[2011] UKPC 28
Privy Council Appeal No 0046 of 2010

JUDGMENT

Gopichand Ganga and others (Appellant) *v* Commissioner of Police/Police Service Commission (Respondent)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Phillips
Lord Brown
Lord Mance
Lord Kerr
Lord Dyson

JUDGMENT DELIVERED BY
Lord Dyson
ON

9 August 2011

Heard on 17-19 May 2011

Appellant
Sir Fenton Ramsahoye SC
Elton Prescott SC
Tom Richards
Anthony Bullock
Jodie Blackstock
Sanjeev Datadin
Cindy Bhagwandeen

(Instructed by Bankside Commercial Solicitors)

Respondent
Peter Knox QC
Miss Carol Hernandez
Ms Nadine Nabie

(Instructed by Charles Russell LLP)

LORD DYSON:

Introduction

1. The appellants have at all material times been officers in the First Division of the Police Force of Trinidad and Tobago. The Police Service Commission ("the Commission") is the body responsible for appointing, promoting and dismissing police officers. Its powers are regulated by the Police Service Commission Regulations 1966 as updated ("the Regulations"). The appellants were all omitted from the list made by the Commissioner of Police ("the Commissioner") of the officers he recommended for promotion and, accordingly, were not promoted by the Commission. In these proceedings, they challenge the decision by the Commissioner not to recommend their promotion on the grounds that (i) his decision was ultra vires and (ii) in making his recommendations, he applied a points-based system which was irrational and unfair.

2. The Police Service of Trinidad and Tobago consists of two Divisions, the First Division (which includes senior officers of ranks from Assistant Superintendent to Commissioner) and the Second Division (which includes officers of ranks from Constable to Inspector): see section 6 and Schedules 1 and 2 of the Police Service Act 1966 and Schedules 1 and 2 of the Police Service Act 2006.

The statutory framework

3. Section 129(1) of the Constitution of the Republic of Trinidad and Tobago 1976 empowers the Commission with the consent of the Prime Minister to make regulations to regulate its own procedure. The Regulations are such regulations. Chapter II, which is headed "The Police Service Commission", sets out some of the powers and duties of the Commission. Regulation 8 provides:

> "8. (1) The Commission in considering any matter or question may consult with any police officer or public officer or other person as the Commission may consider proper and desirable and may require any police officer to attend for the purpose of assisting the Commission in its deliberations and producing any official documents relating to such matter or question."

4. Chapter III is headed “Appointments, Promotions and Transfers”. Regulation 14 provides that “every application for appointment to an office in the First Division shall be made in writing to the [Director of Personnel Administration] on the prescribed form”.

5. Regulation 15 provides:

> “15. (1) The Commissioner shall, after taking into account the criteria specified in regulation 20, submit to the Commission a list of the officers in the Second Division-
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> *(a)* whom he considers suitable for promotion to an office; and
> *(b)* who are not being considered for promotion yet but who have served in the Service for a longer period in an office, or who have more experience in performing the duties of that office, than the officers being recommended.
>
> (2) The Commissioner shall also advise those officers referred to in subregulation (1)(*b*) of their omission from the list for promotion, together with the reasons for such omission.
>
> (3) An officer who is advised under subregulation (2) may make representations on his own behalf to the Commission within fourteen days of being so advised and the Commission may invite him for interview on the basis of his representations.
>
> (4) The Commission shall advise those officers making representations under this regulation of the outcome of their representations.
>
> (5) The Commission may, after considering the representations made, endorse, or otherwise, the recommendations of the Commissioner when promoting an officer.”

6. Regulation 20 provides:

> “20. (1) When considering officers for promotion, the Commission shall take into account the experience, the merit and ability, the educational qualifications and the relative efficiency of such officers.

(2) In the performance of its functions under subregulation (1), the Commission shall in respect of each police officer take into account-

(a) his general fitness;
(b) any special qualification that he possesses;
(c) any special courses of training that he may have undergone, whether at the expense of Government or otherwise;
(d) the evaluation of his overall performance as reflected in his performance appraisal reports;
(e) any letters of commendation or special reports in respect of any special work done by him;
(f) the duties of which he has had knowledge;
(g) any specific recommendation of the Commissioner for filling the particular office;
(h) any previous employment of his in the Service or otherwise;
(i) any special reports for which the Commission may call;
(j) his devotion to duty;
(k) the date of his entry into the Service;
(l) the date of his appointment in his present office.

(3) In addition to the requirements prescribed in subregulations (1) and (2) the Commission shall take into account any specifications that may be required from time to time for appointment to the particular office."

7. On 5 July 2004, by Departmental Order 188/2004, the Commissioner introduced a points-based system for evaluating members of the Police Service for promotion. It was said to be based on the criteria specified in regulation 20 of the Regulations. The details of the system (which was amended by three further Departmental Orders) are considered later in this judgment when the Board deals with the appellants' second ground of challenge.

The history

8. At some point prior to 21 April 2006 following a request by the Commission, the Commissioner decided to make recommendations to the Commission for the promotion of officers in the First Division, and in doing so to apply the points-based system to those officers. By letters dated 21 April 2006, the Commissioner wrote to each of the appellants saying that "[i]n accordance with Regulation 15(2) of the [Regulations], I wish to advise you that you were omitted from the list of persons selected for promotion…... as the officers selected received a higher score than yours." In the same letters, the Commissioner invited the appellants to make representations to the Commission within 14 days in accordance with regulation 15(3).

9. By a letter to the Commissioner dated 2 May 2006, the appellants' attorney contended that the assessment procedure that the Commissioner had used was "ultra vires and illegal because it does not apply to the First Division and is clearly inappropriate for evaluating officers from the First Division". The letter called upon the Commissioner to revoke his decision not to recommend the appellants for promotion and to reconsider their promotional prospects in accordance with the Regulations within 10 days, failing which judicial review proceedings would be instituted to challenge the assessment procedure. By a letter dated 8 May 2006, the appellants' attorney also wrote to the Commission challenging the lawfulness of its procedure, asking it to refrain from making the recommended promotions pending the proposed proceedings.

10. The Commissioner did not revoke his decision and the appellants did not make any representations to the Commission. Instead on 1 June 2006, they applied for leave to bring judicial review proceedings against the Commissioner, naming the Commission as an interested party. They sought (i) an order quashing the Commissioner's decision to apply the regulation 15 procedure on the grounds that the decision to do so in relation to First Division officers was ultra vires and (ii) a declaration that they had been treated unfairly and in breach of their rights to natural justice and contrary to section 20 of the Judicial Review Act 2000, which provides that a person acting in the exercise of a public duty or function in accordance with any law shall exercise that duty or perform that function "in accordance with the principles of natural justice or in a fair manner."

11. The Commissioner swore three affidavits in the judicial review proceedings. In his third affidavit, he explained that promotions in the First Division were not carried out in accordance with regulation 15 and that all promotions in the First Division were carried out under regulation 20. He said that there was no provision applicable to First Division officers comparable to regulation 15. There was, therefore, no provision in the Regulations for giving officers who are not recommended for promotion an opportunity to make representations to the Commission. He felt that "in the interest of fairness and in accordance with the principles of natural justice", since such a right was accorded by the Regulations to officers of the Second Division, it should also be accorded to officers of the First Division. Despite the fact that by his letters of 21 April 2006 the Commissioner said that the appellants were omitted from the list "*in accordance with* regulation 15(2)" (emphasis added), this affidavit evidence has not been challenged.

12. Madam Justice Rajnauth-Lee dismissed the claim on the grounds that (i) under the procedure that was adopted, the Commissioner's recommendations were to be considered and evaluated by the Commission and not merely "endorsed or rubber-stamped" and since the decision whether or not to promote was that of the Commission, there could be no unfairness or illegality in the Commissioner making recommendations; and (ii) the use of the points-system was not irrational or unfair.

The Court of Appeal (Hamel-Smith JA, Warner JA and Kangaloo JA) dismissed the appeal. Hamel-Smith JA gave the only substantive judgment. The Board will refer to it when it deals with the two issues that arise in these appeals.

13. At this stage, it is sufficient to say that the Court of Appeal noted that the Commission had not had the benefit of representations from the appellants. They considered that it would be fair and just that the appellants should be permitted to make such representations if they wished. Pursuant to that suggestion, their attorney wrote to the Commission on 19 February 2009 (without prejudice to their right of appeal to the Board) saying that the points-based system was unfair and irrational and enclosing detailed representations from each of the appellants as to why they should be recommended for promotion. The Commission responded by letter dated 1 April 2009 saying that it had decided that the appellants "still have not attained the evaluation scores required for promotion". By two letters dated 15 April, the Commission stated:

> "The Commission wishes to make it clear that its decision to evaluate and promote First and Second Division Officers of the Police Service is and was based on the criteria specified in Regulation 20 of the [Regulations].
>
> Further the Commission does not apply its system of evaluation rigidly and inflexibly, so much so that it is always prepared to consider the representations of officers who may be affected by its decisions. In the particular case of your clients the Commission has considered their respective representations;
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> ....
>
> The Commission has considered the representations made by your client in light of the judgment of the Court of Appeal, and the criteria specified in Regulation 20 of the [Regulations]. Having done so, the Commission is unable to promote your clients at this time."

The first issue: was the Commissioner's use of the Regulation 15 procedure in relation to First Division officers ultra vires?

14. The appellants' case is as follows. The Commissioner has no statutory power to make recommendations under regulation 15 in respect of First Division officers: regulation 15 by its express terms applies only to Second Division officers. The Commissioner has no general or specific power under the Regulations or any other

legislative provision to adopt the regulation 15 procedure by analogy. Nor does the Commissioner have power to act in this way at common law. Where legislation has provided for a specific scheme, a public body may not exercise its powers (of whatever kind) inconsistently with that scheme: see, for example, *R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513, at pp 522H-523A, 538H-539A and 552B-G.

15. It is submitted that the making of recommendations by the Commissioner in respect of First Division officers was fundamentally inconsistent with the constitutional and statutory scheme in three respects. First, under section 123(1) of the 1976 Constitution, the promotion of officers is the sole province of the Commission. The making of recommendations by the Commissioner runs counter to the constitutional principle that the Commission should be free from influence or interference: see *Thomas v Attorney General of Trinidad and Tobago* [1982] AC 113, 124C-G. Secondly, the making of recommendations in respect of First Division officers falls within the ambit of the regulation of the Commission's own procedure and requires authorisation in the form of legislation (or some measure with Prime ministerial consent). The Constitution requires that the Commission's procedure should not be regulated or amended on an informal basis. Thirdly, the clear scheme and intention of the Regulations, in providing for a system of recommendations by the Commissioner in respect of Second Division officers only, was that no such system should be adopted for First Division officers. There may have been good policy reasons for the distinction. The essential features of the scheme in relation to Second Division officers is that there is no provision for individual applications and the regulation 15 procedure requires the Commissioner to submit to the Commission a "list" of officers. This is what Mr Richards (for the appellants) described as a system for "block appointments". By contrast, in relation to First Division officers, appointment is a specific response to an individual application under regulation 14. In these circumstances, it is submitted that to introduce a system for block recommendations for First Division officers cuts across the scheme which provides for such recommendations only in the case of the Second Division officers.

16. The Board is unable to accept that there is any infringement of constitutional principles in the Commissioner making recommendations in response to a request by the Commission in circumstances where (as here) the decision whether or not to appoint remains that of the Commission. Despite the statement in the letters dated 21 April 2006 that the appellants had been omitted from the persons "selected" for promotion, it is not submitted that the Commission delegated its power of appointment to the Commissioner. The regulation 15 procedure is designed to assist the Commission in discharging its statutory functions. Regulation 15(5) makes clear that it is the Commission's responsibility to promote officers. By seeking the opinion and recommendations of the Commissioner, the Commission is acting entirely properly and pursuant to its powers under the Regulations. Regulation 8 gives the Commission wide powers to consult any person it considers "proper and desirable" when it considers "any matter or question". This power is clearly wide enough to

extend to consulting the Commissioner about individual First Division applicants for promotion. In addition to this general power of consultation, the Commission is entitled to seek the specific recommendations of the Commissioner for filling a particular office: see regulation 20(2)(g). Far from there being any express or implied prohibition on the Commission seeking the opinion of the Commissioner, the Regulations expressly authorise it to do so. Indeed, it would be very surprising if the Commission could not seek the views of the Commissioner, since he is the most obvious source from which to obtain information and an opinion about individual applicants. Even if there had been no such powers conferred by the Regulations, the Commission would have been able to obtain the views of the Commissioner at common law.

17. In his oral submissions, Mr Richards placed most emphasis on the third respect in which he submits the making of recommendations by the Commissioner in respect of First Division officers is inconsistent with the constitutional and statutory scheme. But the Board considers artificial the distinction that he seeks to draw between the Commissioner (i) submitting a block list to the Commission and (ii) making comments on individual applicants. There is no reason to suppose that, in compiling a list in respect of Second Division officers, the Commissioner does not consider each case individually. The points-based system was introduced in order to assist the assessment of individual officers. Department Order 188/2004 makes it clear that the system was for the assessment of "all qualified officers eligible for promotion" and was based on the criteria specified by regulation 20. Regulation 15 obliges the Commissioner to submit his list of Second Division officers "after taking into account the criteria specified in regulation 20". The points-based system is applied in the same way in the consideration of those First Division officers who have applied for promotion. The fact that the final product of the Commissioner's work is a list does not mean that the cases are not considered individually.

18. The Board concludes, therefore, that by responding to the request of the Commission to make recommendations in relation to First Division officers, the Commissioner was not acting ultra vires. He was entitled to adopt a procedure analogous to that prescribed by regulation 15 in relation to Second Division officers. He did so in the interests of fairness and transparency in order to ensure that those who were not recommended by him for promotion had a proper opportunity to make representations to the Commission. That is not unlawful. It is commendable.

The second issue: is the points-based system irrational and/or unfair?

19. It is now necessary to explain the points system in a little detail. Points are awarded to officers under headings, up to a maximum total of 85 points. The first heading is "Academic qualifications", for which there is a maximum of 5 points (in the case of degrees) and a maximum of one point for 5 'O' level passes or "special

courses of training". The second heading is "Performance appraisal", for which the maximum is 30 points for "outstanding", the score being calculated on the basis of the candidate's performance appraisal for the previous year. The third heading is "General fitness" (maximum 20 points) which is based on the officer's sick leave record for the year under review and the 2 previous years, although Departmental Order 85 of 2005 states that "consideration will be given to officers who utilise Extended Sick Leave as a result of an affliction classified as a communicable disease, major accident or surgery". The fourth heading is "Discipline" (maximum 15 points) which is based on a review of the officer's conduct for the past 5 years. The fifth heading is "Overall Service". The sixth heading is "Service in rank". The seventh heading is "Commendation" (maximum five points), the score being based on commendations received within the last three years. The eighth heading is "Commissioner's award" and the ninth heading is "Special courses of training".

20. As already stated, the points system is based on the criteria specified in regulation 20. The Commissioner explains at para 6 of his third affidavit that, prior to the introduction of the points-based system, there was general dissatisfaction in the Police Service with the manner in which performance appraisals were conducted. The performance of almost all officers was marked as "outstanding" so that, if an officer had no disciplinary or other charges against him, he was recommended for promotion. The result was that promotion was in effect based on seniority alone. The points system was introduced to ensure that all the regulation 20 criteria were taken into account.

21. It is not in dispute that the system had to be reasonably apt for achieving the statutory objective of taking account of the regulation 20 criteria. "The measures designed to further the objective must be rationally connected to it": see *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397 at para 40. It is the Commissioner's case that the system satisfies this test. In his first affidavit, he takes each of the criteria set out in regulation 20 and identifies the heading in the points-based system to which he says it relates. Thus, he says that the regulation 20(2)(a) criterion is reflected in the heading "Fitness"; the regulation 20(2)(b) and (c) criteria are reflected in the heading "Academic Qualifications"; the regulation 20(2)(d) (f) and (j) criteria are reflected in the heading "Performance Appraisal"; the regulation 20(2)(e) criterion is reflected in the heading "Commendations"; the regulation 20(2)(g) criterion is dealt with separately because it involves officers who are considered to be specialists; the regulation 20(2)(h) and (k) criteria are reflected in the heading "Service"; the regulation 20(2)(i) criterion is dealt with separately because of its special nature or under "Disciplinary Record" if the report involves a matter of discipline; and the regulation 20(2)(1) criteria are reflected in the heading "Service in Rank".

22. In their written case, the appellants identify four respects in which they say that the points-based system lacks a rational connection to the regulation 20 criteria which

they are intended to reflect. The first complaint is that no regard is paid to "any special courses of training that [an officer] may have undergone" (regulation 20(2)(c)). That is true of the original version of the points-based system. But this omission was made good in the amended version issued on 1 June 2005 when the original category "Five 'O' level passes" was amended to "Five 'O' level passes or Special Courses of Training". There is, therefore, no factual basis for the first complaint. It is not contended that it was irrational not to change the maximum number of points that could be awarded for this category despite the expansion of its scope.

23. The second complaint is that points are awarded under a number of headings in respect of unreasonably short periods of prior service, whereas regulation 20 contains no such temporal restriction. For example, it is submitted that to take account of an officer's performance appraisals only over the previous year offers an unreliable snapshot of the officer's performance: regulation 20(2)(d) requires that account be taken of the officer's "overall performance as reflected in his performance appraisal reports". A similar point is made in relation to "discipline". It is said that the 5 year cut-off for disciplinary offences is too short: the system makes no distinction between the officer who has an unblemished record for 40 years and the officer who committed a heinous disciplinary offence 6 years ago.

24. The third complaint is that an officer's "general fitness" (regulation 20(2)(a)) is assessed only by reference to his sick leave. Mr Richards submits that "fitness" in regulation 20(2)(a) means general fitness or suitability for promotion. The fourth complaint is that points are awarded in respect of "Academic Qualifications" regardless of the nature of an officer's qualifications or the circumstances in which he entered into the Police Service. By failing to take account of the relevance of the officer's qualifications to the post in question or the officer's personal circumstances, the points system fails rationally to assess the officer's "special qualification" as required by regulation 20(2)(b). Thus, for example, equal points would be given for qualifications in criminology and automotive engineering.

25. The Court of Appeal acknowledged at para 36 that the appellants had identified some flaws in the points system. They said that it would be difficult, if not impossible, to eliminate every single flaw. The reason why this challenge failed before the Court of Appeal (as well as before the judge) was that the points-based system was not cast in stone, but was "simply a basis on which a proper assessment of each criterion can be evaluated". Hamel-Smith JA said: "[b]y extending the right to the appellants to make representations to the Commission, there is opportunity to deal with issues such as the time constraints and the like. As long as the Commission is willing to listen to anything new, it demonstrates that the system is a flexible one and not irrational. This built in flexibility should have the effect of taking the sting out of the appellants' complaint" (para 37). At para 39, he said that, without a challenge to the decision of the Commission, there was no warrant for the assumption that

"because the Commissioner made recommendations, it inexorably meant that the Commission had abandoned its statutory duty to assess the criteria in regulation 20 and had accepted the recommendations without more."

26. The Board agrees with the general reason given by the Court of Appeal for rejecting the irrationality challenge to the points system. Even if the system is flawed in any of the respects suggested on behalf of the appellants, the material decision is taken by the Commission. It is not suggested by these appellants that the Commission slavishly follows the recommendations of the Commissioner or that disappointed officers do not have an untrammelled right to make representations to the Commission by reference to the regulation 20 criteria.

27. In any event, even if the points system is properly to be regarded as flawed in some respects, the Board does not accept that the flaws of which the appellants complain show that the system is not *rationally* connected to the objective of meeting the regulation 20 criteria. As Mr Knox QC points out, it is reasonable to have a cut-off point in any appraisal system. Views may differ as to what is a reasonable period, but none of the cut-off periods specified in the system is irrational. In any event, all the appellants received maximum points for "performance appraisal" and "discipline". It is difficult to see how any of them was prejudiced by the 3 year cut-off period that was applied in relation to previous recommendations. They have no grounds for complaint on this score. The same can be said with respect to "general fitness". The Commissioner is entitled to define "general fitness" in the way that he does. It is open to him to produce a system which does not distinguish between different causes of sick leave. This is not an irrational way of measuring "general fitness". In any event, all the appellants obtained maximum points under the "general fitness" heading. As for the point made in respect of "academic qualifications", the Board accepts the submission of Mr Knox that this is not necessarily unreasonable. It is certainly not irrational. Qualifications in areas unrelated to a job may be just as good an indicator of competence as qualifications in the same area, particularly where, as occurred here, there are other headings which bear more directly on a person's suitability for promotion.

28. The Board agrees with the Court of Appeal that there may be force in some of the points made by Mr Richards and that the process might well be improved by some changes. But the complaint is that the points-based system is not rationally connected to the regulation 20 criteria. Neither the judge nor the Court of Appeal was prepared to go that far and they were right not to do so.

Conclusion

29. It follows that the appellants' submissions on both issues must be rejected and the appeals must be dismissed. The Board would make this final observation. The appellants' real complaint is that the Commission did not promote them. But they do not challenge the decisions of the Commission in these proceedings. Instead, they challenge the recommendations made by the Commissioner without alleging that the Commission acted unlawfully in seeking or taking account of the recommendations. Even if the recommendations could be said to have been unlawful, that would not have justified the grant of judicial review, not least because, as the judge and the Court of Appeal pointed out, it was open to the Commission to reject the recommendations, whether in response to the appellant's representations or otherwise. The Board rejects the submission of Mr Richards that it was appropriate for the appellants to challenge the Commissioner's recommendations and seek a declaration that they were unlawful. It accepts the submission of Mr Knox that the appellants should not have launched judicial review proceedings challenging the recommendations of the Commissioner without even making representations to the Commission and without seeking to persuade it not to act on the recommendations. Thus, even if the Commissioner's recommendations were unlawful, the court would have been justified in exercising its discretion to refuse to grant relief on the facts of this case.