IN THE SUPREME COURT
TURKS AND CAICOS ISLANDS

CL 147/23

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE PROCEEDS OF CRIME ORDINANCE AND THE FINANCIAL SERVICES COMMISSION ORDINANCE

AND IN THE MATTER OF THE DECISION OF THE SUPERVISOR DNFBP TO CANCELL THE REGISTRATION OF STANFIELD GREENE AS A DNFBP WITH IMMEDIATE EFFECT AND A DIRECTIVE ISSUED TO TAINO MANAGEMENT LTD. TO REMOVE CLAYTON STANFIELD GREENE AS A DIRECTOR, COMPLIANCE OFFICER, MONEY LAUNDERING REPORTING OFFICER AND FROM ANY OTHER POSITION AS A KEY EMPLOYEE, OR PERSON HAVING FUNCTIONS HELD IN RELATION TO THE LICENSEE AND TO REPLACE HIM WITH A PERSON ACCEPTABLE THE COMMISSION.

BETWEEN

THE KING

AND

(1) THE SUPERVISOR DESIGNATED NON-FINANCIAL BUSINESS PROFESSIONAL
(2) THE MANAGING DIRECTOR FINANCIAL SERVICES COMMISSION

RESPONDENTS

EX PARTE:

(1) CLAYTON S. GREENE PERSONALLY AND DBA AS STANFIELD GREENE ATTORNEYS AT LAW
(2) TAINO MANAGEMENT LTD

APPLICANTS

DECISION

Before: **The Hon. Mr. Justice Chris Selochan**
Appearances: **Mr. Ariel Misick KC for the Applicant**
Mr. David Phillips KC (virtually) for the Respondents
Mr. Clayton Greene present
Hearing Date:
Venue: **Court Room #1, Supreme Court, Providenciales**
Handed Down: **January 26th, 2024**

1. Following an *inter partes* hearing which ended on 20th November 2023, the Applicants were granted leave to apply for Judicial Review by this Court of the following decisions of the Respondents:

    a. Cancelling the registration of Clayton Stanfield Greene as a Designated Non-Financial Business Professional with immediate effect.
    b. Directing Taino Management Ltd. to remove Clayton Stanfield Greene as a director, compliance officer, money laundering reporting officer and from any other position as a key employee or person having functions held in relation to Taino Management Ltd and to replace him with a person acceptable to the Commission.

2. However, an application to stay the decisions of the Respondents pending the hearing of the Application for Judicial Review was refused.

3. In order to ensure that there was early hearing of the matter, the following further directions were given:

    a. The Notice of Motion for Judicial Review is to be filed on or before 4:00 p.m. on 22nd November 2023.

    b. The First Case Management Conference shall be heard on Thursday 23rd November 2023 at 2:30 p.m.

4. The Court reduced the reasons for its decision into writing in a decision dated 8th January 2024.

5. The matter was subsequently fixed for trial on 11th January 2024 and 12th January 2024 beginning at 10:00 a.m. on each day.

6. The Court also granted leave to the Applicants to appeal the decision of the court to refuse to grant a stay of the decisions of the Respondents.

7. On 26th January 2024, the Court handed down it decision in the substantive matter with an oral summary of its reasons and now provides its detailed reasons.

Background to the Applications

8. By letter dated 23rd October 2023, the Managing Director of the Turks and Caicos Financial Services Commission ("the Financial Services Commission" or "the FSC") had advised Mr. Stanfield Greene, the First Named Applicant and an attorney-at-law, of the cancellation of the registration of Stanfield Greene Attorneys at Law ("the Firm") as a Designated Non-Financial Business and Profession (DNFBP) pursuant to *section 167* of the *Proceeds of Crime Ordinance* with effect from 4:00 p.m. on 23rd October 2023 due to him being convicted of a criminal offence. The First Named Applicant had been convicted of a money laundering offence (*Concealing or Disguising the Proceeds of Criminal Conduct* contrary to *section 30(2)(a)* of the *Proceeds of Crime Ordinance 1998*) on 25th September, 2023 and sentenced to six months imprisonment on 12th October, 2023. He appealed his conviction by Notice of Appeal dated 10th October, 2023 and had been released on bail pending appeal. The DNFBP Supervisor further requested that on or before 6th November 2023, evidence be provided that client files had been transferred to another Registrant for the continuation of their business. The letter was accompanied by a Notice of Cancellation of Registration.

9. It is noteworthy that the Bar Council had taken a decision not to take any disciplinary action against the First Named Applicant pending the outcome of the appeal of his criminal conviction, thereby enabling the First Named Applicant to continue to practise as an attorney-at-law in the interim. However, because the bulk of his practice has been in the areas of commercial transactions and real estate, deregistration by the FSC would have a detrimental effect on his income.

10. By letter dated 23rd October 2023, the Managing Director of the Financial Services Commission had issued a Directive to the Second Named Applicant, Taino Management Limited, to comply with the following no later than 4:00 p.m. on 24th November 2023:

    i. Remove Clayton S. Greene (being the First Named Applicant) as a Director, Compliance Officer and Money Laundering Compliance Officer of the Licensee and replace him with a person acceptable to the Commission.
    ii. Remove Clayton S. Greene from any other position as a key employee, or person having functions held in relation to the Licensee and replace him with a person acceptable to the Commission.

    The rationale given by the Financial Services Commission was that, as a result of his conviction, the First Named Applicant did not satisfy the Commission's fit and proper criteria.

11. By letter dated 23rd October, 2023 the Applicants' attorneys-at-law, Misick and Stanbrook, wrote to the Financial Services Commission, asking them to withdraw or suspend the Cancellation pending the outcome of Mr. Greene's appeal and if necessary, replace it with a direction that Mr. Greene be replaced as the Money Laundering Reporting Officer/Money Laundering Compliance Officer of the Firm by 1:00 p.m. on the following day, failing which the Cancellation would be challenged in Court proceedings.

12. By email of 24th October 2023, the Senior Legal Officer of the Financial Services Commission wrote to the Applicants' attorneys-at-law indicating that the Commission

would consider their submission and provide a more fulsome response by close of business on Friday 27th October 2023.

13. By letter dated 24th October 2023, the attorneys-at-law for the Applicants wrote to the Senior Legal Officer of the Financial Services Commission making representations on behalf of both Applicants. In respect of both Applicants it was argued, *inter alia*, that the Commission should not have acted against Mr. Greene before the appeal of his criminal conviction had been determined. In respect of the First Named Applicant, it was further contended that the cancellation was not an effective, proportionate or dissuasive response and was not in the public interest and that he was given a totally unreasonable time frame for compliance.

14. Rather than providing a fulsome response as promised, by letter dated 27th October, 2023, the Managing Director of the Financial Services Commission wrote to the attorneys-at-law for the Applicants simply stating the following:

> *"Reference is made to your letters of 23 October 2023 and 24 October 2023 regarding the captioned matters.*
>
> *We have considered your position but remain of the view that the directive and notice were validly issued. As such, the Commission declines your request for withdrawal or suspension of same.*
>
> *Please be guided accordingly."*

The Application

15. Judicial Review was sought by the Applicants of the following decisions:

i. The decision of the Supervisor DNFBP cancelling the registration of Stanfield Greene Attorneys as a DNFBP pursuant to *section 167* of the *Proceeds of Crime Ordinance*.

ii. The decision of the Financial Service Commission directing Taino Management Limited to remove Clayton S. Greene as a director, Compliance Officer, Money Laundering Reporting Officer and as holder of any other position as a key employee or person having functions in the company and replacing him with a person acceptable to the Commission pursuant to sections *33(1)(d)(i)* and *37(1)(c)* of the *Financial Service Commission Ordinance*.

16. The following reliefs were sought in the Application:

i. A declaration that neither the supervisor DNFBP nor any other officer of the Financial Services Commission (FSC) had jurisdiction to take any enforcement action against Stanfield Greene in relation to conduct occurring before the law firms were subject to the regulatory authority of the FSC thus rendering the actions unlawful and ultra vires.
ii. A declaration that the public interest did not justify the cancellation of the registration of Stanfield Greene, without notice.
iii. A declaration that the purported cancellation of the registration of Stanfield Greene as a DNFBP and to issue the directives to Taino Management without giving either an opportunity of being heard was procedurally unfair and in breach of the *audi alteram partem* rule of natural justice and abuse of process and is therefore unlawful.
iv. In cancelling the registration of Stanfield Greene and in issuing the directives to Taino Management, the Respondents failed to have regard to the following material considerations:
    (a) The draconian nature and effect of the decisions on Stanfield Greene and its business.
    (b) CSG had a constitutional right to appeal his conviction and at the time of making the decisions, the time for appealing had not expired. The cancellation, if allowed to stand, would have the effect of negating CSG's right to appeal.
    (c) The matter in respect of which CSG was convicted occurred 17 years ago and there has never been any allegation that CSG committed any acts of money laundering other than in respect of the offence for which he was convicted. CSG has been a practising attorney for almost 30 years, more than 18 of which as a sole practitioner.

(d) At the time of the offence for which he was convicted, law firms were not regulated by the FSC.

(e) The FSC failed to have regard to ***section 165.5*** of the ***Proceeds of Crime Ordinance*** ("POCO"), that enforcement actions and directives should be proportionate, effective and dissuasive.

v. In all of the circumstances the decisions were disproportionate and Wednesbury unreasonable.

vi. An order of certiorari quashing the decision complained of.

vii. Costs.

THE EVIDENCE

17. The Applicants' case was supported by a narrative affidavit of Clayton Greene, the First Named Applicant herein.

18. In response, the Director of the Anti-Money Laundering Supervision Department of the Turks and Caicos Islands Financial Services Commission, Mr. Tamiko Smith, deposed to an affidavit on behalf of the Respondents. Mr. Smith had previously deposed to a much shorter affidavit opposing the Applicant's application to stay the decisions of the Respondents pending the determination of the substantive judicial review application.

THE CASE FOR THE APPLICANTS

19. The Applicants have challenged the decisions of the Respondents on the basis that they are procedurally unfair, irrational and lack proportionality.

The Firm/Mr. Greene

20. In respect of the Firm/Mr. Greene, the First Named Applicant contended that the decision was arrived at unfairly in that neither the Firm nor Mr. Greene was given the opportunity to make representations prior to the decision and that the Firm/Mr. Greene were entitled to be heard both as a matter of common law and under Section 19(1) of the Constitution.

21. It was contended that Mr. Greene was deprived of the information that the Commission relied on in concluding that Mr. Greene's registration be cancelled with immediate effect and without hearing from Mr. Greene and that the information relied on could not be tested before the decision was made because Mr. Greene was not given an opportunity to comment at all on the Commission's intended decision. Indeed, Mr. Greene may have had information relevant to the Commission's decision and the rule of law required that he be heard.

Taino Management

22. In respect of Taino Management, it was acknowledged on behalf of the Second Named Applicant that the decisions were less draconian than in relation to the Firm because Taino had not lost its licence and Mr. Greene was not required to dispose of his interest in Taino. However, it was contended that the decisions were nevertheless unfair and irrational since Taino was not given the opportunity of being heard before the decisions were made and was not provided with any advance notice of the reasons for the decision.

THE CASE FOR THE RESPONDENTS

23. The Respondents contended that the central issue in the case involved the recognition of the public duty function which was being discharged by the FSC in that, as part of its monitoring duty, the FSC was determining whether after Mr. Greene's conviction of a

money laundering offence he remained an appropriate individual to retain a DNFBP registration and to be involved in the management of Taino Management Ltd. This involved, *inter alia*, the application of the fit and proper criteria to ensure the protection of the public.

24. The Respondents considered the Applicants' arguments to be based on what they say is the mistaken belief that the FSC was required to balance the competing interests of the public on the one hand and Mr. Greene on the other hand. They argued that the competing interests were not balanced but that the protection of the public interest prevails over the private interests of the individual professional. In this regard, reference was made to the well-known authority of ***Bolton v Law Society***[1]. This will be examined in more detail later.

Mr. Tamiko Smith's affidavit

25. The Respondent's case was supported by the narrative affidavit of the Director of the Anti-Money Laundering Supervision Department of the Turks and Caicos Islands Financial Services Commission Mr. Tamiko Smith ("Mr. Smith's affidavit").

26. It is useful to summarise the main aspects of Mr. Smith's affidavit:

a. At paragraph 33 of his affidavit, Mr. Smith deposes to the following in respect of the action taken against Taino Management Ltd:

> "*However, following Mr. Greene's conviction, the Commission determined Mr. Greene could no longer maintain key positions in a licensee. The Commission was also mindful that Mr. Greene is no longer simply an accused man, but now was a convicted person, having been found guilty of a financial crime by a competent court by no less than the Honourable Chief Justice of the Turks and Caicos Islands. The Commission determined*

[1] ***[1994] 1 WLR 512***

that in keeping with its mandate, it had to order Mr. Greene's removal and issued directives accordingly."

b. Mr. Smith, at paragraph 45 of his affidavit, gives the following reasons for the deregistration of the Firm:

   i. *"Mr. Greene was convicted of a money laundering offence.*
   ii. *The firm was the financial business through which Mr. Greene committed the offence.*
   iii. *Mr. Greene held the position of money laundering compliance officer and money laundering reporting officer.*
   iv. *A law practice by its nature facilitates the receipt of large sum of money for re-distribution and it would not be possible to restrict such a function if the law practice is to remain operational.*
   v. *The Commission had no other option of issuing a directive to remove Mr. Greene as the MLCO and MLRO, as it did in respect of TML, because Mr. Greene was the sole practitioner."*

c. At paragraph 46, Mr. Smith states as follows:

   "The Commission therefore determined that to give effect to its mandate, no suitable directive could be issued in this case; cancellation of the registration of the DNFBP was the only appropriate action."

d. At paragraph 48, Mr. Smith contends:

   "When the Commission considered the matter, it was of the opinion that it was in the public's interest to cancel the registration with immediate effect."

e. Mr. Smith gives the reasons why cancellation of the registration was the only appropriate action at paragraph 49:

   "The Commission considered that it was in the public's interest to do so because:

a. *Mr. Greene is the sole proprietor of SGAL. As such, the money laundering compliance and reporting functions are all vested in Mr. Greene; SGAL has no additional internal oversight. The Commission could not risk being a facilitator to the commission of any further offences;*

b. *The continued registration of the DNFBP, notwithstanding its sole proprietor, money laundering compliance officer and money laundering reporting officer having been convicted of a financial crime would mean exposing other members of the public to financial loss arising out of dishonesty or malpractice contrary to the Commission's mandate under section 42) of the FSCO; and*

c. *The public interest includes ensuring that the reputation of the Islands as a financial services centre is not compromised and failure to promptly sanction persons involved in financial crimes exposes the island to increased scrutiny and sanctions from international standards setting bodies such as the Financial Action Task Force."*

f. Paragraph 50 of Mr. Smith's affidavit is especially important in that it looks at what was operating in Mr. Smith's mind when the decision was taken by the FSC to cancel Mr. Greene's registration with immediate effect. Mr. Smith, at paragraph 50 of his affidavit, states:

"Any assessment of the TCI's relevant regulatory framework will consider its experience in preventing access to the financial system by money launderers. The maintenance of a licence by a convicted money launderer, even for a short time, exposes the jurisdiction to reputational risk as it calls into question the adequacy of the TCI's regulatory framework. A poor rating of the TCI has the following implications:

a. *Greater difficulty in gaining access to correspondent banking relationships.*
b. *Difficulty in attracting foreign direct investment.*
c. *The TCI being placed on the international blacklist of non-compliant jurisdictions.*
d. *Difficulty in accessing re-insurance capacity.*

e. *Increase to the costs of doing business in the TCI.*

f. *Making the TCI a less attractive place for doing business.*

g. *Reducing the TCI's borrowing capacity and increasing the cost of borrowing.*

h. *Increased stringency in measures placed on the TCI by the United Kingdom."*

27. It is noteworthy that the matters detailed in Mr. Smith's affidavit were not contained in the letters, notice and directive which were issued to the Applicants, which merely pointed to the fact of the First Named Applicant's conviction as being sufficient to cancel the registration of the Firm in the public interest, and of the First Named Applicant not satisfying the fit and proper criteria in respect of his holding the positions of Director, Compliance Officer and Money Laundering Compliance Officer in Taino Management Ltd.

Application to cross-examine Mr. Tamiko Smith

28. On the first date of the hearing of the matter, learned counsel for the Applicants, Mr. Misick KC, made an application for Mr. Smith to be cross-examined. The Court entertained submissions on this and granted the application, drawing reference to the case of ***Jedwell v Denbighshire County Council and others***[2], where it was held that in rare cases a judge can exercise his discretion to permit the cross-examination of witnesses in a judicial review matter where the justice of the case required it. In that case a local planning authority, in an attempt to rectify a deficiency in its reasons for a negative screening opinion, relied on evidence not disclosed before proceedings had commenced. It was held that the question of whether the planning officer's evidence was an ex post facto justification or a genuine account of her actual reasoning process at the time was a question of fact for the court to decide and that cross-examination of this witness was necessary for justice to be done and to be seen to be done.

[2] ***[2015] EWCA Civ 1232***

29. In the instant case, many of the matters outlined in Mr. Smith's affidavit as being operating in his mind when the impugned decisions were taken were not included in the letters of 23rd October 2023 from the Respondents addressed to the Applicants. An issue which had to be determined by this Court was whether these matters were a genuine account of Mr. Smith's reasoning process when the decisions were taken or were, rather, an ex post facto justification after the decisions were challenged by way of judicial review in this action. In determining this important issue of fact, the Court was of the view that the justice of the case would require the cross-examination of Mr. Smith by counsel for the Applicants.

Evidence given by Mr. Tamiko Smith under cross-examination

30. It is useful at this stage to examine some of the responses given by Mr. Smith in answer to questions posed by counsel for the Applicants, Mr. Misick KC, under cross-examination.

31. The Court considers the following evidence given by Mr. Smith under cross-examination to be particularly relevant:

> *"…At the date of the decision I was not aware that Ms. Henry was an officer of the firm. The Commission did require the closure of the firm. The Commission did not make enquiries about anyone else who could take over the functions of the firm…**The basis for the Commission's decision had to do with the fit and proper criteria. The only basis we relied on was his conviction. When the decisions were made and communicated to Mr. Greene, the letters did not contain the reasons contained in my second affidavit.** In response to the letter from Missick, he was told that he would receive a fulsome response on 27th October…* (Emphasis mine).

Re-examination of Mr. Tamiko Smith:

32. Under re-examination by counsel for the Respondents, Mr. Phillips KC, Mr. Smith referred to the 'fit and proper' test and in particular its criteria of ensuring that criminals are prevented from controlling a DNFBP. He went on to say that in every instance where a DNFBP is controlled by a person convicted of a money laundering offence, the guidance is that consideration should be given to this issue and, according to him, the usual requirement is deregistration. If this were not done, the reaction from the international team would not be acceptable.

33. Whilst acknowledging that he had the option of acting under *section 167(2)* of *POCO*, which provides for the giving of at least 14 days' notice, he stated that he could cancel immediately under section 167(3) if it was in the public interest to do so. He went on to say as follows:

> *"The TCI relies on access to international financial systems. We have persons doing business internationally. Those jurisdictions are also subject to the same obligations. There is the threat of de-risking. That is a real issue that affects everyone in the jurisdiction. We need to be able to comply. Any additional impediment to doing business internationally will affect the TCI public.…The reason for not seeking information from Mr. Greene was because the issue was whether Mr. Greene was a fit and proper person. Based on the guidelines we had enough information to act."*

ANALYSIS

Grounds for Judicial Review

34. In ***Council of Civil Service Unions & Others v Minister for the Civil Service***[3], Lord Diplock[4] outlined the grounds on which judicial review can be sought:

[3] ***[1984] 3 All ER 935***
[4] ***at pages 950-951***

"My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable. By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [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. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards (Inspector of Taxes) v Bairstow [1955] 3 All ER 48, [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review. 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. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

35. In judicial review proceedings, the role of the Court is not to substitute its decision for that of the decision maker but rather to examine the procedure and matters which the public body adopted and took into account in arriving at its decision.

The First Named Applicant

36. The Court will first deal with the decision that affects the registration of the First Named Applicant.

36. ***Section 167*** of the ***Proceeds of Crime Ordinance*** ("POCO") deals with the cancellation of registration and provides as follows:

167. (1) The DNFBP Supervisor may, by written notice, cancel the registration of a designated non-financial business and profession —

(a) at the request of the financial business; or

(b) if it is entitled to take enforcement action against the financial business.

(2) Subject to subsection (3), the DNFBP Supervisor must give a designated non-financial business and profession not less than 14 days written notice of its intention to cancel the financial business's registration.

(3) If the DNFBP Supervisor is of the opinion that it is in the public interest to do so, it may cancel the registration of a designated non-financial business and profession with immediate effect.

(4) A notice given under subsection (2) must state the grounds on which the DNFBP Supervisor intends to cancel the registration and must state –

> *(a) that unless the designated non-financial business and profession, by written notice given to the DNFBP Supervisor, shows good reason why its registration should not be cancelled, the registration will be cancelled on the date specified in the notice; or*
>
> *(b) where subsection (3) applies, that the registration is cancelled with effect from the date of the notice. (Inserted by Ord. 19 of 2010 and amended by Ord. 13 of 2013)*

37. The Financial Services Commission is a corporate body which was established under the ***Financial Services Commission Ordinance*** ("the *FSC Ordinance"*) to supervise and regulate licensees in accordance with the *FSC Ordinance* and to monitor compliance with the legislation, including anti-money laundering regulations. ***Section 173*** of the ***FSC Ordinance*** confers powers on the Governor to make Regulations for the registration and supervision of DNFBPs.

38. Pursuant to *Regulation 27A (1)*, in determining whether a person who carries on business as a DNFBP is a fit and proper person, the Supervisor is to have regard to the following:

(a) The person's probity;
(b) The diligence with which the person is fulfilling, or likely to fulfil its responsibilities;
(c) Whether the interest of the DNFBP is likely to be threatened by the person holding the position.

39. Pursuant to Regulation 27A(2), regard must be had to the previous conduct and actions in business or financial matters of the person in question and in particular, to (a) evidence that the person has committed an offence involving fraud or other dishonesty, or violence and (b) evidence that the person has contravened any enactment designed to protect members of the public against financial loss, due to dishonesty, incompetence or malpractice.

40. Regulation 28 provides that the Supervisor may register an applicant or refuse the registration.

41. Regulation 29 outlines the reasons under which the Supervisor may refuse registration. These reasons include that the applicant, or any of its directors, senior officers or owners do not satisfy the fit and proper test or it would be contrary to the public interest to effect registration.

42. Pursuant to Regulation 30A, the relevant supervisory authority of a financial business is required to adopt the necessary, legal or regulatory measures to prevent criminals and their associates from holding a significant or controlling interest, or management function in a financial business.

43. It is clear that there are two options available to the DNFBP Supervisor under ***section 167*** of ***POCO*** where the issue of cancellation of registration arises:

    a. In general, pursuant to *section 167(2)*, the DNFBP Supervisor must give a designated non-financial business and profession not less than 14 days written notice of its intention to cancel the financial business's registration.

    b. However, pursuant to *section 167(3)*, the DNFBP Supervisor may cancel the registration of a designated non-financial business and profession with immediate effect if it is of the opinion that it is in the public interest to do so.

44. Where the DNFBP Supervisor proceeds under *section 167 (2)*, *section 167 (4)(a)* provides the designated non-financial business and profession with an opportunity to show good reason why its registration should not be cancelled.

45. In the instant case, the DNFBP Supervisor formed the opinion that it was in the public opinion to cancel the registration of the Firm with immediate effect and therefore acted pursuant to *section 167(3)* instead of *section 167(2)* (which would have required the giving of at least 14 days' notice and the opportunity to show good reason why there should be no cancellation).

46. The following critical issues require determination:

a. Whether the actions of the Respondents were justified and proportionate, particularly having regard to the fact that the First Named Applicant has appealed his conviction and that there may have been other less severe sanctions available to the Respondents.
b. The reasonableness of the decision to act under *section 167(3)* instead of *section 167(2)*. In doing so, consideration has to be given to what was operating in the mind of the decision maker when the decision was taken.
c. Whether there was the requirement for the First Named Applicant to have been provided with an opportunity to make representations before a decision was taken for deregistration.
d. Whether the failure to provide an opportunity to make representations could be remedied by a subsequent review of the decision.

47. In this regard, reference is made to Paragraphs 125 to 128 of the Applicants' Written Submissions which succinctly summarise the complaints of the First Named Applicant:

> *Paragraph 125*
>
> *A decision which fails to take into account relevant considerations is irrational. In this case the Commission, by adopting the rigid policy, that any conviction for a money laundering offence must lead to deregistration, without regard to Mr. Greene's personal circumstances fettered its discretion. These circumstances include:*
>
> *(a) This was an important consideration given Mr. Greene's constitutional right of appeal which would be rendered less meaningful if his conviction would be set aside on appeal, but in the meantime, he has lost a significant part of his business.*
> *(b) The conviction was for an offence which was committed some seventeen (17) years ago.*
> *(c) The Firm has not been charged with or accused of any subsequent money laundering offence, or engaged in any other conduct.*
> *(d) The draconian effect that the conviction has on the business of the Firm. Nowhere in Mr. Smith's affidavit did he allude to the impact which the registration would have on Mr. Greene's right to continue his business.*

(e) Whether there were any actions that could have been taken that were less severe than an immediate cancellation of The Firm's registration.

Paragraph 126

There is no evidence that the Commissioner directed his mind to any of these factors in assessing Mr. Greene's honesty, integrity and judgment. His conviction for an offence which took place in 2006/2007 cannot be the sole determination of his honesty and integrity in 2023, particularly given that he has a record which was capable of scrutiny in the many years since he was registered. The Commission failed to carry out any proper investigation or assessment of Mr. Greene's honesty and integrity at the date of the cancellation of The Firm's registration.

Paragraph 127

At paragraph 50 of his affidavit, Mr. Smith asserts that if Mr. Greene was not immediately deregistered following his conviction, the TCI would have a poor rating with the following consequences:

(a) Difficulty in gaining access to correspondent banking relationships.
(b) Difficulty in attracting foreign direct investment.
(c) Being placed on the international blacklist of non-complicit jurisdiction.
(d) Difficulty in accessing insurance capacity.
(e) Increase costs of doing business.
(f) Negative impact on TCI's borrowing capacity.
(g) Increase in stringent measures imposed on the TCI by the UK.

Paragraph 128

No material has been placed before the court to support these assertions that TCI would suffer jurisdictional risk if the decision to cancel had not awaited the outcome of Mr. Greene's appeal of his criminal conviction. The decision is contrary to the FAFT own literature and methodology. The purpose of the FATF Recommendations is to prevent abuse of the Global Financial System. Mr. Greene's conviction did not involve the use or abuse of the Global Financial System. It was purely a domestic transaction.

48. The First Named Applicant had been found guilty of a money laundering offence (*Concealing or Disguising the Proceeds of Criminal Conduct* contrary to *section 30(2)(a)* of the *Proceeds of Crime Ordinance 1998)* **on 25th September, 2023** and sentenced to six months imprisonment on 12th October, 2023. He appealed his conviction by Notice of Appeal dated 10th October, 2023 and had been released on bail pending appeal.

49. The fact of the First Named Applicant's conviction was widely publicised, since the matter had generated enormous public interest in the Turks and Caicos Islands. The Respondents would therefore undoubtedly have been aware of the conviction almost immediately. By letter dated **23rd October 2023**, the Respondents had advised the First Named Applicant of the cancellation of the registration of Stanfield Greene Attorneys at Law as a Designated Non-Financial Business and Profession (DNFBP) pursuant to *section 167* of the *Proceeds of Crime Ordinance* with effect from 4:00 p.m. on 23rd October 2023 due to him being convicted of a criminal offence. The Respondents therefore acted pursuant to *section 167(3)* almost one month after the date of the finding of guilt. The Court considers this to be significant for reasons which it will elaborate on below.

Analysing the evidence of Mr. Smith

50. Having carefully assessed the evidence of Mr. Smith and his responses under cross-examination and re-examination, it is clear to this Court that Mr. Smith took the decision to act under *section 167(3)* purely on the basis that Mr. Greene had a criminal conviction, thereby causing him to automatically fail the "fit and proper test". Mr. Smith contended that this failure made the TCI run the risk of the following:
    a. Greater difficulty in gaining access to correspondent banking relationships.
    b. Difficulty in attracting foreign direct investment.

c. The TCI being placed on the international blacklist of non-compliant jurisdictions.
d. Difficulty in accessing re-insurance capacity.
e. Increase to the costs of doing business in the TCI.
f. Making the TCI a less attractive place for doing business.
g. Reducing the TCI's borrowing capacity and increasing the cost of borrowing.
h. Increased stringency in measures placed on the TCI by the United Kingdom.

51. An important issue which arises for determination is whether the First Named Applicant is to be considered a "criminal" within the ambit of the relevant legislation and Regulations. Counsel for the Respondents submitted that he must be, whilst counsel for the Applicants disagreed, pointing out that the First Named Applicant had appealed his conviction. It was further submitted on behalf of the First Named Applicant that the fact that he had been granted bail pending appeal showed that he had good prospects of his appeal succeeding.

52. The Court cannot escape the conclusion that, having been convicted of a criminal offence, and an indictable one at that, the First Named Applicant can be properly deemed a criminal for the purpose of the relevant legislation and the Regulations. The fact that he has appealed his conviction is of no moment. The conviction remains a valid one unless quashed by an appellate court. The fact that he was granted bail pending appeal also does not assist the First Named Applicant since in determining whether to grant bail pending the appeal of an indictable matter, one of the paramount considerations is whether the sentence would be served before the appeal is heard. It is therefore not entirely unusual where a Defendant receives a short sentence (as in this case a sentence of six months imprisonment) and is not considered to be a flight risk or a threat to witnesses, that a court would view an application for bail pending appeal favourably.

53. Having arrived at the finding that the First Named Applicant can properly be considered to be a criminal, the question then arises whether this justified the Respondents acting in the manner in which they did.

54. It is important to pause at this point and remind that the Respondents adopted the most extreme measure that they could have, being immediate cancellation of the registration of the Firm. From the evidence of Mr. Smith, no other measures were explored. In particular, the Court finds it significant that no consideration was taken of the following:

    a. The criminal offence was committed almost seventeen (17) years ago.
    b. The Firm and Mr. Greene have been operating without issue since then.
    c. The immediate cancellation without notice would have had detrimental consequences to the Firm.
    d. Whilst Mr. Greene was clearly the principal operating mind in the firm, there may have been other less draconian measures which could have been explored. Thus, for example, there was the possibility of another appropriate and qualified individual in the Firm assuming conduct of the client files. This possibility was not explored by the Respondents.

55. By letter dated 23rd October 2023 the Respondents issued a Notice of Cancellation of Registration pursuant to *section 167* of the *Proceeds of Crime Ordinance* with effect from 4:00 p.m. on the said 23rd October 2023. The Firm was also requested to provide evidence that client files had been transferred to another Registrant for the continuation of their business on or before 6th November 2023.

56. It is clear to me that if *section 167(3)* is properly utilized, there is no obligation to give notice or an opportunity to be heard. To do so would fly in the face of the clear intent of section *167(3)* which is to cancel a registration immediately in situations where urgent action is required. In situations such as these, the giving of an opportunity to be heard may well defy the purpose of acting under *section 167(3)* in the first place.

57. The issue then is whether Mr. Smith acted reasonably in utilizing *section 167(3)* or whether he should have acted under *section 167(2)*, thereby affording the First Named Applicant a period of notice of at least 14 days as well as an opportunity to make representations.

58. In order to examine this, we need to look at what was operating in Mr. Smith's mind at the time he made the decision to utilize *section 167(3)*.

59. In assessing what was operating in Mr. Smith's mind at the time of the issuing of the Notice of Cancellation, the Court has taken into account the almost one-month delay between the First Named Applicant's conviction (which was highly publicized and would have been known to the FSC almost immediately) and the date on which action was taken. When one juxtaposes this with the rationale advanced by Mr. Smith for acting without notice under *section 167(3)*, it is difficult to accept Mr. Smith's evidence. Upon assessing the evidence, including Mr. Smith's responses under cross-examination, the Court is of the view that the decision to act without notice was taken purely on the basis of the First Named Applicant's conviction and that at the time of the taking of the decision regard was not had to the fact that there were other matters which could have been taken into account and Mr. Greene being a criminal was simply one of them, albeit a critical one.

60. In addition, many of the matters outlined in Mr. Smith's affidavit were stated for the first time and were not previously brought to the attention of the First Named Applicant or his attorney-at-law. By way of example, at paragraph 50 of his affidavit, Mr. Smith spoke about the reputational risk to the Turks and Caicos Islands which he stated could have the following consequences:

    i. Greater difficulty in gaining access to correspondent banking relationships.
    ii. Difficulty in attracting foreign direct investment.
    iii. The TCI being placed on the international blacklist of non-compliant jurisdictions.
    iv. Difficulty in accessing re-insurance capacity.
    v. Increase to the costs of doing business in the TCI.
    vi. Making the TCI a less attractive place for doing business.
    vii. Reducing the TCI's borrowing capacity and increasing the cost of borrowing.
    viii. Increased stringency in measures placed on the TCI by the United Kingdom.

61. Having carefully assessed Mr. Smith's evidence, the Court is of the view that many of the matters which Mr. Smith contends that he relied upon constituted ex post facto justifications after the decision was challenged by way of judicial review in this action and were therefore not operating in his mind at the time the decision was made.

62. The Court's finding in this regard is buttressed by the fact that Mr. Smith was unable to properly justify under cross-examination how he came to the conclusions that there would be reputational risks to the Turks and Caicos Islands if action was not taken against the First Named Applicant under *section 167(3)*. In addition, if these matters were indeed operating in the mind of Mr. Smith when the decision to act without notice was taken and if Mr. Smith did in fact have these serious concerns, it begs the question: Why wait almost one month before taking action?

63. The action of immediate deregistration is wholly inconsistent with the protracted delay of almost one month in taking action. This period could have been utilised to provide the First Named Applicant with the necessary notice, as well as an opportunity to make representations.

64. The Court is fully cognisant of ***Guideline 3.0*** of the ***Turks and Caicos Islands DNFBP Supervisor Fit and Proper Guidelines***, and in particular ***Guideline 3.2*** which provides, *inter alia*, that one of the purposes of the assessment of a person's fitness and propriety is to ensure that criminals and their associates are prevented from holding (or being owners of), controlling or managing DNFBPs. Indeed, the fact of a criminal conviction may even be one of the primary considerations in deciding whether there should be deregistration. However, it is not the only consideration and the Court is of the view that Mr. Smith erred in forming the view that the fact of a criminal conviction was in itself sufficient to automatically lead him to arrive at the conclusions that he did, being to act pursuant to section 167(3) instead of section 167(2) and to impose the ultimate sanction of deregistration without first exploring other options.

65. In other words, taking into account the evidence of Mr. Smith (and in particular his inability to justify his conclusions that to not act immediately would occasion reputational risk to the Turks and Caicos Islands) as well as the time lapse between the conviction and the deregistration, the Court is of the view that Mr. Smith could not have reasonably formed the opinion that it would be in the public interest for cancellation of the registration of the Firm with immediate effect.

66. To be clear, the Court is not saying that if ***section 167(3)*** is properly applied, the business or profession must be given an opportunity to show good reason why the registration should not be cancelled. ***Section 167(4)(a)*** deals specifically with the notice required under ***section 167(2)*** and explicitly gives the business or profession an opportunity to show good reason why its registration should not be cancelled. ***Section 167(4)(b)*** provides that where subsection 3 applies, the registration is cancelled with effect from the date of the notice. Under subsection 3, there is therefore no statutory requirement for the business or profession to be given any notice or for an opportunity to be heard. It follows that if the proper exercise of Mr. Smith's discretion had dictated that he could proceed under subsection 3 (or to put it another way, if he had reasonably held the opinion that it was in the public interest to cancel the registration of the firm with immediate effect), there would be no obligation in law to consult with the First Named Applicant or to provide him with a reasonable opportunity to make representations. To do so would be to make a mockery of the clear intent of subsection 3 which is to act urgently and without delay to safeguard the public interest in circumstances which so merit.

67. The effect of the decision in respect of the First Named Applicant was to bring the Firm to an immediate halt, notwithstanding the fact that the First Named Applicant had been operating without incident since 2007.

68. The Court is of the view that ***section 162(3)*** should only be utilised in circumstances in which there is some form of immediate financial threat or criminal act that justifies the deprivation of notice to the entity. An example might be where there is evidence that an entity is actively involved in money laundering. In all other circumstances, the rules of

natural justice dictate that action be taken under ***section 162(2)*** which requires the giving of at least fourteen (14) days notice. It is difficult to see what reputational damage could have been occasioned to the Turks and Caicos Islands if Mr. Greene had been afforded the period of notice and the opportunity to make representations. This is especially so since the FSC would have been aware that Mr. Greene had been convicted of an offence which allegedly took place in 2007 and his firm had been operating without any allegation of impropriety since then. Indeed, there is nothing to suggest that Mr. Greene had been anything but an upstanding member of the profession. In addition, the actual notice was sent about one month after the conviction, thereby clearly contradicting any argument that there was the need for urgent action against the Firm to protect the Turks and Caicos Islands from reputational damage.

69. In the circumstances, the Court finds that the Respondents exercised their discretion wrongly in acting under ***section 167(3)*** instead of ***section 167(2).***

70. Having determined that the FSC wrongly exercised its discretion to act under *section 167(3)* instead of *section 167(2)*, the issue then is whether there was an obligation on the part of the FSC to afford the First Named Applicant with an opportunity to make representations prior to arriving at a decision to deregister. In other words, apart from notice being given, ought Mr. Greene have been afforded an opportunity to make representations in regard to the deregistration of the Firm?

71. There can be no dispute that *section 167(2)* confers a draconian power on the FSC in that the ultimate consequence is deregistration. *Section 167(4)(a)* addresses the notice required under *section 167(2)* and gives the business or profession an opportunity to show good reason why its registration should not be cancelled.

72. However, even in the absence of an express statutory provision, an obligation to provide an opportunity to be heard can be implied.

73. In ***Bank Mellat v Her Majesty's Treasury***[5], Lord Sumpton, at paragraphs 29 to 31, addressed the issue of the giving of advance notice and an opportunity to be heard where a draconian statutory power is to be exercised:

> *[29] "The duty to give advance notice and an opportunity to be heard to a person against whom a draconian statutory power is to be exercised is one of the oldest principles of what would now be called public law. In Cooper v Wandsworth Board of Works (1863) 14 CB (NS) 180, (1863) 143 ER 414, the defendant local authority exercised without warning a statutory power to demolish any building erected without complying with certain preconditions laid down by the Act. 'I apprehend', said Willes J ((1863) 14 CB (NS) 180 at 190, (1863) 143 ER 414 at 418), 'that a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds: and that that rule is of universal application, and founded upon the plainest principles of justice'.*
>
> *[30] In Doody v Secretary of State for the Home Dept [1993] 3 All ER 92 at 106 sub nom R v Secretary of State for the Home Dept, ex p Doody [1994] 1 AC 531 at 560, Lord Mustill, with the agreement of the rest of the Committee of the House of Lords, summarised the case law as follows:*
> *'My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive the following. (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the*

[5] ***[2013] UKSC 39 (No. 2)***

decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.'

[31] "It follows that, unless the statute deals with the point, the question whether there is a duty of prior consultation cannot be answered in wholly general terms. It depends on the particular circumstances in which each direction is made. Some directions that might be made under Sch 7 of the Act could not reasonably give rise to an obligation on the Treasury's part to consult the targeted entity, for example because there was a real problem about the implicit or explicit disclosure of secret intelligence or because prior consultation might frustrate the object of the direction by enabling the targeted entity to evade its operation, notably in a case involving money laundering or terrorism…"

Lord Neuberger, in agreement with Lord Sumpton, said the following at paragraphs 178 and 179:

[178] "As Lord Sumption says at [29]– [30], above, where the executive intends to exercise a statutory power to a person's substantial detriment, it is well established that, in the absence of special facts, the common law imposes a duty on the executive to give notice to that person of its intention, and to give

that person an opportunity to be heard before the power is so exercised. While this has been described as a 'rule of universal application … founded upon the plainest principles of justice' (see Cooper v Wandsworth Board of Works (1863) 14 CB (NS) 180 at 190, (1863) 143 ER 414 at 418 per Willes J), it has more recently been expressed in somewhat more measured terms. In Doody v Secretary of State for the Home Dept [1993] 3 All ER 92 at 106 sub nom R v Secretary of State for the Home Dept, ex p Doody [1994] 1 AC 531 at 560, Lord Mustill said: 'Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations … either before the decision is taken … or after it is taken, with a view to procuring its modification …"

[179] "In my view, the rule is that, before a statutory power is exercised, any person who foreseeably would be significantly detrimentally affected by the exercise should be given the opportunity to make representations in advance, unless (i) the statutory provisions concerned expressly or impliedly provide otherwise or (ii) the circumstances in which the power is to be exercised would render it impossible, impractical or pointless to afford such an opportunity. I would add that any argument in support of impossibility, impracticability or pointlessness should be very closely examined, as a court will be slow to hold that there is no obligation to give the opportunity, when such an obligation is not dispensed with in the relevant statute."

74. In the instant matter, the FSC has advanced no good reason why an opportunity could not be afforded to the First Named Applicant to make representations. Indeed, there was a lapse of almost one month between the date of the decision and the date of the registration and that could have afforded the First Named Applicant an opportunity to make representations.

75. The Court therefore finds that the Respondents acted in breach of natural justice in not affording the First Named Applicant an opportunity to make representations before taking the decision to deregister the firm.

The cases of Bolton v Law Society and ***R v The Chief Constable of the Thames Valley Police ex parte Cotton***

76. Counsel for the Respondents relied heavily on the decisions in ***Bolton v Law Society***[6] and ***R v The Chief Constable of the Thames Valley Police ex parte Cotton***[7] to support different aspects of his arguments.

Bolton v Law Society

77. Counsel for the Respondents relied on the case of ***Bolton v Law Society (supra)*** to illustrate the point that where there are competing interests between the public and the person affected by a decision, the public interest must prevail so as to maintain public confidence and trustworthiness of members of the profession.

78. The case of ***Bolton v Law Society*** is often cited in regulatory proceedings, and in particular the following now famous dicta of Sir Thomas Bingham[8]:

> *"…the reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is part of the price…"*

79. In ***Bolton v Law Society***, a solicitor received a sum of money from a client but instead of retaining the sum in his client account, he disbursed the money in anticipation of completion. However, the sale was not completed. The Solicitors Complaints Bureau investigated and the shortage on the client account was discovered but promptly made good by the solicitor. Although the Solicitors Disciplinary Tribunal found that the solicitor's conduct was not deliberately dishonest, it was still serious enough to merit being suspended from practice for two years. The solicitor applied by way of appeal to

[6] ***(1994) 1WLR 512***
[7] ***[1990] IRLR 344***
[8] ***At page 519 E***

the Divisional Court which found that the tribunal's sentence was disproportionate to its findings. The court quashed the penalty of suspension and imposed a fine in substitution. The Law Society appealed and the Court of Appeal held that since a professional disciplinary tribunal was the body best suited to assess the seriousness of professional misconduct an appellate court should not, save in a very strong case, interfere with its sentence and that the Solicitors Disciplinary Tribunal's orders were not primarily to punishment but to the maintenance of a well-founded public confidence in the trustworthiness of all members of the profession and the discharge of any professional duty with less than complete integrity would attract severe sanctions. However, the appeal was dismissed since due to the lapse of time, the Court found that it would be oppressive to reinstate the order for suspension.

80. I have examined the case of ***Bolton v Law Society*** and find it to be of limited assistance in this matter. ***Bolton*** deals with the duty of solicitors to their clients as well as the maintenance of public confidence in the trustworthiness of all members of the profession and the discharge of their professional functions with complete integrity. The principles from ***Bolton*** can of course relate to the membership of any regulated profession and the case has been popularly cited in this regard.

81. The matter before this court does not deal with an allegation involving Mr. Greene's conduct in relation to a client. In addition, the FSC's role is not limited to attorneys and law firms.

82. Where ***Bolton*** does assist is to make the point that the public importance of protecting the public reputation of the profession supersedes the personal consequences of the member of that profession. The case is not however authority for the complete obliteration of the rights of the member of a profession and does not assist the Respondents in justifying why, in respect of the registration of the firm, action was taken under *section 162(2)* instead of *section 162(3)* (which would have required the giving of notice) in circumstances in which there was a one-month lapse from the date of Mr. Greene's conviction.

83. If the FSC had genuinely formed the view that the public interest superseded Mr. Greene's personal interests (for the reasons retailed in Mr. Smith's affidavit), one would have expected that it would have acted without haste in moving to deregister the Firm.

84. In any event, even accepting the superior public interest, the First Named Applicant's interests cannot be completely disregarded and the FSC has failed to demonstrate that the complete evisceration of Mr. Greene's rights were justified in the circumstances.

R v The Chief Constable of the Thames Valley Police ex parte Cotton

85. Counsel for the Respondents has drawn reference to the case of ***R v The Chief Constable of the Thames Valley Police ex parte Cotton*** ("Cotton") to make the point that the onus was on the First Named Applicant to reach out to the FSC and bring to their attention the fact of his conviction as well as to make representations about why he should not be deregistered.

86. In ***R v The Chief Constable of the Thames Valley Police ex parte Cotton***, Mr. Cotton had joined the Thames Valley Police as a constable in July 1984. In October 1986, his employment was terminated on the grounds of obesity, in accordance with the Police Regulations which provided that "during his period of probation in the force the services of a constable may be dispensed with at any time if the chief officer of police considers that he is not fitted, physically or mentally, to perform the duties of his office, or that he is not fitted, physically or mentally, to perform the duties of his office, or that he is not likely to become an efficient or well conducted constable." During his two-year probationary period, Mr. Cotton had received frequent warnings about his weight from his physical training instructor. In June 1986 Mr. Cotton was given a formal warning that unless within two months he reduced his weight from nearly 18 stone to 14 ½ stone, it would be recommended that his services be dispensed with. However, in October, Mr. Cotton still weighed over 16 stone. The assistant chief constable took into account the view of the chief medical adviser that Mr. Cotton's weight was such as to make him unfit to carry out full police duties and he recommended that Mr. Cotton be dismissed. The

deputy chief constable decided that Mr. Cotton should be discharged under regulation 17 as not fitted physically to perform the duties of his office. Mr. Cotton applied for judicial review on grounds that he had been denied natural justice and fair treatment because the deputy chief constable's decision was vitiated by procedural impropriety, particularly that the deputy chief constable had failed to show Mr. Cotton and ask him to comment on the adverse report he had received and on which he had relied from the assistant chief constable. The court dismissed the application and the Court of Appeal affirmed the decision of the High Court judge, holding *inter alia* that:

a. The High Court judge had correctly concluded that the failure to give the applicant the opportunity to comment on material relied upon by the deputy chief constable in taking the decision to dispense with his services on grounds of obesity did not amount to a denial of natural justice such as to vitiate the decision-making process by procedural impropriety.
b. Natural justice is to be equated with fairness. An applicant seeking judicial review on the grounds of a procedural impropriety must show that on the particular facts he has not been given "fair play". There is no such thing as a technical breach of natural justice. An applicant who cannot show that there has been any breach of natural justice in substance cannot expect to be granted even a bare declaration that "procedural impropriety" has occurred. The existence of procedural impropriety presupposes a breach of the duty to be fair.

87. In his submissions, counsel for the Respondents drew an analogy with Mr. Cotton, submitting that the First Named Applicant could not claim that there was a breach of natural justice because he knew that he had been convicted but did not take the opportunity to inform the Commission about his conviction. It was further submitted that the First Named Applicant did not need the Respondents to write to him to ask him to make representations since, being aware of his conviction, he could have done so himself.

88. However, there is an important distinction to be drawn between Mr. Cotton and the First Named Applicant, being that in *Cotton*, the Applicant had been given repeated warnings

about his weight and it was made clear to him that this was an issue. In the instant matter, no such warnings were issued to the First Named Applicant and, in any event, the purported detailed reasons for the Respondents taking the action that they did were never brought to the attention of the First Named Applicant and only detailed for the first time in Mr. Smith's affidavit.

89. In respect of the contention that there was an onus on the First Named Applicant to inform the FSC and voluntarily make representations as to why he should not be deregistered, the Court is not in agreement with this submission. Whilst there is an onus on a person registered to bring matters to the attention of the FSC, to extend that obligation to the voluntary provision of representations places an unnecessary burden on the person registered. It is for the FSC to determine whether a person fulfils the 'fit and proper' criteria and a person registered cannot be expected to engage in speculation about whether the FSC is considering deregistering him. In addition, the person would not be in possession of any reasons why deregistration was being contemplated and would essentially be 'shooting in the dark'.

Reconsideration by the Respondents

90. By letter dated 27th October, 2023, the Managing Director of the Financial Services Commission had written to the attorneys-at-law for the Applicants stating the following:

> *"Reference is made to your letters of 23 October 2023 and 24 October 2023 regarding the captioned matters.*
>
> *We have considered your position but remain of the view that the directive and notice were validly issued. As such, the Commission declines your request for withdrawal or suspension of same.*
>
> *Please be guided accordingly."*

91. By virtue of this letter of 27th October 2023, the Respondents purported to have reconsidered the decision and thereafter communicated that having reconsidered the decision in light of the reasons advanced, their decision remained the same. The Respondents have contended that this afforded the Applicants an opportunity to make representations and thereby remedied any procedural defects in the process adopted by the FSC in respect of deregistration.

92. However, the Court respectfully disagrees with this submission for the following reasons:
    a. At that time, it had not been communicated to the First Named Applicant that the Respondents considered that there was a reputational risk to the Turks and Caicos Islands with accompanying consequences and the First Named Applicant was therefore not in a position to provide justification for his deregistration.
    b. The Respondents had already made the decision and it was already in effect as against the First Named Applicant. The decision had been taken without notice to the First Named Applicant and without properly outlining the rationale for the proposed decision and providing the First Named Applicant with a reasonable opportunity to respond and to carefully consider the responses. This, notwithstanding the fact that the Respondents had ample time and opportunity to do so during the almost one-month lapse between the date of conviction and the date of action. The Respondents cannot now seek to remedy their shortcomings in this regard by relying on their purported consideration of representations made after the decision was taken. Quite simply, public authorities cannot operate in this ad hoc manner.
    c. When the Respondents purported to reconsider the matter, they did so based on representations made on behalf of the Applicants that did not have the benefit of the matters detailed in the affidavits of Mr. Tamiko Smith.
    d. In the absence of a statutory provision or Regulation authorizing same, the FSC did not have the authority to reconsider its decision. Having arrived at its decision on the merits, the FSC was *functus* and the decision could only be challenged by

way of appeal or judicial review. When one thinks about it logically, if indeed the FSC had the authority to reconsider and rescind a decision made on the merits, the question would arise: When can a decision be final? The principle of the finality of a decision is germane to the exercise of the function of a public body. Simply put, the Respondents did not have the authority to reconsider and rescind a decision that it had taken.

Would the First Named Applicant still be entitled to an opportunity to make representations if the conclusion would have been inevitable?

93. This was an issue raised by both parties with conflicting views. The Court has of course already concluded that the Respondents should have proceeded under *section 167(2)* instead of *section 167(3)*, thereby providing the First Named Applicant with an opportunity to make representations. Nevertheless, the issue might still arise whether the fact that a conclusion would be inevitable would render the providing of an opportunity to make representations pointless.

94. It was contended on the part of the Respondents that the Applicants could not complain about not being allowed to make representations because even if they were so allowed, the result would be the same. The Applicants of course disagreed with this position. Authorities were posited on behalf of both parties to support their respective positions.

95. It must first be said that this Court is not of the opinion that even if the First Named Applicant had been given the proper opportunity to make representations, the result would have necessarily been the same. As counsel for the First Named Applicant was at pains to point out, the matter complained of arose in 2007 and the First Named Applicant has been practising with an unblemished record since then. In addition, the Respondents failed to explore the possibility of the Firm continuing in operation without the involvement of the First Named Applicant but simply arrived at the unsupported conclusion that it was a 'one man show'.

96. It must also be recalled that judicial review is concerned with the manner in which a decision was arrived at.

97. I have examined the authorities and found the most helpful to be the case of ***R (on the application of Pathan) v Secretary of State for the Home Department*** [9]**,** and in particular paragraphs 120 to 125 of the judgment***:***

> *[120] "…There is ample authority on the issue of whether the duty to afford the opportunity to make representations arises where any such representations are bound to fail. Thus, as Lord Briggs has pointed out, in Cinnamond v British Airports Authority [1980] 2 All ER 368 at 377, [1980] 1 WLR 582 at 593, it was said that no one could complain of not being given an opportunity to make representations if it would have achieved nothing. A somewhat similar view was expressed in Bank Mellat v HM Treasury (No 2) [2013] UKSC 39, [2013] 4 All ER 533, [2014] AC 700(para [179]) in the passage from Lord Neuberger of Abbotsbury's judgment cited by Lord Briggs at para [161] below. (It is noteworthy, however, that in that passage Lord Neuberger was at pains to point out that any argument advanced in support of pointlessness 'should be very closely examined, as a court will be slow to hold that there is no obligation to give the opportunity, when such an obligation is not dispensed with in the relevant statute.')*
>
> *[121] Pointlessness can have two dimensions. The first is that there is no possibility of bringing about a change of mind on the part of the authority on the terms of the decision that has been made. So, for instance, in the present case, Mr Pathan's application, so long as it was based on a CoS issued by a company which had ceased to have authority to issue such a certificate, could not succeed in any circumstances. The second dimension is different. It involves an examination of whether, on becoming aware of the decision, there was simply nothing that the affected person could do to achieve his aim. In other words, there was no other avenue which he or she could explore to avoid the impact of the adverse decision.*

[9] ***[2020] UKSC 41***

[122] We are here concerned with the second dimension, and it will already be apparent that, in our view, it cannot be said that, even if notified promptly, Mr Pathan would still have been without avenues to pursue in an attempt to alter the outcome of the decision making process. We have outlined above the various options which we believe would have been open to Mr Pathan if he had been alerted earlier to the decision to cancel Submania's sponsor licence. Before turning again to those options, it is necessary to say something of the nature of the duty to act fairly in the context of bringing to the attention of an individual at the earliest time reasonably possible a decision in relation to revocation of the sponsor licence which is likely to affect him or her adversely.

[123] In Cinnamond the pointlessness argument was put starkly. Lord Neuberger's exposition of it in Bank Mellat (No 2) was more muted. The argument needs to be viewed, however, in the context of other judicial pronouncements where a less stringent view of the requirements of the utility of notice can be discerned.

[124] In Secretary of State for the Home Dept v AF (No 3) [2009] 3 All ER 643, [2010] 2 AC 269 (para [72]), Lord Hoffmann noted that the purpose of the audi alteram partem rule 'is not merely to improve the chances of the tribunal reaching the right decision … but to avoid the subjective sense of injustice which an accused may feel if he knows that the tribunal relied upon material of which he was not told.' And in Osborn v Parole Board [2013] UKSC 61, [2014] 1 All ER 369, [2014] AC 1115(para [68]), Lord Reed endorsed a normative understanding of the duty to act procedurally fairly:

'[J]ustice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken. As Jeremy Waldron has written ("How Law Protects Dignity" [2012] CLJ 200 at 210):

"Applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It involves paying attention to a point of view and respecting the personality of the entity one is dealing with. As such it embodies a crucial dignitarian idea – respecting the dignity of those to whom the norms are applied as beings capable of explaining themselves." '

[125] In their work Administrative Law: Text and Materials (5th edn, 2016), Elliott and Varuhas at para 10.2.5 discuss this passage from Lord Reed's judgment:

'*Referring to the dictum from R v The Chancellor of Cambridge (1723) 1 Stra 557 set out at 10.1, concerning God's willingness to grant Adam a hearing, Lord Reed continued (at para 69):*

"The point … is that Adam was allowed a hearing notwithstanding that God, being omniscient, did not require to hear him in order to improve the quality of His decision-making."

On this view, the notion of procedural fairness which would "make no difference" becomes a contradiction in terms, since it rests on an exclusively outcomes-oriented view which overlooks the much wider role played by procedural fairness in an administrative state that seeks to build constructive relationships between individuals and public bodies by casting the former as participants in the process of governance.'

[126] These statements do not, of course, relate directly to Mr Pathan's case. But they serve as a useful reminder that utility is not the only yardstick by which to measure the duty to act fairly in communicating to an individual why (and more relevantly in this case when) a decision adverse to their interests has been or is to be taken. It cannot have been lost on those who were involved in the decision in this case that it would have a significant impact on Mr Pathan and his family. The duty to inform him at the earliest reasonable opportunity that this effect was due to accrue seems to us to be obvious. Not only should those concerned with the decision have been aware that Mr Pathan and his family would experience a major disruption to their lives, they must also have been alive to the likelihood that he would want to do

something to mitigate the effects of the decision. This reinforces the need to inform him timeously…"

98. The Court is not of the opinion that in these circumstances it would have been pointless to hear from the First Named Applicant.

99. In all of the circumstances, this Court is therefore of the view that the Respondents acted in such an egregious manner in respect of the First Named Applicant that was so procedurally irregular that its decision cannot stand.

The Second Named Applicant ("Taino")

100. What then of the Second Named Applicant?

101. Taino is a corporate management company that was established in 2005 as an adjunct of the Firm. It is beneficially owned by the First Named Applicant (Mr. Greene) and has fewer than 100 companies under management. Mr. Greene has always been a Director, the MLRO and MLCO of Taino. Taino began business in 2006.

102. By letter dated 23rd October 2023, the Respondents had directed the Second Named Applicant to comply with the following ***no later than 4:00 p.m. on 24th November 2023:***

a. Remove the First Named Applicant as a Director, Compliance Officer and Money Laundering Compliance Officer of the Licensee and replace him with a person acceptable to the Commission.

b. Remove the First Named Applicant from any other position as a key employee, or person having functions held in relation to the Licensee and replace him with a person acceptable to the Commission.

103. ***Section 33(1)(d)(i)*** of the ***Financial Services Commission Ordinance*** provides as follows:

The Commission may take enforcement action against a licensee if

(d) in the opinion of the Commission –

(i) a person having a share or interest in the licensee, whether legal or equitable, or any director, officer or key employee of the licensee does not satisfy the Commission's fit and proper criteria.

104. ***Section 37(1)*** of the ***Financial Services Commission Ordinance*** provides as follows:

Where the Commission is entitled to take enforcement action against a licensee, the Commission may issue a directive –

(a) Imposing a prohibition, restriction or limitation on the financial service business that may be undertaken by the licensee, including –

(i) that the licensee shall cease to engage in any class or type of business: or

(ii) that the licensee shall not enter into any new contracts for any class or type of business.

(b) Requiring the licensee to take such other action as the Commission considers may be necessary to protect the property of, or in the custody, possession or control of, the licensee or to protect customers or creditors or potential customers or creditors of the licensee.

105. The measures adopted in respect of Taino were far less severe than those in respect of the Firm. They did not require the ceasing of business but rather the replacement of the First Named Applicant as Director, Compliance Officer, key employee and Money Laundering Compliance Officer. Taino did not lose its licence and Mr. Greene was not required to dispose of his interest in Taino. The letter was issued on 23rd October 2023 and an opportunity was given until 24th November 2023 for compliance. Taino was therefore given a reasonable opportunity to put its house in order.

106. The prejudice and consequences suffered by Taino were far less severe than the Firm. Taino remains in operation and the Court is of the view that, having regard to the First Named Applicant's criminal conviction, the actions taken cannot be said to be disproportionate.

107. The Court is also of the view that the power exercised in respect of Taino could not be classified as draconian so there would be no implied obligation to afford an opportunity for the making of representations. (See the discussion in ***Bank Mellat v Her Majesty's Treasury (at paragraph 73 supra)).*** Given the wholly proportionate response and period of notice provided, the Court is of the view that the failure to provide an expressed opportunity to make representations is not fatal in this instance.

108. In the circumstances, the Second Named Applicant's application cannot succeed.

DECISION OF THE COURT:

109. The decision of the Court is therefore as follows:

I hold that the decision of the Respondents to cancel the registration of Stanfield Greene as a Designated Non-Financial Business Professional with immediate effect was procedurally irregular, in breach of natural justice, irrational and made without regard to

relevant considerations. An Order of certiorari is therefore issued quashing the decision of the FSC to cancel the registration of Stanfield Greene ("the Stanfield Greene Decision") as a Designated Non-Financial Business Professional with immediate effect. The decision is remitted for the further consideration of the FSC. The Respondent will pay the costs of the First Named Applicant.

In respect of the Second Named Applicant ("the Taino Decision"), the application is dismissed and the Second Named Applicant will pay the Respondent's costs.

The formal Order of the Court is as follows:

(1) That the Stanfield Greene Decision is hereby quashed; and the matter is remitted to the Respondents for further consideration.
(2) The application to set aside the Taino Decision is refused.
(3) That the Respondents do pay the costs of the application relating to the Stanfield Greene Decision, such costs to be taxed, if not agreed.
(4) That the Applicant, Taino Management Ltd. do pay the costs of the Respondents in relation to the Taino Decision, such costs to be taxed, if not agreed.
(5) The Respondents have leave, if necessary, to appeal against the order quashing the Stanfield Greene Decision.

Dated 22nd March, 2024
The Honourable Justice Chris Selochan
Judge of the Supreme Court