

CASE TYPE: (JUDICIAL REVIEW AND ADMINISTRATIVE ORDER)

THE EASTERN CARIBBEAN SUPREME COURT IN THE HIGH COURT OF JUSTICE

COMMONWEALTH OF DOMINICA

DOM HCV 2017/0118

BETWEEN:

[1] PHILBERT BERTRAND

Applicant

AND

[2] THE ATTORNEY GENERAL OF THE
COMMONWALTH OF DOMINICA

[3] THE
POLICE SERVICE COMMISSION

Respondents

.....
2020: January 31
.....

RULING

[1] **STEPHENSON J.:** “Judicial Review includes the remedies (whether by way of writ or order of certiorari for quashing unlawful acts; mandamus, for requiring performance of a public duty, including a duty to make a decision of determination or to hear and determine any case; and prohibition, for prohibiting unlawful acts.”¹ A person wishing to

¹ CPR 2000 Part 56

apply for Judicial Review must first obtain leave of the Court². The permission stage is to weed out cases that are unarguable

[2] The Applicant has applied under the Civil Procedure Rules 2000 (CPR) Part 56.3 for leave to file judicial review and for an Administrative Order against the respondents³ herein in respect of decisions made by the said Police Service Commission (PSC) and published in the Police Force Orders, issue No. 05 of 2017, dated the February 11th 2017 whereby Sergeants No.308 Clinton Hilaire and Sergeant No. 21 Belgrove Charles were promoted to act and to hold the office of the rank of inspector in the Commonwealth of Dominica Police Force.(The Police Force)

[3] The applicant is a sergeant in the Police Force. Two of his colleagues were promoted from the rank of Sergeant to that of Inspector as was published in the police service orders, but he was not promoted.

[4] The Police Service Commissions (the PSC) is a body established under the Constitution of Dominica with responsibilities which include making promotions within the Police Force. The constitutional position of the PSC has been explained in the Privy Council case of **Cooper v Director of Personnel Administration** ⁴ Lord Hope said that the function of appointing officers, including their promotion, is a matter exclusively for the respondent. The Chief of Police has power to make promotions within the service in accordance with the Police Service Act and Regulations but that power is not applicable to the case at bar.

² Ibid Part 56.3(1)

³ The Attorney General of the Commonwealth of Dominica is sued pursuant to section of the State Proceedings Act Chap. 7:80

⁴ [2006] UKPC 37, [2007] 1 WLR 101, 68 WIR 477.

[5] The applicant submits that he was unfairly and unlawfully denied the opportunity to be considered for appointment on promotion and to be promoted to hold and act in the office of the said rank of inspector. The applicant further contends that the PSC wrongfully injured his legitimate expectation that the said PSC would have acted fairly and lawfully in relation to him in making the decisions complained of and that he would have been promoted to permanently hold or act in the said office of inspector.

[6] The Applicant is seeking leave to file Judicial Review in the form the following orders:

- a) certiorari to remove into this Honourable Court and quash the said decisions of the PSC;
- b) a declaration that the PSC violated the provisions of section 8 (8) of the Commonwealth of Dominica Constitution Order (1978) in relation to him;
- c) in the alternative, a declaration or determination that in making its decisions the PSC violated the rules of natural justice and the principles of basic fairness;
- d) a declaration that in making the said decision or decisions the PSC violated the provisions of regulation 20 of the PSC Regulations⁵ and other relevant provisions thereof.
- e) an order of mandamus directing the PSC to fairly consider and determine the question of appointment on promotion of sergeants to hold and act in the office of the rank of inspector in the Commonwealth of Dominica Police Force according to law; and
- f) if the Court deems it just, then, that the said Police Service Commission must promote the applicant to the rank of inspector accordingly.

⁵ Chap. 1:01

[7] The grounds upon which the applicant seeks to rely on are that the PSC in making their decisions:

- 1) failed to apply the provisions of regulation 20 and other relevant provisions of the Police Service Commission Regulations; ⁶
- 2) violated the provisions of section 8 subsection (8) of the Commonwealth of Dominica Constitution Order 1978 in relation to the Applicant;
- 3) breached the rules of natural justice and the requirements of basic fairness, in that the said the Commission failed or refused to hear the him or to give him an opportunity or a fair opportunity to be heard on the matter and acted with bias.
- 4) wrongfully injured his legitimate expectation that the said Commission would have acted fairly and lawfully, in that, in relation to him the Commission failed to comply with the provisions of section 8 subsection (8) of the said constitution;
- 5) it abused its power and or authority, in that it acted unreasonably, unfairly in bad faith and it unlawfully discriminated against him to his detriment; and
- 6) it unfairly and unlawfully failed and/or refused to inform him of the reason or reasons for its failure or refusal to appoint him to hold or act in the office of the said rank inspector.

The Applicant's case

[8] The applicant filed a lengthy affidavit in support of his application stating his length of service, qualifications, the fact that he has sat and passed the previously required police exams and that he is very experienced in the matters of the functions of a police officer and averred that in his opinion he is properly qualified to be promoted to the rank of

⁶ Chap 1:01

Inspector before the promotions of the other two officers. The applicant also listed the factors to be considered by the PSC in making the promotions as provided for the by the Police Service Commission Regulations.

[9] The applicant contends that he has not been fairly considered and that he has been denied a fair opportunity to be promoted to the rank of Inspector and that the PSC's decision was in breach of the terms of basic fairness.

[10] The applicant averred that pursuant to the PSC Regulations the PSC is obligated to consider all the officers eligible for promotions within the force and to take into account seniority, experience, qualifications and ability together with the relative efficiency of the officers. He went on to state that in the circumstances of his case he is senior to the two officers who were promoted.

[11] The applicant further averred that if the PSC is of the view that he is not properly qualified it must produce a seniority list as is required by the PSC Regulations for the court's examination and determination. The applicant went on list the various factors to be taken into account as listed in the said PSC Regulations.

[12] The applicant opined that the PSC has not complied with the prescribed procedure for promotion as laid down by the PSC regulations and had they done so he has no doubt that he would have been promoted.

[13] The applicant further averred that he is aware that the PSC relies on the recommendations made by the Chief of Police and he has good reason for believing that the said Chief of Police has repeatedly excluded his name from the list of candidates for promotion. He went on to state that he has good reason to believe that his personal file

contains false and negative reports on him which reports have been investigated but he has never been informed of the outcome of said investigations.

[14] The applicant states that he has been advised by his attorney at law and verily believes that he should be informed of the vacancies that exist in the Police force and that based on his knowledge the criteria for promotion he has through his attorney at law sought an explanation from the PSC as to its refusal to promote him and that there has been no response.

The Respondent's response

[15] An affidavit in response was filed by Eleanor Ferrol the Secretary to the PSC in opposition to the application for leave to apply for Judicial Review on the ground that it does not contain an arguable ground for judicial review with a realistic prospect of success and that the application should be denied.

[16] Mrs Ferrol avers that she has been informed by her solicitor and verily believes that the applicant's affidavit contains statements of belief which are not admissible under the CPR. She identified the offending paragraphs and averred that they all contain statements of belief without identifying the source of the belief.

[17] Both parties filed written submissions which have been reviewed by the court.

[18] An applicant for leave to file for judicial review must demonstrate:

- (i) inter alia, that he has been adversely affected by the decision which is the subject of the application; and

- (ii) that he has an arguable case that a ground of judicial review exists that merits thorough examination at a substantive hearing and that there are no debarring factors such as delay in bringing the application or availability of an alternative remedy.

[19] It is established law that the role of the High Court on an application for leave to apply for Judicial Review is restricted to determining whether or not the decision being challenged was legal, not whether or not it was correct.

[20] In considering this application, this court is not concerned with the merits of the decision in question. There is no need at this stage, to perform an in-depth analysis of the applicant's case. This court is concerned with:

- a) the legality, rather than the merits, of the decision;
- b) the jurisdiction of the decision maker; and
- c) with the fairness of the decision making process.

[21] In conducting this assessment I have in mind the relevant learning as enunciated in the case of **Sharma v Browne-Antoine**⁷ where it was held that:

“The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy...the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an

⁷ (2006) 69 WIR 379, [2007] 1 WLR 780

allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities....

"⁸

[22] The grant of leave to an Applicant to institute Judicial Review Proceedings is discretionary. The Court is to consider whether or not the Applicant has made out a proper case. Has he shown that there is an arguable ground for a claim of Judicial Review with a realistic prospect of success?

Legitimate Expectation

[23] Upon review of the applicant's case he has clearly grounded his case on the principle of legitimate expectation. Halsbury's Laws states

"A person may have a legitimate expectation of being treated a certain way by an administrative authority even though there is no other legal basis upon which he could claim such treatment. The expectation may arise either from a representation or promise made by the authority including an implied representation, or from consistent past practice or policy. In all instances the expectation arises by reason of the conduct of the decision-maker and is protected by the courts on the basis that principles of fairness, predictability and certainty in administration should not be disregarded and that a legitimate expectation should not be disappointed."⁹

⁸ Ibid pages 387-388

⁹ Halsbury's Laws of England Volume 61A (2018).2 Substantive Grounds for Judicial Review /(4) Legitimate Expectations paragraph 50

[24] In the case at bar, has the applicant placed evidenced before the court upon which the court can conclude that he has a case grounded in legitimate expectation with a realistic as opposed to a fanciful prospect of success?

[25] In opposing the application for leave Learned Counsel on behalf of the respondent relied on the Privy Council decision of **The United Policyholders Group and Others v the Attorney General of Trinidad and Tobago**¹⁰ where Lord Neuberger in delivering the opinion of the Council said “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” ...¹¹. All in all it is the respondent’s submissions that the requirements of legitimate expectation have not been made out.

[26] The respondents submit that the applicant has not in his pleading placed any evidence before the court of any representation or course of conduct which could amount to a statement which is clear, unambiguous and devoid of relevant qualification as is required to establish legitimate expectation. Learned Counsel on behalf of the applicant submitted that the applicants allegations “that he was unlawfully and unfairly denied promotion to the rank of Inspector and that the decision to promote the officers in questions denied him of a fair opportunity to be considered for and ‘confirmed in permanent promotion to the rank of Inspector”¹² is insufficient to establish legitimate expectation.

¹⁰ [2016] UKPC 17

¹¹ Ibid paragraph 37

¹² Re: paragraphs 9 & 10 of the Applicants affidavit sworn in support of the Application for leave to apply for judicial review

[27] Learned counsel Gildon Richards drew attention to and placed particular reliance on what was said by Lord Fraser Of Tullybelton in **Attorney General of Hong Kong –v- Ng Yue Shiu**¹³

“The justification for it is primarily 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. The principle is also justified by the further consideration that, when the promise was made, the authority must have considered that it would be assisted in discharging its duty fairly by any representations from interested parties and as a general rule that is correct.”

[28] Was there a clear, unambiguous assurance that was devoid of relevant qualification? Based on the evidence adduced in his application for leave, the applicant has failed to establish that there was such an assurance given upon which he relied. He bears the burden of establishing this and in the circumstances of this case he claim is likely to fail in this regard. **Re: R(On the application of Jeffers and others) –v- Secretary of State for Home Department and another.**¹⁴

Procedural impropriety/unfairness

[29] The respondents submit also that the applicant has not put any evidence before the court that the decision to promote the officers in question was procedurally unfair or that the PSC acted unlawfully and unreasonably and he has therefore failed to establish his case in this regard.

¹³ [1983] 2 AC 629 at page 638

¹⁴

[30] It was further submitted that the applicant's claim regarding his eligibility for promotion¹⁵ taken at its highest, is more of a challenge to the *merit* of the Commission's decision not the process. Counsel Mrs Hyacinth Burton submitted that it is now well-established law that judicial reviews are in fact a challenge to the way in which a decision has been made, rather than the rights and wrongs of the conclusion reached. Further that the court in matters such as these are not concerned with the conclusions of that process and whether those were 'right', as long as the right procedures have been followed. In Judicial Review proceedings, the court will not substitute what it thinks is the 'correct' decision.

[31] Regarding the applicant's complaint of the commitment of a breach of Regulation 20 of the Police Service Regulations. Learned Counsel Hyacinth Burton submitted that the applicant has failed to provide any evidence or present an arguable case that the said Regulation 20 was breached. It was submitted that is not sufficient on the part of the applicant to say the criteria for promotion was not followed because he was eligible for promotion and other officers were promoted instead, more is required.

[32] Concerning the applicant's complaint that the PSC's failure and or refusals to give him audience or to respond to his inquiries regarding the promotions complained of and for the breach of the terms of basic fairness and breach of natural justice, Counsel on behalf of the respondents went on to submit that the applicant in the case at bar has failed to produce an arguable case that he had a right to natural justice before a decision is taken to promote the other officers as he has complained. Learned counsel made reference to and relied on the dicta in the case of **Romain –v-the Police Service Commission**¹⁶ which

¹⁵ Re: Paragraph 12 *ibid*

¹⁶ [2014] UKPC 32.

stated that Regulation 20 contains self- contained criteria for exercising the discretion to promote officers:¹⁷

[33] In applications for judicial review the court is called on to exercise a supervisory role, it is not an appeal procedure. This court cannot compel the PSC or any public authority to exercise its power in a particular way nor can it compel it to make a decision which the court believes to be the correct one as the court is not concerned with the merits of the decision.

Breach of Natural Justice and fairness

[34] The respondents contend that there is no breach of Article 8(8) of the Constitution as has been alleged by the applicant as this article is not applicable to the case at bar in that, this article refers to “Any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation”¹⁸ and the PSC does not fall into this category.

[35] The respondents contend that the applicant has failed to make out an arguable case that natural justice and fairness demands that in circumstances of his case he has a right to be heard as it regards his promotion. The Applicant has failed to provide evidence or any factual statement in support of his allegation of bias.

[36] The respondents in the circumstances of this case submit that the application for leave should not be granted.

Should Leave Be Granted to apply for Judicial Review?

¹⁷ Ibid at paragraph 29

¹⁸ See Article 8(8) of the Constitution of Dominica

[37] The thinking behind the rule that leave to apply for Judicial Review must be sought is in order that the court can eliminate at the earliest stage of the judicial review process, claims which are hopeless and "to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending although misconceived" ¹⁹

[38] Lord Diplock in **R v Inland Revenue Commissioners Ex p. National Federation of Self Employed and Small Businesses Ltd.** ²⁰ said:

"The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion to give him leave to apply for the relief. The discretion that the court is exercising at that stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application. "

[39] In **Sharma v Brown-Antoine and Others** it was said that:

"The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay

¹⁹ (see paragraph 54.4.2 White Book).

²⁰ 1982] A.C. 617, 642.

or an alternative remedy;...but arguability cannot be judged without reference to the nature and gravity of the issue argued". It is a test which is flexible in its application...the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on a balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved...but in the strength or quality of the evidence that in practice be required for an allegation to be proved on the balance of probabilities²¹.

[40] This court therefore accepts that the proper question for the court to decide is whether the applicant has demonstrated that he has an arguable ground with a reasonable prospect of success in relation to any of the remedies sought.

[41] In his written submissions learned Counsel Mr. Gildon Richards submitted a statement extracted from **Foulkes Administrative law**²² to wit that the applicant "only has to show, not that it is, but that it might turn out to be an arguable case". Counsel further sought to submit that the applicant "is not required to prove that the grounds of his application in fact exist. He must show however, a real possibility that they might exist" and Counsel placed reliance on the case of **Secretary for State for the Home Department ex pte Swati**²³. I am unable to agree with this submissions in its entirety as I understand it the test on whether to grant judicial review is not whether the applicant has shown what might turn out to be an arguable case or a real possibility that grounds for judicial review might exist but that Leave will be granted if the Court considers, that

²¹ (2006) UKPC 780, at 787

²² At page 340

²³ [1986] 1 ALL E R 717

leave will be granted where the applicant has shown the court that there is an arguable case which has a realistic prospect of success: **Re: Antoine v Sharma**²⁴

[42] It cannot be over emphasised that an applicant for judicial review must satisfy the court that he has a case.²⁵ Where a court is to be called upon to exercise discretion in favour of a party that party cannot be and is never entitled to the exercise of the court's discretion in his favour, as a matter of right. Evidence of a sufficiently compelling nature must be placed before this court by a party, as could properly serve to justify the court's discretion being exercised in that party's favour.

[43] Having looked at the evidence adduced by the applicant overall and addressing my mind to the grounds upon which the applicant seeks to bring his application for judicial review, having considered the nature and the gravity of the issues raised in this application and having taken into consideration the sufficiency and the cogency of the evidence adduced by the applicant, this court is not satisfied that there is an arguable ground for judicial review with a realistic prospect of success as was held in **Mitchell –v- Georges et al**²⁶.

[44] It is not enough for the application at bar to produce a case that is potentially arguable that is not sufficient to justify the grant of leave. **Re: Matatulu –v- DPP**²⁷.

²⁴ [2006] UKPC 57 at [14], [2007] 1 WLR 780 at [14];

²⁵ per Lord Scarman in R v Inland Revenue Commissioners Ex p. Rossminster [1980] AC 952, 1026 H.

²⁶ 72 WIR 161

²⁷ [2003] 4 LRC 712 at 733.'

[45] Having regard to Rule 56.3 (3) (d) of the CPR and the authorities cited in the circumstances of this case I am driven to the conclusion that the application for leave must be refused. In the premises, the Court's order is as follows:

1. The Application for leave to apply for judicial review is refused.
2. No order as to costs.

[46] The court wishes to thank Learned Counsel for their assistance through the submissions which they have made before it. The court also wishes to further thank Counsel and the parties for understanding the length of time that it has taken to complete this ruling but this was due to the extraordinary circumstances of the file being destroyed twice. First in the ravages of Hurricane Maria and then having the constructed file contaminated by the infestation of mold in the temporary accommodation acquired by the court.

[47] Upon an oral application for leave to appeal the court's order leave is so granted.

M E Birnie Stephenson
High Court Judge

(SEAL)

BY THE COURT

REGISTRAR

