

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGUILLA CIRCUIT
(CIVIL)
A.D. 2021**

CLAIM NO. AXAHCV 2018/0046

BETWEEN:

VYDIA CHARLES

Claimant

and

**THE COMMISSIONER OF POLICE
THE SELECTION BOARD OF THE ROYAL ANGUILLA POLICE FORCE
THE SENIOR MANAGEMENT TEAM ROYAL ANGUILLA POLICE
FORCE**

Defendants

Appearances:

Mr. Thomas Astaphan, Q.C., with him Mr. Devin Hodge of counsel for the claimant
Mr. John Carrington, Q.C., with him Ms. Sherma Blaize-Sylvester, Crown Counsel,
Attorney General's Chambers of counsel for the defendants

2019: September 16; 17; 30;
2020 April 20; June 22 (submissions filed);
2021: June 30.

Anguilla Police Act, R.S.A. c. A70 – Sections 6 and 22 – Police Regulations, R.R.A. A70-2 – Regulations 12(1), 12(2) and 12(4) – Judicial Review – Promotion to rank of Inspector – Police Promotion Selection Board – Senior Management Team – Whether Police Promotion Selection Board delegating power to make promotions to the Senior Management Team – Whether ultra vires Police Act and Police Regulations – Promotion selection process – Whether selection process unfair – Whether procedure adopted by the Police Promotion Selection Board ultra vires section 12 of the Police Regulations – Prejudice – Bias – Legitimate expectation – Whether the claimant had a legitimate expectation to be promoted to rank of Inspector based on previous practice in the promotion selection process – Whether the actions of the Commissioner of Police as a member of the Promotion Selection Board rendered the decision of the Promotion Selection Board unlawful – Whether the requirement to undertake an interview as part of the promotion process was unlawful and outside the remit of Regulation 12 of the Police Regulations – Whether the requirement to partake in an interview was ultra vires Regulation 12 of the Police Regulations – Whether interview was a threshold requirement to promotion to the rank of inspector

JUDGMENT

- [1] **INNOCENT, J.:** This is a claim for Judicial Review brought by the claimant, Sergeant Vydia Charles of the Royal Anguilla Police Force (the 'RAPF') against the Commissioner of Police (the 'Commissioner'), the Promotion Selection Board of the RAPF (the 'Board') and the Senior Management Team of the RAPF (the 'SMT'). These proceedings arise out of a promotion and selection procedure conducted by the Board for the promotion of certain police officers who held the rank of Sergeant to the rank of Inspector.
- [2] Consequent on her unsuccessful application for promotion to the rank of Inspector, the claimant filed a claim for judicial review seeking the following relief, namely, (1) an order for certiorari quashing the decision of the Board of November 2018 as it related to the promotion and selection of police officers within the RAPF; (2) an order of mandamus directing that the selection and promotions process within the RAPF be remitted to the Board for the purpose of conducting the promotion and selection process anew in accordance with the findings of the Court and in accordance with law; and (3) an order of prohibition directing that the interview stage not be used as a determinant of threshold eligibility for selection and promotion within the RAPF.

Procedural History

- [3] The claimant had initially sought leave to bring the claim for judicial review on an ex parte application (the 'Ex Parte Application') filed on 23rd November 2018. In the Ex Parte Application, the claimant sought the following orders and relief, namely, (1) leave to apply for judicial review, in particular (a) to obtain an order of certiorari against the Board and the SMT bringing up and quashing the purported decisions of each of them purported to have been made on or about 19th and 20th November 2018, respectively, whereby in the case of the Board (i) they failed to promote the claimant to the rank of Inspector and they purported to select other applicants for promotion to the rank of Inspector and Sergeant, and (ii) they ceded and or delegated their power to make said promotion to the ranks set out in Regulation 12

of the Police Regulations to the SMT , and the purported decision of the Board and the SMT to promote other named officers to the rank of Inspector and Sergeant respectively (iii) Alternatively, if the Board did make said selections and promotions, they erroneously took into account the views therein of the SMT; (2) An order of mandamus directed to the Commissioner and the Board directing them to begin the process of promotion and selection process afresh and in accordance with law; (3) An injunction against the SMT prohibiting them from participating in the promotion and selection process in contravention of Regulation 12 of the Police Regulations; (4) an interim injunction to prevent from going into effect the purported promotion of the officers named in the Report dated 20th November 2018 taking effect until the trial of the claim for judicial review, if leave is granted.

[4] The Court having considered the Ex Parte Application, and noting that it contained a claim for immediate interim relief, ordered an inter partes hearing of the application for leave. The inter partes leave application was opposed by the defendants.¹

[5] By order dated 14th December 2018 a differently constituted Court made the following ruling:

“The Court grants leave to file an Application for Judicial Review once that Court is satisfied that there is an arguable ground for judicial review having a reasonable prospect of success.

Having reviewed the Application along with the affidavits in support along with the application in opposition and its accompanying affidavits, the Court finds:

1. That the Commissioner of Police in this case treated the test scores achieved by the relevant applicants for the post of Inspector as the threshold eligibility for the post when it ought not to have been so.

2. It appears therefore that the requirement to consider merit and efficiency as required by section 12(2) of the Police Regulations were ignored in determining the eligibility of the Applicants for the post of Inspector and sole reliance placed on the test scores.

¹ Notice of Opposition filed 27th November 2018; Affidavits filed by the defendants on 26th and 27th November 2018.

3. Further, the Commissioner of Police had established a practice of dealing with promotions to specialized positions, added to which the representation made by the Commissioner of Police to the Applicant created a legitimate expectation that the established procedure would have been followed in this instance and it was not.”

- [6] It was on the abovementioned basis that the Court granted the application for leave to file a claim for judicial review. In addition, to the grant of leave, the Court also ordered that the application having been heard after the effective date of promotions, no order is made on the injunctive relief sought by the claimant.
- [7] The substance and tenor of the order granting leave to the claimant to file a claim for judicial review present some difficulty for the Court hearing the substantive claim for judicial review for obvious reasons. It appears that the Court in granting leave to the claimant seemed to have already made a determination on critical issues to be determined on the substantive hearing of the claim for judicial review.
- [8] The above observation brings to mind the decision of the Court of Appeal of the Eastern Caribbean Supreme (‘Court of Appeal’) in the case of **Edgecombe v Premier and another**² where it was made clear that the leave stage is a filtering process, with the proper analogy being to applications for leave to appeal and to the proper conduct of such applications as recently remarked upon by Mitchell JA (Ag) in the case of **Treasure Bay (St Lucia) Ltd v Cage St Lucia Ltd** where His Lordship expressed the view that, without deciding the issue, applications for leave to appeal are intended to be a weeding out process, to ensure that unmeritorious appeals are not filed and that such applications should not be contested on the merits at such an early stage in the proceedings.
- [9] Therefore, where the court directs an oral hearing to take place on notice, it is not desirable that a mini-trial of the issue whether leave should be granted should involve the deployment of evidence that does not focus on the narrow issue of

² (2014) 87 WIR 304

whether leave ought to be granted, ought to be actively discouraged. Where a judge determines that leave to seek judicial review should be given to the respondent, it should always be borne in mind that no more than leave is involved and so legal submissions should be directed to whether the threshold requirements of leave have been met rather than to the merits of any possible substantive claim for review.

[10] In the claim for judicial review, the claimant relied on the following grounds which may be briefly summarized as follows:

(a) That she had a legitimate expectation that selection and promotion to the rank of Inspector in the RAPF would take place as and when a vacancy in that rank arose;

(b) That the implementation of an interview process as a threshold for eligibility for selection and promotion to the post of Inspector was irrational;

(c) That she was treated unfairly to the extent that she was not provided with full information regarding the interview process, specifically, the weight to be attached to the interview process, the pass mark, the criteria for marking the answers on the interview and the material to be reviewed in preparation for the interview;

(d) That the Board's and the Commissioner's reliance on the SMT in arriving at a final decision in the selection and promotion process was unlawful;

(e) That the Commissioner was manifestly biased towards her as a candidate for the selection and promotion process in light of his unfavourable view that he held of her as an officer in the Prosecution Department of the RAPF and as Acting Inspector in that Department;

(f) That she was prejudiced in the selection and promotion process as a result of the Commissioner's bias in his capacity as a member of the Board and the SMT.

[11] The selection and promotion process under review was conducted in the manner hereinafter appearing. In September 2018 promotions were advertised. The candidates for promotion to the rank of Inspector were required to partake in a series of workshops calculated to prepare them for the interview and the promotion process generally. There was a period of five weeks pre-interview workshops. One

workshop per week up until two weeks prior to the dates set for the interview. There were two workshops per week, the last of which was on 9th November 2018.

- [12] A list of the candidates for selection and promotion for the available vacancies was published and circulated to all police officers. The claimant was named among the list of candidates for selection and promotion.
- [13] There were three available positions of Inspector and thirteen police officers submitted applications to be considered for selection and promotion to this rank. At least twenty constables applied for selection and promotion to the rank of Sergeant.
- [14] At the time that promotions were advertised, the claimant had been at the rank of Sergeant in the RAPF for nineteen years and had served as Acting Inspector in the prosecution's department of the RAPF for the period commencing November 2017 and ending September 2018.
- [15] The claimant participated in the selection and promotion process but did not succeed in being selected and promoted to the rank of Inspector.
- [16] By a notice circulated via email dated 20th November 2018,³ the names of the candidates for selection and promotion to Inspector and who had scored a mark of 25 and above were published. The claimant was not among the names listed. It appeared that the claimant had placed great emphasis on the substance of the notice as a basis of her claim for judicial review. Therefore, it will be necessary to set out the terms of the notice in full when it is time to examine the ground of judicial review relied on by the claimant relative to the notice, in particular, the allegation of unlawful delegation to the SMT.

³ Exhibit VC3.

- [17] In support of her claim for judicial review of the decision of the Board, the claimant alleged that between 1st July 2016 and 6th December 2018 the vacancy in the rank of Inspector in the Prosecution Department had not been advertised. Both the claimant and Sergeant Brian Best had acted in the vacant post of Inspector in the Prosecution Department at various times during that period. The claimant had also acted as Inspector in the Operations Department from October 2016; and had attended the Junior Command Training Course during the period February 2017 to May 2017.
- [18] Contrary to the claimant's grounds for seeking judicial review of the Board's decision, the defendants contended that the role of the Board was to select from among eligible candidates, those police officers at the rank of Sergeant to be promoted to the rank of Inspector to fill vacancies at that latter rank in the RAPF.
- [19] The defendants contended that upon the Commissioner assuming office, an assessment was made of the human resource needs of the police force in accordance with the strategic policing plan and the suitability of officers for promotion.
- [20] The defendants conceded that in keeping with the strategic policy plan, certain promotions to certain specialized post within the RAPF were filled by advertisement of those vacant positions after a selection and promotion process with the exception of one case where a specialized post was filled by the transfer of one officer who held the rank of Inspector to another specialised post of Inspector, notably in prosecution. To that extent the defendants denied the existence of any stated policy or practice of advertising and filling vacant specialised post of inspector as and when they became available. Therefore, the defendants contended that vacancies were not filled as and when they arose. In the circumstances, the defendants contended that the claimant could not rely on the principle of legitimate expectation in reliance on any promise or undertaking that a particular practice would be engaged in the process of promotion to the rank of Inspector.

- [21] According to the defendants, the two year minimum requirement as Sergeant provided for in Regulation 12(4)(a) was only one of two alternative minimum or basic criteria for promotion to the rank of Inspector, the other being in accordance with Regulation 12(4)(b). Therefore, the minimum length of service did not by itself automatically qualify a Sergeant for promotion to Inspector. The Board's consideration of a candidate's suitability for promotion did not depend entirely only on seniority but also on merit and performance which was assessed by means of the interview.
- [22] In respect of the claimant's assertion that the failure to fill the rank of Inspector in the prosecution department had not been undertaken for some time resulting in the enlargement of the pool of candidates who qualified, the defendants contended that the pool of candidates was enlarged as a matter of policy. They contended that a broader assessment of the resources, needs and leadership talents of the prosecution department was necessary at the material time.
- [23] The defendants further contended that the selection and promotion exercise, which included the assessment of the performance and merit of the candidates, was conducted by the Board and not the SMT. The defendants contended that the SMT met after the selection and promotion process had been completed by the Board to consider the deployment of successful candidates within the RAPF. Therefore, no decision as to the suitability for the promotion of candidates to be made by the Board was delegated to the SMT. The SMT was ostensibly a consultative body.
- [24] In the premises, the defendants contend that the claimant could not succeed on a claim for judicial review on any of the grounds upon which she relied.
- [25] In the circumstances, the following issues arose for determination:
- (1) Whether the selection and promotion process adopted by the Board was within the ambit of the Police Regulations, in particular Regulations 12 (2) and 12(4). If not, whether the Board had acted unlawfully and in breach of Regulations 12

(2) and 12(4) of the Police Regulations, thereby rendering the Board's decision ultra vires the Police Regulations.

- (2) Whether it was implied, that the Board not being directed by any statutory or otherwise established procedure in conducting the selection and promotion exercise, was under a duty to act fairly, rationally and reasonably. If answered in the affirmative, whether the selection and promotion process adopted by the Board in this instance was unfair, unreasonable and irrational.
- (3) Whether the Board had delegated its functions under Regulation 12 to the SMT in the selection and promotion process. If so, whether such delegation rendered the decision of the Board ultra vires the Police Regulations, unlawful and therefore liable to be quashed.
- (4) Whether the claimant had a legitimate expectation that she would be promoted to the rank of Inspector in the Prosecution Department.
- (5) Whether the Board had frustrated the claimant's legitimate expectation, if it existed, by continuing the practice of filling the vacant specialised post in the RAPF if and when the specialised post became vacant by an entirely different procedure.
- (6) Assuming that all the above mentioned issues are answered in the affirmative, in the claimant's favour, whether the court can substitute its own decision for that of the Board.

[26] The Court will deal first with the question of whether the process of selection and promotion to the rank of Inspector adopted by the Board operated unfairly to the claimant and was irrational, unlawful and or ultra vires the Police Regulations.

[27] Regulation 12 of the Police Regulations governs the process of selection for promotion to the rank of Sergeant and Inspector by the Board. Therefore, the process of selection and promotion to the rank of Inspector contained in Regulation 12 must be strictly adhered to by the Board. The Board cannot resort to a process of selection and promotion that is contrary to the Board's statutory remit under Regulation 12.

- [28] Promotions to the rank of Inspector are governed by Regulation 12 of the Police Regulations. Regulation 12(1) identifies the body by whom the process of selection and promotion to the rank of Inspector can be made, the composition of that body, and the criteria for selection and promotion. Regulation 12(1) provides that promotion to the rank of sergeant or Inspector shall be by selection by a Promotion Selection Board consisting of two police officers on the Force above the rank of Inspector appointed by the Governor after consulting with the Commissioner of Police; and one person appointed by the Governor in his discretion.
- [29] Regulation 12(2) provides that in a selection, seniority shall not constitute a basis for promotion unless it is combined with merit and efficiency.
- [30] Regulation 12(4) sets out the threshold eligibility for promotion and provides that no officer shall be promoted to the rank of Inspector unless he has served in the rank of Sergeant for a least 2 years before the promotion; or assuming that the candidate for promotion has not satisfied the requirements of Regulation 12(4)(a), the Commissioner is satisfied that the officer possesses special qualifications for the duties he is to discharge after his promotion; and he has been free from any sentence under section 32 of the Act, other than reprimand or caution, for at least 2 years immediately before the promotion.
- [31] The Regulations make no provision regarding the procedure to be followed by the Board in determining the suitability for promotion to the rank of Inspector. In other words, the Regulations do not set out explicitly any particular procedure or criteria to be employed by the Board in the selection and promotion process.
- [32] The statutory role and function of the Commissioner is provided for in section 6 of the Police Act (the 'Act') and states that there shall be a Commissioner of Police who shall have the command and superintendence of the Force and shall be responsible to the Governor for the efficient administration and government of the

Force and for the proper expenditure of all public money appropriated for the service thereof.

- [33] The Governor is the executive authority empowered to make regulations for the RAPF as appears by section 72 of the Act, and provides that the Governor, after consultation with the Executive Council, may make regulations relating to all or any of the matters set out in section 72 of the Act. The Governor in consultation with the Executive Council is empowered to make regulations generally, for the good government of the Force and all such other matters as may from time to time, be deemed expedient for rendering the Force efficient in the discharge of its duties and for securing proper discipline therein.⁴ However, the Governor in the exercise of his discretion under section 72 of the Act has not made any regulations relating to the procedure to be adopted in the selection and promotion process.
- [34] It appears that the provisions of Regulation 12 (2) do nothing more than provide that where the Board is conducting the selection and promotion exercise, it is not required in the course of its deliberations to have regard to a candidate's seniority as the overarching basis for selection and promotion without considering whether such seniority is coupled with merit and efficiency. Therefore, in the absence of any regulations made by the Governor under section 72 of the Act in relation to the procedure for conducting the promotion and selection process by the Board, taken in conjunction with the Commissioner's statutory remit under section 6 of the Act, that the Board in exercising its functions exercised a discretion subject only to the limitation as to seniority not constituting the sole basis for promotion unless combined with merit and efficiency.
- [35] In discharging its functions as mandated by Regulations, the Board in the absence of regulations made pursuant to section 72 of the Act, cannot be faulted for utilising a procedure that was not contained in Regulation 12, that is, the process of the

⁴ Section 72(1)(f)

interview. Clearly, in discharging its functions pursuant to Regulation 12, the Board had a duty to act fairly and rationally.

[36] The Court is fortified in this view by the decision of the House of Lords in **Re Shields**,⁵ where the appellant in a claim for judicial review contended that the Chief Constable had no power to make provisions as to eligibility and qualifications for promotion and that the only power to make such provisions was given to the Secretary of State for Northern Ireland by section 25 of the Police (Northern Ireland) Act 1998.

[37] In **Re Shields**, section 36 of the Police (Northern Ireland) Act 1998 required the Secretary of State to exercise his powers under the Act in such manner and to such extent as appeared to him best calculated to promote the efficiency and effectiveness of the Northern Ireland Police Service. Subject to the Act, it was left to him to judge whether and how to exercise his powers. Section 25(1) of the Act gave him a wide-ranging, but in the court's opinion plainly discretionary power to make regulations as to the government, administration and conditions of service of members of the force.

[38] This discretionary power extended (without prejudice to the generality of sub-s (1)) to the matters listed in sub-s (2)(a) to (f), including in sub-s (2)(b) "the qualifications for appointment and promotion of members of the Constabulary", in understandable contrast to the requirement in sub-section (3) and (4) that regulations "shall" be made to govern disciplinary procedures and appeals. Section 19(1) of the 1998 Act entrusted the direction and control of the force to the Chief Constable, by whom (under s 22 of the 1998 Act) appointments and promotions to any rank in the force other than that of senior officer were to be made "in accordance with regulations [made by the Secretary of State] under s 25 [of the Act]".

⁵ [2003] UKHL 3

[39] The Court in **Re Shields** found that:

It would seem to me clear that if the Secretary of State had taken it upon himself to prescribe a detailed and apparently comprehensive code of regulations governing the procedures to be followed on making appointments and promotions, the criteria to be satisfied, the qualities to be sought and the grounds of disqualification, the power of the Chief Constable to give directions in this field would have been, despite the broad language of s 19, very severely constrained, perhaps to vanishing point.”

[40] However, in **Re Shields**, just as in the case of the Governor under the Police Act, the Secretary of State did not do so. The Royal Ulster Constabulary (Promotion) Regulations 1995 (SI 120/1995), which continued to have effect under the 1998 Act, were notably brief. Regulation 4, “Qualifications for promotion”, laid down examination, service and age standards necessary for promotion to the ranks of sergeant and inspector. Regulation 6 provided that promotion from one rank to another should, with very limited exceptions, be by selection. Therefore, promotion was to turn on merit, not seniority or length of service, but no criteria were prescribed to govern the choice, as between candidates possessing the minimum qualifications, and no indication was given of what would weigh in favour of or against particular candidates. The basis upon which the selection exercise was to be conducted was left open. This situation is substantially similar to the circumstances existing in the present case.

[41] The House of Lords in **Re Shields** held that the Court of Appeal was correct in not upholding the appellant’s argument that the power conferred on the Secretary of State by s 25 of the 1998 Act precluded any intervention by the Chief Constable in the field covered by the section. Their Lordships held that section 25(1) could scarcely have been expressed in more comprehensive terms; and that to hold that section 25(1) and (2) precluded intervention by the Chief Constable to regulate “the government, administration and conditions of service” of the force, whether the

Secretary of State had exercised his discretionary power to make regulations or not, would emasculate the responsibility placed on the Chief Constable by section 19.⁶

[42] Lord Bingham delivering the decision of Their Lordships observed:

"I readily accept, as did counsel for the Chief Constable, that if and to the extent that the Secretary of State has exercised his power to make regulations governing promotion the Chief Constable may not make any direction which would contradict or undermine the Secretary of State's prescription. But the obligation on the Chief Constable is, in my opinion, to make promotions in accordance with regulations made by the Secretary of State under s 25 if and to the extent that the Secretary of State has made such regulations. Where, as here, the Secretary of State has chosen to exercise his regulatory powers in a very limited way, it is open to the Chief Constable to fill in the gaps provided he does so in a way which is not, directly or indirectly, inconsistent with the Secretary of State's prescription: see, for example, *Taylor v Chief Constable of the Royal Ulster Constabulary* (unreported, 26 September 1986, Hutton J). If the Secretary of State is unhappy with the Chief Constable's direction, he has the power to override it by regulation.

I consider this to be the correct interpretation of this legislation. It also seems to me to yield the best administrative solution. It permits the Secretary of State to lay down what he or she considers to be the important ground rules, while leaving questions of detailed management to the judgment of the officer responsible and accountable for the performance of the force. In the present case, it enables what might otherwise be unarticulated bars to promotion to be the subject of consultation, debate and clear public statement. It enables the Chief Constable to tackle, openly, a problem which any conscientious chief officer of police would wish to address."⁷

[43] The reasoning behind Their Lordship's decision are plainly set out in the judgment of Lord Hutton in **Re Shields** where he stated:

"In my opinion the power given to the Secretary of State by s 25(2) to make regulations in respect of a wide range of matters affecting the police is a permissive power which he may or may not choose to exercise as he thinks right having regard to his duty under s 36. The use of the word "may" in s 25(2) in contrast to the use of the word "shall" in s 25(3) and (4) makes this clear. I further consider that the wording of s 36 does not impose a duty on

⁶ *Infra* at para. [4]

⁷ *Infra* at paras. [7] and [8]

the Secretary of State to exercise the power under s 25(2) to make regulations in respect of the entire range of matters set out in the subsection. . . . I do not consider that Parliament intended that the Secretary of State should be under a duty to make regulations to deal with all the many aspects of police work and its organisation set out in s 25(2)."⁸

[44] His Lordship also held that if, for example, the Secretary of State did not make regulations pursuant to section 25(2)(h) as to the duties which are or are not to be performed by members of the police force, the Chief Constable clearly had power under s 19 to make orders in respect of the duties to be performed.⁹

[45] In **Re Shields**, section 22 of the 1998 Act provided that appointments and promotions to any rank in the Royal Ulster Constabulary other than that of a senior officer shall be made, in accordance with regulations under s 25, by the Chief Constable. His Lordship, construed the provisions of section 22 recited above in the following manner:

"In some contexts the words "in accordance with" are properly understood to mean that a person must only act as he is instructed to act and within the ambit of those instructions. But in other contexts where a person has a power to act the words will mean that he is to act in compliance with such directions or instructions or regulations as are given or made, but provided he does not act in a way which is contrary to those directions or instructions or regulations, his freedom of action is not otherwise restricted."¹⁰

[46] Lord Hutton expressing his disagreement with the Court of Appeal's decision that the Chief Constable had no power to issue the Force Orders in question, espoused the following view:

"I respectfully differ from this conclusion. The Promotion Regulations made by the Secretary of State contain virtually no guidance as to how the decision whether or not to promote an officer is to be made. Regulation 4 merely lays down certain conditions which have to be satisfied before a candidate is qualified for promotion, and regulation 6 states that promotion shall be by selection, but does not state what the criteria are for selection. I do not consider that Parliament intended that the Chief Constable should have no power to supplement by a Force Order whatever provisions relating

⁸ At para. [22]

⁹ At paras. [23] – [24]

¹⁰ At para. [27]

to promotion the Secretary of State decided to make by way of regulations under s 25(2)(b)."¹¹

[47] In conclusion, Lord Hutton stated that:

"I consider that the general scheme of the 1998 Act (and now of the 2000 Act) was to give the direction and control of the police force to the Chief Constable subject to any regulations which the Secretary of State might decide to make under section 25 pursuant to his duty under section 36 to exercise his powers under the Act in such manner and to such an extent as appeared to him to be best calculated to promote the efficiency and effectiveness of the police service. In discharging his functions of directing and controlling the police force the Chief Constable, as well as being subject to any regulations made by the Secretary of State, was also under a duty to have regard to the annual policing plan issued by the Police Authority and the statement of principles issued by the Secretary of State."¹²

[48] His Lordship also further considered that the powers of the Chief Constable under sections 19 and 22 of the relevant legislation included power to give directions on matters relating to eligibility for, and selection for, promotion, and that the Force Order did not conflict with, but rather supplemented, the Promotion Regulations made by the Secretary of State. Therefore, he held that the subparagraphs were lawful and were not ultra vires.

[49] The Court accepts Mr. Carrington QC's argument that it was opened to the Board to use any method of selection available to them once this would rationally achieve the objective of allowing them to make selections from among the pool of candidates for promotion to the rank of Inspector.

[50] In the Court's view, adopting the approach of the Privy Council in **Re Shields**, transposed to the present case, that in the absence of any specific regulations made by the Governor pursuant to his discretionary power under section 72 of the Act, it was opened to the Board to exercise its powers under Regulation 12 in such manner

¹¹ At para. [29]

¹² At para. [31]

and to such an extent as appeared to them to be best suited to promote the efficiency and effectiveness of the RAPF.

- [51] Another ground for review advanced by Sergeant Charles, was that the interview process adopted by the Board operated unfairly in relation to her and was irrational and an abuse of power on the part of the Board.
- [52] It appeared from the evidence that the claimant was unable to point to anything that was intrinsically unfair about the interview process or the selection process in general. She claimed not to have knowledge of the grading system based on the interview. She also claimed not to have been provided with sufficient or adequate information prior to the promotions process which amounted to unfairness to her.
- [53] Mr. Carrington QC submitted that it is not sufficient for a finding to be made that the selection and promotion process was unfair merely because the claimant may have found the interview difficult. Mr. Carrington QC relied on the decision in **Sankar and others v Public Services Commission**¹³
- [54] The case of **Sankar** concerned the legitimacy of the Commission's use in the years 2003 to 2005 of an Assessment Centre Exercise ("ACE") in the process of determining who to promote to the posts of Deputy Permanent Secretary. The main issue was whether the use of the ACE was consistent with regulation 18 of the Public Service Commission Regulations. Further issues arose as to whether it involved an illegitimate abrogation or delegation by the Commission of its role and duties and whether it was inconsistent with the Appellants' legitimate expectations and/or unfair. The Appellants succeeded on these issues before the trial judge, but failed before the Court of Appeal.
- [55] The appellants sought declarations that the Commission was wrong to use the ACE as a basis for shortlisting, and that it was obliged to consider all candidates pursuant

¹³ [2011] UKPC 27

to the criteria set out in regulation 18, irrespective of whether or not they passed the ACE. In other proceedings, one of the appellants put her case more widely. She claimed declarations that the whole ACE exercise was “illegal, ultra vires, null and void and of no effect”, that the procedure adopted by the Commission was unfair, unreasonable and irrational and/or deprived her of her legitimate expectation and that the Commission had acted unreasonably and irrationally in bypassing her for promotion. The Appellants submitted that they should have been considered for promotion and indeed promoted without being required to undergo, and without regard to the results of, any ACE.

- [56] The Privy Council held that in the court below, the judge gave only two reasons for concluding that it was unfair to introduce what she described as “a change so fundamental and alien to the public service culture as a mode of selection for promotion” and that it contravened or circumvented the detailed code in the Regulations and that it breached representations made through the Regulations. The Privy Council held that both reasons assumed that the ACE was inconsistent with the Regulations and so added nothing to the Appellants' case in that regard which the Board had already rejected. The Privy Council found that on one reading of the judgment in the court below, independently of these two reasons, the judge may also have thought that “the decision to introduce ACE given the limited opportunity that candidates had to familiarise themselves with the method, was procedurally unfair”, and the Appellants in their submissions to the Board also relied in this connection upon her earlier statements that “the first exercise was gruelling, even traumatic and I would expect, humiliating to participants such as Claimants”. The Court of Appeal also drew attention to the length of notice which the Appellants had regarding the process to be adopted. The Privy Council concluded that the ACE was an involved a carefully prepared and presented process. The Privy Council also found that despite the Appellants' complaint that they were given no or no adequate time to prepare, that the ACE was designed to test existing skills in a manner requiring no such preparation. Although the judge used the word “gruelling, even

traumatic” and speculated that it was also “humiliating”, the Board found that the Appellants’ affidavits initiating the proceedings refer to it only as “rigorous” or, in the case of one of the appellants, “very rigorous”. One of the appellants claimed also, that she felt “very traumatised and depressed”. Their Lordships regarded such evidence as wholly incapable of sustaining a suggestion that the ACE was unfair to the point where it or any decisions based on it should be regarded as invalid.

[57] According to Mr. Carrington, QC, the claimant did not allege that she was prejudiced in the selection and promotion process, more particularly with respect to the interview, by reason of her being on sick leave for a period prior to the selection and promotion process.¹⁴

[58] Consistent with Mr. Carrington, QC’s observations, the claimant testified that she was not restricted in any way from applying for promotion in November 2018. She said that because of her absence from work she became aware of the promotion process unofficially the day before the deadline for applications. She also testified that she became aware of the workshops after they had started because she was away on sick leave from about the second or third week in September until about the second or third week in November; just before the promotion process got underway. She heard about the workshops but only attended the last half of one workshop. Therefore, she alleged that she had no knowledge of what went on in these workshops.

[59] She admitted having undergone the same tests as the other candidates. However, she testified that having learnt of some of the things that the other candidates were exposed to in the workshops, had she been exposed to or received the material she would have been more prepared. She claimed to have requested the material.

[60] Surprisingly, the claimant testified that she was able to say from her personal knowledge that the Board did not consider her merit, experience and qualifications

¹⁴ Transcript at pp. 187-189

in making a determination in relation to her application for promotion. This was in the Court's view a most incredulous revelation given the fact that she was not present during the Board's deliberations.

- [61] Even more astonishing was the claimant's testimony that she agreed that there was nothing fundamentally wrong in having the interview as part of the selection and promotion process as there were ten candidates for promotion to the rank of Inspector.
- [62] The claimant also alleged that prior to the selection and promotion process, no indication was given with respect to the actual pass mark for the interview. In fact, she testified that she had no idea that there was a pass mark. This information she said, was only revealed after all candidates had been interviewed.
- [63] This testimony was confirmed by the testimony of Inspector Crispin Gumbs ("Inspector Gumbs"), who at the material time was the public relations and training policy development officer with the RAPF. According to this witness, it was only after the Board has engaged in the selection and promotion process was the information regarding the pass mark disseminated. He indicated that he only became aware of the pass mark when the email was copied to him. Inspector Gumbs admitted that he was not present at the workshops or the interviews.
- [64] The Court is also guided by the testimony of Sergeant Kevin Edwards ('Sergeant Edwards'), who was one of the candidates for promotion to the rank of Inspector. Sergeant Edwards testified that he became aware of the procedure for the selection process and the grading of the questions asked at the interview stage at the workshops. He was referred to the email Exhibited as VC3 and he accepted that the words "pass mark" did not appear therein. The claimant's assertion regarding her knowledge of the "pass mark" and the scoring of the interview seems plausible bearing in mind that she testified that she did not attend all of the workshops prior to the interview.

[65] The issue regarding whether the “pass mark” was a prerequisite for obtaining promotion to the rank of Inspector was raised with the Commissioner in cross-examination. According to the Commissioner, the pass mark was not part of the selection process and was not the threshold for selection. The Commissioner’s attention was drawn to the contents of Exhibit VC. He agreed that the email could have been interpreted to mean that only those candidates achieving a score above 25 marks would be considered for promotion and considered for placement within the RAPF by the SMT. However, he insisted that this was indeed not the case at all.¹⁵

[66] The abovementioned issue was also canvassed in the evidence of Ms. Aunika Webster-Lake (‘Ms. Webster-Lake’) one of the lay persons who sat on the Board. According to this witness, the mark allotted to the claimant occurred after consultation with other members of the Board.¹⁶

[67] In relation to the “pass mark”, Ms. Webster-Lake testified that the members of the Board had a discussion prior to the interview on what mark they would not go below. She stated:

“The mark. We had a discussion before we had the interviews about how it would work, what would be acceptable, the levels we wouldn’t go under, we had that discussion.”

[68] In addition, she testified that essentially, she told the other members of the Board that the pass mark was too low. According to Ms. Webster-Lake, the response to her concern was that persons in the RAPF tended to work their way up through the ranks and that the situation would have been different in the case of formal training at a university and therefore it was necessary to give the candidates a proper opportunity to respond in light of this. In Ms. Webster-Lake’s words, “. . . we decided

¹⁵ Transcript at pp. 537 - 565

¹⁶ Transcript at pp. 596 – 597

then that there would be a mark that we would entertain, above that, not below.” It appears, then that the pass mark for the interview was 25.¹⁷

[69] It appeared from the testimony of Ms. Webster-Lake, that if a candidate scored lower than the pass mark of 25, that candidate would not have been considered for promotion to the rank of Inspector.¹⁸ In the circumstances, according to this witness, the claimant, not having surpassed the score of 25 would not have been considered for selection for promotion.

[70] In relation to the question of whether the interview process was the only criteria and or threshold for selection, the Court had regard to the testimony of Ms. Webster-Lake.¹⁹ This testimony was contrasted to the testimony of the Commissioner given in cross-examination.²⁰

[71] According to the Commissioner, he was the person who came up with the score of 25. However, the questions were scored by the panel. The Commissioner, in his testimony, stated in essence, that the Board did not use a score to determine who would be selected for promotion to the rank of Inspector. In the Commissioner’s words, “the selection process had already been concluded. Those who had scored very high obviously were the ones who were promoted”.

[72] Based on the pith and substance of the Commissioner’s testimony in relation to the interview exercise, the Court understood him to be saying that the “pass mark” was simply a cut-off point to determine who would be selected for promotion to the rank of Inspector. This cut-off point was also used to select three Sergeants who were suitable for future development to meet the needs of the RAPF. So that ultimately, the score of 25 was determined by him ex post facto, that is, at the conclusion of the selection process.

¹⁷ Transcript at pp. 608 - 610

¹⁸ Transcript at p. 610

¹⁹ Transcript at pp. 617 – 634

²⁰ Transcript at pp. 653 et seq.

- [73] It seems therefore, that the Commissioner's evidence, if accepted, meant that the selection and promotion process did not involve merely selecting officers for promotion simply on the basis of a score of 25 and above. In other words, a score of 25 and above was not an ultimate and predetermined threshold for determining suitability for promotion.
- [74] If the assumption that the Commissioner himself had determined the pass mark, this clearly is of no moment in determining the fairness of the procedure adopted by the Board. For all intents and purposes the Board can properly be said to have acted collectively. Ultimately, it was the Board's collective decision emanating from consultation among its members that determined which police officers would be promoted.
- [75] The reason for arriving at this conclusion, is simply that, in the case where a statutory administrative body is vested with a discretion, and the minute details of the decision making process are not specified by the empowering statute, the administrative body is permitted to delegate tasks among itself and thereafter collectively exercise its decision making power in the manner contemplated by the statute and in keeping with the principles of public law.²¹ In addition, it appears, that in any event the individual performance of each candidate at the interview was scored separately by each member of the Board and the final selection made collectively after due deliberation.
- [76] Furthermore, given the Commissioner's role and function under the Act, it appears that he would have been perhaps most competent to determine the personnel needs of the RAPF and would have had more than a working knowledge of the strength and weaknesses and the suitability for promotion of each police officer who presented themselves as suitable for promotion to the rank of Inspector.

²¹ *Barnwell v Attorney General and another* (1993) 49 WIR 109

- [77] It appeared that the claimant alluded to her having attended the Junior Command Training Course ('JCTC') as signifying her qualification for selection and promotion on the basis that it formed part of the criteria under Regulation 12. That is, that she possessed special qualifications for the duties that she would be discharging after her promotion. In essence, the claimant appeared to be suggesting that attendance at the JCTC was a prerequisite for promotion to the rank of Inspector.
- [78] In the Court's view, attendance at the JCTC was not a prerequisite for promotion. Attendance at the JCTC was perhaps one of the considerations for determining eligibility in the selection and promotion process under Regulation 12. Therefore, in the Court's opinion, that argument carried very little, if any weight.
- [79] In her fixed date claim, the claimant alleged that whereas Regulation 12 of the Police Regulations established the criteria for promotions to the rank of Inspector, she was possessed of the experience, qualifications, merit and efficiency that made her a suitable candidate for promotion to the rank of Inspector. In a nutshell, she averred that she possessed training in prosecution and the JCTC which she claimed was an established prerequisite throughout the history of the RAPF for promotion to the rank of Inspector.
- [80] In response, the defendants contended that attendance at the JCTC was not a prerequisite for promotion to the rank of Inspector and never was. According to the defendants, to make this a prerequisite would amount to a discriminatory practice as it would have the tendency to exclude other police officers who were eligible for promotion to the rank of Inspector and who had not attended the JCTC. In other words, attendance at the JCTC would have been an artificial means of determining eligibility without regard to competitiveness and the criteria of merit and efficiency. To have held out the JCTC as a prerequisite to promotion to the rank of Inspector would have amounted to predetermination and a restrictive qualification for promotion.

- [81] Mr. Carrington, QC submitted that the Court should afford very little weight to this allusion since in order for any such practice to be relevant there must be evidence that the Board adopted such a practice. The Court agrees entirely with this argument advanced by Mr. Carrington, QC. Mr. Carrington, QC further submitted that Regulation 12 contained no requirement for such attendance to merit selection and promotion to the rank of Inspector.²²
- [82] Mr. Carrington, QC's submission is supported by the evidence given by the claimant herself in cross-examination. In her testimony she agreed that she was familiar with Regulation 12. She testified that there is nothing contained in Regulation 12 that speaks to the successful completion of the JCTC.
- [83] However, it appears that the claimant placed substantial reliance on what she described as a precedent set in the RAPF that police officers would have to successfully complete the JCTC prior to being promoted to the rank of Inspector. According to the claimant, being sent to do the JCTC was a precursor to being promoted to Inspector.
- [84] The fact that attendance at the JCTC was not a prerequisite to promotion to the rank of Inspector also came out of the testimony of Deputy Commissioner, Mr. Elliot Forbes ('Deputy Commissioner').²³
- [85] The claimant also contended in support of her case for judicial review, that the effect of the delay in the promotions process widened the slate of candidates who were entitled to apply for selection and promotion to the rank of Inspector. Accordingly, she complained that she was prejudiced by having to compete with the additional candidates who hitherto had not met the criteria for promotion under Regulation 12(4)(a).

²² Transcript at pp. 371-376

²³ Transcript at pp. 214 – 219

[86] In her testimony under cross-examination, the claimant was directed to paragraph 33 of her affidavit where she stated that:

“However, there were Sergeants who would have served as Sergeants for the minimum period required by Regulation 12, in November of 2018, and this is when the 1st and 2nd Respondents chose to advertise “General Promotion”, to my “prejudice”.”

[87] Under cross-examination, the claimant accepted, that the existence of more police officers at the rank of sergeant in November 2018 than previously, did not affect the work she had done in the RAPF for almost nineteen years. According to the claimant, that state of things did not affect her qualifications, seniority and efficiency as a police officer. She also stated that it was not an issue that she had to compete with other candidates in the promotions process.

[88] The claimant contended as part of her case that she was prejudiced by the Commissioner either failing, refusing or neglecting to apply what she described as the regular practice of filling the post of Inspector in the Prosecution Department as and when it became vacant, thereby permitting candidates for promotion to the post of Inspector who would not have otherwise qualified by virtue of not having acquired a minimum of two years’ experience at the rank of Sergeant to become eligible to apply for promotion to the rank of Inspector.

[89] In answer to this allegation, the defendants contended that the selection and promotion process under review was not with respect to filling any specific position within the RAPF. On the contrary, the selection and promotion process was for promotion to the rank of Inspector rather than to any specific vacancy in the RAPF.

[90] In fact, the claimant in her testimony under cross-examination, accepted this proposition. She was directed to her affidavit wherein she stated that:

“This process was a general promotions process, and not a process of promotion to a specific or specified vacant post, like had occurred with those promotions mentioned above.”

- [91] She further accepted that the position of Inspector, prosecution department was never advertised and that there was nothing in the Regulations that required it to be so advertised.
- [92] In addition, the Commissioner held the view, that it was his duty to assess the needs of the RAPF and to deploy its human resources in such a way to achieve the desired objective of fulfilling the mandate of the RAPF. In light of this, it was necessary to select from the widest pool of candidates.²⁴
- [93] Mr. Astaphan, QC, in his written submissions, contended that the Commissioner was not seeking to satisfy what was in the public interest by reneging on his promise to hold promotions by October 2018. According to Mr. Astaphan, QC, The Commissioner was in fact seeking to achieve the strategic goal of expanding the pool of candidates for the rank of Inspector based on his bias against the resources available within the Prosecution Department at the relevant time that included the claimant who was then Acting Inspector up to September 2018.
- [94] Therefore, Mr. Astaphan, QC submitted that candidates who would not have met the statutory criteria under Regulation 12(4)(a) to become eligible to the rank of Inspector before November 2018 became eligible for promotion. As a result, the strategic goal had been achieved. Mr. Astaphan, QC, submitted that ultimately, the sergeant who was promoted to the rank of Inspector in the prosecution department did not meet the statutory requirement for promotion under Regulation 12(4)(a) before November 2018. However, it appears that Mr. Astaphan QC omitted to take account of the fact that there may very well have been other candidates for promotion who would have become eligible by virtue of Regulation 12(4)(b).
- [95] Mr. Carrington, QC, contrary to the view adopted by Mr. Astaphan QC, argued that the claimant could not have had a legitimate expectation that the Commissioner's conduct would run contrary to his statutory duty to comply with the Regulations. In

²⁴ Transcript at pp. 480 - 489

support of this argument, Mr. Carrington QC, relied on the decision in **United Policyholders Group v Attorney General**²⁵

- [96] The Court interpreted Mr. Carrington, QC's point to be that clearly, promotions to the rank of Inspector could only have occurred upon the appointment and convening of a selection and promotion Board after the Board had been appointed by the Governor in accordance with Regulation 12(1). Therefore, it was not incumbent on the Commissioner to convene a meeting of the selection and promotion Board until a Board had been appointed by the Governor. In the circumstances, it would be sensible to conclude, that the Commissioner had no control over the precise timeline for conducting the selection and promotion process. To hold otherwise would fly in the face of the purport and effect of Regulation 12(1).
- [97] Mr. Astaphan, QC, also submitted that the departure from treating the post of Inspector in the prosecution department in the same was as any other post of Inspector, that is by filling such latter positions when a vacancy arose was inconsistent with the practice that existed hitherto whereby vacant posts of Inspector were treated as specialised post and were not filled by a selection and promotion process opened generally to all eligible applicants.
- [98] Relying on the decision in **CCSU v Minister for the Civil Service**²⁶ Mr. Astaphan, QC, submitted that a regular practice can give rise to a legitimate expectation, thereby creating the presumption that a decision maker will follow a certain procedure. Mr. Astaphan also relied on the proposition, that when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty.²⁷

²⁵ [2016] UKPC 17

²⁶ [1984] 1 AC 374 at 401 A-E

²⁷ Attorney General of Hong Kong v Ng Yuen Shiu Privy Council Appeal No. 16 of 1982 at p. 6

- [99] In a nutshell, Mr. Astaphan, QC, made the submission that the change in the procedure relative to the specialised post of Inspector in the prosecution department and the failure of the Commissioner to adhere to his promise in relation to time at which promotions were to be held, were in breach of the claimant's legitimate expectation; and in consequence amounted to unfairness to her in so far as her prospects of promotion to the rank of Inspector in the Prosecution Department were frustrated.
- [100] The claimant's reliance on legitimate expectation arose within the context of what may be described as her expectation or reasonably held belief that the post of Inspector, prosecution department would have been filled in the same way as other specialized post in the RAPF had been filled previously. She further alleged that the Commissioner engaged in the regular practice of filling post as and when there was a vacancy, which gave rise to the legitimate expectation that the same process would be applied to the post of Inspector in the prosecution department.
- [101] Mr. Carrington, QC contended, that this latter complaint, was based on a fundamental misunderstanding of Regulation 12 which deals with the promotion of police officers to the rank of Inspector and not promotion to any specialized post of Inspector within any department in the RAPF. In conclusion, Mr. Carrington QC submitted that there could have been no prejudice to the claimant in not being promoted to the post of Inspector in the prosecution department as the selection and promotion process could not have automatically yielded such a result.
- [102] In the Court's view, Mr. Carrington, QC has adequately answered the question whether the delay on the part of the Commissioner to fill the substantive post of Inspector in the prosecution department was unfair and or prejudicial to the claimant. Mr. Carrington, QC contended that the claimant's complaint ignored the basic premise that the post could have been filled either by the process of selection and promotion which was dependent on the Governor's appointment of the Board or upon the transfer of an officer already holding the rank of Inspector to the

prosecution department; and in any case, the claimant who held the rank of sergeant would not have been eligible for such a transfer. Therefore, it cannot be said that she had been prejudiced in the manner in which she alleged. In fact, this proposition is supported by the evidence coming from the claimant herself.

[103] The Court found no evidence of any previous practice in relation to filling either the specialised post of Inspector in the Prosecution Department or the Inspector post generally in the manner alleged by the claimant. In fact, what came out of the evidence is the fact that prior to November 2018 there were vacancies in certain specialised post at the rank of Inspector where there was only one eligible candidate for selection and promotion to these vacant post.

[104] It appears therefore, that these promotions were undertaken as a result of the state of circumstances existing at the material times and not in keeping with any discernible policy as advocated by the claimant. It is worthy of note, that in the present case there were three vacancies of Inspector unlike on the previous occasions alluded to by the claimant, there was only one vacancy of Inspector in existence. Therefore, in the Court's view, there could have been no settled practice for the manner in which promotions were conducted as evidently the selection and promotion process was historically conducted in different ways at different times.

[105] The Commissioner also gave what may be regarded as a possible explanation for the delay in the filling of the rank of Inspector in the prosecution department. Essentially, the Commissioner testified that the RAPF had fell into disorganization after Hurricane Irma and many of the police officers had been deployed on other duties.²⁸ According to the Commissioner, in assessing the needs of the RAPF, he found it necessary to enlarge the pool of candidates for the purpose of selecting the persons who were best suited to fill the vacant post of Inspector generally within the ranks of the RAPF.

²⁸ Transcript at pp. 314 – 317; 494 – 503

- [106] In support of her claim for judicial review, the claimant alleged that she met with the Commissioner sometime in May 2018 regarding the post of Inspector in the Prosecution Department on the basis that the substantive post had remained vacant as of 1st July 2016 notwithstanding that she had acted in the post for a considerable period of time.
- [107] The claimant further alleged that the Commissioner promised her that promotions would take place before October 2018 and that she would be considered for the position. However, according to the claimant, promotions to the rank of Inspector occurred in November 2018 and as a result the number of candidates eligible to apply for promotion to the rank of Inspector increased. Therefore, she claimed that the Commissioner had reneged on his promise to promote her to the rank of Inspector in the Prosecution Department.
- [108] Quite surprisingly, in her evidence given at the trial, the claimant testified that in her conversation with the Commissioner regarding the vacancy in the post of Inspector, Prosecution Department, the Commissioner did not tell her that she would be promoted to Inspector. She also agreed, that if that position had been advertised and more than one person applied that she would have expected for there to have been a selection process under Regulation 12. The claimant also testified that at no time did the Commissioner indicate to her that the procedure under Regulation 12 would not have been followed.
- [109] The claimant agreed in cross-examination, that as part of the Commissioner's remit of efficient administration and government of the RAPF, it was his responsibility to decide on the time when promotions would be held. She also agreed that it was the Commissioner's responsibility to observe the performance of the various officers in the RAPF and to assess the human resource needs of the RAPF. She accepted that part of the Commissioner's responsibility should be to ensure that the right persons were deployed to the right positions in the RAPF.

- [110] The Commissioner, although accepting that he did in fact have a conversation with the claimant in May 2018, denied that he told her that promotions would take place in October. In any event, the claimant testified that in the event that she had been promoted to the rank of Inspector it was not guaranteed that she would have been posted as Inspector, prosecution department as there were other positions vacant at the rank of Inspector.
- [112] In the Court's view, and having regard to the evidence lead at the hearing, it appears that the claimant has not produced a scintilla of evidence to support the allegation that the Commissioner had promised her that she would be promoted to the rank of Inspector either generally or in the prosecution department. The Court is fortified in the view, that in any event, the claimant simply cannot establish the existence of any legitimate expectation in that regard, simply because such a promise was undeliverable as it did not fall within the Commissioner's statutory remit. Therefore, the Court fails to see how the claimant can establish a legitimate expectation on that basis.
- [113] It appears to the Court, that the underlying basis of the claimant's complaint is not necessarily with respect to the procedure adopted in the selection and promotion of candidates to the rank of Inspector, but rather, seemed to have been more particularly concerned with the fact that she was not selected for promotion to the rank of inspector in the prosecution department. The tenor of the claimant's testimony suggested, and made it appear, that she was disgruntled by the fact that she was not promoted to the rank of Inspector in the prosecution department. This can be discerned from her testimony where she placed heavy reliance on her having attended the JCTC and in her latter testimony where she alluded to the length of time that she held the rank of Acting Inspector, particularly as Acting Inspector in the prosecution department.
- [114] In particular, the claimant's testimony in re-examination is quite telling, and seems emblematic of the Court's previous observation. She testified that at the time of the

trial she was assigned to the prosecution department and that in November 2018 was assigned to the prosecution department. Also, she testified that she was assigned to the prosecution department since September 2017. According to the claimant, at the time of the interview only three out of the other candidates, including herself, had completed the prosecution training course. She testified that she had done the prosecution training course in August 2011; and that of the three candidates, including herself, she had the greatest experience in the prosecution department.

[115] In any event, although the testimony of the Deputy Commissioner seemed to suggest that on several occasions specialized post of Inspector in the RAPF were advertised, in the Court's view, these previous promotions to specialized post of Inspector in various departments of the RAPF have no bearing on the present claim. In fact, the Court has given its attention to the provisions of Regulation 12(4)(b) which confers on the Commissioner the power to consider a police officer eligible for promotion from the rank of Sergeant to the rank of Inspector where the Commissioner of Police is satisfied that the officer possesses special qualifications for the duties he is to discharge after his promotion. In any event, those specialized positions were indeed advertised. There appeared to be no challenge that these promotions were not made in conformity with the Police Regulations. Furthermore, the present claim does not interrogate anything related to previous promotions within the RAPF.

[116] Therefore, the claimant's argument that promotions to specialised post of Inspector within the RAPF created the legitimate expectation that promotion to the rank of Inspector in the prosecution department would be conducted in the same manner given the fact that the position of Inspector in the prosecution department was a vacant specialised post in the RAPF and that she possessed the necessary qualifications cannot stand.

[117] It appears from the testimony of the Deputy Commissioner, that the failure to advertise the vacant specialised post of Inspector in the prosecution department did not fit in with the RAPF's immediate priority needs. Clearly, the fact that the position remained vacant for some time was as a result of the policy decision to fill those specialized positions that were deemed a priority. The advertisement that lead to the selection and promotion process in November 2018 was admittedly different to that for other specialized post advertised previously; the former was for specialized positions within the force and the latter with respect to the general promotion to the rank of Inspector. Clearly, this was a question of policy and fell within the ambit of the management strategy of the hierarchy of the RAPF as part of their duty under section 6 of the Act. It was a matter of discretion. The fact that the specialized post of Inspector prosecution was not advertised in the selection and promotion process in November 2018 cannot be said to have created any legitimate expectation on the part of the claimant.

[118] The latter point is reinforced by the testimony of the Commissioner who testified that he is familiar with the concept of a specialised post of Inspector in the RAPF. However, he is not required by the legislation to treat it any different to any other inspector post. The Commissioner denied that there was any established practice, as far as he was aware, that would have resulted in the position of Inspector prosecution to be advertised prior to the holding of the promotion process in November 2018. This explanation seems quite plausible given the general scheme of the Regulations.

[119] It appears from the Commissioner's testimony in cross-examination, that he conceded that several promotions to specialized post at the rank of Inspector had been done otherwise than in keeping with the letter of Regulation 12. In fact, he testified that it was indeed the case that several promotions were done by him otherwise than in conformity with Regulation 12.

- [120] Essentially, the Commissioner testified that whenever there was a vacancy in the rank of Inspector and there was only one applicant for the post he would promote the police officer without engaging in the promotion and selection process mandated by Regulation 12.²⁹ In a nutshell, it appeared that the Commissioner was operating on the basis of a misapprehension of Regulation 12(1). It seems the Commissioner had formed the impression that he could have unilaterally promoted an officer to the rank of Inspector by virtue of Regulation 12(4)(b) without the need to convene a selection and promotion Board.³⁰
- [121] In the Court's assessment, it also appeared that the claimant seemingly relied on legitimate expectation as a ground for review on the basis that because of the preexisting practice, and more particularly, the practice adopted by the Commissioner of seemingly, as she alleged, unilaterally promoting police officers to the rank of Inspector on the basis of Regulation 12(4)(b), that is, without recourse to a process of selection as mandated by Regulation 12, that she held the legitimate expectation that the same practice would be applied to her in light of her having attained certain qualifications.
- [122] So far as private law is concerned, all that the claimant had was a bare expectation, based upon her knowledge of what was the general practice, that vacant specialised posts of Inspector would be filled as they became vacant. However, the claimant had no remedy in private law against the Commissioner. Clearly, she could not sue for breach of contract as her employment and the terms of her employment were governed by the State and not the Commissioner. The claimant had no contractual relationship with the Commissioner.
- [123] In public law, as distinguished from private law, however, such legitimate expectation could have given to the claimant a sufficient interest to challenge the legality of the adverse decision made by the Board by not promoting her to the rank

²⁹ Transcript at pp. 348 - 370

³⁰ Transcript at pp. 371 - 378

of Inspector in the prosecution department on the ground that the Board in reaching its decision had acted outside the powers conferred upon it by the legislation under which it was acting; and such grounds would include the Board's failure to observe the rules of natural justice, that is, its duty to act fairly towards her in carrying out their decision-making process. In any event, such an argument seemed to have been debunked by the claimant's own testimony.

[124] The expectations may be based upon some statement or undertaking by, or on behalf of, the public authority which has the duty of making the decision, if the authority has, through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry. In the present case, there is no allegation made by the claimant that the Board had in any way given any undertakings to her that she would have been promoted or that a particular procedure would have been adopted in the decision making process that lead up to the decision not to promote her.

[125] It is clear that legitimate expectation can be invoked in relation to most, if not all statements as to the procedure to be adopted in a particular context. This principle was espoused in the case of **Attorney General of Hong Kong v Ng Yuen Shiu**³¹ where the Privy Council, held, that where a public authority charged with the duty of making a decision, promised to follow a certain procedure before reaching that decision, good administration required that it should act by implementing the promise provided the implementation did not conflict with the authority's statutory duty.

[126] It is a well-established principle of law that if a person or public body is entrusted by the legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of these powers and duties. They cannot enter into any contract or take any action incompatible with the

³¹ [1983] 2 A.C. 629

due exercise of their powers or the discharge of their duties. But that principle does not mean that a statutory body can give an undertaking and break it as they please. So long as the performance of the undertaking is compatible with their public duty, they must honour it.

[127] The Commissioner held the view that it would not have been reasonable for any police officer to hold the view that because there had been a process in the past when specific post in the force had been advertised, that the selection and promotion process currently under review would have been advertised in the same manner. It appeared that the Commissioner's reasoning was simply that, in the instant case, there were three vacancies for Inspector whereas on previous occasions there was only one such vacant specialized post of Inspector. In the circumstances, such latter vacancies were advertised as specialised post.³²

[128] In fact, based on the Commissioner's own concession, the advertisement of three distinct specialised post of Inspector would have inevitably achieved the same result as the advertisement of the general post of Inspector. It appeared that Mr. Astaphan QC had adopted the position that the advertisement of three distinct specialised post of Inspector would have obviated the need to resort to the SMT for the appointment of any one of the successful candidates to any specialised post of Inspector in the RAPF. The Court found this to be a wholly unsustainable argument given the principles of law that the Court has already alluded to.

[129] The question which therefore confronts the Court is whether the claimant, in all the circumstances of the present case, can rely on the principle of legitimate expectation in support of her claim for judicial review. As the Court sees it, two distinct issues are discernible; (1) did the Commissioner's representations give rise to legitimate expectation that promotions would be held in October 2018; and (2) if so, was the Commissioner entitled in law to resile from the expectation so created.

³² Transcript at pp. 671 - 677

- [130] In order to succeed on the basis of the principle of legitimate expectation, the claimant was required to establish the existence of a statement that is clear, unambiguous and devoid of relevant qualification upon which she relied.³³
- [131] The law relating to legitimate expectation was painstakingly set out in the case of **United Policyholders Group and others v Attorney General of Trinidad and Tobago**³⁴ cited by Mr. Carrington, QC in his written submissions. In giving the judgment of the Board, Lord Neuberger stated the principle thus:
- “In the broadest of terms, the principle of legitimate expectation is based on the proposition that, where a public body states that it will do (or not do) something, a person who has reasonably relied on the statement should, in the absence of good reasons, be entitled to rely on the statement and enforce it through the courts. Some points are plain. First, in order to found a claim based on the principle, it is clear that the statement in question must be “clear, unambiguous and devoid of relevant qualification.”³⁵
- [132] One of the principles that emanates from the decision in **United Policyholders Group** is that a legitimate expectation cannot arise in relation to conduct that is contrary to the public body’s statutory duty.³⁶
- [133] Another principle elucidated in the decision in **United Policyholders Group** is however such a person is entitled to say that a statement by a public body gave rise to a legitimate expectation on their part, circumstances may arise where it becomes inappropriate to permit that person to invoke the principle to enforce the public body to comply with the statement.³⁷ This elucidation of the principle is quite apt to the circumstances of the present case.
- [134] Therefore, it is more than plausible that the Commissioner in the exercise of his general powers under section 6 of the Act, may very well have been quite competent to recommend that there ought to have been a selection and promotion process.

³³ United Policy Holders Group v Attorney General at para. 36

³⁴ [2016] UKPC 17

³⁵ At para. 37

³⁶ At para. 38

³⁷ At para. 38

However, Regulation 12 clearly confers the power onto the Governor to appoint the Board. Therefore, any undertaking or promise by the Commissioner that promotions would be held at a particular time was qualified by the provisions of Regulation 12(1). Therefore, the Commissioner's conduct and or promise could not possibly have given rise to a legitimate expectation in the manner advanced by the claimant.

[135] Therefore, it seems correct, especially given the claimant's acceptance that she could have held no legitimate expectation, enforceable through the courts that the Commissioner could have acted in a manner that was contrary to Regulation 12.³⁸ In addition, given the tenor of the claimant's email to the Commissioner is suggestive of canvassing for a promotion and for all intents and purposes may properly be considered self-serving, notwithstanding that Regulation 8 creates a proscription against petitioning for promotion.³⁹

[136] In addition, Mr. Carrington, QC in his written submissions correctly pointed out that there appeared to be no mention in any of her formulations of the ground of legitimate expectation that she relied on the alleged promise.

[137] In any event, with respect to the claimant's argument that she had a legitimate expectation that promotion to the vacant specialised post of Inspector in the prosecution department would have been filled in a similar manner as hitherto existed, the question that arises is, whether in adopting a different procedure in the selection and promotion process under review, the Board was entitled to take account of the wider policy issues when deciding whether to or not to give effect to the previous practice.

[138] A similar issue was considered in the case of **Paponette and others v Attorney General of Trinidad and Tobago**.⁴⁰ The Privy Council had to decide the question whether there was a sufficient public interest to override the legitimate expectation

³⁸ Transcript at pp. 351 – 368 and 363 – 368

³⁹ Petitions asking for promotion are strictly forbidden.

⁴⁰ [2010] UKPC 32

to which the representations had given rise. This raises the further question as to the burden of proof in cases of frustration of a legitimate expectation.

[139] In **Paponette**, the Privy Council held that the initial burden lies on a claimant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the claimant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too. However, once these elements have been proved by the applicant, the onus shifts to the authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest.⁴¹

[140] Their Lordships reasoned that if the authority does not place material before the court to justify its frustration of the expectation, it runs the risk that the court will conclude that there is no sufficient public interest and that in consequence its conduct is so unfair as to amount to an abuse of power. Their Lordships relied on the principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances. It is for the authority to prove that its failure or refusal to honour its promises was justified in the public interest. There is no burden on the claimant to prove that the failure or refusal was not justified.⁴²

[141] In the present case, it appears that the Commissioner has provided on behalf of the Board a legitimate explanation for not following its previous policy thereby frustrating any legitimate expectation that the claimant may have had. It appeared from the evidence that the Commissioner had, on behalf of the Board, identified the

⁴¹ At para. [37]

⁴² At para. [38]

overriding interests on which it relied to justify the frustration of any legitimate expectation the claimant may have had.

[142] The present case is clearly distinguishable from the case of **Paponette** in this respect in so far as in the latter case the authority was unable to justify the frustration of a promise by failing to place evidence before the judge or the Court of Appeal to explain why the 1997 Regulations were made.⁴³

[143] Ultimately, their Lordships in **Paponette** reasoned that, unless an authority provided evidence to explain why it has acted in breach of a representation or promise made to a claimant, it was unlikely to be able to establish any overriding public interest to defeat the claimant's legitimate expectation. Fairness, as well as the principle of good administration, demanded that it needs to be justified. Often, it is only the authority that knows why it has gone back on its promise. At the very least, the authority will always be better placed than the claimant to give the reasons for its change of position. Therefore, where an authority decides not to give effect to a legitimate expectation, it must "articulate its reasons so that their propriety may be tested by the court".⁴⁴

[144] In **Paponette**, their Lordships applied the principle that the law required that any legitimate expectation, be properly taken into account in the decision making process, otherwise the authority would be deemed to have acted unlawfully.⁴⁵ In contrast to the case of **Paponette**, it cannot be said that in the present case the Board had failed in its duty to consider the legitimate expectation that the claimant may have had that the previous policy would be applied to the selection and promotion process under review. This is evident in the testimony of both the Commissioner and Deputy Commissioner.

⁴³ At para. [39]

⁴⁴ At paras. [42] – [43]

⁴⁵ At paras. [45] – [47]

- [145] The decision in **Paponette** is distinguishable from the present case. The Commissioner articulated the Board's reasons and explanations for the procedure adopted in the selection and promotion process under review in his evidence. The Court formed the view that the matters upon which the Board relied were particularly motivated by policy considerations which factored in the personnel needs, efficiency, best interest and good governance of the RAPF.
- [146] In addition, no evidence has been presented to suggest that the Board did not factor in and take into account any legitimate expectation that the claimant may have had in deciding to follow the procedure that it did. The email to which Mr. Astaphan, QC had made copious reference to in the course of the trial, is suggestive that the Commissioner, at the very least, must have had knowledge of the claimant's concerns.⁴⁶
- [147] The Court is of the considered view, that its approach is consistent with the legal principles laid down in the case of **United Policyholders Group** where the Board distinguished the case of **Paponette**.⁴⁷
- [148] The Court finds favour with the view expressed by their Lordships in **Sankar** that it was not easy to reconcile the claimant's reliance on these statements or decisions as giving rise to a legitimate expectation on her part with her case that appointments for promotion could and should only be made under the Regulations taking into account that the Regulations made no specific mention of the elements of seniority, experience, educational qualifications, merit and ability which indubitably were criteria, which in any event the Board would have had recourse to in arriving at their decision.

⁴⁶ Per: Lord Neuberger in *United Policyholders Group* at paras. 73 and 74

⁴⁷ At para. 62

- [149] In the Court's considered view, the interview which was a departure from the procedure previously adopted was a means of testing ability and merit, which were prime considerations for promotions to a senior post for which the claimant applied. Therefore, there is in the Court's view no reason to read any of such previous decisions regarding promotions as expressing a policy which would necessarily continue in, or was intended to commit the Board for, the future. Further, if any legitimate expectation may otherwise have been induced, it was capable of being withdrawn by appropriate notice. In the present case, the claimant had ample warning that the new interview process was going to be implemented.⁴⁸
- [150] More importantly, even if the Court were to find that the claimant had a legitimate expectation that a particular procedure that previously existed would have been followed by the Board in making promotions to the rank of Inspector, the fact remains that if the Court were to hold that the Board were to honour the claimant's legitimate expectation and order that the Board undertake the selection and promotion process afresh and adhere to the previous procedure of advertising specialised post of Inspector as they became vacant, to do so would assume the powers of the executive; in the present case, the powers of the Governor under section 72 of the Act.
- [151] In the Court's view, the question of an abuse of power by the Board arises within the context of whether the Board not having acted in a manner in keeping with the claimant's legitimate expectation, acted in a manner that was unfair as to amount to an abuse of power. The Board was clearly doing what they were mandated to do by virtue of Regulation 12, that is, to conduct a selection and promotion process in accordance with the terms of the Regulation 12. There has been no allegation that the Board conducted the exercise of selection and promotion otherwise than in conformity with Regulation 12. This is particularly the case given the Court's findings in relation to the question of the interview process. In any event there is also no

⁴⁸ Exhibit VC2

evidence to show that in exercising its powers under Regulation 12 the Board acted arbitrarily or in excess of any power conferred by the Regulation itself.

[152] The claimant advanced irrationality as a ground for review on the basis that the interview process adopted by the Board was irrational. The test for irrationality has been aptly described by the Court of Appeal in **Cove Hotels (Antigua) Limited v The Hon. Gaston Browne Prime Minister of Antigua and Barbuda and others**⁴⁹ where the Court held that the decision of a public body is irrational where it is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided, could have arrived at it.⁵⁰

[153] It appears that the claimant failed to obtain the pass mark at the interview stage of the selection process by one mark, she scored 24/45. The pass mark was 25/45. According to the claimant, she was unaware at the time of the interview what weight would be placed on the interview to satisfy suitability for selection and promotion to the rank of Inspector, the pass mark, the criteria for awarding marks to answers given at the interview, and the material that was necessary for review in preparation for the interview. She alleged, that as a result of the foregoing, and in all the circumstances of the case, she was unfairly prejudiced in the process of selection and promotion.

[154] The claimant developed her point regarding the unfairness of the interview process further, by contending that in the application of the interview process, where a candidate fails, they are automatically disqualified from being eligible for selection and promotion. This she contended resulted in unfairness and irrationality to the extent that the interview procedure had no rational connection to the objectives to be achieved by Regulation 12. In particular, she contended that Regulation 12 made

⁴⁹ [2019] ECSCJ No. 348

⁵⁰ Per Webster JA at para [52]

no provision for the conduct of an interview as part of the process of selection and promotion.

[155] Ultimately, she contended that Regulation 12 did not contemplate the interview process being a threshold requirement for eligibility for selection and promotion to the rank of Inspector; therefore, the adoption of the interview as a threshold requirement either undermined or disregarded the criteria relative to experience, qualifications, merit and efficiency mandated by Regulation 12.

[156] Distilled to its essence, the claimant's main contention was that the introduction of the interview in the selection and promotion process had no rational connection to merit, efficiency, seniority or special qualifications as mandated by the provisions of Regulation 12. Mr. Astaphan, QC argued that the interview ought not to have been a "threshold for eligibility" for selection and promotion. According to Mr. Astaphan, QC, the reliance on the interview as a threshold resulted in the Board not having performed their statutory function of considering the claimant's merit for selection and promotion.

[157] In support of the aforementioned argument, Mr. Astaphan, QC sought to make a comparison between the present case and the circumstances existing in the cases of **Ranjan Rampersad v Commissioner of Police and another**⁵¹ and **Ramoutar v Commissioner of Prisons and another**.⁵² Mr. Astaphan, QC contended that the circumstances existing in the present case were distinguishable from the former cited cases for the following reasons.

[158] Mr. Astapphan, QC's first submission on this point was that the decision whether or not to promote the claimant in the instant case, was not based on the requirements of Regulation 12. Her elimination was a direct result of an interview. Secondly, the points based system in **Rampersad** and **Ramoutar** took into account broad criteria

⁵¹ [2011] UKPC 25

⁵² [2012] UKPC 29

contained in the regulations. Accordingly, Mr. Astaphan, QC posited the view that it was for this reason that the Judicial Committee, in both instances, was not prepared to accept that it was irrational or unfair. In Mr. Astaphan QC's view, as far as the present case was concerned, the interview was wholly unsuitable as a determinant of threshold eligibility to the extent that it sufficiently or at all satisfied or addressed the specific criteria established by Regulation 12 so that a rational and fair determination was made.

[159] Ultimately, Mr. Astaphan, QC submitted that whereas in the present case the Board was to be guided by certain criteria for selection and promotion, the Board had no rational basis to create their own scheme for selection and promotion that was not in conformity with the dictates of Regulation 12 and then utilize it to establish their own basis for selection and seemingly disregard the considerations set out in the Regulation itself.

[160] On the contrary, the defendants contended that the role of the Board was to select from among eligible candidates police officers to be promoted to available vacancies at the rank of Inspector. The defendants' main contention was that the selection and promotion process provided for by Regulation 12 implied a level of competitiveness among the candidates. That competition, they averred, was resolved by a system of grading the candidates by the Board. Accordingly, the system of grading was intended to alleviate any predetermination and to make the process open and transparent. To do otherwise would subvert the process of selection and promotion and would defeat the statutory mandate given to the Board by Regulation 12.

[170] Further, and contrary to the claimant's contentions on this point, the defendants held the position that the selection and promotion to the rank of Inspector was not based solely on a candidate's performance during the interview stage. According, to the defendants when it came to considering promotion to the rank of Inspector the Board took into account the candidates' antecedent record including their contribution to

the police force; those matters included their record of efficiency, any awards or distinction during their service.

[171] According to the defendants, the interview process was an important and relevant component of the selection and promotion process and impacted the overall assessment of every candidate and their likely operational competence for a position of leadership. It was necessary to take into account how officers assuming positions of command would work under pressure.

[172] In the Court's view, Mr. Carrington, QC has posed the question related to this issue correctly. According to Mr. Carrington, QC the true question is whether the conducting of an interview as part of the selection and promotion process was a reasonable method by which to achieve the statutory objective of selection and promotion from a pool of candidates under Regulation 12. This was the position adopted by the Commissioner in his affidavit and in his testimony at the trial. The Commissioner was cross-examined extensively with respect to the interview process.⁵³

[173] In **Gopichand Ganga and others v Commissioner of Police**,⁵⁴ the appellants challenged the decision by the Commissioner not to recommend their promotion on the grounds that his decision was ultra vires and, in making his recommendations, he applied a points-based system which was irrational and unfair.

[174] In **Ganga** Regulation 15 provided that 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- (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 and that

⁵³ Transcript at pp. 517 - 532

⁵⁴ [2011] UKPC 28

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. Regulation 20 mandated that 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. 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.

- [175] The Court in **Ganga**, following the decision in **R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence [2003] QB 1397 at para 40**, held that 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 and that the measures designed to further the objective must be rationally connected to it. They also held 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”. The Board in **Ganga**, also found that assuming that the points system was properly to be regarded as flawed in some respects, they could not accept that the flaws of which the appellants complained showed that the system was not rationally connected to the objective of meeting the regulation 20 criteria.
- [176] The Court accepts Mr. Carrington QC’s argument that it was not foreshadowed anywhere in the claimant’s case, that the interview process was amounted to a threshold eligibility for selection and promotion. Instead, it may properly be regarded as one of the criteria employed by the Board in making the selection and promotion in accordance with the matters set out in Regulation 12.
- [177] In the Court’s view, the claimant’s contention that the interview process operated unfairly towards her fails. In addition, the criticisms levelled at this process highlighted by the claimant by way of the personal disadvantages that she labored under does not operate to negate the efficacy of the interview process in so far as

it was rationally connected to achieve the objective of the selection and promotion process under Regulation 12.

[178] In the course of her testimony, the claimant was referred to an email that she sent to the Commissioner inquiring about the material provided at the workshops that she did not attend while on sick leave.⁵⁵ However, it appears that the claimant did not allege that she did not receive the requested information or that the information provided in response was inadequate.

[179] In addition, the court makes the following observations. Regulation 12 contains no specific provision for threshold eligibility for promotion to the rank of Inspector, in the sense of any specified qualification, training, seniority or any similar precondition. In order to be eligible to be considered for selection and promotion to the rank of Inspector, the candidate would have to satisfy the provisions of Regulation 12(4). That is all.

[180] It is therefore necessary to make a distinction between “eligibility” and “suitability”. This distinction between the two concepts was in the court’s view clearly distilled in the case of **Ramoutar**. The court is inclined to adopt the distinction made by the court in that case. In **Ramoutar**, their Lordships made the distinction in this way:

“Normally the word “eligible” imports a threshold condition of appointability. It does not normally mean “suitable”. It means capable of being appointed if found suitable.”⁵⁶

[181] On that basis, one can clearly see that Regulation 12(4) does not utilise the word “eligibility” anywhere. The only allusion to “eligibility” can be equated with what is contained in Regulation 12(4) itself. Therefore, the only threshold for eligibility for promotion to the rank of Inspector is what is contained in Regulation 12(4). That being the case, the question arises as to the basis upon which the Board was to assessed the candidates’ suitability for promotion to the rank of Inspector?

⁵⁵ Exhibit VC12

⁵⁶ At para. 13

- [182] It is obvious, that the provisions of the Regulations regarding the procedure for making promotions sets out no comprehensive code, which suggest that the Board had a discretionary power to exercise in determining the procedure to be adopted in the selection and promotion process.
- [183] In addition, the Regulations did not set out precisely and specifically the terms of any criteria for selection and promotion. Therefore, it was incumbent on the Board to formulate a rational criteria upon which they could rely to determine suitability for selection and promotion. It is safe to assume that the Board would have set their own benchmarks in relation to the qualities that they deemed desirable to satisfy preferment to the rank of Inspector. It would be inconceivable that the Board, in their deliberations would have ignored the basic criteria such as merit, efficiency, seniority and efficiency. In the Court's view, the interview was just one method of assessing the aforementioned qualities.
- [184] As the Court has said repeatedly in this judgment, judicial review is only concerned with the decision making process and not the decision arrived at by the administrative authority. In that vein, the Court cannot seemingly regulate the evaluation and assessment process undertaken by the Board in circumstances where the enabling statute simply does not prescribe the procedure by which this evaluation and assessment process is to be undertaken. It is clear that the Governor, in whose discretion the Regulations can be made, did not establish any procedural framework by virtue of which the selection and promotion process was to be undertaken by the Board. Therefore, the Board was entitled to determine its own procedure for determining the suitability of the candidates for selection and promotion to the rank of Inspector.
- [185] In regulating its own procedure, the Board was required to act fairly. The Regulations required that the Board, in the exercise of its administrative discretion in assessing whether a candidate for selection and promotion was suitable for promotion, to make all necessary inquiries and to adjudicate on the merits of the

candidate. If the administrative discretion is exercised fairly, honestly and in good faith in assessing the candidate, the court will not interfere with the exercise of the discretion. There is no evidence that the Board did not act fairly, honestly and in good faith in the exercise of its functions.

- [186] In all the circumstances of the case, the function of the Board was to assess the claimant's suitability for promotion. Therefore, the conducting of an interview with all the eligible candidates who applied as part of the selection and promotion process was a method employed by the Board for assessing the suitability of each candidate.
- [187] In support of her claim for judicial review, the claimant relied on actual bias towards her on the part of the Commissioner. The claimant contended that the Commissioner held the view that she was unfavourable for promotion to the rank of Inspector in the prosecution department.
- [188] According to the claimant, the Commissioner held the view, that having assessed the state of resources and the needs of the prosecution department, it necessitated that the pool of candidates for promotion required expansion.
- [189] When followed to its only logical conclusion, it appeared that the claimant was alleging that having served as acting Inspector in the prosecution department, she ought to have been favoured for promotion to the substantive rank of Inspector; and the Commissioner having decided to widen the existing pool of candidates for promotion to Inspector meant that he held an unfavourable view of her performance as acting Inspector in the prosecution department. By virtue of this syllogism the claimant contended that the Commissioner, as a member of the Board was biased towards her in the result, that decision of the Board was tainted because the Commissioner did not bring an open mind to the deliberations of the Board in the promotion and selection process and or, the Commissioner having been biased may have influenced the Board's decision.

- [190] The claimant formulated her perception of bias on the basis that the Commissioner had formed an opinion pertaining to available resources within the Prosecution Department prior to the selection and promotion process that were adverse to her. The claimant contended that the Commissioner held an unfavourable view of her candidacy which brought into question the integrity of the process and jeopardised or prejudiced her chance of being selected for promotion. This bias towards her, she asserted, had the effect of infecting the promotion and selection process before the Board.
- [191] The Court has formed the view, that the claimant's allegation of bias on the part of the Commissioner was not made out. Apart from finding that the allegation of bias on the part of the Commissioner was not made out, it appeared that at times, in large measure, this claim of bias was contradicted by the claimant's own testimony. For example, in re-examination the claimant testified that between October 2015 when the Commissioner was appointed and November 2018 when the selection and promotion process was held, she was never told by the Commissioner or any senior ranking officer that her performance was unsatisfactory. In fact, she went on to testify that during her tenure as Acting Inspector she was always commended by the Commissioner and always recognized, as in his words, "doing a good job"; and that was on more than one occasion.
- [192] The Commissioner denied the allegation of actual bias. In a nutshell, the Commissioner having denied that he held any unfavourable view of the claimant either prior or during the promotion process, insisted that in his capacity as Commissioner, it was his duty to assess the needs of the RAPF and to deploy its resources to meet the needs and strategic objectives of the RAPF's mandate.
- [193] Distilled to its essence, the claimant's allegation of bias seemed premised on the assumption that the Commissioner, as a member of the Board had either a predetermined view of her suitability to hold the rank of Inspector in the Prosecution Department or a predetermined view of what he considered to be a suitable

candidate for promotion to the rank of Inspector; which said view did not include her. Therefore, if one progresses the argument further, the claimant's contention was that the Commissioner could not and did not carry out his functions on the Board with an open mind.

[194] It is noteworthy, that the claimant, having held such perceptions of actual bias took no objection to the constitution of the Board at the time that the selection and promotion process was being carried out. In any event, it is not the claimant's perception of bias that matters. The test to be applied is whether there was a real danger that a fair minded and informed observer, with knowledge of all the facts, and having considered all the facts, would conclude that there was the real possibility of bias so that the Commissioner could not approach his task as a member of the Board with an open mind. In the circumstances, much would depend on the conduct, utterances or pronouncements made by the Commissioner in relation to the selection and promotion process.

[195] In the Court's view, Mr. Carrington, QC's argument that if one adopts the view that the selection and promotion process was not in relation to any specific post of Inspector, but instead in relation to selection and promotion to the post of Inspector generally, the view held by the Commissioner regarding the suitability of certain police officers to hold specific post in the RAPF is irrelevant to the issue whether the selection and promotion process was unfair to the claimant as her allegation of bias touched and concerned his views in relation to her and not towards others.

[196] The Court adopts the view expressed by Mr. Carrington, QC in his written submissions, that there was nothing inherently wrong in the Commissioner sitting as a member of the Board and having his own opinions concerning the suitability of the candidates. This position is fortified by the decision in **Ganga**, where the Privy Council, when reviewing the promotion regulations in Trinidad and Tobago said:

"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.”⁵⁷

- [197] In any event, the Court is not satisfied that the claimant has not made out a case of bias in the manner alleged or at all. In the Court’s considered view, it would not be correct to hold that there was a real danger that a fair minded and informed observer, with knowledge of all the facts, and having considered all the facts, would conclude that there was the real possibility of bias so that the Commissioner could not approach his task as a member of the Board with an open mind. It would not amount to bias where the Commissioner, in accordance with his statutory remit, to have a view on the competence and performance of the police officers under his command; particularly where the selection and promotion process was adjudicated upon taking into account the merit and efficiency of individual candidates.
- [198] The Court now turns to consider the question whether the Board had unlawfully or contrary to the letter of the Regulations delegated the ultimate decision in the selection and promotion process to the rank of Inspector to the SMT. There also appears to be some contention related to the question of whether the Board had abdicated some of its powers of selection and promotion to the SMT.
- [199] The claimant alleged that the Board relied on the SMT to make certain final decisions in respect of the selection and promotion process. Furthermore, she contended that, in the event that those decisions related to or in any way influenced the selection and promotion of candidates to the rank of Inspector, these decisions were ultra vires. Ultimately, she contended that there was no statutory regime that conferred any authority to the Board to delegate the responsibility for the selection and promotion process to the SMT. In respect of that latter argument the claimant is correct.

⁵⁷ At para. 16

[200] It appeared that her reason for holding the belief that the Board had delegated part of its functions to the SMT was based on an email from the Commissioner of Police sent by Jody-Ann Dunn to all candidates who participated in the selection and promotion process on 20th November 2018.⁵⁸ According to the claimant, the email contained words to the effect that the SMT would be going over or discussing the interview process after which a decision would be made as it related to appointments and the functions of the organization. According to Sergeant Charles her personal knowledge of the Board's delegation of its mandate to the SMT was based on the email. The impugned email read:

“As set out previously final decisions on appointments will be made after an SMT meeting (CoP, D/Cop, Supt) tomorrow morning. The Insp process results will be taken into consideration during those discussions along with the wider organisational requirements. The panel has agreed that all candidates achieving scores of 25 and above out of the 45 available marks will be considered at the Tuesday morning SMT meeting.”

[201] In cross-examination, the claimant agreed that there was nothing contained in the email that stated that the SMT made any decision in the selection and promotion process. She also agreed that the SMT could allocate persons who had been promoted to various post within the RAPF.

[202] In response to this aspect of the claim, the defendants held the position that the promotions were determined by the Board and not the SMT. According to the defendants, the SMT met after the selection and promotions process had been completed to consider the deployment of those candidates who were to be promoted to the rank of Inspector to specific departments in the RAPF.

[203] This state of affairs is foreshadowed in the testimony of the Deputy Commissioner, one of the members of the SMT, who testified that part of the functions of the SMT was to determine the personnel needs of the RAPF. According to the Deputy Commissioner, the SMT being comprised of the three most senior members of the

⁵⁸ Exhibit VC3

RAPF were well placed to make that determination. He stated that as part of the SMT's administrative functions they would determine whether it was necessary to fill vacant post within the RAPF and then advertise the same.

[204] The Commissioner remained adamant during his testimony in cross-examination that the Board made the selection and did not delegate their function to the SMT.⁵⁹

[205] In relation to the question of whether the Board had delegated its powers of selection and promotion to the SMT, Mr. Astaphan, QC cross-examined the Commissioner extensively with respect to the inclusion of three additional police officers who were then at the rank of Sergeant to the list with the names of three other Sergeants who had been promoted to the rank of Inspector that was submitted to the SMT.⁶⁰ According to the Commissioner, the additional three police officers had scored a mark above 25 and that they were included in the list for consideration for "future promotion" or "further appointments for development".

[206] The Commissioner, agreed that he was the one who decided to add the three additional names as part of his overall duty of superintendence over the police force and as part of his responsibility to run an effective and efficient police force, which required him to develop (sic the capacity of) officers.⁶¹

[207] The Court failed to see how this interrogated and sought to resolve the issue of whether the Board had delegated its functions to the SMT. The review in the present proceedings relate to the promotion exercise to the rank of Inspector and does not concern any issue relative to those police officers who remained at the rank of Sergeant and how they were dealt with by the SMT. The critical question is whether those officers who had passed the selection and promotion process to the rank of Inspector were or were not promoted by the SMT. In other words, which body ultimately made the decision regarding the promotion of those police officers.

⁵⁹ Transcript at pp. 566 - 578

⁶⁰ Transcript at pp. 657 et seq.

⁶¹ Transcript at p. 658

- [208] A great deal of emphasis was placed by Mr. Astaphan, QC on the email dated 22nd November 2018 which in large measure he held out as alluding to the fact that the decision to promote to the rank of Inspector was that of the SMT and not that of the Board; and or that the email purported to give an indication that the selection and promotion process could have been undertaken, as in the past, by advertisement for specialized post of Inspector.
- [209] In so far as the email contained the words “final decision on appointments after an SMT meeting”, the Commissioner testified that the said reference in the email was with respect to where the officers who had been promoted to the rank of Inspector would serve within the organization and the future development opportunities that he had earlier referred to.
- [210] The short answer to the abovementioned issue, in the Court’s opinion, was given in the Commissioner’s testimony where he stated:
- “The three that were to be made Inspector. Their appointments within the Force would be an SMT decision. The selection Board does not select to say that you’re an Inspector here or an Inspector there, it says you are an Inspector.”
- [211] Based on the character of the questions put to the Commissioner in cross-examination by Mr. Astaphan QC, it appears that the subtle point intended to be made was that, notwithstanding, the explanation given by the Commissioner regarding the SMT’s role in the placement of those police officers who had been promoted to the rank of Inspector in specialized post in the RAPF, it was incumbent on the Board to perform that function and in no way was it the function of the SMT to undertake such a task. To that extent, Mr. Astaphan, QC appeared to attempt to sustain the argument that the Board had in so doing abdicated part of its functions to the SMT.
- [212] However, the Court finds this argument untenable given the Court’s previous findings in relation to legitimate expectation and, in addition, Regulation 12 only mandated that the Board conducts a selection and promotion procedure to elevate

police officers who were eligible from the rank of Sergeant to the rank of Inspector. Regulation 12 does not speak to the selection and promotion of police officers to specialized post, but instead purely to the general rank of Inspector. Therefore, the allegation that the SMT usurped any one of the functions of the Board or that the Board delegated its powers of appointment to the SMT cannot stand on the basis advanced by the claimant.

- [213] In the Court's view, the starting point for determining whether the allegation of improper delegation or abdication of the Board's decision making power has been made out, is by construing the terms of the statute to determine whether what was done by the Board in the particular instance was contemplated by the statute.
- [214] As the Court has already pointed out, Regulation 12 simply empowers the Board to make a decision regarding the suitability of those persons holding the rank of Sergeant for promotion to the rank of Inspector, provided that they met the eligibility requirements under Regulation 12(4) (a) or 12(4)(b) as the case may be. Regulation 12 does not specifically or at all empower the Board to appoint any police officer promoted to the rank of Inspector to any specific post of Inspector within the RAPF. The decision making process undertaken by the Board was merely to select candidates for promotion to the rank of Inspector and no more.
- [215] As the Court has already pointed out, there was nothing contained in Regulation 12 that prescribed the procedure that the Board was to follow in executing its power of selection and promotion. It is clear that the Governor in the exercise of his discretion under section 72 of the Act did not make any regulations setting out the procedural framework regarding the manner in which the Board was to conduct the process of selection and promotion and the role that each member of the Board was to undertake in the selection and promotion process.

- [216] Therefore, it was within the province of the Board to determine its own internal procedures in the fulfillment of its mandate under Regulation 12(4). It is recognized that where a statute is not prescriptive of the specific manner in which an administrative body is to operate, it is usually within the remit of that body to determine its own procedure within the ambit of recognized principles of public law relevant to the decision making by administrative authorities.
- [217] The subtle question that arises, based on the basic assumptions adopted by the claimant, is whether by permitting the SMT to conduct the exercise of determining the appointment of the police officers to various specialised post of Inspector in the RAPF amounted to an unlawful delegation of power to the SMT. In other words, was the Board required, in the exercise of its powers required to make the necessary appointments at the conclusion of the selection and promotion process as opposed to seemingly delegating that power to the SMT.
- [218] In the court's considered view, the claimant has not established that the Board delegated its powers of selection and promotion to the rank of Inspector to the SMT. Assuming that the SMT sat and determined that the officers promoted to the rank of Inspector were to be appointed to specialised post in the RAPF, the decision to promote them to the rank of Inspector would still be that of the Board. The Court sees nothing amounting to delegation of the Board's powers where it sought recommendations from the SMT or consulted with the SMT in appointing the promoted officers to specific post in the RAPF. The decision whether to promote or not remained that of the Board.
- [219] The Regulation 12 procedure was designed to assist the Board in discharging its statutory functions. Regulation 12 makes clear that it is the Board's responsibility to promote officers. By seeking the opinion and recommendations of the SMT, the Board was acting properly and entirely pursuant to its powers under the Regulations. The Board's mandate under Regulation 12 gave the Board sufficient powers to consult any person it considered proper and desirable when it considered the matter

of the filling of specialised posts of Inspector. In any event, the ultimate discretion to fill specialized post of Inspector within the RAPF laid with the Commissioner pursuant to the powers conferred on him by section 6 of the Act. The Commissioner clearly had the discretion to transfer or appoint any Inspector appointed to any post in the RAPF if in his estimation, the Inspector held the qualifications and capabilities of holding that specialized post. In that regard, it was within the purview of the Commissioner to consult with and illicit recommendations from other members of the hierarchy of the RAPF as to the suitability, performance, qualifications, expertise and capabilities of any officer that made him eligible to hold a specialised post.

[220] In the circumstances, the Commissioner was entitled to seek the specific recommendations of the SMT for filling a particular office. Indeed, it would be very surprising if the Commissioner could not seek the views of the SMT, since they would have been the most obvious source from which to obtain information and an opinion about individual successful applicants. Even if there had been no such powers conferred by the Regulations, the Board would have been able to obtain the views of the SMT at common law. In any event, the members of the SMT comprised the command hierarchy of the RAPF.

[221] In the present case, the SMT's membership comprised the Commissioner, Deputy Commissioner Forbes and Superintendent Haslyn Patterson. Both the Commissioner and Superintendent Haslyn Patterson were members of the Board. All three occupied the top tier of the superior rank in the RAPF. Therefore, they were the persons who were best placed to determine the personnel needs of the RAPF and the qualities and capabilities of those police officers who were appointed to specialised post of Inspector after their selection and promotion thereby enabling them to decide the appropriate post to which they ought to be appointed.

Conclusion

- [222] Therefore, for the reasons stated above, the claimant cannot succeed on any of the grounds upon which she relied in support of her claim for judicial review. In any event, assuming that the claimant was successful in her claim for judicial review, the Court would have found great difficulty in granting the relief sought by the claimant save for certain declaratory relief. The claimant sought an order of certiorari quashing the decision to promote the successful candidates to the rank of Inspector; an order of mandamus directing the remittal of the selection and promotion process to the Board for reconsideration and an order prohibiting the Board from using the interview as a determinant for promotion to the rank of Inspector.
- [223] This is the case as the Court ought to be slow to intervene in executive policy making powers. Policy being for the public authority alone should be accepted by the courts as part of the factual data. In other words, as not ordinarily open to judicial review. The Court's task is simply limited to inquiring into whether the application of the policy to an individual who has been lead to expect something different is a just exercise of the policy making power of the administrative body.
- [224] The Court cannot sit as a court of appeal from the decisions of the Board, and is in no way concerned with the merits of candidates for promotion or the micro-management of personnel decisions in the RAPF. The primary concern of the Court is to ensure that the Board carried out the functions and powers conferred on it by the relevant legislation.
- [225] Therefore, had the claimant been successful in her claim for judicial review, the Court would not have been prepared to grant the orders of certiorari, mandamus and prohibition that she sought to obtain. Also, the Court would experience great trepidation in granting a declaration that the decision of the Board in promoting certain members to the rank of Inspector was ultra vires, null and void. Such orders might border on usurpation of the powers of the Board, which was to be avoided,

and that a declaration that the decision of the Board was void was unsatisfactory because it was not clear what consequences flowed from it.

[226] The Court retains a discretion whether to grant any relief or remedy. However, the discretion to refuse relief is a narrow one and where relief is refused, the reason for so doing should be stated. In considering how that discretion should be exercised, the court is entitled to have regard to such matters as the nature and importance of the flaw in the challenged decision, the conduct of the claimant, the effect on administration of granting relief and whether the remedy would cause relevant prejudice and detriment.

[227] Given the nature of the relief sought by the claimant, it seems self-evident that the operations of the RAPF would be severely interrupted and would severely prejudice those officers who were already promoted. Therefore, it seems that this would have been an appropriate case where, if the claimant was successful, in which the Court would decline to grant the relief sought by the claimant. Furthermore, any declaratory relief would have been entirely superfluous given the fact that since the adjudication of this claim and the delivery of the Court's judgment, the claimant has been promoted to the rank of Inspector and is assigned to the Prosecution Department.

[228] As the Court has stated repeatedly, judicial review is concerned not with the decision but with the decision-making process. Unless that restriction on the power of the court is observed the court will, under the guise of preventing the abuse of power, be itself guilty of usurping power. The Court cannot seemingly substitute its own decision or procedural framework for that of the administrative or executive body.

Order

[229] In the circumstances, and for the reasons set out in this judgment, the claim for judicial review is dismissed and the Court declines to grant the declarations and other remedies sought by the claimant. There shall be no order as to costs.

Shawn Innocent
High Court Judge

By the Court

Registrar