

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO: CV2008 - 03436

BETWEEN

RAMDEO RAMTAHAL

CLAIMANT

AND

DEFENCE COUNCIL

INTENDED DEFENDANT



JUDGMENT

Before the Honourable Mme Justice C. Pemberton

Appearances:

For the Claimant: Mr R.L. Maharaj S.C. leading Ms V. Maharaj

For the Defendant: Mrs D. Peake S.C. leading Ms A. Humphrey, Ms A. Baksh
and Mr M. Bhimsingh instructed by Ms R. Tang-Pack and
Ms R. Hosein

[1] INTRODUCTION

On 5th September 2008, the Applicant Mr Ramdeo Ramtahal filed an application for leave to apply for Judicial Review of a decision purportedly made by the Defence Council. That decision was not to promote him to the rank of Lieutenant.

[2] BACKGROUND

Sub-Lieutenant Ramdeo Ramtahal joined the services of the Defence Force of Trinidad and Tobago. This was in 1983. By 16th February 2003

he had attained the rank of Sub-Lieutenant and he thereby became a candidate for promotion to the position of Lieutenant. That candidacy however was coloured by certain other requirements:

- (a) Service in the lower rank of eighteen (18) months;
- (b) Recommendation to higher service by the Commanding Officer.

[3] To Mr Ramtahal's mind these were the only requirements. In fact he opined that the steps to be taken to secure his promotion were in the nature of "settled practice and/or policy established by the Commissions Board". By letter of 28th December 2003, the Commanding Officer made a recommendation for Mr Ramtahal's promotion to the rank of Lieutenant (Coast Guard) to the Secretary of the Defence Force Commissions Board. This letter was followed by one of 6th January 2003. That was not acted upon since the Commissions Board did not meet between January and August 2005.

[4] In September 2004, Mr Ramtahal was informed that he and others had to face an additional hurdle of passing a qualifying examination for promotion. He was to be examined during the period 6th to 7th September 2004. These examinations were to be held in accordance with "**COAST GUARD REGULATIONS** Section II Annex 2 paragraphs 13 – 15..." This information was contained in a memorandum No. 124/2004 dated 24th August 2004 posted on a notice board at his place of employment.

[5] Mr Ramtahal does not disclose when, but he approached his Commanding Officer to query the reason for the apparent change in policy. He was informed that the arrangement to be put in place was in line with the true legal position that special duty officers were required to write an examination so as to become eligible for promotion. Mr Ramtahal asserts that his Commanding Officer relied on an opinion expressed which

interpreted Regulation 4 of the **DEFENCE (OFFICERS) REGULATIONS**¹. Mr Ramtahal refused to comply with the suggestion that he write the examinations since:

- (1) Regulation 4 did not apply to him – a Special Duty Officer;
- (2) Settled practice did not require him to write examinations for promotion.

[6] Mr Ramtahal informs that thereafter he made numerous oral and written representations to his Commanding Officer and to the Chief of Defence Staff through his Commanding Officer, requesting that he be promoted retroactively without having to write examinations. Mr Ramtahal shares with us the dates of his written representations, 16th March 2005 and 28th January 2005 but does not share the number of oral representation made. Mr Ramtahal informed that he made a further oral representation to the Chief of Defence Staff (Ag.) sometime in April 2005. He continued to advert to the settled practice at (a) and (b) above². He further opined that the requirement for him to do a written examination was one outside the legal purview of the Commissions Board.

[7] By letter of 10th January 2006 some one year and four months after he became aware of the Commissions Board decision, Mr Ramtahal submitted correspondence to the Defence Council, through the Chief of Defence Staff. This correspondence repeated his submissions as to his being promoted as he desired without having to face written examinations and to be retroactive to 16th February 2003. Several letters followed 11th October 2006; 7th November 2006; 21st November 2006 all to no avail, until 5th June 2008. On that day, the Permanent Secretary, Ministry of National Security responded, advising that the Defence Council had

¹ Regulation 4: An Officer is eligible for substantive promotion to the rank of Captain, Major or other corresponding rank where he has passed the appropriate examination and has been recommended for promotion to the Board by his Commanding Officer.

² Paragraph [2] infra.

denied his request to be promoted retroactively without his having to write the examinations.

[8] Mr Ramtahal now approaches this court to pronounce that the decision of the Defence Council to deny his request through these representations was faulty. I have summarized the grounds as follows:

- (1) Legitimate Expectation of a substantive benefit of his promotion induced by:
 - (a) settled past conduct and/or practice and/or policy of the Commissions Board;
 - (b) the fact that he had been recommended by the Commanding Officer since 28th December 2003;
 - (c) his effective date of promotion would have been 16th February 2003.
2.
 - (a) The Legitimate Expectation of a substantive benefit – the promotion had been frustrated by the decision requiring him to undergo a written promotional examination;
 - (b) There was a lawful and/or reasonable and/or irrational exercise of discretion when the hitherto advantageous policy was revoked.
3. The change in policy was unjustified since the opinion upon which it was based failed to take into account relevant considerations and is not based on a proper application of the law since Regulation 4 of the Defence (Officer Regulations) made under Section 244 of the **DEFENCE ACT** does not apply to Special Duty Officers, but to regular officers – a different category of officer in the Defence Force.
4. There are no regulations which specifically regulate the terms and conditions of Special Duty Officers. It was the Commissions Board view that Special Duty Officers are for all purposes in a

category different to regular commissioned officers to whom the Defence (Officers) Regulations are inapplicable.

5. There was a breach of natural justice and procedural impropriety.
6. The decision was *ultra vires*. The policy adopted by the Commissions Board cannot be altered by a legal opinion.
7. The decision is so unfair as to amount to a misuse or abuse of public power.

[9] I received this Notice of Application 30th September 2008 and immediately formulated the following issues for determination:

- (a) Is the Defence Council a body that can be sued?
- (b) Is this a matter that can be reviewed by the Court?
- (c) Delay.

I received submissions from Mr Maharaj S.C. and Mrs Peake S.C. for my consideration. Mrs Peake asked me to consider these other issues, including:

- (d) Can the Claimant rely on a Legitimate Expectation that he would have been promoted, given the settled practice that obtained prior to 2004?
- (e) Does this matter have any real prospect of success?

[10] **(1) IS THE DEFENCE COUNCIL A BODY THAT CAN BE SUED?**

I have examined the submissions of both Counsel and the law in the area³. From that I understand that the Defence Council is a creature of

³ Section 7 of the **DEFENCE ACT** Chapter 14:01

- (1) There is established a Defence Council (in this Act, referred to as “the Council”) consisting of –
 - (a) the Minister, who shall be the Chairman;
 - (b) two other members of the Cabinet appointed by the Prime Minister, one of whom shall be the Vice-Chairman;
 - (c) the Chief of Defence Staff;
 - (d) the Permanent Secretary in the Ministry responsible for the Trinidad and Tobago Defence Force, who shall be the Secretary.

statute entrusted with responsibilities for *inter alia*, “the command, administration and discipline of and all other matters relating to the Force⁴”. Those responsibilities do not extend to the operational use of the Force⁵. It is therefore clear to me, that the Defence Council is a “public authority” acting in the exercise of a “public duty” and must act “in accordance with any law”. A decision made by that body is therefore amenable to Judicial Review⁶.

[11] (2) **IS THIS A MATTER THAT CAN BE REVIEWED BY THE COURT?**

Essentially, a matter concerning promotions, being one falling within the scope of administration can be reviewed by the court.

[12] (3) **DELAY**

The **JUDICIAL REVIEW ACT** (“The Act”) at Section 11 provides that an application for Judicial Review must be made promptly. The outside limit is three (3) months from the date “when the grounds for the application first arose”. The Court has a residual discretion and may extend the period of application for leave where there is good reason. Good reason may include a variety of elements, one of which being the time when an Applicant became aware of the aggrieved decision or any other relevant matters. These matters must be disclosed on the face of the

(2) Where the Secretary is absent at a meeting of the Council, the person presiding at the meeting may nominate any member to perform the duties of Secretary for that meeting.

(3) Where a member referred to in subsection (1) (b) is by reason of illness or otherwise temporarily unable to perform his functions as a member, the Prime Minister may appoint some other Minister to the Council during the period of such illness or inability.

⁴ See Section 8 (1) **DEFENCE ACT** Chap. 14:01: Subject to Subsection (2), the Council shall be responsible under the general authority of the Minister for the command, administration and discipline of and all other matters relating to the Force.

⁵ See Section 8 (2) **DEFENCE ACT**: The responsibility of the Council shall not extend to the operational use of the Force for which responsibility shall vest in the Chief of Defence Staff subject to the general or special directions of the Minister.

⁶ Section 5 (1) of the **JUDICIAL REVIEW ACT** Chap. 7:08: An application for Judicial Review of a decision of an inferior Court, tribunal, public body, public authority or a person acting in the exercise of a public duty or function in accordance with any law shall be made to the Court in accordance with this Act and in such manner as may be prescribed by Rules of Court.

application for leave and must not reside solely on the breast of an Applicant to be trotted out when this issue is raised at a hearing⁷.

[13] Moreover, the Act clearly states that when the relief sought is an order for *certiorari*, as it is in this case, “the date when the ground for the application first arose **shall** be taken to be the date of that ... decision⁸”. This is a mandatory section which can be coloured by Section 11 (1) only if good reason is shown.

[14] Let us now examine Mr Ramtahal’s case to see whether this application was made on a timely basis; and whether there is good ground for the grant of leave to apply for Judicial Review.

[15] **CLAIMANT’S SUBMISSIONS**

Mr Maharaj began his account by referring the Court to Section 11 (1) of the Act. According the grounds for this application first arose on or about “6th June 2008 when the letter dated 5th June 2008 containing the impugned decision was received” by Mr Ramtahal. The conclusion was that the time limit for making the application has not been executed.

⁷ Section 11 (1) An Application for Judicial Review shall be made promptly and in any event within three months from the date when 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 a 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.

See also Kangaloo JA in **SANATHAN DHARMA MAHA SABHA v MANNING & ORS** Civil Appeal 174 of 2004 para. 10.

⁸ See Section 11 (4) *op cit*.

[16] Mr Maharaj then introduces the principle that the impugned decision “is a continuing wrong” which “continues to affect his rights and entitlements”⁹.

[17] Mr Maharaj recognized the three month stricture contained in the Act but then goes on to discuss what options are open to the court where there is “delay within the three months period”. Fordham¹⁰ he stated gives comfort when the author opines that:

“when it is generally the practice of the Courts to work on the basis of the three month limit and to scale it down wherever the features of the particular case make that time limit unfair to the Defendant or to third parties. A useful starting point is that when judicial review claims are brought within the prescribed three month period, there is a rebuttal presumption that they have been brought promptly where there is no prejudice or no immense practical difficulties as a result of delay within the three month period, it is generally accepted that it is reasonable to proceed with the case”¹¹.

[18] The discourse then touches very briefly on what the court would consider when granting permission outside of the three months limit that is for good reason or whether such grant would be detrimental to good administration.

[19] Mr Maharaj concludes:

The respondent is not in a position to claim that they have been prejudiced or adversely affected by any delay in filing

⁹ See **CHANDRESH SHARMA v. THE HONORUABLE PATRICK MANNING** Civ. Appeal 144 of 2005.

¹⁰ **MICHAEL FORDHAM “JUDICIAL REVIEW HANDBOOK”** 4th edition.

¹¹ See page 540 of Fordham (supra).

this application since Mr Ramtahal's petition to it was made in or about 10th January 2006. It gave its decision over two years later by letter of 5th June 2008 in respect of the petition. It has therefore not treated this matter as one which requires promptness and urgency.

[20] **INTENDED DEFENDANT'S SUBMISSIONS**

(a) **RELEVANT DECISION AND TIME**

Mrs Peake argued that the evidence as presented by Mr Ramtahal reveals that the real decision to be challenged is that of the Commission Board in September 2004, some four (4) years before Mr Ramtahal applied for leave to seek Judicial Review. That is a decision taken by the competent authority and not one for which the Defence Council can be faulted.

[21] Further, the evidence states that Mr Ramtahal took his concerns to his Commanding Officer, querying the sudden change in policy; he made written and oral representations to the Chief of Defence Staff and finally he petitioned the Defence Council in writing by letter dated 10th January 2006. Several reminders were dispatched, culminating in a piece of correspondence dated 21st November 2006 sent by his then Attorneys-at-Law. That correspondence it would appear yielded the response of 5th June 2008, purporting to be the decision to be impugned.

[22] However, argues Mrs Peake, it is necessary to examine the **DEFENCE ACT** at Sections 11, 13, 14 and 194 to put these events in proper perspective. Sections 11 and 13 set out the Commissions Board function; Section 14 (1) details the appeals procedure. Section 194 is a complaints procedure. The conclusion was that the Section 194 complaints procedure was inapplicable; the appeals procedure at Section 14 was not followed and so the decision made by the Commissions Board, four (4) years ago remained the decision to be reviewed.

THE LAW – SECTION 194 and 14 DEFENCE ACT

This Petition cannot be regarded as a complaint under Section 194 and is not an appeal under Section 14.

[23] **DELAY**

Given the strictures laid out in Section 11 of the Act, and given that the decision to be reviewed is that of the Commissions Board, aged by four (4) years, the inescapable conclusion is that this application for leave cannot be permitted¹². However Mrs Peake addressed the qualification of whether there exists “good reason” to extend that time limit under the following heads:

- (a) No good and sufficient reason; and
- (b) Detriment to good public administration.

[24] **(A) NO GOOD AND SUFFICIENT REASON**

Mrs Peake submitted that there is no good reason advanced for the delay in attacking the relevant decision. Thus the provisions of Section 11 of the Act are not displaced. She relied on Kangaloo J¹³ in the **MAHA SABHA** case.

[25] **(B) DETRIMENT TO GOOD PUBLIC ADMINISTRATION**

Further, even if I were minded to find in favour of Mr Ramtahal, I should not since to do so must be regarded as detrimental to good administration since:

- (1) Other persons similarly circumstanced to Mr Ramtahal would have succumbed to the written examination, unlike Mr Ramtahal;

¹² **SANATHAN DHARMA MAHA SABHA v MANNING & ORS**, Civil Appeal 174/04 per Kangaloo J. paragraph 10.

¹³ Op cit. (see p. 11) footnote.

- (2) Those other persons who were successful would have been recommended for promotion and in fact were promoted¹⁴;
- (3) Mr Ramtahal who failed to write the examination and would not therefore have been eligible for promotion, cannot be allowed to use the illegal policy in place prior to 2004 to advance his cause retroactively in 2008.

[26] **MR RAMTAHAL'S RESPONSE**

At the hearing of 2nd July 2009, Mr Maharaj maintained that the instant was “an application for Judicial Review of the decision of the Defence Council communicated to the Applicant by letter dated 5th June 2008 in which the Applicant was informed that the Defence Council at its meeting of 30th April 2008 **denied his petition** for him to receive retroactive promotion from the 16th February 2003 without him (his) writing a promotion examination”.

[27] **DELAY**

Mr Maharaj reiterated that the correct decision to be reviewed was the one being challenged in the case at bar, that is, the denial of Mr Ramtahal's petition by the Defence Council of which he was notified by letter of 5th June 2008. Therefore delay was not an issue which the court should consider.

[28] **LAW, ANALYSIS AND CONCLUSIONS**

(1) RELEVANT DECISION AND TIME

Is the decision to be reviewed that of the Commissions Board (“the Board”) made in 2004? The following are the salient facts and legal position:

¹⁴ See paragraphs 5, 6, 7, 8 & 9 of the Affidavit of Lt. Commander Ronald Alfred.

LAW

- (1) The Board is the relevant decision making body as per Sections, 10, 11 and 13 of the **DEFENCE ACT**¹⁵.
- (2) The Defence Council's role in a promotion matter is clearly spelt out in the Act. It only comes to fruition on the happening of a certain event, namely, an **appeal** from the decision of the Commissions Board¹⁶.

This matter had its genesis in advice received by the Commissions Board on the correct interpretation and application of Regulations 3 and 4 of the **DEFENCE (OFFICERS) REGULATIONS**.

The legal position may be summarized as follows:

Regulation 3 provides that a serving officer in the land or sea forces may be eligible for promotion in the following manner:

LAND FORCES

- (i) to Lieutenant after 2 years commissioned service;
- (ii) to Captain after 4 years commissioned service;
- (iii) to Major after 7 years commissioned service.

COAST GUARD

- (i) Sub-Lieutenant – progress while training;
- (ii) Lieutenant – after 18 months service as Sub-Lieutenant;
- (iii) Lieutenant Commander – after 9 years commissioned service as a Lieutenant.

¹⁵ **Sections 10 (1)** – There is established a Commissions Board (hereinafter referred to as “the Board”) appointed by the President and consisting of –
(a) the Chairman of the Public Service Commission, who shall be the Chairman;
(b) a member of the Judicial and Legal Service Commission;
(c) one member of the public;
(d) the Senior Regimental Battalion Commanding Officer;
(e) the Commanding Officer of the Coast Guard.

Section 11 – The Board shall advise the President through the Minister on appointments to commissions and promotions in the Force up to the rank of Major/Lieutenant Commander.

Section 13 – In making appointments or promotions under this Act, the President shall act in accordance with the advice given by the Board under Section 11 or by the Minister under Section 12, as the case may be.

¹⁶**Section 14 (1)** – A member of the Force who is aggrieved by the failure of the Board to recommend him for an appointment to a commission or a promotion may appeal to the Council through the Board.

The ranks equivalency is as follows:

- (i) Lieutenant in land forces – Sub-Lieutenant in Coast Guard;
- (ii) Captain in land forces – Lieutenant in Coast Guard;
- (iii) Major in land forces – Lieutenant Commander in Coast Guard.

Regulation 4 refers to promotion to the ranks of Captain; Major or any other corresponding rank. The Regulation takes cognizance of this equivalency. Having said that, the requirements laid down in Regulation 4, passing the promotion examination and receiving the recommendation of the Commanding Officer apply to officers of corresponding rank in the Coast Guard as stated above.

[29] Whatever the issue, it remains a Commissions Board decision that can be tested on appeal to the Defence Council. Once the appeal is made and the Defence Council decides, then it becomes a Defence Council decision¹⁷. Therefore, could the letters, representations and petitions sent by Mr Ramtahal to the Chief of Defence Staff and to the Defence Council through the Chief of Defence staff satisfy the requirements of “an appeal to the Council through the Commissions Board”?

[30] Mr Maharaj stated as well that Mr Ramtahal utilized the procedure set out at Section 194 of the **DEFENCE ACT**. He gave clear indication to both his Commanding Officer and the Chief of Defence Staff of his displeasure in respect of the Commissions Board refusal to recommend him for promotion. Their failure to satisfactorily address his grievances entitled him to complain to the Defence Council. In addition, Mr Maharaj saw the petition sent to the Defence Council as satisfying the provisions of Section 14 (1) concerning the refusal of the Commanding Officer to recommend him for promotion to the post of Lieutenant.

¹⁷ See Application of **PHILLIP HONG PING v POLICE SERVICE COMMISSION** HCA S1169 of 2002.

[31] Mr Maharaj further contends that it is important to note that at no time did the Defence Council indicate that it could not consider Mr Ramtahal's petition on the basis that it had no authority or jurisdiction to do so. That being so, the Defence Council, argued Mr Maharaj, had a duty to take into account relevant matters including Mr Ramtahal's legitimate expectations, the legality of the decision requiring Mr Ramtahal to write the examinations, the rules of natural justice and procedural propriety.

[32] **SECTION 14 AND SECTION 194**

The word "complaint" within Section 194 does not envisage the type of matter as complained of in the case at bar. This matter is covered specifically at Section 14 in that a person dissatisfied with the decision of the Commissions Board has a statutory route for addressing that dissatisfaction. Section 194 does not, and, to my mind cannot contemplate a matter of this kind which essentially is a promotion issue to be handled by the Commissions Board and the Defence Council in a structured system, and one designated and determined by statute. I do not believe that the framers of the Act meant that a person aggrieved in a matter such as this can have as it were two bites at the cherry. In any event, the Section 194 procedure and the section 14 (1) procedure are not wrapped in each other but are mutually exclusive. One cannot say that the procedure set out in Section 194 satisfies the requirements of Section 14 (1).

[33] Even though there is no form of appeal or no standard or prescribed form, is Mrs Peake on solid ground for submitting that Mr Ramtahal's representations do not amount to an appeal and the relevant decision to be reviewed remains that of the Commissions Board?

[34] In order to answer that question one needs to look at the evidence as supplied by Mr Ramtahal through the various exhibits. The last communication was by way of a document dated 10th January 2006 to the

Defence Council through the Chief of Defence Staff to which an answer by the Permanent Secretary dated 5th June 2008 was given.

[35] What is an appeal? It may be explained as a request to a superior body to set aside or overturn the decision of an inferior body or tribunal. In some cases the appeal body may substitute its decision in place of that of the inferior body or it may remit the matter for re-hearing or retrial in accordance with certain statutory guidelines. An appeal may not be as of right but may be conferred on an affected individual by statute. In this case, the **DEFENCE ACT** at Section 14 (1) provides for a right of appeal. The appeals procedure is also fixed by the said Act. In my view it must be followed strictly. This was not the case here. There is no evidence that the latest communication to the Defence Council followed the prescribed route. It therefore cannot be considered an appeal within the confines of the said Act.

[36] Even if I am wrong and the “Petition” may be styled as an appeal, Mr Ramtahal has another hurdle to cross, that of timeliness.

I note that there are no provisions with respect to the time within which an appeal can be made from a decision of the Commissions Board. I would think though that that right has to be exercised within a reasonable time. Thus, even if there is no time limit to appeal, a lapse of one and one third (1 1/3) years before making a complaint to the Defence Council is to my mind too long. To allow leave to review the decision will defeat the clear purpose and intent of judicial review proceedings, to act promptly and to act within the confines of relevant law – in this case Section 14 of the **DEFENCE ACT**.

[37] **CONCLUSION**

Since there was no appeal within Section 14 then the decision to be reviewed, if any, remains that of the Commissions Board. It therefore is

clear that this application for leave is substantially beyond the time prescribed in Section 11 (4) the **JUDICIAL REVIEW ACT**. In addition, there has been no good reason advanced for me to even consider whether I should exercise a discretion to extend time. Further, Mr Ramtahal did not exhaust the statutory procedure mandated to address issues such as the one at bar. Mr Ramtahal therefore fails on this ground.

[38] **LEGITIMATE EXPECTATION AND REASONABLE PROSPECT OF SUCCESS**

At the hearing Mr Maharaj framed the case within legitimate expectation principles. His submission was that Mr Ramtahal is a beneficiary of a legitimate expectation of a substantive benefit created in his favour by representations made to him by a settled practice which was in existence for over forty (40) years.

[39] According to Mr Maharaj the evidence as supplied in the application clearly points to Mr Ramtahal being the beneficiary of a legitimate expectation of the substantive benefit as claimed. This was based on settled practice and policy combined with the effects of Sections 11 and 13, statutory provisions which Mr Ramtahal satisfied.

[40] Mr Maharaj further advanced that even if a case “does not fall within the strict requirements of legitimate expectation, the court has the power to grant redress in Judicial Review, where the breach of the representations of the public authority involves an **unfair abuse of power**”.

[41] Mr Maharaj opined that Mr Ramtahal’s case has met the requirements of a request for grant of leave to apply for Judicial Review since his case was not hopeless. In fact, Mr Ramtahal has made out an arguable case and one that has a realistic prospect of success.

[42] **EVIDENCE**

Mrs Peake opened her reply by directing me to the evidence in this case. She singled out “**RR8**” headed “Petition for Promotion”; and “**RR12**” Response from the Defence Council¹⁸.

[43] **SETTLED PRACTICE AND LEGITIMATE EXPECTATION**

The evidence is that Mr Ramtahal became an officer in August 2001. There as no evidence produced by Mr Ramtahal of the settled practice or policy in existence as at 2004.

[44] Mrs Peake argues that even if we assume that a settled practice or policy was in place, there were no examinations in place as at 2004. Does Mr Ramtahal have a legitimate expectation to promotion because he has completed his service and his Commanding Officer has recommended him? The burden lies on Mr Ramtahal to convince me that he has a realistic prospect of success. Mr Ramtahal, she submits cannot do so because there is no evidence produced of a clear, unambiguous representation made by the decision-maker- the Defence Council – in this case - that affects him. The Commission Board dictated the policy, not the Defence Council. Mr Ramtahal must contend that the Defence Council breached a policy set by them. This had not been done. Furthermore, the statutory underpinnings of both bodies are different. The Commissions Board is established under Section 10 of the **DEFENCE ACT**. The Defence Council is established under Section 7 thereof. The decision of the Commissions Board cannot bind the Defence Council.

[45] Essentially, by the evidence as presented Mr Ramtahal has **not** shown that there was settled practice carried out by the Defence Council which spoke to his request; there was an unequivocal and unambiguous representation

¹⁸ See attached.

made to him about his request that there was no other officer similarly circumstanced who did not write the examinations and was promoted.

[46] **REAL PROSPECT OF SUCCESS**

Mrs Peake continued that one of the considerations for granting leave to apply for Judicial Review is whether the application has a real prospect of success. In other words has the Applicant made out a case which can ultimately succeed?

[47] The court was led on an examination of the facts as presented on the application, the challenge to the decision of the Defence Council. According to Mr Ramtahal the decision of the Defence Council not to accede to his request was illegal since he had a legitimate expectation that he would be promoted to the desired post based on “settled past conduct and or practice and or policy of” the Commissions Board to recommend for promotion, officers who had served 1½ years as Sub-Lieutenant and were recommended for promotion by the Commanding Officer.

[48] It is settled law that one of the tenets of a legitimate expectation is that that expectation goes beyond an enforceable legal right provided there is some reasonable basis for the expectation to arise. It is clear that such an expectation cannot be grounded in a breach of the law, and must be the result of a clear and unambiguous representation whether oral or written or by conduct made by the authority complained against. Thus the question for Mr Ramtahal to answer is whether his legitimate expectation that he would not have to write the promotional examination was well founded. Mr Maharaj framed it as this – that Mr Ramtahal had a substantive legitimate expectation that the Commissions Board would not deviate from a “settled practice or policy” evident in the cases prior to 2004 so as to allow Mr Ramtahal his wish not to write the promotional examination. Mr Maharaj framed this as a promise of a substantive legitimate

expectation. Mrs Peake disagrees. She relied on Warner J.A. in **PAPONETTE** to support her view.

[49] **ANALYSIS AND CONCLUSION**

Warner J.A. in **PAPONETTE** gave a succinct account of the development of the law in legitimate expectation. The Learned Judge advances this principle:

In appraising whether a substance legitimate expectation has been frustrated, a Claimant must demonstrate

- i. a “clear, precise and unambiguous representation, devoid of relevant qualifications”; and
- ii. The court must be persuaded that there has been “conspicuous unfairness” amounting to an abuse of power in order to found a claim of “substantive legitimate expectation”. Inherent in this criterion would be a state of affairs, “so plain and obvious” that it would demand that it be set right.

[50] I shall now analyse the case at bar from two aspects:

- (1) Legislative Basis;
- (2) Evidential Basis.

In order to assess whether the expectation held by Mr Ramtahal was legitimate or not Section 244 and Regulations 3 and 4 of the **DEFENCE (OFFICERS) REGULATIONS** need to be examined.

[51] **LEGISLATIVE BASIS**

Prior to 2004, only requirement (b) was utilized by the Promoting Authorities. In fact, the evidence reveals that (b) had last been utilized in 2002. Thereafter the other officers similarly circumstanced to Mr Ramtahal had to face the selection process mandated by the Regulations. That situation was corrected to bring the procedure for promotions in line with the Regulations which to my mind are clear and unambiguous. Could

one now say that Mr Ramtahal's expectation was legitimate as being based on a faulty practice? The answer surely is no. I associate myself with the court in **GHAMDI**¹⁹, when it noted that "An administrative error cannot change requirements prescribed in law"

[52] The plain and ordinary meanings and application of the sections therefore are that Mr Ramtahal having served as a Lieutenant after eighteen (18) months was eligible for promotion to the next higher rank of Sub-Lieutenant. He had to cross two other hurdles, attaining a passing grade at the appropriate promotion examination and receiving the recommendation of his Commanding Officer. That is a correct reading and application of the relevant law. Neither the Commissions Board nor the Defence Council can step outside these legal requirements. Even if it is correct to say that the Defence Council's decision is the relevant decision to be reviewed it was not one based on an illegality. An application for Judicial Review has no reasonable prospect of success. Leave therefore cannot be granted.

[53] In this case Mrs Peake asserts and I agree that there was no clear precise and unambiguous representation either by the Commissions Board or the Defence Council that was devoid of any relevant qualification made to Mr Ramtahal that he would not have to face a written examination for promotion.

[54] Further, I am not persuaded that the application for leave to seek Judicial Review has presented any evidence of conspiracy of unfairness amounting to an abuse of process, to support the claim of legitimate expectation of a substantive nature. In fact, **not** writing examinations for promotion was

¹⁹ See **GHAMDI v CANADA (MINISTER OF FOREIGN AFFAIRS & INTERNATIONAL TRADE) AHMAD SAEED AL GHAMDI and THE MINISTER OF FOREIGN AFFAIRS and INTERNATIONAL TRADE** 2007 FC 559, 64 Imm. L.R. [3d] 67.

set right by the Commissions Board and the Defence Council cannot now resile from that position and not offend the law.

[55] I am therefore of the firm view that Mr Ramtahal's challenge if allowed full ventilation will be fruitless.

[56] Counsel raised a number of other issues substantive unfairness and abuse of power, which were interesting and thought provoking. However, I shall not examine them given the foregoing.

[57] **SPECIAL DUTY OFFICERS**

I should however wish to make comment on the perceived position of Special Duty Officers. I have perused the **DEFENCE ACT**. I can find no classification of "Special Duty Officers" which would admit to a selective application of its provisions. Mr Ramtahal was an officer under the said Act. Section 241 makes it clear that the persons subject to military law include officers and that the Act applies to persons subject thereto²⁰. Therefore all of the provisions of the **DEFENCE ACT** apply to Mr Ramtahal.

[58] **CONCLUSION**

In answer to the questions posed and issues discussed:

- (1) The Defence Council is a body that can be sued in Judicial Review proceedings.
- (2) This matter falls within the class of actions which if taken by the Defence Council can be reviewed.
- (3) The decision of the Commissions Board falls to be reviewed given the factual matrix in this case. That being so there has been a

²⁰ See Sections 241 (1) Subject to this section, the following persons are subject to military law:

(a) officers and other ranks of the Force.

Section 241 (5) - This Act applies to persons subject thereto under this section and in relation to the units as well outside as within Trinidad and Tobago.

delay in bringing these proceedings some four (4) years which renders an application for leave unsuccessful.

- (4) Mr Ramtahal has not satisfied me that he had a legitimate expectation to be treated according to his wishes since there is no proof of settled practice at the time his expectation would have arisen in 2004.
- (5) In addition, to allow this application for leave to succeed will be detrimental to good public administration since persons may be affected who unlike Mr Ramtahal sat and passed the examination and were promoted during the period.
- (6) From a thorough and close reading of Regulations 3 and 4 of the **DEFENCE (OFFICERS) REGULATIONS** the legitimate expectation harboured by Mr Ramtahal is eroded by the clear and unambiguous provisions of the statute. In the premises there is no real prospect of success.
- (6) The application for leave to apply for Judicial Review is refused.

ORDER:

1. That the application filed 5th September 2008 be and is hereby refused.
2. Costs to be paid by the Claimant to the Intended Defendant to be assessed.
3. Statement of Costs to be filed on or before 15th January 2010.
4. Assessment to take place on 4th February 2010 at 11:30 a.m. SF02.

Dated this 5th day of November 2009.

/s/ CHARMAINE PEMBERTON
HIGH COURT JUDGE