

# GLS Administrative Law Webinar

---

## CASE REFERENCE

**R. v Deputy Chief Constable of Thames Valley Ex p. Cotton**

**Court of Appeal (Civil Division)  
15 December 1989**

Westlaw Case Analysis ..... 8 pages

Official Transcript ..... 18 pages

Status:  Positive or Neutral Judicial Treatment

## **R. v Chief Constable of Thames Valley Ex p. Cotton**

**Also known as:**

## **R. v Deputy Chief Constable of Thames Valley Ex p. Cotton**

Court of Appeal (Civil Division)

15 December 1989

### **Case Analysis**

#### **Where Reported**

[1990] I.R.L.R. 344; Times, December 28, 1989; Independent, December 22, 1989; [Official Transcript](#)

#### **Case Digest**

**Subject:** Administrative law

**Keywords:** Dismissal; Natural justice; Police officers

**Summary:** Natural justice; procedural impropriety; termination of employment of police constable; following number of warnings; whether substantive breach of natural justice

**Abstract:** C's employment as a constable was terminated after a number of warnings on grounds of obesity on the basis that he was not "fitted physically" to perform the duties of his office in accordance with Reg.17(1). He applied for judicial review on the grounds that he had been denied natural justice and that the decision was vitiated by procedural impropriety in that he had not been given the opportunity to comment on a detrimental report. The High Court judge dismissed the application, finding that C had failed "to establish that there was a real, as opposed to a purely minimal, possibility that the outcome would have been different".

Held, dismissing C's appeal, that the High Court judge had not erred in finding that there had been no denial of natural justice on the grounds of procedural impropriety. Natural justice was to be equated with fairness and there was no such thing as a technical breach of it. An applicant had to show that there had been a substantive breach. C had not shown that he had been treated unfairly and could not therefore properly claim that there had been a breach of natural justice.

#### **Appellate History & Status**

**Queen's Bench Division**

**R. v Chief Constable of Thames Valley Ex p. Cotton**

[1989] C.O.D. 318

**Affirmed**

**Court of Appeal (Civil Division)**

**R. v Chief Constable of Thames Valley Ex p. Cotton**

[\[1990\] I.R.L.R. 344; Times, December 28, 1989; Independent, December 22, 1989; Official Transcript](#)

**All Cases Cited****R. v Chief Constable of North Wales Ex p. Evans**

[\[1982\] 1 W.L.R. 1155](#); [\[1982\] 3 All E.R. 141](#); [\(1983\) 147 J.P. 6](#); [\(1982\) 79 L.S.G. 1257](#); [\(1982\) 126 S.J. 549](#); HL

**Cinnamond v British Airports Authority**

[\[1980\] 1 W.L.R. 582](#); [\[1980\] 2 All E.R. 368](#); [\[1980\] R.T.R. 220](#); [78 L.G.R. 371](#); [\(1980\) 124 S.J. 221](#); CA (Civ Div)

**George v Secretary of State for the Environment**

[77 L.G.R. 689](#); [\(1979\) 38 P. & C.R. 609](#); [\(1979\) 250 E.G. 339](#); [\[1979\] J.P.L. 382](#); CA (Civ Div)

**Stininato v Auckland Boxing Association**

[\[1978\] 1 N.Z.L.R. 1](#); CA (NZ)

**Malloch v Aberdeen Corp (No.1)**

[\[1971\] 1 W.L.R. 1578](#); [\[1971\] 2 All E.R. 1278](#); [1971 S.C. \(H.L.\) 85](#); [1971 S.L.T. 245](#); [\(1971\) 115 S.J. 756](#); HL

**John v Rees**

[\[1970\] Ch. 345](#); [\[1969\] 2 W.L.R. 1294](#); [\[1969\] 2 All E.R. 274](#); [\(1969\) 113 S.J. 487](#); Ch D

**Ridge v Baldwin**

[\[1964\] A.C. 40](#); [\[1963\] 2 W.L.R. 935](#); [\[1963\] 2 All E.R. 66](#); [\(1963\) 127 J.P. 295](#); [\(1963\) 127 J.P. 251](#); [61 L.G.R. 369](#); [37 A.L.J. 140](#); [234 L.T. 423](#); [113 L.J. 716](#); [\(1963\) 107 S.J. 313](#); HL

**Key Cases Citing****Applied**

Smith v North Eastern Derbyshire Primary Care Trust

[\[2006\] EWCA Civ 1291](#); [\[2006\] 1 W.L.R. 3315](#); [\(2006\) 9 C.C.L. Rep. 663](#); [\[2007\] LS Law Medical 188](#); [\(2006\) 150 S.J.L.B. 1152](#); [Times, September 11, 2006](#); [Official Transcript](#); CA (Civ Div)

R. (on the application of Wainwright) v Richmond upon Thames LBC

[\[2001\] EWHC Admin 310](#); [\[2001\] 18 E.G. 174 \(C.S.\)](#); [Official Transcript](#); QBD (Admin)

R. v Broxtowe BC Ex p. Bradford

[\[2000\] I.R.L.R. 329](#); [\[2000\] B.L.G.R. 386](#); [Official Transcript](#); CA (Civ Div)

**Followed**

R. v Broxtowe BC Ex p. Bradford

[\[1999\] C.L.Y. 97](#); QBD

**Considered**

Wylie's Application for Judicial Review, Re

[\[2004\] NIQB 86](#); [\[2005\] N.I. 359](#); QBD (NI)

R. (on the application of Capenhurst) v Leicester City Council

[\[2004\] EWHC 2124 \(Admin\)](#); [\(2004\) 7 C.C.L. Rep. 557](#); [\[2004\] A.C.D. 93](#); [Official Transcript](#); QBD (Admin)

R. v Islington LBC Ex p. Degnan

[\(1998\) 30 H.L.R. 723](#); [\[1998\] C.O.D. 46](#); [\(1998\) 75 P. & C.R. D13](#); CA (Civ Div)

R. v Northumberland Family Health Services Authority Ex p. Aitchson

[\[1993\] C.O.D. 406](#); DC

R. v Marylebone Magistrates Court Ex p. Perry

[\(1992\) 156 J.P. 696](#); [\[1992\] Crim. L.R. 514](#); [\(1992\) 156 J.P.N. 348](#); [Times, February 20, 1992](#); QBD

## All Cases Citing

### Mentioned by

R. (on the application of Asian Music Circuit) v Arts Council England

[\[2012\] EWHC 1538 \(Admin\)](#); QBD (Admin)

### Mentioned by

R. (on the application of LePage) v HM Assistant Deputy Coroner for Inner South London

[\[2012\] EWHC 1485 \(Admin\)](#); DC

### Mentioned by

R. (on the application of South West Care Homes Ltd) v Devon CC

[\[2012\] EWHC 1867 \(Admin\)](#); [Official Transcript](#); QBD (Admin)

### Mentioned by

R. (on the application of Adams) v Commission for Local Administration in England

[\[2011\] EWHC 2972 \(Admin\)](#); [Official Transcript](#); QBD (Admin)

### Mentioned by

Manning v Ramjohn

[\[2011\] UKPC 20](#); [Official Transcript](#); PC (Trin)

### Mentioned by

R. (on the application of Kerr) v Cambridge City Council

[\[2011\] EWHC 1623 \(Admin\)](#); [Official Transcript](#); QBD (Admin)

### Mentioned by

R. (on the application of Shoesmith) v Ofsted

[\[2011\] EWCA Civ 642](#); [\[2011\] I.R.L.R. 679](#); [\[2011\] B.L.G.R. 649](#); [\(2011\) 108\(23\) L.S.G. 16](#); [\(2011\) 155\(22\) S.J.L.B. 35](#); [Official Transcript](#); CA (Civ Div)

### Mentioned by

R. (on the application of Shoesmith) v Ofsted

[\[2010\] EWHC 852 \(Admin\)](#); [\(2010\) 154\(17\) S.J.L.B. 27](#); [\[2011\] P.T.S.R. D13](#); [Official Transcript](#); QBD (Admin)

### Mentioned by

R. (on the application of Seabrook Warehousing Ltd) v Revenue and Customs Commissioners

[\[2010\] EWCA Civ 140](#); [\[2010\] S.T.C. 996](#); [Official Transcript](#); CA

(Civ Div)

**Mentioned by**

Secretary of State for the Home Department v F

[\[2009\] UKHL 28](#); [\[2010\] 2 A.C. 269](#); [\[2009\] 3 W.L.R. 74](#); [\[2009\] 3 All E.R. 643](#); [\[2009\] H.R.L.R. 26](#); [\[2009\] U.K.H.R.R. 1177](#); [26 B.H.R.C. 738](#); [\(2009\) 106\(25\) L.S.G. 14](#); Times, June 11, 2009; [Official Transcript](#); HL

**Mentioned by**

R. (on the application of Broxbourne BC) v North and East Hertfordshire Magistrates' Court

[\[2009\] EWHC 695 \(Admin\)](#); [\[2009\] N.P.C. 60](#); [Official Transcript](#); QBD (Admin)

**Mentioned by**

R. (on the application of Midcounties Co-operative Ltd) v Wyre Forest DC

[\[2009\] EWHC 964 \(Admin\)](#); [Official Transcript](#); QBD (Admin)

**Mentioned by**

Secretary of State for the Home Department v F

[\[2008\] EWCA Civ 1148](#); [\[2009\] 2 W.L.R. 423](#); [\[2009\] 2 All E.R. 602](#); [\[2009\] H.R.L.R. 4](#); [\[2009\] U.K.H.R.R. 176](#); [\[2009\] A.C.D. 7](#); Times, October 29, 2008; [Official Transcript](#); CA (Civ Div)

**Mentioned by**

R. (on the application of O'Callaghan) v Charity Commission for England and Wales

[\[2007\] EWHC 2491 \(Admin\)](#); [\[2008\] W.T.L.R. 117](#); [Official Transcript](#); QBD (Admin)

**Mentioned by**

Gray v Marlborough College

[\[2006\] EWCA Civ 1262](#); [\[2006\] E.L.R. 516](#); [\(2006\) 150 S.J.L.B. 1289](#); [Official Transcript](#); CA (Civ Div)

**Mentioned by**

R. (on the application of JF) v Croydon LBC

[\[2006\] EWHC 2368 \(Admin\)](#); [Official Transcript](#); QBD (Admin)

**Applied**

Smith v North Eastern Derbyshire Primary Care Trust

[\[2006\] EWCA Civ 1291](#); [\[2006\] 1 W.L.R. 3315](#); [\(2006\) 9 C.C.L. Rep. 663](#); [\[2007\] LS Law Medical 188](#); [\(2006\) 150 S.J.L.B. 1152](#); Times, September 11, 2006; [Official Transcript](#); CA (Civ Div)

**Mentioned by**

R. (on the application of Montgomery) v Hertfordshire CC

[\[2005\] EWHC 2026 \(Admin\)](#); [\[2006\] I.R.L.R. 787](#); [Official Transcript](#); QBD (Admin)

**Mentioned by**

J v Staffordshire CC

[\[2005\] EWHC 1664 \(Admin\)](#); [\[2006\] E.L.R. 41](#); [\[2006\] E.L.R. 141](#); [Official Transcript](#); QBD (Admin)

**Mentioned by**

R. (on the application of National Association of Health Stores) v Secretary of State for Health

[\[2005\] EWCA Civ 154](#); [Times, March 9, 2005](#); [Official Transcript](#); CA (Civ Div)

**Considered**

Wylie's Application for Judicial Review, Re

[\[2004\] NIQB 86](#); [\[2005\] N.I. 359](#); QBD (NI)

**Mentioned by**

R. (on the application of R) v Hampshire CC

[\[2004\] EWHC 3193 \(Admin\)](#); [Official Transcript](#); QBD (Admin)

**Considered**

R. (on the application of Capenhurst) v Leicester City Council

[\[2004\] EWHC 2124 \(Admin\)](#); [\(2004\) 7 C.C.L. Rep. 557](#); [\[2004\] A.C.D. 93](#); [Official Transcript](#); QBD (Admin)

**Mentioned by**

Rubin v First Secretary of State

[\[2004\] EWHC 266 \(Admin\)](#); [\[2004\] 3 P.L.R. 53](#); [\[2005\] J.P.L. 234](#); [Official Transcript](#); QBD (Admin)

**Mentioned by**

JJ Gallagher Ltd v Secretary of State for Transport, Local Government and the Regions

[\[2002\] EWHC 1812 \(Admin\)](#); [\[2002\] 4 P.L.R. 32](#); [\(2002\) 99\(36\) L.S.G. 42](#); [Official Transcript](#); QBD (Admin)

**Mentioned by**

R. (on the application of Wainwright) v Richmond upon Thames LBC

[\[2001\] EWCA Civ 2062](#); [\(2002\) 99\(9\) L.S.G. 29](#); [Times, January 16, 2002](#); [Official Transcript](#); CA (Civ Div)

**Mentioned by**

R. (on the application of Chattington) v Chief Constable of South Wales

[\[2001\] EWHC Admin 887](#); [Official Transcript](#); QBD (Admin)

**Mentioned by**

Tameside MBC v Grant

[\[2002\] Fam. 194](#); [\[2002\] 2 W.L.R. 376](#); [\[2002\] 1 F.L.R. 318](#); [\[2002\] 3 F.C.R. 238](#); [\[2002\] Fam. Law 106](#); [\(2001\) 98\(41\) L.S.G. 34](#); [\(2001\) 145 S.J.L.B. 237](#); Fam Div

**Applied**

R. (on the application of Wainwright) v Richmond upon Thames LBC

[\[2001\] EWHC Admin 310](#); [\[2001\] 18 E.G. 174 \(C.S.\)](#); [Official Transcript](#); QBD (Admin)

**Mentioned by**

A v Kirklees MBC

[\[2001\] EWCA Civ 582](#); [\[2001\] B.L.G.R. 448](#); [\[2001\] E.L.R. 657](#); [Times, May 1, 2001](#); [Official Transcript](#); CA (Civ Div)

**Mentioned by**

R. (on the application of Lichfield Securities Ltd) v Lichfield DC

[\[2001\] EWCA Civ 304](#); [\(2001\) 3 L.G.L.R. 35](#); [\[2001\] 3 P.L.R. 33](#); [\[2001\] P.L.C.R. 32](#); [\[2001\] J.P.L. 1434 \(Note\)](#); [\[2001\] 11 E.G. 171 \(C.S.\)](#); [\(2001\) 98\(17\) L.S.G. 37](#); [\(2001\) 145 S.J.L.B. 78](#); [Times, March 30, 2001](#); [Official Transcript](#); CA (Civ Div)

**Mentioned by**

R. (on the application of Davies) v Secretary of State for the Home Department

[Independent, November 23, 2000](#); [Daily Telegraph, November 28, 2000](#); [Official Transcript](#); CA (Civ Div)

**Mentioned by**

R. v Secretary of State for the Home Department Ex p. Amnesty International (No.3)

[Official Transcript](#); QBD

**Applied**

R. v Broxtowe BC Ex p. Bradford

[\[2000\] I.R.L.R. 329](#); [\[2000\] B.L.G.R. 386](#); [Official Transcript](#); CA (Civ Div)

**Mentioned by**

R. v Chief Constable of the British Transport Police Ex p. Farmer

[\[1999\] C.O.D. 518](#); [Official Transcript](#); CA (Civ Div)

**Followed**

R. v Broxtowe BC Ex p. Bradford

[\[1999\] C.L.Y. 97](#); QBD

**Mentioned by**

R. v Chief Constable of the British Transport Police Ex p. Farmer

[\[1998\] C.O.D. 484](#); [\(1998\) 95\(36\) L.S.G. 31](#); [Times, September 4, 1998](#); [Official Transcript](#); QBD

**Mentioned by**

Boddington v British Transport Police

[\[1999\] 2 A.C. 143](#); [\[1998\] 2 W.L.R. 639](#); [\[1998\] 2 All E.R. 203](#); [\(1998\) 162 J.P. 455](#); [\(1998\) 10 Admin. L.R. 321](#); [\(1998\) 148 N.L.J. 515](#); [Times, April 3, 1998](#); HL

**Considered**

R. v Islington LBC Ex p. Degnan

[\(1998\) 30 H.L.R. 723; \[1998\] C.O.D. 46; \(1998\) 75 P. & C.R. D13; CA \(Civ Div\)](#)

**Mentioned by**

R. v Secretary of State for the Home Department Ex p. Al-Fayed (No.1)

[\[1998\] 1 W.L.R. 763; \[1997\] 1 All E.R. 228; \[1997\] I.N.L.R. 137; \[1997\] C.O.D. 205; Times, November 18, 1996; Independent, November 19, 1996; CA \(Civ Div\)](#)

**Mentioned by**

R. v Secretary of State for the Home Department Ex p. Hickey (No.2)

[\[1995\] 1 W.L.R. 734; \[1995\] 1 All E.R. 490; \(1995\) 7 Admin. L.R. 549; \(1994\) 144 N.L.J. 1732; Times, December 2, 1994; Independent, November 29, 1994; DC](#)

**Mentioned by**

R. v Director General of Fair Trading Ex p. Southdown Motor Services

[\[1994\] E.C.C. 243; \(1993\) 12 Tr. L.R. 90; Times, January 18, 1993; QBD](#)

**Considered**

R. v Northumberland Family Health Services Authority Ex p. Aitchson

[\[1993\] C.O.D. 406; DC](#)

**Mentioned by**

R. v Life Assurance Unit Trust Regulatory Organisation Ex p. Ross

[\[1993\] Q.B. 17; \[1992\] 3 W.L.R. 549; \[1993\] 1 All E.R. 545; \[1993\] B.C.L.C. 509; \(1993\) 5 Admin. L.R. 573; \[1992\] C.O.D. 455; Times, June 17, 1992; Independent, July 16, 1992; Financial Times, June 25, 1992; CA \(Civ Div\)](#)

**Considered**

R. v Marylebone Magistrates Court Ex p. Perry

[\(1992\) 156 J.P. 696; \[1992\] Crim. L.R. 514; \(1992\) 156 J.P.N. 348; Times, February 20, 1992; QBD](#)

**Mentioned by**

R. v Deputy Governor of Parkhurst Prison Ex p. Hague

[\[1992\] 1 A.C. 58; \[1991\] 3 W.L.R. 340; \[1991\] 3 All E.R. 733; \(1993\) 5 Admin. L.R. 425; \[1992\] C.O.D. 69; \(1991\) 135 S.J.L.B. 102; Times, July 25, 1991; Independent, September 4, 1991; Guardian, July 31, 1991; HL](#)

**Journal Articles**

**Public law update (October)**

Amendments; Assessment; Asylum seekers; Children; Compensation; Consultation; Detention; Fast track; Funding; Judicial review; Local authorities; Miscarriage of justice; Right to respect for private and family life; Voluntary organisations.

[N.L.J. 2004, 154\(7148\), 1519-1520](#)



**General duties to consult the public: how do you get the public to participate?**

Consultation; Local authorities powers and duties.

[Nott. L.J. 2002, 11\(2\), 33-45](#)

**Status and contract in the law of public employment.**

Judicial review; Jurisdiction; Public authorities; Unfair dismissal.

[I.L.J. 1991, 20\(1\), 72-75](#)

**Books**

**Encyclopedia of Local Government Law**

Chapter: Chapter 4 - Judicial Control of Local Authorities

Documents: [1-158 When do procedural standards apply?](#)


**White Book 2012**

Chapter: Section A - Civil Procedure Rules 1998 and Practice Directions

Documents: [Rule 54.16 Evidence](#)

© 2012 Sweet & Maxwell

Westlaw<sup>®</sup> UK

Status:  Positive or Neutral Judicial Treatment

**The Queen v The Chief Constable of the Thames Valley Police Ex Parte  
Andrew Brett Cotton**

CO 1366 1987

In the Supreme Court of Judicature

Court of Appeal (Civil Division)

On Appeal from the High Court of Justice

Queen's Bench Division

Crown Office List

15 December 1989

**1990 WL 753309**

Lord Justice Slade Lord Justice Stocker and Lord Justice Bingham

Friday 15th December 1989

**Representation**

MR. JOHN SAMUELS Q.C. and MR. B. PATTEN (instructed by Messrs. Russell Jones & Walker, Solicitors, London WC1X 8DH) appeared on behalf of the Applicant (Appellant).

MR. MICHAEL BELOFF Q.C. and MR. THOMAS HILL (instructed by The Clerk to the Thames Valley Police Authority, Reading RG2 9XD) appeared on behalf of the Respondent (Respondent).

**JUDGMENT (Revised)**

LORD JUSTICE SLADE:

This is an appeal by Mr. Andrew Brett Cotton from a judgment of Simon Brown J., given on 14th October 1988, whereby he dismissed an application by Mr. Cotton for judicial review of a decision of the Deputy Chief Constable of the Thames Valley Police Force of 9th October 1986 to dispense with the applicant's services pursuant to Regulation 17 (1) of the Police Regulations 1979 , Statutory Instrument 1979 No. 1470. Those Regulations, though now no longer current, were in force at the material time. Regulation 17 (1) provides:

“Subject to the provisions of this Regulation, 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 likely to become an efficient or well conducted constable.”

The decision was taken by the Deputy Chief Constable, in the absence on holiday of the Chief Constable, who is the respondent to this application. Pursuant to Regulation 17 (3) , the applicant was in fact given the opportunity to retire, instead of having his services dispensed with, and did so on 13th October 1986. However, nothing turns on this and, for the sake of convenience and simplicity, I will follow the judge in referring to the ending of the applicant's engagement as a dismissal, even though this description is not strictly accurate.

The applicant was dismissed on the grounds of obesity. The grounds of challenge to the decision in

question are that in all the circumstances he was denied natural justice and fair treatment, and the decision-making process was vitiated by procedural impropriety.

The applicant was born on 18th March 1963 and joined the Thames Valley Police as a constable on 23rd July 1984. Pursuant to Regulation 16 of the 1979 Regulations, he was on probation for the first two years with the Force. The judge (at p. 4 B) described his weight at the date of his appointment as being 16 stone, though the correctness of this description has been challenged.

His Initial Training Report stated:

"He found physical training difficult at first due to him being overweight. The initial assessment of his fitness was below satisfactory. However, he worked very hard and made a steady improvement throughout."

At eight months' service (March 1985) his appraisal report stated that "he was making good progress" and "making every effort to lose weight". On 1st April 1985, he attended the Phase I Course. On that day his weight was 16 stone 5 pounds, and he took 13.08 minutes to complete the 1½ mile run, for which the standard time was 12 minutes.

In July 1985, he was advised to lose weight. On attending the Phase II Course on 9th September 1985, he weighed 16 stone 10 pounds, and took 14.44 minutes to complete the 1½ mile run. The Physical Training Instructor commented:

"Very poor stamina due entirely to being grossly overweight despite advice to lose weight after Phase I. Will fail Phase III physical unless immediate action is taken."

An appraisal in November 1985 included these comments of the Training Officer:

"His fitness continues to be a problem due to his excess body weight which he has been given very clear advice on by the Physical Training Staff."

On 24th March 1986, it was reported that Mr. Cotton had attended the Phase III Course with an ankle injury which had prevented him from taking part in physical activities. At that time his weight had increased to 18 stone.

On 25th March 1986, Chief Inspector Dando saw him and again advised him of the need to lose weight and improve his general standard of fitness. On 4th April 1986, Mr. Cotton weighed 18 stone 10 pounds. Superintendent Todd advised him at that time to contact his own doctor in order to produce a diet which would produce a significant weight loss. He also arranged for Sergeant Newman, a Physical Training Instructor at the Sulhamstead Training Centre, to give him advice on losing weight. Mr. Cotton attended the Final Course on 21st April 1986. His weight was not recorded, but he was described as being overweight. He again failed the timed run, completing it in 14.37 minutes. On 14th May 1986, Superintendent Todd gave a 21 month Appraisal Report recommending confirmation of Mr. Cotton's appointment, subject to the outstanding issue of his fitness and weight. On that date his weight was 18 stone 6½ pounds.

In view of the pending completion of Mr. Cotton's probationary period, Assistant Chief Constable Pollard (Personnel) made an appointment for him to see Dr. Foster, the Chief Medical Adviser to the Thames Valley Police, and on 19th May 1986 he wrote to Dr. Foster saying:

"P.C. Cotton has failed to pass three physical fitness tests during his probationary period. His weight has apparently risen from just over 15 stones to 18 stones, and despite several warnings, he has failed to control it. I should be grateful if you would let me know if you consider that this officer is likely to remain fit for full police duties. You may consider that given a little time he could reduce his weight, in which case consideration could be given to extending his probationary period on medical grounds."

On 23rd May 1986, Dr. Foster replied to the letter of 19th May by a letter of which the most material

passages are as follows:

"I have, today, examined P.C. Cotton bearing in mind the information, given in your letter, that his weight has risen from 15 stone to 18 stone during the last two years. Today, when I weighed him, he was 17 stone 6 pounds. He tells me he is now on a diet. Even so at 6 feet 0 inches he should be very much lighter ...

"Obviously in his present state, this man is not fit to remain in the Police Force. However, he has managed to lose half a stone in a short time, and he is keen to stay in the Force. I would have thought it reasonable that if this man can get down to well under 15 stone, let us say 14½ stone, in the next two months, it would be possible to keep him in the Force. However, if he has not achieved this at the end of two months, then he should be discharged. One would assume his physical fitness tests would return to normal with the loss of this weight."

On 2nd June 1986, Assistant Chief Constable Pollard, as contemplated, requested the Home Office that Mr. Cotton's probationary period should be extended to 19th October 1986. On 10th June 1986, Chief Superintendent Lord, on behalf of Assistant Chief Constable Pollard, interviewed Mr. Cotton to give him a Regulation 17 warning. Mr. Cotton was accompanied by Inspector Muddle, his Relief Inspector, who stated that he regarded him as an excellent officer who had a lot to offer, and also by P.C. Watson, acting as his "friend". Chief Superintendent Lord made a file note of this interview the next day, 11th June 1986, which related its course in detail. The file note records that having explained the purpose of the interview which was concerned solely with [Mr. Cotton's] physical health and fitness, Chief Superintendent Lord "read to him all reports on his file touching on that". (There is an issue as to precisely which reports were read, but I do not think anything turns on this). The note then proceeds to recite a good deal of the earlier history of Mr. Cotton's fitness and weight over the period of his probation, covering much the same matters as those which I have already recorded. A point came in the interview when Chief Superintendent Lord referred to Dr. Foster's letter of 23rd May 1986. The note records:

"P.C. Cotton agreed that the comments read over to him were fair and accurate, but argued that had he received a formal warning earlier then he would have been in a better position to have lost weight and regained his fitness. He admitted however that he had received the necessary advice frequently over a long period, particularly from the staff at Sulhamstead [the Police Training Centre]."

The last two and most important paragraphs of this note stated:

"I advised P.C. Cotton that he would not be confirmed unless within two months he reduced his weight to 14 stone 7 pounds, and completed the 1½ mile run within 12 minutes. He was also told that in order to be given sufficient time to meet the Force Surgeon's requirements, his probationary period would be extended for 3 months to 19th October 1986. Failure to meet these requirements would lead to my recommending that his services be dispensed with. Lastly I strongly advised the officer that physical fitness was a requirement of all serving officers. It was not enough for him to lose weight to scrape through his probation and then return to his former obesity. If at any time in the future he was found to be overweight he would be placed before the Force Surgeon with a view to his discharge on medical grounds."

By 23rd June 1986, the applicant had succeeded in losing nine pounds in weight in about a month. On that day his weight was found to be 16 stone 11 pounds, and he completed the 1½ mile run in 12 minutes 11 seconds. During the course of the next two months, he managed to lose another nine pounds; on 26th August 1986 his weight was found to be 16 stone 2 pounds. During the next fortnight, however, his weight increased by seven pounds; on 9th September 1986 it was 16 stone 9 pounds. However, on that day he completed the 1½ mile run stamina test in 11 minutes 38 seconds (22 seconds inside the recommended standard of 12 minutes).

On 10th September 1986, Sergeant Newman from the Sulhamstead Training Centre, submitted a report to Superintendent Clark (Training). This report recorded successive weights for the applicant over a substantial period, stating, inter alia, that his weight on joining the Force had been 14 stone 10 pounds. It referred to his successful passing of the stamina test on 9th September, but stated

"P.C. Cotton remains overweight by at least 2 stones, but has been able to achieve the required standard for stamina on this occasion..."

On 15th September 1986, Superintendent Clark wrote a report to Chief Superintendent Lord, referring, inter alia, to certain failures of the applicant to keep assessment appointments, and concluding:

"In view of his apparent lack of commitment to reducing his weight and apparent lack of ability to keep assessment appointments, I would recommend that his appointment should not be confirmed."

On 16th September 1986, an Inspector (Personnel), whose signature is illegible, submitted a written note to Superintendent Middleton stating that the applicant "does not appear on the face of it to have the necessary commitment which is required for the service".

On 19th September 1986, Dr. Foster wrote a letter to Superintendent Middleton as follows:

"This letter is in addition to the letter of the 23rd May 1986. As you know, at that time I saw P.C. Cotton, who was 17 stone 6 pounds, and thought it would be reasonable to see if he could get his weight down to under 15 stone. I then said that if he had not achieved this within 2 months, he should be discharged from the Force. I understand today from Sergeant Nicoll that P.C. Cotton now weights 16 stone 9 pounds. It is to be noted that P.C. Cotton was 16 stone when he joined the Force. Therefore, despite trying to lose weight, this man has only managed to achieve a weight of 16 stone, 9 pounds, a weight which is not only above that when he was admitted to the Force, but one which would make him unfit to carry out full police duties. I therefore recommend to the Police Authority that he should be discharged, as he has failed to obtain a satisfactory weight for his weight for his height."

Dr. Foster's assumption that the applicant then weighed 16 stone 9 pounds was correct. His assumption that he was 16 stone when he joined the Force is under challenge.

On 7th October 1986, Assistant Chief Constable Pollard saw the applicant, who was accompanied by his "friend", P.C. Watson. Assistant Chief Constable Pollard made a file note of this interview, which I should quote more or less in full:

"I went through the history of P.C. COTTON's fitness problems since he joined the Force and referred in particular to his interview with Chief Superintendent Personnel, on my behalf, on 10 June 1986, when he was given a Regulation 17 Warning. At that time, on the advice of the Force Surgeon, he was told that unless he reduced his weight in two months to 14 stone 7 pounds and completed the run within 12 minutes, consideration would be given to dispensing with his services.

"I told PC COTTON that he had not complied with this advice and therefore the Chief Constable would be considering whether to dispense with his services...I confirmed that PC COTTON had been aware that this was the purpose of the interview and that he had therefore had time to 'prepare his case'. I sought his comments. PC COTTON merely wished to say that he loved the Police and that he considered it in the interests of both the Force and himself that he remained a serving Police Officer.

"His 'friend' PC WATSON brought up the following points:

- a) He has now in fact completed the run and fitness test satisfactorily.
- b) Despite his weight he is sufficiently fit to be a member of a PSU and has had no difficulty in coping with the training and duty resulting.

c) He plays soccer regularly for a Police soccer team and is on the fringe of playing for Thames Valley Police. His position is, admittedly, that of goalkeeper.

d) He has, in fact, managed to take off a significant amount of weight and is now down to 16 stone. PC COTTON's doctor allegedly has stated that to have tried to take off more weight within the time constraints would have been dangerous to his health.

e) PC WATSON asked for consideration to be given to extending PC COTTON's probation again, with the officer having a medical check now and a further one in three months time. This would give him a further opportunity to prove his fitness.

"Overall, PC COTTON's weight problem had never hampered his job and indeed he had been commended for good work on several occasions. He presented me with some papers outlining these circumstances, one of which resulted in the officer chasing a suspect for some distance before arresting him.

"I emphasised to PC COTTON the fact that the Police Surgeon had stated that the weight was the only criteria and that his failure to lose sufficient weight made him unfit to carry out full Police duties. The vital point was that the Chief Constable had to look to his officers serving 30 years: if an officer was unfit at two years, what would happen in the following 28?"

Having prepared this typewritten file note, Assistant Chief Constable Pollard appended to it a handwritten note dated 8th October, and addressed to the "Acting Chief Constable", in the following terms:

"There are 3 possible options in respect of PC COTTON:

(a) Confirm.

(b) Extend his probation for a further period (for a second time).

(c) Dismiss under regn. 17.

I have no hesitation in recommending option (c). DR. FOSTER, our force surgeon, has recommended unequivocally that PC COTTON is at a weight such as to make him unfit to carry out full police duties. I have spoken to DR. FOSTER on the telephone and acquainted him with the circumstances at (a) – (d) above: DR. FOSTER made it clear that they make no difference whatsoever because what has to be considered is the ability of this man to be a fit police officer for 30 years."

On 9th October 1986, Deputy Chief Constable Rutherford reached his decision, which he recorded in writing as follows:

"1. In the absence of the Chief Constable, this matter falls to me for consideration and decision.

2. PC Cotton has clearly had difficulty in keeping his weight to an acceptable level since the time of his recruitment but it would appear that the most critical stage was between the 23rd May when he was examined by Dr. Foster and the current date. In May he was weighed at 17 st. 6 lbs. and in the opinion of the Chief Medical Adviser, he was not fit to remain in the Force. I am quite sure that at that time it was made clear to him that he had to achieve a weight loss of about three stones. It was significant that at the time Dr. Foster felt that this ought to be achieved within two months and this tends to negate the suggestion that PC Cotton was medically advised against losing this weight.

3. In the light of Dr. Foster's most recent letter of 19 September and confirmation that PC Cotton still weighs in excess of 16 stone, I am quite satisfied that he should be discharged under Regulation 17 as not fitted physically to perform the duties of his office."

On the following day, 10th October, Assistant Chief Constable Pollard gave formal notice to the applicant in accordance with Regulation 17 (1) of the 1979 Regulations that his services as a constable would be dispensed with as from 13th October 1986. That notice, a copy of which the applicant acknowledged having received, stated:

"Careful consideration has been given to reports which have been submitted regarding your physical condition and as a result the Chief Constable cannot be satisfied that you are fit physically to perform the duties of a constable."

On receipt of this notice, the applicant submitted written notice to retire on 13th October 1986, as he was entitled to do.

On 6th January 1987, the applicant's solicitors wrote to the Chief Constable of the Force enquiring, inter alia, who had had responsibility for the decision to dispense with his services. On 23rd January 1987, the Clerk to the Authority replied saying that the decision had been taken by the Deputy Chief Constable. On the basis of that information, an application was issued on 12th February 1987 for leave to apply for judicial review on the grounds that the decision was non-delegable and should have been that of the Chief Constable himself. Leave was then granted for the application to proceed. However, from the evidence served in reply on behalf of the Chief Constable, it became apparent for the first time that the Deputy Chief Constable had in fact been empowered to take action under Regulation 17 because the Chief Constable was at all material times absent, and his Deputy was for the time being discharging his functions. In the light of this evidence, this first application was withdrawn and an order for costs was made against the Authority. On 30th July 1987, the applicant applied for leave to make the application which is under consideration on this appeal, and leave to move was granted by McNeill J. on 15th August 1987. The relief sought in the application, as amended, included a declaration that there was a procedural impropriety in the decision of the Deputy Chief Constable of 9th October 1986, orders of certiorari and mandamus and damages. The grounds on which relief was sought were that:

"In arriving at his decision, the Deputy Chief Constable

(1) failed to see the applicant;

(2) omitted to show, or ask the applicant to comment on reports in his possession from the medical practitioner and from the Assistant Chief Constable (Personnel) which were detrimental to the applicant and on which the Deputy Chief Constable placed reliance;

(3) received his only account of the applicant's defence and answers to the matters raised against him from the Assistant Chief Constable (Personnel) who was the officer who had been delegated to enquire into the facts of the matter and who reported to him adversely to the applicant.

In the premises the applicant was denied natural justice and fair treatment and the decision making process was vitiated by procedural impropriety."

The Deputy Chief Constable stated in an affidavit that, at the time when he considered the matter of the applicant, he was provided with a "complete file of papers relating to the officer's probationary period" and that he "had regard to" the following documents:

(a) The file note by Chief Superintendent Lord concerning the interview on 10th June 1986;

- (b) Dr. Foster's letters of 23rd May and 19th September 1986;
- (c) Sergeant Newman's report dated 10th September 1986;
- (d) Assistant Chief Constable Pollard's file note of 7th/8th October 1986.

I take this to mean, as did the judge, that, in saying this, the Deputy Chief Constable meant that he had had particular regard to these documents.

On 4th October 1988, before the hearing began, the Chief Constable recorded in writing a concession that the decision of 9th October 1986 had been taken in breach of the rules of natural justice because of

“the failure (i) to show the report of the Assistant Chief Constable (Personnel) dated the 7th day of October 1986 to the applicant, and (ii) to seek his comments thereon before taking the decision to require him to resign.”

This concession was made in the light of the unreported decision of Mann J. in *Chief Constable of Thames Valley Police Ex parte Stevenson* (6th March 1987), the facts of which have a number of features in common with those of the present case. In that case the applicant was formerly a police constable with the Thames Valley Police. By way of an application for judicial review, he sought to impugn a decision of the Chief Constable made on 22nd July 1985 dispensing with his services on the grounds that the Chief Constable could not be satisfied that he was likely to become an efficient or well conducted constable. The decision was challenged on two grounds, irrationality and procedural impropriety. The first ground of challenge failed. The second ground arose in the following circumstances. On 19th July 1985, shortly before the relevant decision was taken, Assistant Chief Constable Pollard had interviewed the applicant. Following the interview, Mr. Pollard (as in the present case) supplied the Chief Constable with a file note of the interview and also a written report which (as did his report in the present case) contained not only factual matters and opinions, but also a recommendation. It was said that there had been a breach of the rules of natural justice in that the applicant was not shown Mr. Pollard's report to the Chief Constable, and accordingly had no opportunity to make recommendations upon the opinions and recommendations contained in it. In dealing with this submission, Mann J. in the *Stevenson* case first referred to two passages from the speeches in [Chief Constable of the North Wales Police v. Evans \(1982\) 1 W.L.R. 1155](#). Lord Hailsham L.C. said (at p. 1161):

“Once it is established, as was conceded here, that the office held by the appellant was of the third class enumerated by Lord Reid in [Ridge v. Baldwin \[1964\] A.C. 40, 66](#), it becomes clear, quoting Lord Reid, that there is

“an unbroken line of authority to the effect that an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation.”

I regard this rule as fundamental in cases of this kind when deprivation of office is in question. I agree with the appellant's affidavit that ‘a formal hearing’ may well be unnecessary if by that is meant an oral hearing in every case held before the chief constable himself. But this does not dispense a chief constable from observing the rule laid down by Lord Reid. It may well be also that part or all of the inquiry on the facts may be delegated to a subordinate official, as was done here by the appellant to the deputy chief constable, though, where this is done, the ultimate decision must not be delegated, and in my view, common prudence should dictate that the report by the delegated officer, in this case the deputy chief constable, or at least its substance, should be shown to the officer the subject of review and an opportunity afforded him to comment on it before the final decision is taken by the chief constable himself.”

Lord Bridge (at p. 1165) said:



“ I do not dissent from the view that a chief officer of police who is contemplating dispensing with the services of a probationer constable under regulation 16 of the Police Regulations 1971 may delegate to a suitable subordinate the investigation of a specific complaint with a view to giving the constable a fair opportunity to meet the allegations made against him. But in the case of such delegation certain conditions should be observed. First the delegate should make clear to the constable the precise nature of the complaint and that he, the delegate, is acting on behalf of the chief officer of police to hear whatever the constable wishes to say about it. Secondly, the delegate should make a full report to the chief officer of what the constable has said. Thirdly, the chief officer should himself show the report to the constable and invite any comment on it before reaching any decision under regulation 16 .”

Mann J., having cited these two passages from the speeches in the Evans case, next referred to the unreported decision of the Divisional Court in Michael Thomas Clarke v. Ronald Frederick Broome , 27th November 1986, in which Ralph Gibson L.J., by way of commenting on those passages, observed:

“As we have said, the views expressed by their Lordships are not of statutory force but the substance of the guidance given is that the Chief Constable must make his decision after the officer has had a fair opportunity to put his case to the Chief Constable. In particular, we are not deciding that, if the officer is not heard personally by the Chief Constable, there must in every case for that reason alone be a breach of the requirement of natural justice. If the delegated officer, who hears the defence and reply of the officer the subject of the review, fairly records a written summary of that defence and reply, and passes the file with that summary upon it to the Chief Constable for decision, we incline to the view that, depending upon the nature of the allegation and of the defence, such procedure could be satisfactory and sufficient.”

Mann J., in the Stevenson case, concluded:

“In the instant case, those observations would have been pertinent had simply the file note of Mr. Pollard been passed to the Chief Constable. It was not, however, that document alone. It was accompanied by the report which I have read. That report was not seen by the applicant and he did not, therefore, have an opportunity of commenting upon the opinions and the recommendation therein contained...

“I would share the reservations expressed by Ralph Gibson L.J. as to the position in regard to a report which is a simple exposition of what passed at interview with a probationer constable such, for example, as was the file note in this case. However, where the Chief Constable's delegate expresses opinions and makes recommendations to the Chief Constable, then, in my judgment, the requirements of fairness cannot be satisfied unless the report is shown to the applicant in order that he might have an opportunity of dealing with what it contains.

“Mr. Griffiths suggested that such a view might inhibit frankness. I would hope that senior police officers would never be inhibited by the necessity of complying with the requirements of fairness.

“Accordingly, I find that there is here a procedural impropriety. What then is to be done? I regard the case as a very plain one. The applicant lied and he has not disputed that he did so. It was, I should have thought, a very clear case. Upon the evidence I have seen, I would not have thought for one moment that any representation made by the applicant upon Mr. Pollard's report would have produced any result useful to him.

“However, a breach of the requirements of fairness is a serious matter even if it be devoid of practical consequences, as I think it was here. I propose to grant the declaration that there was here procedural impropriety. I would also, subject to any observations of counsel, give the applicant his costs. I would also give a liberty to apply. I give that liberty because there is a claim for damages but, in the light of what I have said, it may be thought that that claim has no value.”

The basis of the respondent's proposed concession in the court below was that, in line with the Stevenson decision, the failure to show the applicant Mr. Pollard's recommendation, whether or nor it would have made any difference, was technically a breach of the procedural requirements which the

police authorities have to observe. Simon Brown J., however, rightly thought that the concession gave rise to an important question of principle, which he identified as being (Judgment 10 E-F):

“Whether in such a case, when it is accepted that the applicant lost nothing which could have been of value to him, the view should be taken that there has been a breach of the rules of natural justice but no relief beyond a declaration to that effect, or whether the better view is not that the challenge ought simply to be held to have failed.”

Following prompting by, and with the leave of, the learned judge, the respondent's counsel accordingly withdrew the concession on the third day of the hearing, relying primarily for this purpose on the decision of this court in *George v. Secretary of State for the Environment* (1977) L.G.R. 689 . In that case, the applicant's complaint was that she had not had notice of a compulsory purchase order and in the result had been unable to attend an inquiry to object to it. This court rejected her application to quash the order. Lord Denning, after referring to a number of authorities, said (at pp. 695-696):

“On reading those cases, it seems to me that there is no such thing as a ‘technical breach of natural justice’ ... You should not find a breach of natural justice unless there has been substantial prejudice to the applicant as a result of the mistake or error which has been made. In this case there was no substantial prejudice. I do not think that there was any prejudice at all...”

Roskill L.J. (at p. 698) expressed a conclusion:

“I do not believe for one single moment that she (the applicant) has suffered any substantial injustice or prejudice. I do not believe that she has been in any way prejudiced or has lost the chance of appearing at one of these many inquiries...”

Cumming-Bruce L.J. said (at p. 699):

“I do not for a moment accept that on the authorities there is any ground for the view that there is such a concept known to the law as a technical breach of natural justice. A breach of natural justice means that because of what has happened — something that has been done or has failed to be done — somebody has either actually suffered injustice or there is a real risk that somebody has suffered injustice.”

In the present case, Simon Brown J. (at p. 13 B-D) said:

“I have no doubt that the test of ‘a real risk’ of injustice, is the correct test and that Lord Denning's reference to ‘substantial prejudice’ uses the word ‘substantial’ in antithesis to *de minimis* and involves the same approach. In other words, to make good a natural justice challenge, it is not necessary for an applicant to show that there is a large chance that, had other and better procedures been followed, a different conclusion would have been arrived at, let alone that probably a different conclusion would have been arrived at. It is sufficient if an applicant can establish that there is a real, as opposed to a purely minimal, possibility that the outcome would have been different.”

The learned judge's conclusion on the facts (at p.13 F-H) was that:

‘Even had the applicant been shown the recommendation and opinion of the assistant Chief Constable, included after the record of interview, still no different view would have been taken: that is to say, there would have been no real, no sensible, no substantial chance of any further observation or action on the applicant's part in any way altering the final decision in his case.’

Simon Brown J. further heard extensive argument on the issue of damages. As to this, he said (at pp. 15 G – 16 C):

“Even had I felt it appropriate here, as did Mr. Justice Mann in similar circumstances, to make a declaration that there had been a procedural impropriety; even, that is, had I been minded to treat the matter on the footing of the respondent's earlier concession, I would not have given liberty to apply in regard to the damages claim. Rather I would have dismissed it, and for this reason. In my judgment a claim for damages does not lie in a case like this. It is trite law that such a claim exists only when the applicant has and can establish a recognised cause of action. The mere fact of succeeding in judicial review proceedings does not supply him with one. Successful natural justice challenges do not carry in their wake damages claims. They entitle the applicant to a fresh decision but it is generally well recognised that the mere quashing of a decision and the recognition that the state of affairs which it brought about was unlawfully occasioned does not carry with it an entitlement to damages.”

Before this court the applicant seeks a declaration that the impugned decision was taken in breach of the rules of natural justice, but we have not heard argument on the issue of damages. By an arrangement between counsel, it was agreed that if we were to allow the appeal, we would give the applicant liberty to apply for damages without prejudice to the respondent's submission that the applicant cannot on any footing be entitled to them.

In this court we have had the benefit of clear and cogent arguments on both sides. Mr. John Samuels Q.C., on behalf of the applicant, summarised his complaints as follows:

(a) The material placed before Assistant Chief Constable Pollard by Dr. Foster by the telephone conversation subsequent to the interview with the applicant on 7th October 1986, and passed on to Deputy Chief Constable Rutherford for the purposes of his decision on 9th October 1986, was not disclosed to the applicant, and his comments thereon were never sought or invited.

(b) The applicant was given no opportunity to comment or make representations to the Deputy Chief Constable on the recommendation of 8th October 1986 addressed to the “Acting Chief Constable”.

The failure to give the applicant the opportunity to comment fairly on these matters before the decision was taken to dispense with his services under Regulation 17, it was submitted, amounted to a procedural impropriety and a breach of the rules of natural justice. Authority for this proposition, it was said, was to be found in the decisions of the Divisional Court in *Clarke v. Broome* (supra) and *Mann J. in Ex p. Stevenson* (supra), and an unreported decision of Woolf J. in *Ex p. Street* (14th July 1983).

Mr. Samuels accepted that, in deciding whether there had been a breach of the rules of natural justice, the court must have some regard on the facts as found to the question whether the adoption of the correct procedure by the decision-taker might have led to a decision different from that made. He accepted that, if the court were satisfied that the asserted procedural impropriety could have had no bearing on the fairness of the decision made, then the court should not rule that there had been a breach of the rules of natural justice. However, if the court considered there was any possibility that the correct procedure might have led to a different decision, then, in his submission, it should find a breach of the rules of natural justice.

Mr. Samuels submitted with much force that the court would be treading a dangerous path if, having found that there had been unfairness in the decision-making process, it declined to interfere with the decision merely because the applicant was unable to demonstrate substantial prejudice. This, he submitted, would be to confuse the proper role of the court on an application for judicial review founded not on the asserted unreasonableness of the decision itself, but on the process by which it was reached. In such a case, he suggested, it is in general not the proper function of the court to speculate as to what the decision would have been if the correct process had been followed. In many cases an applicant would not be in a position to prove prejudice. Mr. Samuels cited, as an example, the case of a clerk to magistrates improperly discussing the merits of the case with them. If the decision-making process is flawed by a breach of the rules of natural justice or otherwise, then, it was said, the applicant is ordinarily entitled as of right to a declaration to that effect.

In any event, it was submitted, there was a more than minimal possibility that, if the applicant had had an opportunity to make adequate representations on the recommendation of Assistant Chief Constable Pollard, those representations would have included (I quote from the skeleton argument submitted on behalf of the applicant):

- "a) The erroneous information supplied to Dr. Foster on 19/5/86, which vitiated his advice on 23/5/86.
- b) The extent to which the Appellant had demonstrated improvement in both his physical fitness and his weight loss continuously since receiving a formal warning on 10/6/86.
- c) The misunderstanding of ACC Pollard as to the Appellant's initial weight on joining the police is likely to have flawed his appreciation of the extent to which it was objectively unreasonable to expect the Appellant to attain, within 2 months, a lower weight than that which he had borne at any time during his police service.
- d) The fact that the Appellant had been certified fit to join the police at a weight of 16 stones, and was only 9 pounds heavier (following a temporary increase in weight, which he was well on the way to shedding) when his discharge was under consideration.
- e) Medical evidence in relation to the undesirability of seeking to reduce weight to a level significantly below that which the Appellant had borne at any time during his police service during a relatively short period, and yet to remain in sound physical condition.
- f) A submission that confirmation of the Appellant's engagement as a constable would not preclude his subsequent discharge on medical grounds, should he prove unfit for police Service:..."

The references to "erroneous information" in (a) and "misunderstanding" in (c) require some explanation. The applicant's weight at the time of his engagement was referred to in passing by the judge who (at p. 4 B) said that the applicant's probation "began in about June 1984 when the applicant weighed some 16 stones". It appears that this particular figure did not feature prominently in argument in the court below. In this court, however, Mr. Samuels has placed considerable emphasis on it in developing points (a), (c) and (d) above. In his submission, if the applicant had had the chance to make adequate representations on these matters, this might well have affected the Deputy Chief Constable's decision.

In the knowledge that the applicant's weight at the start of his probation would feature in argument in this court, Mr. Michael Beloff Q.C. sought and obtained leave to put in a respondent's notice, submitting that the judge erred in recording this initial weight as he did, and that it should have been recorded as being 95 kg. (approx. 14 stone, 12 lb.). We have been taken through the available evidence on this point. I do not propose to traverse all of it. Suffice it to say that it shows that when the applicant first applied to join the Police, he was found medically "unfit for the duties of a constable". There is in evidence a copy of a report written and signed by Dr. Foster dated 9th February 1984 which describes the applicant as being "overweight". On that day his weight was 107 kg. However, during the succeeding weeks he clearly took steps to reduce his weight. Dr. Foster saw him again on 10th May 1984 and in a further report endorsed on the original report he wrote "Now 95 kilos – a good reduction... Now FIT". As Mr. Beloff submitted, this is by far the most cogent evidence before the court as to the applicant's weight on starting his probation. With one exception, all the subsequent police records before us are consistent with it. In our core bundle of documents there are references to the initial weight as being "just over 15 stones" (at p. 16), "15 stone" (at p. 17), "14 stone 10 lbs." (at p. 22). The contention that the applicant's weight at the start of his probationary period was 16 stone is founded exclusively on the reference to this weight in Dr. Foster's letter of 19th September 1986. I accept Mr. Beloff's submission that everything else points to this reference as having been a simple error. On the available evidence, I therefore reject the submission that the authority originally engaged the applicant in the knowledge that he was 16 stone, and indeed if the applicant had believed this to be so, one would have expected this point to have been forcefully made on his behalf at the interview of 7th October 1986. In my judgment, there is no substance in points (a), (c) and (d) above.

As to point (b) above, it cannot unfortunately be said that the applicant had demonstrated a "continuous" improvement in his weight loss since receiving a formal warning on 10th June 1986. His

weight had increased by 7 pounds between 26th August and 9th September 1986. And though his "friend" , P.C. Watson, at the interview of 7th October 1986 stated, no doubt on information given to him by the applicant, that his weight was "now down to 16 stone" , there is no evidence to support this assertion. As to point (e) above, though P.C. Watson had asserted at that interview that the applicant's doctor had stated that "to have tried to take off more weight within the time constraints would have been dangerous to his health" , there is no evidence to support this assertion. If such advice had been given, I would have expected it to have been adduced in the court below. Though it was suggested that the respondent's concession had influenced the failure to adduce medical evidence, this can scarcely be so, since all the evidence had been sworn by the time when the concession was made. As to point (f), a representation to this effect would have amounted to no more than stating the obvious.

It is not in dispute that the applicant, who failed his medical when he first applied to join the police, was aware from the very start of his probationary period that his weight gave rise to concern on the part of the Chief Constable and rendered him vulnerable to discharge under Regulation 17 . He had received frequent warnings from his Physical Training Instructor (Police Sergeant Newman). He had received a formal warning from Chief Superintendent Lord on 10th June 1986. Despite that formal warning, by 9th September 1986 he had not succeeded in reducing his weight below 16 stones 9 lbs. and indeed it had increased by 7 lbs. over the preceding fortnight. At his interview with Assistant Chief Constable Pollard on 7th October 1986 he was given full opportunities to make representations about his weight and its relevance to the decision which the Deputy Chief Constable was about to take. It is not suggested that that interview was conducted unfairly or that Assistant Chief Constable Pollard's note of it was inaccurate or unfair.

As Mr. Beloff submitted, the reason for dispensing with the applicant's services was his significant failure after due time and due warning to meet the weight requirements of the authority which employed him. Possibly his constitution is such that, through no fault of his own, he can exercise little control over his weight. If that is so, he deserves sympathy. Whether or not it is so, it was the objective fact of his weight, not the reason why he continued to weigh so much, which was the basis for the Deputy Chief Constable's decision. The material which the applicant did not see before that decision was taken did include comments by Dr. Foster and Assistant Chief Constable Pollard to the effect that the submissions made by him at the interview of 7th October 1986 were insufficient to persuade them that his services should not be dispensed with. But he was fully aware of their views, of which Assistant Chief Constable Pollard had specifically told him at the interview of 7th October.

In all the circumstances, Simon Brown J. was, in my judgment, entirely justified in concluding that, even if the applicant had been shown the material in question,

"there would have been no real, no sensible, no substantial chance of any further observation on the applicant's part in any way altering the final decision in his case".

Furthermore, in my judgment, in the particular circumstances of this case, the failure to give the applicant the opportunity to make submissions on this material was not, at the time of the failure, unfair.

So much then for the facts. I now revert quite briefly to the law. If it is to be read as a statement of a general rule, I would entirely agree with the statement of Mann J. in the *Stevenson* case that

"where the Chief Constable's delegate expresses opinions and makes recommendations to the Chief Constable, then... the requirements of fairness cannot be satisfied unless the report is shown to the applicant in order that he might have an opportunity of dealing with what it contains".

Read as a statement of a general rule, this has ample support from the decisions of the House of Lords in *Evans* and the decision of the Divisional Court in *Clarke v. Broome* . If, however, (which I doubt) it was intended to state a universal rule that if these steps are not taken, an applicant who has suffered no prejudice whatsoever has the right to obtain from the court on an application for judicial review a declaration that there has been a "procedural impropriety" , I would, with great respect, disagree.

The procedure recommended in *Evans* by Lord Hailsham as the course of “common prudence” and endorsed by Lord Bridge, is clearly one that should generally be followed. However, as Woolf J. said in *Ex parte Street* (supra) “I do not regard it as laying down a standard which must be followed word by word”. Different facts will call for different responses. Save in cases where an applicant has a statutory or contractual right to demand that a particular procedure be followed in dealing with his case, his right (if any) to complain of the procedure actually adopted stems simply from his right to have his case fairly dealt with in accordance with natural justice. Save in such cases it will not, in my view, be right for the court to hold that the failure of the respondent to take certain steps during the course of the procedure has involved “procedural impropriety” unless it is satisfied that such failure was, in all the circumstances then subsisting, unfair to the applicant. The existence of “procedural impropriety” presupposes a breach of the duty to be fair.

Usually in a case where the delegate of a Chief Constable expresses opinions and makes recommendations to the Chief Constable after he has had a final interview with the officer whose continued service is under consideration, it will be unfair to the officer if he is not shown the report before the final decision is taken – but, in my view, not always. Looking at the present case through the eyes of an objective observer as at 8th October 1986, a decision that the failure complained of was unfair to the applicant would, in my judgment, be to prefer abstract theories of justice to reality. In reality the applicant was not, in my judgment, treated unfairly in any way.

I recognise that on particular facts in cases such as the present, a procedure may have been unfair at the time when it was adopted, even though the applicant may be unable affirmatively to prove that he has suffered any prejudice in the event. In an appropriate case of this kind, the court should not, I think, shrink from granting the remedy of judicial review, if only by making an appropriate declaration. The very existence of this remedy does much to ensure that public authorities follow fair procedures. On the other hand, the occurrence or otherwise of a relevant procedural impropriety does not, in my judgment, fall to be determined in any given case merely by reference to abstract rules. An applicant seeking judicial review on these grounds must, in my judgment, show that on the particular facts he has not been given “fair play”. In my judgment, this has not been established in the present case. From the decision of this court, I would like to see a message to potential litigants emerging, once again, loudly and clearly – namely that “natural justice is not concerned with the observance of technicalities, but with matters of substance”: (see per Kerr J. in *Lake District Special Planning Board v. Secretary of State for the Environment* (unreported) 13th February 1975, cited by Lord Denning M.R. in *George* (supra) at p. 695). An applicant who cannot show that there has been any breach of natural justice in substance cannot, in my view, expect to be granted even a bare declaration that “procedural impropriety” has occurred.

For the reasons stated, I would dismiss this appeal.

LORD JUSTICE STOCKER:

I agree.

I have read and adopt with gratitude the comprehensive history of the applicant's weight at various stages of his career as a probationer police officer and desire only to enlarge upon one aspect of these factual matters. In the course of his submission Mr. Samuels enlarged upon the point put forward on the applicant's behalf by his “friend”, P.C. Watson, in the course of his interview on 7th October, 1986 by Assistant Chief Constable Pollard, in which it was asserted that the applicant's weight was, “Now down to 16 stone”. In the course of his submissions to this court Mr. Samuels was contending that whatever else may be said in support of the proposition that the applicant should have been enabled to make representations to the Acting Chief Constable and to have been shown his report, one fact of great significance emerged which clearly should have entitled the applicant to have made further representations. That fact, if I correctly understood the submission, was that the applicant was admitted as fit on entry as a probationer police officer when he weighed 16 stone, but was dismissed as unfit when he was the same weight and had in the meantime completed the timed run satisfactorily. If there was a factual basis for this observation I would be myself of the opinion that a case arose upon which the applicant should not have been denied the opportunity to enlarge upon his contention that there was apparent unfairness. Whilst accepting that investigation into the factual basis for the submission based on fact may appear to involve the court in an apparent investigation into the merits of the decision rather than the decision-making process itself, where the submission seems to be founded on a misapprehension of the true effect of the evidence, such investigation is permissible. It is raised before this court by the respondent's counsel, Mr. Beloff, to counter this argument put forward on behalf of the applicant. It seems to me clearly established by the documents

that the applicant's weight was not 16 stone when he was accepted into the force, but substantially less. Indeed, it was his weight reduction at the time of his second medical examination which justified the reversal of the earlier finding that he was unfit *inter alia* by reason of his weight. The medical record (on page 188 of the main bundle), indicates clearly that the applicant when examined by Dr. Foster on 9th February, 1984, was "Unfit for the duties of a constable" by reason of overweight and varicose veins. Clearly the applicant had the latter condition rectified, for on 6th April, 1984, he wrote a letter to the Police Authority stating this fact, and saying (page 193 of the main bundle), "I now find myself at the required weight for entry". On 13th April the Assistant Chief Constable (Personnel) invited him to attend on 10th May. This he did and Dr. Foster records, "Now 95 kilos, a good reduction", and records that the varicose veins had been operated upon. We are told that 95 kilos is the equivalent of 14 stone 12 lbs. He is certified "Now fit"; thus it is clear that the applicant's weight on entry was 14 stone 12lbs, and not 16 stone. The only reference to the latter weight on entry is contained in the letter of Dr. Foster of 19th September, 1986. This is clearly an error. Further the assertion by P.C. Watson that the applicant's weight at the time of the interview was 16 stone is unsupported by any evidence – his last recorded weight was 16 stone 9 lbs on 9th September, 1986.

I have dealt with this factual matter in detail because the facts indicate to me that the argument which seemed to me to be capable of supporting a suggestion of unfairness – that he was dismissed as unfit due to weight of 16 stone when this was his weight on admission when he was certified fit. Once the factual basis of this contention is established as incorrect then in my view nothing remains which calls for further explanation and his dismissal was due to persistent overweight throughout his service and he can have been under no possible misapprehension that this was the sole reason for that dismissal. I agree with Simon Brown J that nothing that could have been said to the Acting Chief Constable could have affected this fact.

Accordingly Simon Brown J rejected the course adopted by Mann J in *Stevenson* that where there had been procedural impropriety the court should make a declaration to this effect. In my view the judge was correct in so doing in a case in which, being based solely on an established fact that the applicant was overweight, no further representations could affect the conclusion. I do not doubt that in the majority of cases "fairness" will require that a person who has been recommended for dismissal by an officer charged with the duty of investigation should be shown the contents of that officer's report to the Chief Constable, who alone can make the final decision, on the basis of the passages in the speeches of Lord Hailsham and Lord Bridge in the case of the [Chief Constable of North Wales Police v. Evans, \[1982\] 1 WLR 1155](#), cited by Slade LJ. I agree that there can be no such thing as a "Technical breach of natural justice"; in my view natural justice is to be equated in this regard to "fairness" and it is only if there is a real risk of injustice or unfairness that a procedure adopted can be properly stigmatised as a procedural impropriety. Whether or not there is a real risk of unfairness must depend on the facts in each case.

I agree with the judgment of Slade LJ both as to his conclusion on the facts and his exposition of the law, and I too would dismiss this appeal.

LORD JUSTICE BINGHAM:

The Police Regulations 1979, which apply in this case, prescribe no procedural code to be followed by a chief officer of police when deciding whether or not to dispense with the services of a probationary constable. But it is not in doubt, and both parties accept, that in making his decision the chief officer must treat the constable fairly.

Another way of stating what is in essence the same principle is to say that the chief officer must observe the rules of natural justice. Reference to "rules" can, however, be misleading if it is taken to suggest some universally – applicable procedure or some formula-based test of what is required of the decision-maker. It can, I think, lead to an unduly doctrinaire and mechanistic approach. A test of fairness is to be preferred because, being very general, it can better embrace the almost infinite variety of situations which fall for consideration. The minimum that fairness demands in one case may be much more than fairness requires in another.

Even within the limited context of Regulation 17(1) this is, I think, plainly true. A question arises whether Constable A is likely to become a well-conducted constable because he is suspected of sexual misdemeanours with a colleague's wife. A question arises whether Constable B is physically fitted to perform the duties of his office because he has lost a leg in a motor accident off duty. The chief officer must act fairly in each case. But I think it plain that what fairness requires will be much more far-reaching in the first case (where all may be in issue and very difficult questions of judgment

may arise) than in the second (when the loss of the leg at least must be acknowledged).

I would readily accept the view expressed by Lord Denning MR and Cumming-Bruce LJ in [George v. Secretary of State for the Environment \(1979\) 77 LGR 689 at 695 and 699](#) that there can be no such thing as a technical breach of natural justice. That is because, to my mind, a procedure must in all the circumstances of a given case be either fair or unfair. Since (always assuming the absence of a prescribed statutory procedure) the court is concerned with matters of substance and not mere form, a procedure cannot be unfair in a purely technical sense. There is no third category embracing procedures which are unfair to the subject of the decision as a matter of technicality but not substance.

Judges of high authority have held that the subject of a decision who has been denied a right to be heard cannot complain of a breach of natural justice (or unfairness) unless he can show that the decision might have been different if he had been heard. In *Malloch v. Aberdeen Corporation* [1971] 1 WLR 1579 at 1595 Lord Wilberforce said:

“The particular principle of administrative law to which he appeals is that, before his dismissal became effective, he ought to have been given an opportunity of making written representations to or being heard by the education authority. He had asked for this opportunity, and it is admitted that it was refused by the respondents.

“The appellant has first to show that his position was such that he had, in principle, a right to make representations before a decision against him was taken. But to show this is not necessarily enough, unless he can also show that if admitted to state his case he had a case of substance to make. A breach of procedure, whether called a failure of natural justice, or an essential administrative fault, cannot give him a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain.”

In *George*, (supra) all three members of the court held that a complainant must show prejudice or at least the risk of prejudice, although their approach may have been coloured by the statutory language under consideration and by the court's view that the complainant had known the true facts throughout. In [Cinnamond v. British Airports Authority \[1980\] 1 WLR 582, Shaw LJ said at 592](#) :

“As to the suggestion of unfairness in that the drivers were not given an opportunity of making representations, it is clear on the history of this matter that the drivers put themselves so far outside the limits of tolerable conduct as to disentitle themselves to expect that any further representations on their part could have any influence or relevance. The long history of contraventions, of flouting the regulations, and of totally disregarding the penalties demonstrates that in this particular case there was no effective deterrent. The only way of dealing with the situation was by excluding them altogether.”

Brandon LJ said at 593:

“The third question which was argued before us was that of natural justice. So far as that is concerned, I agree with what has been said by Lord Denning M.R. and Shaw L.J. I do not think that in the circumstances of this case there was any need to give these minicab drivers an opportunity to make representations to the authority before they issued the ban. The reason for the ban must have been well known when the letters were received. Any representations which were desired to be made could have been made immediately by letter. None were. The truth is that no representations other than representations which included satisfactory undertakings about future behaviour would have been of the slightest use.

“If I am wrong in thinking that some opportunity should have been given, then it seems to me that no prejudice was suffered by the minicab drivers as a result of not being given that opportunity. It is quite evident that they were not prepared then, and are not even prepared now, to give any satisfactory undertakings about their future conduct. Only if they were would representations be of any use. I would rely on what was said in [Malloch v. Aberdeen Corporation \[1971\] 1 W.L.R. 1578](#), first per Lord Reid at p. 1582 and secondly per Lord Wilberforce at p. 1595. The effect of what Lord Wilberforce said is that no one can complain of not being given an opportunity to make representations if such an opportunity would have availed him nothing.”



In [Stininato v. Auckland Boxing Association \(Inc\) \[1978\] 1 NZLR 1 at 29](#) , Cooke J attached importance to the trial judge's conclusion that "if further opportunity to make explanations had been given to the plaintiff, the final decision would have been the same." There are, however, authoritative statements to the opposite effect, and De Smith ( [Judicial Review of Administrative Action](#) , 4th Ed., at 243) is probably right to describe the law as "still uncertain." Sir William Wade ( [Administrative Law](#) , 6th ed., at 573) refers to "the dubious doctrine that a hearing would make no difference."

While cases may no doubt arise in which it can properly be held that denying the subject of a decision an adequate opportunity to put his case is not in all the circumstances unfair, I would expect these cases to be of great rarity. There are a number of reasons for this:

- (1) Unless the subject of the decision has had an opportunity to put his case it may not be easy to know what case he could or would have put if he had had the chance.
- (2) As memorably pointed out by Megarry J in [John v Rees \[1970\] Ch 345 at 402](#) , experience shows that that which is confidently expected is by no means always that which happens.
- (3) It is generally desirable that decision-makers should be reasonably receptive to argument, and it would therefore be unfortunate if the complainant's position became weaker as the decision-maker's mind became more closed.
- (4) In considering whether the complainant's representations would have made any difference to the outcome the court may unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of a decision.
- (5) This is a field in which appearances are generally thought to matter.
- (6) Where a decision-maker is under a duty to act fairly the subject of the decision may properly be said to have a right to be heard, and rights are not to be lightly denied. Accordingly if, in the present case, I had concluded that Mr. Cotton had been treated unfairly in being denied an adequate opportunity to put his case to the Acting Chief Constable, I would not for my part have been willing to dismiss this appeal on the basis that it would have made no difference if he had had such an opportunity (although the court's discretion as to what, if any, relief it should grant would of course have remained).

I am, however, firmly of opinion that Mr. Cotton was given a full opportunity to put his case (through Mr. Pollard) to the Acting Chief Constable and was not treated unfairly in any way.

Mr. Cotton knew from the outset that the Thames Valley Police Force regarded weight as a crucial consideration. His first application to join was rejected because he was overweight (and also had varicose veins, which may perhaps have been related to his weight). He applied again when he had achieved what he called "the required weight for entry" , and having made "a good reduction" in his weight was then found fit. During his probationary period he was weighed frequently and on every occasion except the first he was found to be substantially overweight. Time and time again he was told that he must reduce his weight to an acceptable level. On the 10th June 1986 he was formally warned by his Chief Superintendent that a recommendation to dispense with his services would be made unless within two months he reduced his weight to 14½ stone and showed himself capable of running 1½ miles within the not ungenerous time of 12 minutes. His probation was extended for three months to enable him to meet those requirements. Although he successfully completed the run he did not reduce his weight to 14 stone or anywhere near it. He was accordingly told, while on leave, that he would be required on his return to see Mr. Pollard (the Assistant Chief Constable in charge of personnel) when there was a possibility that his services would be dispensed with under regulation 17 . Although he deposes that he had no notice of the grounds on which that action might be taken, he does not suggest that he was in any doubt and he can have been in none. At the meeting, according to Mr. Cotton (who was accompanied by P.C. Watson, nominated by the Police Federation to act as

his friend),

“Mr. Pollard went through my history, particularly as regards my weight. He referred to the fact that in the opinion of the Force Surgeon I was not physically fit to be a Police Constable, and said that he, Mr. Pollard, would be recommending to the Chief Constable that my services be dispensed with. P.C. Watson and I were then asked for our comments and P.C. Watson replied on my behalf ...”

Although some criticisms have been made of Mr. Pollard's typewritten summary of the meeting I am not persuaded that it is other than a fair and accurate minute of what was said.

In his manuscript endorsement on the minute (which Slade L.J. has quoted) Mr. Pollard recommended that Mr. Cotton's services be dispensed with. That was nothing new. It reflected what Mr. Pollard had clearly said at the meeting and what Mr. Cotton must anyway have expected. Mr. Pollard referred to Dr. Foster's unequivocal recommendation that Mr. Cotton was unfitted by his excessive weight to carry out full police duties. That also had been expressly put to Mr. Cotton at the meeting. Mr. Pollard referred to the fact (which I shall assume to have been unknown to Mr. Cotton and his friend) that he had spoken to Dr. Foster on the telephone to see if the points made on Mr. Cotton's behalf affected his opinion in any way, and recorded that they did not. I see nothing unfair in that. Mr. Pollard did not, I feel sure, expect Dr. Foster's opinion to be affected by those points, but it was wise to check. Had Dr. Foster raised some entirely new point, fairness might (and probably would) have required Mr. Cotton to be given a chance to deal with it. But he did not. He said that what had to be considered was Mr. Cotton's ability to be a fit police officer for thirty years. This was a point clearly and expressly raised by Mr. Pollard at the meeting. It is important to note that the issue did not concern Mr. Cotton's character, or whether he had shown adequate moral determination to reduce weight, but with the much simpler question whether his weight exceeded that which the Force regarded as acceptable for a constable of his height. Manifestly it did. There was not much to be said about this, but what little there was Mr. Cotton had a full opportunity to say.

In [Chief Constable of the North Wales Police v. Evans \[1982\] 1 WLR 1155 at 1165](#), Lord Bridge said that in a situation such as this the chief officer should show the constable the report made to him and invite comment before reaching his decision. Such a practice may no doubt be desirable in all cases and essential in some, but like Woolf J in *R v. The Chief Constable of the Nottingham Constabulary* (unreported, 14th July 1983) I do not regard this guidance

“as laying down a standard which must be followed word by word. What it does provide is a practical guide as to the approach which should be adopted by chief officers of police in order to ensure fair play.”

In *Clarke v. Broome* (unreported, 27th November 1986) a Queen's Bench Divisional Court (Ralph Gibson LJ and McNeill J) found that a probationary constable had been denied natural justice and observed that

“a probationer who is the subject of a plain case is as much entitled to the benefit of a fair procedure as any other officer.”

I do not for a moment question the correctness of that decision on its own facts, and the quoted statement is one that I would respectfully endorse. But all cases turn on their own facts and I see no unfairness in the procedure adopted here.

In *R v. Chief Constable of Thames Valley Police ex parte Stevenson* (unreported, 6th March 1987) Mann J. said:

“However, where the Chief Constable's delegate expresses opinions and makes recommendations to the Chief Constable, then, in my judgment, the requirements of fairness cannot be satisfied unless the report is shown to the applicant in order that he might have an opportunity of dealing with what it contains.”

I do not doubt that this may often, perhaps usually, be the case, nor again do I doubt the correctness of the judge's decision on the facts of that case. But I do with respect venture to think that the judge was wrong to state, as if it were a rule of law, what cannot be more than an indication of the factual inference the court will ordinarily draw. I think it important that decision-makers and judges should fix their gaze on the fairness of the procedure adopted rather than on the observance of rigid rules. I would not, however, share Simon Brown J's implied criticism of the decision of Mann J on the ground that the judge should not have made a declaration of procedural impropriety having formed the view that any further representation by the constable would have been most unlikely to make any difference. The judge was in my view fully entitled to conclude that

“a breach of the requirements of fairness is a serious matter even if it be devoid of practical consequences.”

Some criticism was directed to the Acting Chief Constable's decision letter, which Slade LJ has quoted. The Acting Chief Constable was not, it appears, much impressed by the contention that Mr. Cotton's own doctor had advised him against losing the weight Dr. Foster thought necessary. It is, however, plain that the decisive consideration was that Mr. Cotton weighed over 16 stone when in the opinion of Dr. Foster, which the Acting Chief Constable accepted, he should have been no more than about 14. His decision that Mr. Cotton's weight made him unfitted to perform the duties of his office was based on grounds clearly understood by Mr. Cotton since his first medical examination in February 1984.

Mr. Cotton has to my mind shown no unfairness and raised no suspicion of unfairness and suggested no appearance of unfairness. I would dismiss this appeal.

*(Order: Appeal dismissed with costs, such order as to costs to include the abortive hearing before two Lords Justices).*

Crown copyright

© 2012 Sweet & Maxwell

Westlaw<sup>®</sup> UK