REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
SAN FERNANDO

High Court Action No. S-1020 of 2005

In the matter of the illegal practice by and/or policy of the Statutory Authorities Service Commission ("SASC") to ignore and/or disregard an officer's previous service in the same office and range in a different Statutory Authority prior to transfer for the purpose of calculating seniority

and

In the matter of the illegal practice by and/or policy of the SASC to ignore and/or disregard the applicant's previous service in the same office and range (Clerk I, Range 14) in the Port of Spain City Corporation prior to her transfer to the San Fernando City Corporation

and

In the matter of the illegal and/or unfair treatment of the applicant contrary to the principles of natural justice

BETWEEN

JACQUELINE SOLOMON-SANKAR

Applicant

And

STATUTORY AUTHORITIES SERVICE COMMISSION

Respondent

Before the Honourable Mr. Justice James C. Aboud (Ag.)

Appearances: Mr. Anand Ramlogan with Ms. Furlonge, instructed by Mr. Haresh Ramnath for the applicant

Ms. Rachel Thurab, instructed by Ms. Ramhit, for the respondent

Dated: 29 May 2008

The applicant is an officer appointed to serve one statutory authority who applied for, and obtained, a transfer to another statutory authority, serving in identical capacities at both authorities. The respondent is the Statutory Authorities Service Commission ("SASC"). The SASC has a policy, when preparing its various seniority lists, to discount the years that a transferred officer has previously served, and to calculate seniority from the date of transfer to the recipient authority. Seniority is the main criterion used in the promotion of officers in the statutory authorities. After her transfer, the applicant discovered that officers with fewer years of service in her grade and range of office were ranked higher on the seniority list of the authority to which she was transferred. She requested an adjustment. The SASC informed her of its policy, of which she claimed no knowledge. She applied for and obtained leave to apply for judicial review on the ground that the cancellation of her previous years of service was illegal and unauthorised. At the substantive hearing, the respondent applied to set aside the applicant's leave on the ground of undue delay in applying for judicial review. It was alleged that the applicant was long aware of the SASC's policy to discount her previous years of service. The question is whether, and in what circumstances, such an objection can be entertained at the substantive application.

Held:

(a) On the facts before the judge that granted leave to apply, and on the facts presented at the substantive hearing, there was no undue delay in applying for judicial review such as would cause leave to be set aside, or justify the dismissal of the substantive application.

(b) The Judicial Review Act, 2000, creates two separate and distinct stages in the application for judicial review, namely, the application for leave stage and the substantive application stage; undue delay is a factor relevant only at the application for leave stage and a judge at the substantive application does not have jurisdiction to resurrect it as a ground to set aside the grant of leave save in cases of non-disclosure, the emergence of new facts, or a change in the law, and provided that a separate application to set aside leave has been

promptly made and pursued prior to the hearing of the substantive application.

(c) *The policy that the years served by an officer at one statutory authority is to be disregarded when preparing the seniority list of the authority to which he has been transferred is unauthorised and illegal; it is legally permissible and within the discretionary powers of the SASC to calculate seniority from the previous date of appointment if the transferred officer is serving in identical capacities.*

(d) *Detriment to good administration or hardship to third parties is statutorily linked to delay at the application stage but remain as valid considerations in granting relief at the substantive application stage, because substantive judicial review relief is always discretionary.*

(e) *The applicant is therefore entitled to relief, but the declarations are granted in terms that minimise detriment to good administration or prejudice to third parties.*

JUDGMENT

1. The SASC is a service commission created by statute, and responsible, *inter alia,* for the appointment, promotion, transfer, and disciplining of officers employed in certain statutory authorities, among them the Port of Spain City Corporation ("POSCC") and the San Fernando City Corporation ("SFCC"). The applicant was first employed as a temporary Clerk I at the POSCC on 10 December 1990. She held continuous employment in a temporary capacity until she was appointed on 12 March 1997 to the post of Clerk I, the appointment taking effect from 5 August 1996. Sometime in early 1992, while she was still a temporary Clerk I, the applicant wrote the SASC requesting a transfer to the SFCC. She lived (and continues to live) in the city of San Fernando and had a baby in February 1992. She said that the cost of transportation between the cities and the duties of motherhood were causing hardship. The SASC

replied on 16 June 1992 to say that there were no vacancies at the SFCC at that time. On 19 August 1997, the applicant, now holding the substantive post of Clerk I (Range 14), wrote another letter requesting a transfer. She said that her domestic situation had become more pressing since her previous letter. Her infant son was attending school and she needed to hire a babysitter until she returned at night to her San Fernando home.

2. One month later, in September 1997, a temporary vacancy for a Clerk I occurred at the SFCC. The SASC said that its "normal procedure" is for one of its officers to contact a potential transferee to inform them about the vacancy. In this case, one Mrs. Flora Griffith, a Clerk IV employed by the respondent, telephoned the applicant. Mrs. Griffith swore an affidavit attesting to this telephone conversation, which she said occurred on or around 26 September 1997. She alleged that she informed the applicant that "there was a temporary Clerk I vacancy" at the SFCC and that the applicant was very happy and said that "she would accept the temporary position as Clerk I". She further swore:

> "I also informed her that on her assumption of duty at the [SFCC] she would become the most junior Clerk I at that Corporation, as each Authority is its own entity. I also informed her that her previous service would be used for pension purposes. I am able to recall this conversation because the applicant expressed her gratitude to me and told me that she would have accepted the position even if the appointment was for only two days".

Ms. Griffith said that the applicant did not disagree with the policy to place her as the most junior Clerk I. She further stated that it was normal procedure to inform officers that seniority does not transfer between authorities as each authority is independent, and that it is "widely known and accepted by officers within the authorities that upon a transfer their seniority would be lost". This part of Mrs. Griffith's evidence contradicted the applicant's affidavit, which stated that no one ever informed her that a transfer operates as a cancellation of previously acquired seniority. In the course of the hearing I granted leave to the applicant to cross-examine Mrs. Griffith with leave also to the respondent to cross-examine the applicant.

3. On 1 October 1997 the applicant wrote the SASC's executive director formally accepting the transfer offered to her by Mrs. Griffith in these terms:

> *Subject: Transfer on Secondment to the SFCC*
>
> *I wish to refer to a telephone conversation with myself and Mrs. Griffith on 26.9.97 on the above subject.*
>
> *In this regard I would like to inform you that I am prepared to accept the transfer on Secondment to the SFCC from the date of assumption to 31.05.99.*

The SASC approved the applicant's transfer on secondment by letter of 10 October in these terms:

> *"SASC is pleased to second you as a clerk I (Range 14), SFCC with effect from the date of your assumption of duty to 31 October 1997"*

At the bottom of this letter the following annotation was handwritten by one of the SASC's officers: "Assumed duties 13/10/97".

4. The correspondence and evidence suggests that the secondment was meant to be for a specific term. The applicant's letter of acceptance states that the secondment would last until 31 May 1999. The SASC's letter speaks of a three-week secondment. Nonetheless, the applicant remained seconded as a Clerk I (Range 14) from 13 October 1997 to 24 October 2002, a period of just over five years. On that latter date the SASC wrote her a letter these terms:

> *Dear Madam*
>
> *SASC is pleased to appoint you on transfer as Clerk I (Range 14), SFCC with effect from 17 October 2002.*

5. Approximately one year later, on 7 October 2003, the applicant wrote the SASC requesting that her seniority be regularized. She had made the discovery during the first year after her formal transfer on 17 October 2002 that temporary Clerk I's at the SFCC (appointed between 1997 to 2002) were senior to her, even though she was appointed a permanent Clerk I at POSCC in 1996. She wrote, "Could you kindly use your good office in regularising my seniority on the permanent establishment-Re Clerk I's?" She then set out her employment history as detailed above, and pointed

out that officers junior to her were deemed her seniors at the SFCC. She concluded her letter in these terms:

> *"I believe I should be senior to these officers since I was already a permanent Clerk I (having been appointed and confirmed on 5/8/96) when I was seconded to the SFCC as a clerk I on 13/10/97. There might have been an oversight in advertantly* (sic) *placing me lower than these officers on the seniority list, hence my request."*

6. On 9 March 2005, one year and five months later, the SASC's executive officer replied. Her letter was in these terms:

> *The SASC considered your request and has requested that you be informed that based on current practice, your seniority as a Clerk I at the SFCC dates from 17 October 2002, the date of your permanent appointment to that authority. This recognizes the autonomous nature of individual Statutory Authorities. A copy of the current seniority list of Clerks I at the SFCC is enclosed for your perusal.*
>
> *However, advice is being sought on whether it would be legally appropriate for seniority in respect of an appointment to a Statutory Authority to be carried over on transfer to a similar grade or office in another Authority. Your representations will be further considered on receipt of that advice.*

It is noteworthy that the letter was copied to the Solicitor General. The effect of the practice was to deprive the applicant of six years of service as a Clerk I (Range 14).

7. Almost immediately the applicant responded. She wrote the SASC on 14 March 2005, indicating that she was never advised that her years of service would not "carry over" on a transfer. She said that this was the first time that she was hearing of this practice, and might not have applied for a transfer if her years of service would be "wiped out". The loss of seniority had drastic consequences to her career, she said. She asked for a time-frame for the delivery of the legal advice and the "re-consideration" of her representations. On 18 March 2005 the SASC wrote to indicate that it could not provide a time-frame for the legal opinion and that enquiries would be made to secure an early response from the legal advisor. Some two and a half months passed without further correspondence from the respondent on the status of the legal opinion.

8. On 7 June 2005 the applicant filed this application for judicial review, challenging the legality of the SASC's practice or policy to disregard her prior years of service at the POSCC and to calculate her seniority from the effective date of her transfer to the SFCC. The grounds of the application are that it is illegal, unauthorized, and contrary to law, because it conflicts with the policy of the Statutory Authorities Act and the regulations thereunder; it is in breach of the principles of natural justice; it is *Wednesbury* unreasonable; and it amounts to an improper exercise of discretion. On 8 June 2005, Best J heard and determined the *ex parte* application for leave to apply for judicial review. After reading the Statement in support and the affidavit, and hearing the applicant's counsel, he made an order extending the time to file the application to 7 June 2005. Leave to pursue the following reliefs was granted:

    (i) A declaration that the practice/policy of the SASC to ignore and disregard an officer's prior service with a different statutory authority upon transfer is irrational, unreasonable, and illegal;

    (ii) An order of *certiorari* to remove and quash the decision of the SASC contained in a letter dated 9 March 2005 to calculate the Applicant's seniority from 17 October 2002;

    (iii) A declaration that the applicant's seniority is to be calculated and/or determined by reference to the date of her first permanent appointment as a Clerk I in Port of Spain City Corporation (5 August 1996);

    (iv) A declaration that the current practice of the SASC to disregard or ignore an officer's previous service in the same office at a different statutory authority is illegal and/or irrational;

    (v) Damages;

    (vi) Costs; and

    (vii) Pursuant to Section 8(d) of the Act, such further orders, directions, or writs as the court considers just and as the circumstances warrant.

9. The order and the supporting documents, together with the motion, returnable on 4 July 2005, were served on the respondent on the next day, 9 June 2005. On the return date, the respondent had not yet filed any affidavits in opposition and Smith J gave directions to do so. The matter was next called, before me, on 23 February 2006 and, again, the respondent's affidavits were not filed. I extended the time to do so. The respondent then filed the affidavits of Jeanette Renaud and Flora Griffith on 7 and 11 April 2006. It also filed a notice of intention to apply, at the hearing of the substantive application, to set aside the leave granted by Best J and for an order dismissing the application. This notice was filed on 12 April 2006, some 10 months after service of the proceedings on the respondent. The ground of the intended application was that there was "delay in applying for leave and the respondent has not been heard on the issue".

10. The respondent approached the application from two flanks. Firstly, in attack mode, raising the issue of undue delay, both as a ground to set aside the grant of leave, and as a ground to dismiss the substantive application. Secondly, in defence mode, Ms. Thurab sought to justify the lawfulness of the practice, and made the submission that the declarations would disturb every seniority list and result in administrative chaos in all the statutory authorities.

ISSUES TO BE DECIDED

11. The issues are as follows:
    (a) Whether the applicant delayed in making the application, and, if so, whether on this ground the court should set aside the leave to apply for judicial review granted by Best J, or alternatively, whether it should dismiss the substantive application ("the delay issue");
    (b) Whether it is illegal, irrational, or unreasonable for the SASC, as a matter of practice or policy, to discount an officer's years of service in a particular grade and range in a statutory authority when she is transferred

to another statutory authority in the same grade and range ("the illegality issue")

(c) If the practice or policy is illegal, what orders, if any, should the court make ("the issue of reliefs").

The Delay Issue

12. Section 11 of the Judicial Review Act, (Act No. 60 of 2000) ("the JRA") provides as follows:

> 11. (1) An application for judicial review shall be made promptly and in any event within three months from the date when the grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.
>
> (2) The Court may refuse to grant leave to apply for judicial review if it considers that there has been undue delay in making the application, and that the grant of any relief would cause substantial hardship to, or substantially prejudice the rights of any person, or would be detrimental to good administration.
>
> (3) In forming an opinion for the purpose of this section, the Court shall have regard to the time when the applicant became aware of the making of the decision, and may have regard to such other matters, as it considers relevant.
>
> (4) Where the relief sought is an order of certiorari in respect of any judgment, order, conviction, or other decision the date when the ground for the application first arose shall be taken to be the date of that judgment, order, conviction, or decision.

13. The issue of undue delay, either as a ground to set aside leave or as a submission in the substantive application, is resolved on the facts, but important questions of procedure are involved. In relation to the application to set aside the grant of leave, Ms. Thurab, for the SASC, conceded that questions of misrepresentation or non-disclosure did not arise in the *ex parte* application. She insisted that the delay was apparent on the *ex parte* papers. I must therefore confine myself to the documentation before Best J on 8 June 2005. In relation to the dismissal of the substantive application on the ground of delay I am not so confined, and can look at all the evidence. I should mention that the both counsel asked the court to hear the

respondent's application as part of the substantive argument, and not as a preliminary objection to the hearing of the substantive application.

Setting aside the grant of leave: the facts

14. Before dealing with whether I have jurisdiction to vacate the order of Best J, which is the more important question, I am fully satisfied that on the facts disclosed on the *ex parte* papers that the leave-granting judge was fully justified to (a) to extend the time to make the application and (b) grant leave to apply. The applicant's letter of 7 October 2003 evidences her awareness that officers junior to her at the SFCC were deemed senior to her on the seniority list. It does not evidence an awareness of a policy or practice to cancel her previously acquired seniority. In fact, she attributes her placement on the seniority list to an oversight or inadvertence. She asks the SASC to regularize her position on the list, not adjust any policy or practice. It took one year and five months for the respondent to reply, time lost through no fault of the applicant. The SASC's letter of 9 March 2005 clearly states its practice to calculate seniority from the effective date of transfer, but then curiously throws out a lifeline of hope. It says that, notwithstanding its policy, legal advice is being sought as to whether the policy should apply to officers who are transferred between authorities but in similar grades or posts. This is exactly what the applicant wants clarified and the substantive issue of this judicial review. The SASC says that her representations will be further considered on receipt of the legal advice. This letter does not amount to a statement that the applicant's position on the seniority list is cast in stone. It seems that the respondent is not sure of the legality of its own practice. Having quickly replied on 14 March 2005 to deny any knowledge of the practice, the applicant asks for a time-frame for the legal advice. The respondent's letter of 18 March 2005 says that it can provide no time-line, and the applicant files for judicial review on 7 June 2005.

15. I do not consider the applicant's letter of 7 October 2003 as the point at which time begins to run. She was simply requesting the regularisation of the seniority list,

which appeared to her to be inadvertently prepared. Despite its lack of confidence in the policy's legality, time runs from the SASC's reply of 9 March 2005. The time between that letter and the filing of the proceedings is two days short of three months. In making the order to extend time, Best J must have considered the possibility that time might have run from the applicant's letter of 7 October 2003, and his order was curative of that potential but, in my view, inconsequential, defect. He must be deemed to have found good reason to extend time. In granting leave to apply, Best J must likewise be deemed to have considered, on the papers before him, that the grant of leave would not cause substantial hardship to, or substantially prejudice the rights of any person, or be detrimental to good administration. On an *ex parte* application he would naturally be unaware of the consequences of a successful substantive application (which only belatedly came to light in the affidavit of Jeanette Renaud). Likewise, the applicant cannot be expected to know that the proposed reliefs would disrupt the SASC's seniority management systems. If the effect of the reliefs was actually or constructively known to her then the applicant's position would be different. I can see no good reason why Best J should not have granted leave on the papers before him.

16. With respect to proof of delay as a ground to refuse substantive relief, the facts are likewise unsupportive. The evidence of delay at the substantive application rested entirely on the affidavit and oral testimony of Mrs. Griffith. In her affidavit she says that during her telephone conversation with the applicant in 1997 she specifically told her that she would be the most junior Clerk I at the SFCC. Later, during her cross-examination, she said that she had had a meeting with the applicant, but vacillated as to whether the discussion about her junior status occurred in a telephone conversation or the meeting. The meeting was never mentioned in the affidavit. I consider her evidence to be tendentious and lacking credibility; her grim demeanour in the witness box did not help. In 1997 the applicant was not offered a transfer but secondment to the SFCC for a specified term. The applicant acknowledges an offer of secondment from Ms. Griffith of one year and five months, but the respondent's formal letter of secondment is for a period of only three weeks. As a seconded officer, cancellation

of previously earned seniority would not arise, because the applicant retains her substantive post at the POSCC and is, in effect, only "on loan" to the SFCC for a specified term. I cannot imagine that an officer who is seconded for five days or five years is disentitled, during the secondment, from acquiring seniority in the post in which she is substantively appointed. Therefore, the likelihood of a discussion about the applicant's junior status while seconded at the SFCC is low. It might instead be reflective of the fact that of all Clerk I's at the SFCC she was going to be the most junior. In any event, during her cross-examination, Mrs. Griffith admitted that while she told the applicant that she would be the most junior Clerk I, she did not specifically say that she would lose her previous years' service for the purposes of seniority. Significantly, the policy or practice is not stated in any officer's handbook or pamphlet, or is it anywhere published on any notice board. The most that the respondent could say was that it was "generally known". It was not specified in the respondent's letter of 24 October 2002 which confirmed her "appointment on transfer", something I mark as unsettling in light of the alleged serious consequences of a transfer. I do not believe in these circumstances and in light of the *viva voce* evidence of Mrs. Griffith that the applicant had knowledge, actual or constructive, of the respondent's policy or practice in 1997. The substantive application is therefore, on the facts, impervious to any attack based on undue delay.

Delay as a ground at the hearing of the substantive application

17. The issue here is whether I have any jurisdiction at the hearing of the substantive application to vacate the leave granted by Best J. The issue is academic in light of my findings of fact, but it is of increasingly vital procedural importance. First, some general observations. Section 11 (1) of the JRA sets out a three-month time-line for applying but provides an exception, when there is undue delay, to extend time if "there is good reason" for doing so. "Good reason" is not limited to, but may include, an explanation for the delay. It could include the public importance of the matter or the overwhelming strength of the applicant's case: *Sanatan Dharma Maha Sabha v The Hon. Patrick Manning (unreported) Civil Appeal No. 74 of 2004, Judgment of*

Kangaloo JA, of 14 October 2005, p 8. In my judgment, Best J had good reason to extend time. Section 11 (2) empowers the court to refuse leave if it considers that there has been undue delay <u>and</u> the grant of any relief would cause substantial hardship or prejudice or be detrimental to good administration. The hardship or detriment must occur as a result of the delay, and not as a result of the type of reliefs being sought. It is a two-part but self-contained enquiry: Is there undue delay, and, if so, would any of the reliefs being sought result in hardship or detriment? It may be that leave might be granted to pursue some of the reliefs, or maybe none at all. However, the hardship or detriment factor, if it does not arise as a consequence of delay, is not altogether irrelevant because substantive relief is always discretionary and in granting relief the court takes a panoramic view of many factors: *Walkerwell Ltd v Water and Sewerage Authority (unreported) HCA No. Cv. 342 of 2000, decision of Jamadar J of 16 February 2004, p 12; Credit Suisse v Allerdale Borough Council [1997] QB 306, 355, per Hobhouse LJ.* However, the hardship and detriment of the reliefs are statutorily linked to undue delay in section 11 (2) and confined to the application stage of the proceedings. Best J was not in a position to refuse leave on the ground of delay because, firstly, there was good reason to extend time, and secondly, the alleged hardship and detriment of the reliefs was incapable of deduction at the application stage.

18. The question of hardship or detriment in this case is, therefore, only one discretionary factor used in formulating or refusing relief in the final phase of the substantive application. It cannot be resuscitated as an application-stage factor to determine whether I should set aside the order of a judge of concurrent jurisdiction, which is what Ms. Thurab asked me to do. Whether that jurisdiction exists in judicial review applications is not easy to answer, but it continues to bedevil lawyers. In *Fisherman and Friends of the Sea v Environmental Management Authority and BP Trinidad and Tobago LLC (Unreported) Court of Appeal, Civ. App. 106 of 2002,* Mr. Justice Nelson JA (as he then was), in reviewing the exercise of a leave-granting judge's discretion explained the procedural effect of section 11 (1) and (2):

> I must bear in mind the policy of the JRA was to have a filtering mechanism for applications for judicial review, and further, where such applications are not prompt or later than three months from the impugned decision a second filter, a discretionary extension of time, must be put in place. Thereafter, under our law, if the time for applying for leave has been extended, by section 11 (2), which deals only with the leave stage, the application for leave may be defeated if undue delay would cause substantial hardship or prejudice to third parties or detriment to good administration. (Para. 37)
>
> In Trinidad and Tobago we have copied section 31(6) of the UK Supreme Court Act in our section 11 (2), but with substantial changes. The effect of the changes is to disapply the concept of undue delay to applications for substantive judicial review. Section 11 (2) deals only with leave applications and not substantive applications. (Para. 46)

19. I examined this case and others in *Paula Barrimond v Public Service Commission (unreported) in HCA S-1301 of 2005* and concluded as follows:

> A judge at a substantive hearing who is reviewing the *ex parte* grant of leave by another judge pursuant to a notice of preliminary objection, or, as in the instant case, on an oral application, would, in the absence of new factual developments or non-disclosure, be carrying out an appellate function within the unaccommodating structural confines of the JRA. In England the position is different. In *R. v Secretary of State for the Home Department, ex parte Chinoy 1991 TLR 16 April 1991* Bingham LJ (as he then was) asserted in the Divisional Court that in rare cases leave granted *ex parte* could be set aside on the *inter partes* hearing on grounds other than non-disclosure or new factual developments, namely, in cases where leave should plainly not have been granted. In that case, which was governed by the Rules of the Supreme Court, UK, and not the JRA, a motion to set aside was filed with supporting affidavits that introduced new facts, and a recent judgment had clarified the law governing one of the issues. The *Chinoy* approach was endorsed by the Court of Appeal in *Sanatan Dharma Maha Sabha v The Hon. Patrick Manning (unreported) Civil Appeal No. 74 of 2004, Judgment of Kangaloo JA, of 14 October 2005,* but the respondent there had filed an application to set aside leave that was heard and determined as a separate application. Further, the undue delay was established and what fell to be determined was whether hardship or detriment could be resurrected as a ground to set aside the grant of leave. Those are not cases of general application. In Trinidad and Tobago the lines between the leave stage and the application stage, as recognized by Nelson JA, are not blurred. The JRA plainly recognizes two separate stages. There is a divergence of views to this troublesome question between Nelson JA and the *obiter* remarks of Kangaloo JA. Perhaps Parliament should have regard to the salutary advice of Kangaloo JA in the *Maha Sabha* Case and revisit the language of section 11. Until then, I am bound by *Fishermen and Friends of the Sea*.

It seems to me that absent non-disclosure, new factual developments, or a change in the law, and absent a motion to set aside leave made by a separate and prompt application, the grant of leave in judicial review proceedings in Trinidad and Tobago cannot be set aside at the hearing of the substantive application. *Chinoy* and *Maha Sabha* have restricted application.

20. The SASC filed a notice that it would apply to set aside leave at the hearing of the substantive application. The notice was filed almost one year after service of the returnable motion, a fact that should not to be overlooked. An unexplained lack of promptness on the part of respondents dashes the applicants', and the courts', procedural expectations of forward momentum. The SASC should have instead promptly filed a separate application to set aside leave. Such an application operates as a sequel or epilogue to the leave stage and complies with the JRA. It extends the life of the initial enquiry and is not part of the fabric of the substantive stage. In that sense the notice was misconceived. While such applications sadly increase the labour of judges and lawyers, I can find no sensible alternative interpretation of section 11 of the JRA.

The illegality issue

21. Is the practice or policy of the SASC illegal, unauthorised, or unreasonable? The SASC was established by the Statutory Authorities Chap 24:01 ("the Act"), in 1967.[1] It was imbued with power to appoint persons to be officers in state agencies known as statutory authorities and statutory boards, and to transfer, promote, remove from office, and exercise disciplinary control of such officers. There are some 14 statutory authorities or boards that fall under the jurisdiction of the SASC, representing a wide range of state activities, among them the POSCC and the SFCC. These two Municipal Corporations (among many other former predecessor city and county councils) were created in 1990 by the Municipal Corporations Act (Act No. 20 of

[1] All references to the provisions of the Act in this judgment are taken from the consolidated Act published in the 2006 Revised Laws of Trinidad and Tobago, which was not in counsels' bundles. The only material difference is that section 9 is now renumbered section 8.

1990). Section 35 of that Act provided that the SASC "shall appoint, remove, transfer, and exercise disciplinary control over the officers of each Corporation". I note that while these two corporations perform identical executive functions, the same could not be said of the functions of some of the other scheduled authorities, for example, the Cocoa and Coffee Industry Board and the St. Jude's Home for Girls.

22. In *Braithwaithe v Port Authority of Trinidad and Tobago (unreported) decision of F. Hosein J (Acting), dated 7 August 1998, in H.C.A. No. 2305 of 1994, pp 6-7,* the court gave an historical account of the difference between public servants and officers employed by statutory authorities:

> By the year 1966 the newly independent state of Trinidad and Tobago had rapidly expanded its sphere of operations into a number of other areas such as housing, industrial development, port facilities, library services, and the distribution of agricultural produce. One medium through which this was achieved was by the creation of State agencies known as statutory corporations or authorities. These statutory corporations were invested with power and authority to undertake activity in accordance with their Acts of incorporation. The mandate of these statutory authorities included certain functions not traditionally performed by the State, but which were consonant with the then prevailing ideology that the state sector should encompass a much wider area of activity than it had hitherto undertaken.
>
> In order to fulfil their objectives, these statutory authorities soon employed large numbers of persons. Although these persons did not fall within the contemplation of public officers as defined in the 1962 Constitution they had an indirect nexus with the State by the mere fact of employment by a legal entity performing functions which in some cases were the traditional preserve of the State and which in large measure were funded by the State.

23. Section 2 of the Act defines "officer" as "a person who is appointed to hold or to act in a pensionable office in the service of a statutory authority and whose remuneration is paid on a monthly basis". This is contrasted with "public officer" who is defined in section 3 of the Constitution as a member of the Civil Service. Section 5 (1) provides as follows: "The Commission shall have power to appoint persons to be or act as officers and to transfer, promote, remove and exercise disciplinary control over persons so appointed". Section 8 of the Act deals with the transfer and secondment of

staff between the civil service and the statutory authorities and *vice versa*, and between the statutory authorities *inter se*. The material subsections now follow:

> 8. (3) An officer in the Civil Service may, with the approval of the Commission, be seconded to the service of a statutory authority and an officer in the service of a statutory authority may, with the like approval, be seconded to the Civil Service.
>
> (4) Where a secondment is effected, the President, or the statutory authority concerned, as the case may require, shall make such arrangements as may be necessary to preserve the rights of the officers so seconded to any pension, gratuity, allowance or other superannuation benefit for which he would have been eligible had he remained in the service of the Government or the statutory authority, as the case may be.
>
> (5) Except with the approval of the President, a period of secondment shall not in any case exceed five years.
>
> (6) An officer in the service of a statutory authority may, whenever the Commission considers it appropriate or the Minister so recommends, be transferred to the service of another statutory authority, and upon such transfer the officer shall be treated as a member of a Pension Scheme, if any, and the provisions of the Pension Scheme with respect to the superannuation benefit and liabilities shall apply accordingly, save that where no Pension Scheme is established or authorised to be established, the President shall by regulations make such arrangements to protect the superannuation rights of the officer as is considered fit and proper.

24. The SASC regulations, made under the Act, define “appointment” in regulation 2 as the “placing of a person in the service of a Statutory Authority and includes service in the public service”. “Promotion” is defined as “the appointment of an officer to an office in a grade carrying a higher remuneration whether such office is in the same statutory authority or not”. Regulation 18 makes seniority a critical factor used by the SASC in determining whether to promote officers. Regulation 20 mandates the SASC to maintain up-to-date seniority lists:

> 20 (1) The Executive Officer shall keep up-to-date seniority lists of all officers holding offices in the several grades in the service of a Statutory Authority.
>
> (2) The Head of a Statutory Authority shall keep in the prescribed form, up-to-date seniority lists of all officers holding offices in the several

grades in his Department, for the purpose of making recommendations for promotions and acting appointments.

(3) The seniority of an officer shall be determined by the date of his appointment to the particular grade within the range in which he is serving. The seniority of officers promoted to the same grade from the same date shall be determined by their seniority in the former grade.

Regulation 21 provides for seniority in cases of resignation and regulation 22 empowers the SASC to determine seniority in all other cases:

21. The seniority of an officer who voluntarily resigns from the service of a Statutory Authority and is subsequently re-appointed to it shall be reckoned from the date of his re-appointment.

22. In any case not covered by regulations 20 and 21, the Commission shall determine the seniority of the officer.

Regulations 29 and 30 deal with orders of transfers and create rights for officers aggrieved by such orders. If the Commission proposes to transfer an officer, it must make "an order of transfer" and give not less than one month's written notice to the officer. An aggrieved officer may ask for a review of the proposed order, and his request and representations must be made within seven days of receipt of the order of transfer. The SASC is mandated to consider the representations and make a decision. These rights do not specifically include the right to complain against any loss of seniority arising out of an order of transfer, but only the right to complain about the order of transfer. Officers must comply with the order of transfer pending the review by the SASC, but where the order of transfer involves the exchange between offices of two officers, the aggrieved officer need not comply during the review process. Regulation 31 identifies the effective date of appointment of officers:

31. (1) The date of appointment to an office in a particular service within the service of an Authority shall normally be the date on which the officer assumes substantively the duties of the office to which he has been appointed.

(2) The date of appointment on promotion shall be such date as the Commission shall specify.

(3) [*Deals with date of appointment of officers from abroad.*]

25. Ms. Thurab contends that every statutory authority is an independent, autonomous entity. She says that there is no "statutory authority service", like there is a teaching service or a police service. The police service is one homogenous entity, and police officers can be transferred seamlessly within it from one police department to another. She submitted that the statutory authorities are different because the seniority of officers is based on the years of service in a particular statutory authority. She pointed out that the Act and the regulations refer to officers as being "in the service of a statutory authority" and not "in the service of statutory authorities". This, perhaps, was her most persuasive argument. However, a phrase, by itself, does not often reveal the intentions of parliament. The court must look at the Act and the regulations as a whole.

26. There is no express provision that mandates the SASC to discount or preserve the seniority of transferred officers. The court will therefore have to deduce the policy of the Act and regulations. I think that the legislative policy or intention can be deduced by a conjoint reading of section 8, and regulations 20 (3), 21, 22, 29, and 31. It is this: the preservation of seniority on transfer is legally permissible and within the discretionary powers of the SASC.

27. Section 8 deals, *inter alia*, with transferred and seconded officers. It is worthwhile noting that there is no specific statutory authorisation to second officers from one statutory authority to another, but a practice of secondment has obviously developed to suit the needs of the authorities, and, I make no pronouncement on it[2]. For the purposes of this judgment, the secondment of the applicant to the SFCC is treated as a secondment that all parties regarded as entirely legitimate. On transfer, officers are to be "treated as a member of a Pension Scheme, if any, and the provisions of the Pension Scheme with respect to the superannuation benefit and liabilities shall apply accordingly" (subsection (6)). The pensionable benefits of transferred officers are therefore expressly preserved. When officers (including, by practice, those in the

[2] It is not a point that has any bearing on the issues of this case, but the SASC should immediately consider revising its regulations.

statutory authorities) are seconded, the recipient statutory authorities "shall make such arrangements as may be necessary to preserve the rights of the officers so seconded to any pension, gratuity, allowance or other superannuation benefit for which he would have been eligible had he remained in the service of … the statutory authority" (subsection (4)). The preserved rights on secondment are interpreted by the SASC to mean that there is no loss of seniority (even for a long secondment of five years), but the language, while more detailed than in subsection (6), does not expressly preserve seniority. The pension, gratuities, allowances, or other superannuation benefits of seconded officers must necessarily refer to the pensionable benefits and emoluments of the post, and not the accumulated seniority. The SASC's generous interpretation of subsection (4) exhibits common sense and fairness, because the literal construction of subsection (4) is that the only rights not lost on secondment are pensionable benefits and emoluments. In devising its policy, the SASC did not extend its generosity in the construction of subsection (4) to its construction of subsection (6). Parliament did not expressly preserve the benefit of acquired seniority on transfer or secondment. This is a surprising omission because seniority is more important to the careers of these officers than pensionable benefits. A pension is calculated on the basis of the officer's substantive grade and range, which reflects his earning capacity, but earnings vary according to the officer's promotional prospects. The higher the grade and range the better the pensionable benefits. It would be absurd for a transferred officer to retain his entitlement to pensionable benefits as of right, but automatically lose the means by which those benefits are enhanced, namely his promotion prospects. In the absence of express words of exclusion, I can only surmise that it was not the intention of Parliament for the SASC to automatically exclude an officer's accumulated seniority on secondment or transfer.

28. This construction is made more sensible in light of the fact that the SASC, or the Minister, can compel an officer to be transferred, even if he is aggrieved by the transfer. The review procedure in regulation 29 is designed for transfers ordered by the SASC of its own volition. In such cases, an officer aggrieved by the transfer

order is given an opportunity to say why the order should not be made. I suspect that one of the grounds of objection could be the SASC's policy or practice of erasing acquired seniority on transfer, but the language of regulation 29 is noticeably restrained in describing what grounds the aggrieved officer can raise. Nonetheless, in cases of compulsory transfer, the SASC reserves the right to wholly ignore the officer's representations and to proceed with the transfer. If the policy were correct, then an officer whose review is unsuccessful would be forcibly deprived of his seniority and promotion prospects. The unreasonableness of this deprivation was correctly recognised in the *obiter* remarks of Mr. Justice C. Hamel-Smith (Acting) in *Yuclan Balwant v SASC (unreported) HCA No. 402 of 2001, dated 3 June 2002, pp 11-12*. It is not sufficient for Ms. Thurab to say that the applicant should have availed herself of the review procedure. The applicant has no problem with the transfer; she applied for, and waited more than five years for it. Her problem is with the policy of erasing her years of service. The question is whether the policy is illegal, unreasonable, or unauthorised, not whether the applicant should or should not be transferred. That matter is best dealt with by a public law court. In this case, the applicant applied for a transfer, and the SASC never issued an order of transfer with the requisite one-month notice. The applicant therefore had no rights under regulation 29 to request a review.

29. Further justification for this construction is found in regulation 20 (3), which provides that seniority is determined by the date of appointment "to a particular grade within the range" in which the officer is serving. It does not provide for the determination of seniority from the date of appointment to a particular post within a particular statutory authority. This is a very important signpost. The applicant is a Clerk I (Range 14), and she was transferred from the POSCC to the SFCC in the same grade and range.

30. The only legislative direction to erase previously acquired seniority occurs in regulation 21, where it is mandated that the seniority of an officer who voluntarily resigns and is subsequently re-appointed is calculated from the date of his re-appointment. A resignation is a break in service. I cannot imagine that Parliament

intended to equate a voluntary, pre-mature resignation with a transfer, whether voluntary or involuntary, which is not a break in service. The policy here is to dissuade officers from voluntarily resigning, not to penalise those who have been transferred, whether voluntarily or involuntarily. The fact that accumulated seniority is specifically excluded in one case raises the possibility that it was not Parliament's intention to exclude it in every case.

31. Regulation 22 creates a discretion for the SASC to determine the seniority of officers in cases not covered by regulations 20 and 21. It seems to me that such cases would necessarily include transfers of officers between different statutory authorities. By law, the regulation 22 discretion must be exercised in accordance with the well-known principles of fairness. This power is exercisable after the transfer is made, when the seniority list of a statutory authority is being prepared. To my mind, its proper exercise would entail observance of the rules of natural justice before the seniority list is prepared. The preparation of a seniority list is an issue quite different from the issue of whether or not an officer should be transferred (in the regulation 29 review). The regulation 22 discretionary power must be reasonably exercised: if the SASC proposes to discount the accumulated seniority of any transferred officer it should give notice to the affected officer, allow representations, and consider the special circumstances (if any) of each transfer before the seniority list is prepared.

32. The SASC, in its correspondence and affidavits, refers to a transfer as "an appointment on transfer" but the etymology of that phrase is found nowhere in the Act.[3] "Persons" are appointed, but "officers" are transferred, promoted, or disciplined. Section 5 makes a distinction between "persons" and "officers", and the distinction is repeated in the definition sections in the Act and the regulations. Technically, an officer cannot be "appointed on transfer". Only a person can be appointed. Once appointed, the person becomes an officer. An officer can be transferred, promoted, or dismissed. Therefore, a transfer is not an appointment, and

[3] The phrase is found in the Transferred Officers' Continuity of Service Act, Chap 23:02, passed in 1962, which preserved the pensionable benefits of officers transferred between the former Municipal Councils. It was, in my view, impliedly repealed by the Municipal Corporations Act in 1990.

the phrase "appointment on transfer" is an oxymoron. An officer, when promoted, changes the grade and remuneration of his office, so a promotion is an appointment, because it involves a change of office. But a transfer is a lateral movement involving no change in the substantive office, except the physical location at which the duties of the office are performed. This is made more apparent in regulation 31, which provides in sub-regulation (1) that the date of appointment is "normally" the date on which the officer "assumes substantively the duties of the office to which he has been appointed". Sub-regulations (2) and (3) make provision for calculating appointment dates on promotions and in appointments of officers from abroad, but are noticeably silent about calculating the appointment date when officers are transferred. The regulation provides that the appointment date is calculated "normally" by reference to the assumption of the duties of an office *simpliciter*, and not the assumption of an office in a particular statutory authority. The use of the word "normally" connotes that there are other ways to determine the date of an appointment. A doorway is therefore open for determining the appointment date of officers who are transferred.

33. Regulation 31 supplies sufficient tools to inspect Ms. Thurab's submission that when the legislation refers to an appointment to or in the service of a statutory authority it means one self-contained entity, and not the "statutory authorities' service". Regulation 31 speaks about appointment "to an office in a particular service within the service of an Authority". Throughout the Act and the regulations reference is made to a person or officer being in the service of a statutory authority. The word choice is not ideal because the meaning is unclear. It seems to be adapted from the phrase "the civil service" or "the public service", perhaps indicating that Parliament did not regard these officers as private sector employees. In my opinion, the word "service" is an abstract, not a concrete noun. Unlike a concrete noun, which refers to a thing that can be touched, an abstract noun refers to a quality, concept, or idea. The word "service" in the phrase "appointed to an office in a particular service", refers to the quality of the duties of the office, whether it is secretarial, technical, or administrative, and the grade or range of it. The word "service" in the second phrase of the sentence, "[within] the service of an Authority" is likewise an abstract noun

(despite the preposition “within”) because it describes the governing attribute of the authority as being one that provides a public service. The abstract noun “service” in both cases describes the qualities or concept of the office, and the nature or character of the authority’s functions. The upshot of the SASC’s submission is that there is a “POSCC Service”, a “SFCC Service”, and, for that matter, a “St. Jude’s Home for Girls Service”. I have not been asked to decide that nettlesome, esoteric question. It may be correct to disconnect the authorities in relation to the making of appointments and promotions, but I do not think that the distinctiveness, autonomy, or independence of separate “Service entities” has any interpretative use in relation to explaining the legal rationale of a seniority list that includes transferred officers. The words are not clear enough to permit the court to equate a transfer with an appointment. An appointed officer is metaphorically indentured to an authority at a particular grade and range, with every opportunity, during his working life, of advancing his career within it. But an officer cannot lawfully or logically be said to re-indentured to another authority upon transfer so as to “re-appointed” or to begin a new career, *tabula rasa*, when his grade and range, on transfer, remain identical. That would reduce the transferred officer to a mere chattel and synthesize the office furniture with the officer. An officer transferred several times would have several different “careers” performing the same tasks and have little or no hope of career advancement. Unequivocal language, like that used in relation to officers that resign and are re-appointed, is needed to support such a construction. Parliament intended to distinguish these officers from their brothers and sisters in the public service. But they are “serving” in statutory authorities umbilically linked to the state, and performing functions reflective of its national policy and they, too, are “servants” of the authorities as a whole, and, it must be said, in almost every case, carrying out “a public service”. The comprehensive interruption of their careers on transfer could not have been Parliament’s intention.

34. It cannot be gainsaid that each statutory authority has an independent legal existence by virtue of their distinctive Acts of incorporation. That legal independence is reflected in every aspect of their functions and activities save one: the appointment,

promotion, transfer, and disciplining of their officers. The SASC has jurisdiction over the officers in the statutory authorities and no jurisdiction over the functions of the statutory authorities. The jurisdiction over the officers is not a divisible jurisdiction. It is one jurisdiction, emanating from the Act, over all the scheduled authorities. To say that an officer's years of service in one statutory authority must be extinguished on transfer to another statutory authority is akin to saying that even in matters of employment each authority is a separate fiefdom. Kings have no masters. While official lines of demarcation are drawn around each authority, the lines intersect at one point, and that is in the area of personnel management. In that area, the statutory authorities have no authority. It is not so much a question of whether the authorities are independent entities. They are. But their functional and legal independence is subordinate to the SASC's overriding jurisdiction over their staff. In relation to transfers, the SASC's approach should not be to erect impermeable walls of autonomy.

35. I have come to the conclusion that the policy devised by the SASC is not statute driven. In fact, it is contrary to the policy of the Act. It seems to me that it originates out of a genuine misunderstanding of the Act and the underlying and essential principles of fairness. These principles are imperative components in the creation of any man-made policy that adversely affects an officer's career. Insofar as regulation 22 empowers the SASC to determine seniority in cases not falling within regulations 20 and 21, the SASC failed to appreciate its duty to act fairly. I find as a fact that the SASC did not effectively communicate its policy to the applicant. It therefore deprived her of an opportunity to make any representations. It wrongly determined her seniority from the date that she assumed her substantive office as Clerk I (Range 14) in the SFCC. In my judgment, the Act does not prohibit the retention of acquired seniority in transfers in which the officer is laterally moved in the same grade and range. The fact that the POSCC and the SFCC carry out identical functions is irrelevant, although it was a point that Mr. Ramlogan pressed. It is not the similarity of the authorities' functions but the similarity of the officers' functions that is the key statutory criterion in determining the appointment date of transferred officers. The

fact that the policy, even if it was *intra vires*, was not published on any notice board or included in any official correspondence, only stirs the conscience of the court. Such catastrophic and far-reaching information should not, as a matter of office protocol, be conveyed by telephone. In my view, the SASC's policy is unauthorised, unreasonable, and it amounts to an improper exercise of discretion. In a nutshell, it is illegal. But is the applicant entitled to any reliefs?

The issue of reliefs

36. Judicial review is a purely discretionary jurisdiction: *Ex parte Argyll [1986] 1 WLR 763, 774-775.* Some of the considerations that the court takes into account are spelt out in section 11 (2) of the JRA, which basically codifies various well-known criteria used in the exercise of discretionary powers. These criteria are useful at both stages of the application for judicial review. In the *Walkerwell* case (*op. cit.*), Mr. Justice Jamadar said this at page 12:

> Though delay is one consideration for the exercise of the discretion to refuse relief (Order 53, rule 4), there are others also related to the particular circumstances of each case. These considerations include:
> (i) regard for the wider public interest;
> (ii) whether the relief sought would be of any practical value;
> (iii) the impact on third parties; and
> (iv) the impact on administration.
> Clearly more than one consideration may be present in any single case. Ultimately however, the decision whether or not to grant relief must be made in light of the circumstances existing at the time of the hearing, and not of the original decision (see, *Ex parte Everett [1989] QB 811*).

This statement accurately reflects the law, save for the usefulness of delay as a factor at the substantive application, with which I respectfully (for the reasons given above) disagree.

37. In her affidavit, the SASC's acting Executive Director, Ms. Jeanette Renaud, gave three reasons or grounds why relief should be refused. Firstly, she said that if the applicant's seniority at the POSCC was reinstated officers serving at the SFCC would be disadvantaged. Some with less seniority than the applicant were already promoted, and others are in line for promotion ahead of her on the seniority list.

Secondly, she said that a departure from the policy of discounting years of service on transfers "would entail a change in the method of determining seniority". She said that this would "require an 'across-the board' system of advancement which would change the configuration of the authorities, and alter the character of what are now independent, autonomous bodies". Thirdly, she said that the retroactive alteration of the policy would "plunge the SASC and each authority into administrative chaos in that every office in every range at each authority would need to be considered is assessing seniority across the board".

38. In devising appropriate judicial review relief, the court's duty is both microscopic and macroscopic. If the SASC's policy has illegally deprived the applicant of her career prospects, her deprivation must be addressed, but the impact on good administration and prejudice to third parties must also be minimised, if not avoided. In relation to the first ground, I think it would be improper to couch a declaration in terms that retroactively reverses any past promotions at the SFCC, or anywhere else for that matter. The promoted officers have a legitimate expectation of keeping their jobs, and their financial and other affairs are undoubtedly arranged around their status as promoted officers. However, junior officers ahead of the applicant on the seniority list at the SFCC ought not to be too severely prejudiced or disappointed if the applicant's lawful place on the list is restored. Their superior rank is, at best, a *spes successiones* of a material benefit and not an actual benefit, because promotion is not a right. It is dependant on the existence of vacancies at the SFCC and their general job performance, and there is no evidence in regard to either. A declaration that immediately recognises the applicant's lawful rank on the seniority list will meet the justice of the case.

39. In relation to the second and third grounds, I do not believe that a properly worded declaration of the policy's illegality would entail a change in the method of determining seniority generally. Evidence of administrative chaos was not adduced; it may be hyperbole to describe it like that. This court does not underestimate the resourcefulness and competence of the SASC's staff. A declaration would only apply

to officers who apply for a transfer, or are faced with an order of transfer. I think that they are likely to be a much smaller group on the various seniority lists than officers who have not been transferred. The method of determining seniority would remain intact at each statutory authority, save in relation to officers transferred between authorities. There is no "across-the board" revolution, because the policy only affects transferred officers. However, I do not think that the interests of justice will be served if the declaration of illegality has retroactive effect, because I believe that the illegality is based on a genuine misunderstanding of the law, and, more importantly, would have a negative impact on the past decisions of the SASC and cause prejudice to promoted officers in all the various authorities.

40. I do not accept that the protection of the rights of transferred officers would alter the independent, autonomous character of the statutory authorities. Even if it did, I place the rights of those officers to the protection of the law above the SASC's administrative convenience in managing the authorities as disconnected fiefdoms. The flawed policy that seniority is lost on transfer between statutory authorities does not preserve the autonomy of the bodies any more than its reversal will diminish it. The authorities' legal autonomy is in no way compromised by the protection of the rights of transferred officers. Their independence to carry out their statutory functions is indisputable. The autonomy that the SASC so vigorously protects in relation to transfers is derived, not from the authorities (whose independence is not questioned), but from the SASC's conceptual understanding of how transfers operate. Fairness in the transfer process does not advance or diminish the independence of statutory authorities. None of them can claim any loss of autonomy if the flawed policy is corrected. A transfer operates, in effect, as a cross-border imposition. It is an inter-jurisdictional power exercised by the SASC over and between all its client statutory authorities. It is fully authorised by the legislation. It must be exercised fairly.

41. However, this court is not minded to grant any declaration that will have the effect of commanding the SASC to henceforth automatically preserve the years of service of

every transferred officer. Notwithstanding all that has been said, it is not within the court's functions or expertise to devise a scheme to effectively manage transfers between authorities. If a floodgate were opened then junior officers from authorities with massive staffs might apply for strategic transfers to smaller authorities solely for the purpose of improving their standing on the seniority lists. The consequences of such an open-ended declaration are as manifold as the works of the imagination. The policy under review is the one that results in the automatic cancellation of seniority on the ground that that is what the Act requires. This court has held that the Act contains no such requirement, but this is not to say that the preservation of seniority is likewise automatic on every transfer. Regulation 22 preserves the right of the SASC to prepare seniority lists and this is a function that must be exercised with fairness. The Act has relevance to two distinct types of transfer, voluntary and involuntary. This case concerns a voluntary transfer, and the SASC always has the option to refuse the request, or to grant it on mutually agreeable terms. It would seem to me that the discretion to retain seniority is stronger in the case of an involuntary transfer. A Parliamentary intervention would be welcome, because the officer corps in 1967, when the Act was passed, has grown exponentially, and so too have the number of statutory authorities and state boards. Until such an intervention, a new policy will need to be devised. The policy must recognise that there is no statutory impediment to the preservation of seniority on transfer. By way of suggestion, the SASC should consider adopting a policy that contains the following features:

(a) In cases of requests for voluntary transfer, the preservation of seniority is a matter for the discretion of the SASC when preparing its seniority list under regulation 22, or, at the regulation 29 review (should the question there arise, prior to transfer), taking into consideration, for example, the urgency or rationale of the request, the length of service of the proposed transferee, the staffing arrangements and internal affairs at the recipient authority, the functional differences (if any) between the duties that the officer will perform at both authorities[4], the

[4] For example, the duties or functions of an Administrative Secretary at the Cocoa and Coffee Board might be different from those at the National Lotteries Control Board.

number of officers at the recipient authority who might be by-passed on the seniority lists, and any other-or different- matters that, in the opinion of the SASC, are relevant to the proper discharge of its functions. The SASC also has the power to refuse a request for a transfer, or to grant one on mutually acceptable terms as to seniority.

(b) In cases of involuntary transfer, the factors in favour of the preservation of seniority are stronger, because the officer has not requested a transfer, and his transfer ought not to trigger an uninvited penalty.

(c) In either case, the SASC should consider the desirability of issuing an order of transfer in accordance with regulation 29, with the requisite one-month notice. There is no reason why, as a matter of fairness, the officer should not be told in advance, and in writing, how the SASC proposes to treat with his previously accumulated seniority. The regulation 29 review can then take place, allowing representations from the officer. If it is proposed that seniority will not be preserved, then the principles of fairness would lean in favour of the supply of full reasons for the decision of the review panel, or even an oral hearing according to the circumstances.

(d) The policy, however it may be devised, (which is a matter exclusively for the SASC) should be published in a pamphlet or on the notice boards of all the scheduled authorities.

DISPOSITION OF PROCEEDINGS

42. In all the circumstances, the following orders and declarations are hereby granted:

(1) A declaration that the applicant's seniority as a Clerk I (Range 14) in the SFCC shall be calculated as from 5 August 1996, and this shall be reflected immediately in the current seniority list, but without

prejudice to the status of any officer hitherto promoted at the SFCC on the basis of any past seniority list.

(2) An order of *certiorari* to remove into this court and quash the SASC's statement of policy conveyed by letter of 9 March 2005 to calculate the applicant's seniority from 17 October 2002.

(3) A declaration that the SASC's policy or practice that an officer's years of service performing functions at a particular grade and range in one statutory authority is automatically lost or is lawfully to be disregarded when preparing the seniority list of the statutory authority to which he is transferred in the same grade and range is unauthorised and illegal, but, in relation to the statutory authorities under the SASC's jurisdiction, (i) all seniority lists existing at the date of this judgment shall not be altered or affected by this declaration, (ii) all officers transferred prior to today shall maintain the seniority assigned to them at the statutory authorities to which they have been transferred, and (iii) all promotions, or already approved promotions, of junior officers over senior transferred officers, made pursuant to any previously created seniority lists, are deemed valid.

43. Costs will follow the event. The respondent is ordered to pay the applicant's costs, save that the costs of the application to cross-examine, which was ordered on 31 July 2006 in the course of the hearings, and the costs of the cross-examination of Mrs Flora Griffith on 28 November 2006 shall be borne by the applicant.[5]

James Christopher Aboud
Judge (Ag.)

[5] I notice that the flysheet on the court's file does not record the order as to these costs, but it is recorded in my notebook.