the investigation, may be an oral report. Nothing said by counsel for the Applicant shakes my faith in that conviction.

Having made the findings and held as I have hitherto stated, there remains one issue of substance which needs to be explored. That is the issue of whether, assuming there had been some unfairness in the original procedure by the Board of Governors, that unfairness could have been cured by the subsequent appeal hearing before the Minister. What is the curative effect, if any, of a subsequent appeal which is not itself flawed.

It will be recalled that it was the submission of the Respondents' counsel that, notwithstanding any breach if natural justice in the initial part of the proceedings, the court had to look at the entire proceedings. The effect of the hearing of the appeal was to provide a de novo opportunity to the Applicant, and thus cure any defect in the original proceedings. Counsel had cited the case of Calvin v Carr (1979) 2 All ER 444. That case was considered and applied in a case in the Jamaican Full Court in the case of James Zaidie v Jamaica Racing Commission (1981) 18 JLR 131.

I set out in summary the head note of that case and the holdings by the Jamaican Court of Appeal.

> The Applicant is a licensed race-horse trainer and a member of the Jockey Club of Jamaica. As a result of a complaint made to the Jockey Club alleging that the applicant had falsely entered his horse for a race by shodding same with "racing plates" instead of the approved plates for the race and in the absence of any permission to do so, the applicant was summoned by a notice stating that he should appear at the proceedings for the purpose of enquiry into the allegation. The notice concluded with an intimation to the applicant that he could bring all persons who could give evidence relating to the incident. At the proceedings the report of the allegations were read and verified and the applicant made his presentation without asking for time or adjournment. The applicant was found guilty of corrupt practices and "warned off" for two years.
>
> He then appealed to the Jamaican Racing Commission (which is the statutory body empowered to entertain appeals from the decisions for the Jockey Club) which under its wide statutory powers reviewed and dismissed the applicant's appeal and confirmed the decision of the Jockey Club.
>
> The applicant then applied by way of an application for an Order of Certiorari to quash the proceedings of the tribunals. The grounds of this application include - breach of the rules of natural justice, in that a proper charge was never preferred: that no evidence was called to establish the primary facts against the applicant; that the applicant was given no opportunity to reflect on the report before he was called upon, an inquisitorial procedure was adopted: and that the Jockey Club had no jurisdiction to find the applicant guilty in the absence of a specific charge and adequate notice thereof.

It was held:

> (i) the requirement to give prior notice or a precisely formulated charge to a person against whom prejudicial allegations are to be made will not be applicable where the person claiming to be aggrieved must

be assumed to have known or did in fact know what was being alleged or what was likely to happen to him. In the instant case, the applicant by virtue or his membership and knowledge of the operation of the Club knew what was being alleged.

(ii) where there is evidence to show that a person tried by a tribunal had sufficient time or did not ask for time to enable him to properly defend himself against the allegations levied against him therein, he cannot afterward maintain that there was a breach of natural justice against him by such tribunal. In this case, the records and the notice show that the applicant had sufficient time and that he did not ask for an adjournment;

(iii) where ..... the applicant;

(iv) any defect in the application of the rules of natural justice by an inferior tribunal can be cured by a subsequent proceeding in an appellate court or tribunal which possesses a clear power of review of the entire case or matter. In the instant case the appellate proceedings at the Racing Commission being an entire review of the matter, any defect was thereby cured;

(v) it is a settled principle of law that a Court ought to consider the entirety of the proceedings which took place both at the original and the appellate tribunals before making a pronouncement as to whether or not there had been a breach of the rules of natural justice in a matter now before it. In this case, there had been no such breach.

I adopt for the purposes of this judgment the holdings of the learned judges of the Full Court. It seems to me that each specific holding is relevant to the instant matter. In particular, the holdings at (i), (ii) (iv) and (v) are particularly instructive. And for the purposes of elucidating the Court's view of the curative nature of appeal proceedings, I adopt the 4th and 5th holdings of their lordships.

I have also found a report of a interesting Malaysian case which, while not an authoritative precedent, nevertheless provides an excellent commentary on the case, Calvin v Carr. In Y.H Wong v Syarikat Hong Leong Assurance Sdn Bhd, a Malaysian Federal Court examined this specific issue of the curative nature of appeal proceedings which are essentially a rehearing. There, a company executive had been dismissed by the insurance company with which he worked on account of the fact that he was implicated in purchasing wrecked motor vehicles which had previously been insured by the company. He was not given any opportunity to be heard in his own defence and the Industrial Court which heard his appeal held that he should succeed against the company on the basis that he had been denied a legitimate expectation that he would be given a chance to be heard. In the Federal Court of Malaysia the Industrial Court was reversed because it was held that the hearing before the

Industrial court was an opportunity for the matter to be heard in a fulsome way which would have negated any breach of natural justice that had hitherto occurred in the process. In the somewhat lengthy cite from his decision set out below, the judge Mohd Azmi FCJ examined the issue of curative appeals in the following way.

> In Calvin v Carr [1979] 2 All ER 440; [1979] 2 WLR 755, two fundamental issues were dealt by the Privy Council regarding the decision of the steward inquiry which disqualified Mr. Calvin as a jockey for one year, and the subsequent dismissal of his appeal by the Jockey Club Appeal Committee pursuant to the Australian Jockey Club Act 1873. Mr. Calvin's argument was grounded on the fact that his purported disqualification by the stewards and the dismissal of his appeal were void on the grounds inter alia, that the stewards had in the first instance failed to observe the rules of natural justice or fairness, and their decision was therefore invalid, and that accordingly, the appeal committee had no jurisdiction to hear and determine the appeal from it. In rejecting both arguments and dismissing the appeal, the Privy Council, speaking through Lord Wilberforce after thoroughly examining its own decisions on the matter in Australia, Canada, England and New Zealand, held [1979] 2 All ER 440:
>
> > A decision of an administrative or domestic tribunal reached in breach of natural justice was void rather than voidable, but until declared to be void by a competent body or court, it was capable of having some effect or existence in law and could not be considered as being legally non-existent. Assuming the stewards' decision to be void, it was nevertheless a decision for the purposes of an appeal to the committee, which therefore had jurisdiction to entertain the appeal.
> >
> > There was no absolute rule that defects in natural justice at an original hearing could or could not be cured by appeal proceedings which had been correctly and fairly conducted. However, where a person had joined an organization or body and was deemed, on the rules of that organization and the contractual context in which he joined, to have agreed to accept what, in the end was a fair decision, notwithstanding some initial defect, the task of the courts was to decide, in the light of the agreements made and having regard to the course of the proceedings, whether at the end of those proceedings there had been a fair result reached by fair methods. On the facts, those who took part in racing were deemed to have accepted the Rules of Racing and to be bound by the decisions of bodies set up under the rules, provided they received fair treatment and a consideration of their case on its merits. The appellant's case had received, overall, full and fair consideration and there was therefore no basis on which the court ought to interfere.
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> In the appeal before us, apart from the crucial question of whether the Industrial Court was a competent body to declare the dismissal null

and void, our main concern was with the second decision in **Calvin** on whether the defect in natural justice by Hong Leong could or could not be cured by the inquiry in the Industrial Court.

In dealing with the second issue, the authorities seem to show that there are two categories of cases at each end of the spectrum with a third category occupying in between. The first involves cases where the rules provide for rehearing by the original body or some fuller or enlarged form of it, for example, rules and regulations of social clubs, where the first hearing is superseded by the second body. The second category is where the complainant has the right to nothing less than a fair hearing, both at the original and at the appellate stage.

Having regard to the objectives of the Industrial Relations Act 1967, we did not see why the reference under s 20 by the Minister in dismissal cases could not be considered as falling under the third or intermediate category, albeit closer to the first category as a rehearing of the dispute. As stated by Lord Wilberforce in Calvin [1979] 2 All ER 440 at p 447; [1979] 2 WLR 755 at p 765:

> No clear and absolute rule can be laid down on the question whether defects in natural justice appearing at an original hearing, whether administrative or quasi-judicial, can be 'cured' through appeal proceedings.

It is true that in **Leary v National Union of Vehicle Builders [1970] 2 All ER 713 at p 720; [1970] 3 WLR 434 at p 443**. Megarry J was of the following opinion:

> If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal?... As a general rule... I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body.

But in disagreeing with the above statement, as being too broadly stated, Lord Wilberforce in **Calvin [1979] 2 All ER 440 at p 448; [1979] 2 WLR 755 at p 766** held:

> It affirms a principle which may be found correct in a category of cases; these may very well include trade union cases, where movement solidarity and the dislike of the rebel, or renegade, may make it difficult for appeals to be conducted in an atmosphere of detached impartiality and so make a fair trial at the first (probably branch) level an essential condition of justice. But to seek to apply it generally, overlooks, in their lordships' respectful opinion, both the existence of the first category, and the possibility that intermediately, the conclusion to be reached on the rules and on the contractual context, is that those who have joined in an organization, or contract, should be taken to

> have agreed to accept what, in the end is a fair decision, notwithstanding some initial defect.
>
> We were of the view that for the subsequent body to be able to 'cure' the original defect in natural justice, it is essential that the subsequent body is an impartial body and free from partiality, capable of arriving at a fair decision. Unlike, for instance, in the case of Tech Tan Appeal Committees, the Industrial Court is clearly an independent quasi-judicial statutory body capable of reaching a fair result by fair methods, notwithstanding some initial defect by Hong Leong in dismissing the appellant.

I adopt the excellent analysis of the curative nature of appeals, at least in those circumstances like Calvin, where a full rehearing by an impartial body takes place. In my view, the instant case falls within that category of cases where the first hearing is superseded by the second and therefore any defect is curable in the subsequent hearing. I am of the firm view that any possibility of unfairness in the hearing before the principal and board, if there was such, was cured by the de novo hearing before the Minister. The Minister is clearly in the position of a "subsequent body (who) is an impartial body and free from partiality, capable of arriving at a fair decision". I would also be prepared to hold, if that were necessary, and as Respondents' counsel has submitted, that since certiorari is a discretionary remedy, the court should still exercise its discretion to refuse its grant even if it were of the view that there had been some breach of the rules of natural justice. In that regard, I am mindful of the dicta of the learned Master of the Rolls, Lord Greene, in **Wednesbury**, (See above) which I fully embrace:

> The Courts must always, I think, remember this: first, we are dealing with not a judicial act, but an executive act;.....
>
> What then, is the power of the Courts? They can only interfere with an executive authority if it be shown that the authority has contravened the law. It is for those who assert that the local authority has contravened the law to establish that proposition...it is not to be assumed prima facie that responsible bodies, like the local authority in this case will exceed their powers; but the court, whenever it is alleged that the local authority has contravened the law, must not substitute itself for that authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a body such as the local authority in this

> case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case. As I have said, it must always be remembered that the court is not a court of appeal. When discretion of this nature is granted, the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law."

In light of the foregoing, my order is that the application by the Applicant is denied. I make no order as to costs.