



Trinity Term

[2019] UKPC 26

Privy Council Appeal No 0040 of 2018

JUDGMENT

Seukeran Singh (Respondent) v Commissioner of Police (Appellant) (Trinidad and Tobago)

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

before

Lady Hale

Lord Wilson

Lady Black

Lord Briggs

Lord Sales

JUDGMENT GIVEN ON

10 June 2019

Heard on 21 March 2019

Appellant
Thomas Roe QC

Respondent
Anand Ramlogan SC
Tom Richards
Chelsea Stewart

(Instructed by Charles Russell Speechlys LLP)

(Instructed by Alvin Pariagsingh)

LADY BLACK:

1.

This appeal concerns the arrangements for promotion within the Police Service and, in particular, eligibility/entitlement to write the qualifying examination which forms part of the promotional assessment process for promotion to, and within, the First Division of the Police Service.

2.

On 6 November 2008, Mr Singh, the respondent, was serving as a Superintendent of Police, but had not yet completed his 12-month probationary period in the role. That day, he received a letter from the Office of the Commissioner of Police inviting him to sit a written assessment (in other words,

qualifying examination) on 13 November 2008 with a view to promotion to Senior Superintendent. Later in the day, that invitation was countermanded on the basis that he was not eligible to sit the assessment because he had not completed his 12 months' probation.

3.

Still wishing to sit the assessment, Mr Singh applied to the High Court *ex parte* for leave to apply for judicial review, and for an interim injunction requiring that he be permitted to sit the assessment. The application was made on 12 November 2008, the day before the assessment. It was initially refused by the High Court but then granted by the Court of Appeal on the day of the assessment. Accordingly, Mr Singh duly sat the assessment on 13 November 2008. When the assessment results were considered together with the other elements of the assessment process, Mr Singh was placed fifth in the Order of Merit List published on 9 January 2009. In the many years that have passed since then, he achieved promotion to Senior Superintendent and he is now retired.

4.

The litigation has nevertheless continued. In April 2010, in the High Court, Madame Justice Joan Charles dismissed Mr Singh's claim for judicial review. The matter was subsequently remitted to her by the Court of Appeal for reconsideration with further evidence. The resulting hearing took place in May 2012 and the judge gave judgment in March 2013, holding that her original decision had not been affected by the fresh evidence. Mr Singh then appealed to the Court of Appeal which allowed his appeal in December 2015, declaring the Commissioner's decision to debar Mr Singh from writing the assessment examination to be null and void and *ultra vires* the relevant Act and Regulations. The short *ex tempore* reasons given at that time were followed by a fuller reasoned judgment of 16 July 2018 (Moosai JA, with whom the other two members of the court agreed). The Court of Appeal then granted the Commissioner final leave to appeal to the Board.

5.

The parties' interpretations of the legal provisions governing promotion in the Police Service are polarised. Mr Singh supports the Court of Appeal's view that he was not only eligible, but also entitled, to sit the assessment. The Commissioner, on the other hand, argues that Mr Singh was not eligible to sit the assessment until he had completed his probationary period in his existing rank and, indeed, that no officer can claim an entitlement to sit any particular examination.

The legal provisions

6.

It is necessary to have regard to provisions of the Constitution, the Police Service Act ("the Act"), and the Police Service Regulations 2007.

a) The Constitution

7.

Section 122 of the Constitution provides for there to be a Police Service Commission, with its members appointed by the President of Trinidad and Tobago. Section 123 of the Constitution sets out the powers of the Police Service Commission, which include power to appoint the Commissioner and Deputy Commissioner of Police (section 123(1)(a)), further powers in relation to the Commissioner and Deputy Commissioner's performance and efficiency (section 123(1)(b) to (e)) and, by section 123(1)(f), power to "hear and determine appeals from decisions of the Commissioner of Police ... in relation to appointments on promotion or as a result of disciplinary proceedings brought against a police officer appointed by the Commissioner of Police".

8.

As relevant, section 123A provides:

“123A.(1) Subject to section 123(1), the Commissioner of Police shall have the complete power to manage the Police Service and is required to ensure that the human, financial and material resources available to the Service are used in an efficient and effective manner.

(2) The Commissioner of Police shall have the power to -

(a) appoint persons to hold or act in an office in the Police Service, other than an officer referred to in section 123(1)(a), including the power to make appointments on promotion and to confirm appointments; ...

(3) ...

(4) In the performance of his functions under this section the Commissioner of Police shall act in accordance with the Police Service Act and the Regulations made thereunder.”

b) The Police Service Act

9.

The Act is described in its long title as:

“An Act to consolidate, amend and revise the law relating to the Police Service, to ensure efficient and transparent management of the Service and to provide that the principles of equity and meritocracy shall be applied at all times and for other related matters.”

10.

Under the Act, the Police Service consists of two Divisions, the First Division and the Second Division. The offices of Superintendent and Senior Superintendent are in the First Division.

11.

Sections 16, 17 and 17A of the Act make provision for promotions in the First Division. The first hurdle is that, by section 16(2):

“A police officer shall not be considered for promotion to and within the First Division unless he has attained the prescribed points.”

To satisfy this requirement, the officer must attain sixty or more points on his performance appraisal report, see regulation 19(3) of the Police Service Regulations (below).

12.

To “determine the suitability for promotion to and within the First Division to the next higher rank of a police officer from the rank of Inspector through to Senior Superintendent”, section 17A provides for the use of a “promotional assessment process”, conducted by a “person” whom the Commissioner causes to be contracted for that purpose. The results of the process are submitted to the Commissioner in the form of an Order of Merit List, see section 17A(2). Further details of the promotional assessment process, and in relation to the Order of Merit List, can be found below under the heading c) The Regulations.

13.

In exercising the powers of appointment vested in him by section 123A(2)(a) of the Constitution (above), the Commissioner has to take into account the results of the promotional assessment process, see section 16(1). Section 17 reinforces this in the following terms:

“17. Subject to section 16(2), promotions to and within the First Division shall be made by the Commissioner only on the basis of the results of a promotional assessment process.”

14.

However, the Commissioner is given a veto by section 17A(3) which provides:

“(3) A police officer shall not be appointed to an office in the First Division if the Commissioner objects to the appointment of that officer to that office.”

15.

Section 21 deals with probation. Section 21(1) requires a police officer on first appointment to serve “the prescribed period of probation”, with subsection (2) making provision for a constable to be dismissed within the probationary period in certain circumstances, and subsection (3) providing for a constable who successfully completes his probation to be eligible to be confirmed as a constable. Other ranks are dealt with in subsection (4) as follows:

“(4) A police officer who is promoted shall serve the prescribed period of probation.”

16.

Section 78 gives the President power to make regulations to give effect to the purpose of the Act, including regulations prescribing the procedure for appointments from within the Police Service and prescribing periods of probation. The relevant regulations are the Police Service Regulations 2007 (“the Regulations”).

c) The Regulations

17.

Part II of the Regulations deals with probation and promotion. Regulations 11 to 17 concern the Second Division, but, as will appear later, one provision is of note when interpreting the scheme in place for promotion to and within the First Division:

“17. A constable shall not be considered for promotion unless he has three years in the Service.”

18.

Regulation 19 deals with the principles for selection for promotion to and within the First Division, including further details in relation to the promotional assessment process. Playing a central role is the officer’s performance appraisal report, to which reference was made at para 11 above, and which is the subject of detailed provisions to be found in regulation 71. As has already been indicated, the points awarded to an officer on the basis of his performance appraisal report have particular importance for promotion purposes, by virtue of regulation 19(2) and 19(3) which provides:

“19(2) The points awarded to a police officer based on his performance appraisal report shall represent 25% and the results of the promotional assessment process shall represent 75% of his final grade as stated in the Order of Merit List mentioned in sub-regulation (9).

19(3) A police officer shall not be considered for promotion to and within the First Division unless he has attained 60 or more points on his performance appraisal report.”

19.

Regulation 19(5) provides that the promotional assessment process is to have two stages, the first stage being the focus of the present proceedings:

“19(5) The promotional assessment process shall comprise of two stages as follows:

(a) stage one shall require every qualifying officer to write a qualifying examination, from which only the top performing candidates as determined by the person shall proceed to stage two; and

(b) stage two shall be a suitability assessment process.”

20.

Regulation 19(2) made mention of an Order of Merit List, and this is taken up in regulation 19(9) as follows:

“(9) Subject to sub-regulation (2), every officer considered for promotion shall be rated according to the results of the promotional assessment process specified in this regulation together with the points awarded to him based on his performance appraisal report and be placed on an Order of Merit List.”

21.

By virtue of regulation 19(10) to (12), the Order of Merit List is submitted to the Commissioner and remains valid for twelve months from the date of its publication, subject to extension by the Commissioner for up to a year.

22.

Probationary periods following promotion are dealt with at regulations 21 to 26. It is worth setting out regulation 21 in full:

“21(1) An officer who is promoted to an office shall serve a probationary period of 12 months in the office to which he is promoted.

(2) Where an officer is promoted to an office in which he has performed the duties, whether in an acting or temporary capacity, for a period of equal or longer duration than the prescribed period of probation, immediately preceding the promotion, the officer shall not be required to serve the probationary period.

(3) Where an officer is promoted to an office in which immediately preceding the promotion he has acted for a period less than 12 months, the period of acting service shall be offset against the prescribed period of probation.

(4) Where an officer is promoted before he has completed the period of probation in his former office, the unserved portion of that period of probation shall be waived and the officer is deemed to have been confirmed in that appointment.”

The Commissioner’s submissions

23.

The argument for the Commissioner has developed as the case has gone on and has involved two separate strands. One strand might be termed a policy argument and the other turns more directly upon interpretation of the legal provisions.

24.

The policy argument featured in the Statement of Facts and Issues prepared for the Board, where the Commissioner signalled that he contended that he was entitled to maintain a policy under which

officers could not sit assessments for promotion whilst still completing their probationary period in their existing rank. This was the basis upon which Joan Charles J dismissed Mr Singh's judicial review proceedings, holding that the Commissioner has considerable discretion in the promotion of officers, which entitled him to adopt a general policy that officers must complete their probationary period before being eligible to sit an assessment for promotion. However, in oral submissions before the Board, Mr Roe QC, counsel for the Commissioner, sensibly acknowledged that, in the absence of a policy document, or even any discrete body of ideas which could properly be described as a policy, he could not seek to justify the Commissioner's decision as an application of policy. The argument that the Commissioner places before the Board therefore turns on the proper interpretation of the law governing promotion within the Police Service.

25.

The Commissioner's case is that, as a matter of law, an officer is only eligible to sit a promotion assessment once he has completed his probationary period in his existing rank. This is the basis on which he proceeded with respect to Mr Singh, and he submits that he was correct. However, if this interpretation should not appeal to the Board, he submits that it was reasonable for him to interpret the provisions in this way, and there can be no valid complaint about his approach.

26.

Mr Roe made it clear to the Board that, whatever the view taken as to the eligibility issue, the Commissioner is particularly concerned to dispel the notion that any officers have a legally enforceable right to sit a promotion assessment. In the Commissioner's submission, the Court of Appeal was wrong to take the view (summarised at para 24 of Moosai JA's judgment) that, having satisfied the requirements of regulation 19(3) by virtue of having attained the requisite number of points on his performance appraisal report, Mr Singh "was a qualified officer for the purposes of regulation 19(5) and therefore entitled thereunder to write that examination". No such entitlement is conferred by the provisions, on the Commissioner's case. It would be, he says, an unjustified qualification on his complete power to manage the Police Service, conferred on him by section 123A of the Constitution, and would leave no room for him to use his management powers to formulate a policy as to when officers might apply for promotion, including by requiring that they should first complete their probationary period in their existing rank.

Mr Singh's submissions

27.

Mr Ramlogan SC and Mr Richards on behalf of Mr Singh submit that the appeal must inevitably be dismissed. As is now common ground, the Commissioner proceeded upon the basis that, in law, Mr Singh was not eligible to write the examination, and not upon the basis of any policy he had devised to manage the Police Service. That was a wrong view of the law, in their submission, because Mr Singh was eligible, notwithstanding that he was still within his probationary period. Accordingly, they say, the Court of Appeal was right to declare the Commissioner's decision null and void and ultra vires the Act and the Regulations.

28.

They point out that the question of whether officers who have not completed their probationary periods are entitled to sit the examination does not arise as a necessary part of the determination of this appeal, since Mr Singh sought no declaration to that effect and none was made, and, in any event, he achieved his promotion and is now retired. However, they support the Court of Appeal's view on the question of entitlement, and the Board is grateful for the submissions they offered on the issue.

Discussion

29.

The Board has no doubt that an officer in Mr Singh's position is eligible to write the qualifying examination for promotion within the First Division, notwithstanding that he has not yet completed his period of probation in his existing office. It does not assist the Commissioner to point to the "complete power to manage the Police Service" entrusted to him by section 123A(1) of the Constitution, because he has acknowledged that he was, in fact, proceeding upon the basis that Mr Singh was ineligible as a matter of law, rather than deploying his management power. He submits that what is envisaged by the legal provisions is a steady progression from rank to rank, with the officer completing his probationary period in each rank before promotion, but he does not point to any provision that requires this, although the Regulations do incorporate provisions which restrict promotion in other ways, such as regulation 19(3) (para 18 above) imposing the precondition of 60 points or more on the performance appraisal, and regulation 17 (para 17 above) ruling out promotion of a constable unless he has had three years in the Service.

30.

What conclusively renders the Commissioner's submission untenable, in the Board's view, is regulation 21(4) (see para 22 above), which deals with the position "[w]here an officer is promoted before he has completed the period of probation in his former office". If an officer were ineligible for promotion before completing his probation, such a provision would be wholly unnecessary. As, in both the Second and the First Division, promotion is preceded by a qualifying examination, an officer who has reached the point of actually being promoted before completing his probation will have written the qualifying examination well within his probationary period. The Commissioner argues that the Board should set no store by the fact that regulation 21(4) allows for the possibility of promotion before the end of probation because "there is nothing to suggest that this would be other than an exceptional case". That does not assist his position, however. He does not point to any provision which expressly establishes the special eligibility of the probationer in the exceptional case. That probationer's eligibility is therefore governed by the general provisions applicable to all probationers, and if he or she can proceed to write the examination, that demonstrates that there is no bar in law to officers who are still within their probationary period writing the examination.

31.

The Commissioner therefore proceeded upon a clear error of law. His interpretation of the legal provisions was one that simply was not open to him and the Board need not dwell further on his unpromising argument that it was open to him to proceed upon his own reasonable interpretation, even if it was wrong.

32.

Whether an officer is entitled to write the examination whilst still in his probationary period is, however, a different question, and, as the respondent rightly points out, one which does not require determination in the present appeal. The Board does not normally decide academic issues, and it is therefore only with hesitation that it broaches the subject at all, in order to express provisional views.

33.

The Court of Appeal considered that an officer in Mr Singh's position was entitled to write the examination, summarising its approach in this way:

"24. ... In our opinion, the appellant, having satisfied on the evidence the regulation 19(3) requirements of being a police officer seeking promotion within the First Division and one who had a

performance assessment for the period as Superintendent with 60 points or higher, was a qualified officer for the purposes of regulation 19(5) and therefore entitled thereunder to write that examination.”

34.

The respondent supports the Court of Appeal’s reasoning, underlining that the terms of regulation 19 are generally mandatory, the language of discretion (“may”) being used only three times. In his submission, when regulation 19(5) provides that “stage one [of the promotional assessment process] shall require every qualifying officer to write a qualifying examination”, that means that the Commissioner has no discretion to preclude a “qualifying officer” from writing the examination. Although “qualifying officer” is not defined, the respondent endorses the Court of Appeal’s view that it means an officer who has satisfied regulation 19(3) by the attainment of 60 or more points. As there is nothing to exclude an officer who, like Mr Singh, has not yet completed his probationary year in his existing role from this category, it follows in his submission that such an officer is not just eligible but also entitled to write the examination.

35.

However, as the Commissioner points out, regulation 19 must be interpreted in the light of section 123A of the Constitution which gives the Commissioner “complete power to manage the Police Service” and requires him to ensure that its resources are used in an efficient and effective manner. This is intended to give him a wide discretion, subject of course to section 123A(4) which requires him, in the performance of his functions, to act in accordance with the Act and the Regulations. It would, as Mr Roe submits, be a surprising qualification to the Commissioner’s power if he were to be precluded from having in place a policy that, as a general rule, an officer should complete his probationary period in his existing role before seeking promotion. Appointment processes absorb resources and it makes sense that, charged as he is with using Police Service resources in an efficient and effective manner, the Commissioner should be able to ensure that the appointment process concentrates upon those officers who are most likely to be suitable for promotion. So, if experience shows (for example) that those who have been confirmed in their existing role are more likely to be suitable for promotion than those who are still serving their probationary period, there would be an obvious role for a policy which normally excludes probationers from the process.

36.

The respondent stresses the constitutional principle that the Police Service should be insulated from political influence by the government of the day, see *Endell Thomas v Attorney General of Trinidad and Tobago*[1982] AC 113 at 124. He emphasises the importance, in this context, of the detailed code, contained in the Act and the Regulations, which ensures that decisions relating to promotion are made on the basis of objective criteria pursuant to a transparent process, rather than on the basis of administrative discretion. It is consistent with the prescriptive nature of the provisions, in his submission, to interpret regulation 19(5) as precluding any discretion in the Commissioner to debar a “qualifying officer” from writing the qualifying examination.

37.

The Board accords full weight to the importance of safeguarding the independence of the Police Service, but it observes that the Commissioner has, in fact, been given considerable freedom of decision in the form of the veto which, by virtue of section 17A(3) of the Act, he can exercise over the appointment of an officer in the First Division. It also observes that section 123(1)(f) (see para 7 above) establishes a proper structure within which the Commissioner exercises his power to make

decisions as to promotion, there being an appeal from such decisions to the Police Service Commission.

38.

The Board considers that the Commissioner's powers in relation to promotion should not be deemed to be limited by the Act or Regulations unless such a limitation is clearly spelled out, and it is not inclined to interpret regulation 19(5) as such a limitation.

39.

It seems to the Board that regulation 19(5) is concerned with the attributes of the promotional assessment process rather than with the question of who should be allowed to enter the assessment process. It establishes that the process must comprise two stages, the candidate progressing from the examination at stage one to the suitability assessment process at stage two. There seems to be general agreement that the reference, in regulation 19(5)(a), to "qualifying officer" ("shall require every qualifying officer to write a qualifying examination") is a reference to an officer who has attained sixty or more points on his performance appraisal report. But even if that is correct, in the Board's view, it would be inappropriate to read the provision as creating an entitlement for every such officer to write the examination. On the contrary, it might more appropriately be read as an acknowledgment that it is a condition precedent to entering the promotional assessment process that the officer should have attained his sixty or more points. This would be consistent with regulation 19(3), which is not drafted in terms of entitlement, providing only that an officer "shall not be considered for promotion ... unless" he has attained the requisite points, and not that all officers who have attained the requisite points will be considered.

40.

Whilst, for these reasons, the Board is inclined to agree with the Commissioner that a probationary officer is not entitled to require that he be permitted to write the qualifying examination, this is irrelevant to the outcome of the appeal. The respondent is entirely correct in submitting that the appeal must be dismissed because, the Commissioner having wrongly interpreted the law as rendering Mr Singh ineligible to write the examination, the Court of Appeal was right to declare his decision "null and void and ultra vires the Act and the Regulations": judgment para 26. In those circumstances, subject to any submissions made in writing by the parties, the Board considers that the Commissioner should pay the costs of the appeal to the Board.