

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**HCA NO. S 111 OF 2003**

**IN THE MATTER OF AN APPLICATION BY CHARLES VERNON  
FREDERICK, MOOKISH PULLIAH SHAMSHUDEEN MOHAMMED,  
ADRIAN PASCAL, WILBERT LOVELL AND KUNDAN NANCOO  
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF THE FAILURE OF THE COMMISSIONER OF PRISONS  
AND/OR THE PUBLIC SERVICE COMMISSION (PSC) TO COMPLY WITH  
THE PROVISIONS OF REGULATION 168 OF THE PUBLIC SERVICE  
COMMISSION (AMENDMENT) REGULATIONS 2000 AND/OR THE  
PRINCIPLES OF NATURAL JUSTICE WHEN CONSIDERING THE  
APPLICANTS PROMOTION**

**BETWEEN**

- 1. CHARLES VERNON FREDERICK**
- 2. MOOKISH PULLIAH**
- 3. SHAMSHUDEEN MOHAMMED**
- 4. ADRIAN PASCALL**
- 5. WILBERT LOVELL**
- 6. KUNDAN NANCOO**

**APPLICANTS**

**AND**

**COMMISSIONER OF PRISONS**

**AND**

**PUBLIC SERVICE COMMISSION**

**RESPONDENTS**

**Before the Honourable Madam Justice M. Dean-Armorer**

**Appearances:**

Mr. Anand Ramlogan for the Applicants  
Mr. Krishendeo Narinesingh for the Respondents

***JUDGMENT***

**Introduction:**

In this Application for Judicial review, six (6) prison officers seek relief against the Commissioner of Prisons and the Public Service Commission, in respect of the failure of the former to recommend them for promotion and of the latter for awarding promotions contrary to the requirements of regulation 168(2) of the *Public Service Commission Regulations*.

**Brief History of these proceedings:**

1. On the 28<sup>th</sup> January, 2003, the Honourable Justice Tiwary-Reddy, granted leave to the Applicants to apply for judicial review.
2. The substantive matter first came up for hearing in the month of February 2003, and after several attempts at settlement, hearing eventually began on the 17th September 2003.
3. On the first day of hearing, the Applicant sought the Court's leave to amend their Statement by adding a new paragraph to the relief sought. The

Court's leave was granted with the consent of Learned Counsel for the Respondent and the following was added as paragraph (e):

*“(e) A declaration that the PSC acted illegally when it considered, relied and made promotions based on a list of recommended candidates prepared by the Assistant Commissioner of Prisons.”*

4. The Applicant also obtained leave to amend the last paragraph of the relief sought, by applying for an order directing the Public Service Commission to reconsider the Applicant's suitability for promotion “...in accordance with the findings of the Court...”.

5. In the course of the hearing, learned Counsel for the Applicants applied for a stay of proceedings before the Public Service Commission in respect of the six (6) remaining vacant posts of Prison Officers II, pending the hearing and determination of the Application herein. This order was made with the consent of the learned Counsel for the Respondents and was intended to preserve the existing vacancies in the event that the Applicants were successful in these proceedings.

**Relevant Facts:**

1. The relevant facts are not in issue. Each of the six (6) Applicants had been prison officers for many years. The first Applicant, Charles Frederick, had been a Prison Officer for twenty-three (23) years. The second Applicant, Mookish Pulliah; the third Applicant, Shamshudeen Mohammed and the fifth Applicant, Wilbert Lovell had each been prison officers for twenty (20) years. Adrian Pascall, the fourth Applicant and the sixth Applicant, Kundan Nancoo had both been Prison Officers for sixteen (16) years.

2. On several occasions, since 1996, they all acted in the post of Prison Officers II. They all deposed that their acting appointments, particularly in recent times, were hardly

ever broken and that in the cases of the first, second, third, fourth and fifth Applicants, they had acted as Prison Officers II for a continuous period of two years. The sixth (6<sup>th</sup>) Applicant, Kundan Nancoo had acted as a Prison Officer II for a continuous period since 1998.

3. In the year 2002, the Public Service Commission promoted eighty-two (82) Prison Officers I to the rank of Prison Officer II. Promotions were made in two groups. There were four (4) Prison Officers I in the first group. They were promoted with effect from the 26<sup>th</sup> of June 2002. The second group consisted of seventy-eight (78) Prison Officers I. They were promoted to the rank of Prison Officer II with effect from December, 2002. The Applicants were not among those promoted. They were, however senior to many of the officers, who had in fact been promoted and had acted as Prison Officers II in priority to some promoted officers who were senior to them.

4. Three affidavits were filed on behalf of the Respondents. They were: the affidavit of Leo Abraham filed on the 28<sup>th</sup> March 2003; the supplemental affidavit, sworn by Leo Abraham on 8<sup>th</sup> April, 2003; and the affidavit, which was sworn on the 30<sup>th</sup> June, 2003 by Michael Mahabir, Director of Personnel Administration.

5. The affidavit of Leo Abraham alluded to the change, which had been wrought in the procedure for promotions by the ***Public Service (Amendment) Regulations*** L.N. 107 of 2000. Mr. Abraham annexed a copy of the amendment and explained that the erstwhile merit list had been replaced by the recommendations of the Commissioner of Prisons.

6. Mr. Abraham deposed further that he recommended all six (6) of the applicants for promotion to the rank of Prison Officer II and annexed a copy of his recommendation as "L.A. 3". The contents of "L.A. 3" are material. It is a memorandum dated the 17<sup>th</sup> November, 2002, from the Commissioner of Prisons to the Director of Personnel Administration. The stated subject of the memorandum is *'Filling of Vacancies in the Prison Service'*. The names of the Applicants appear as numbers 20 to 25 on the list,

which bears the heading, *“the following prison officers I are recommended for promotion to the ranks of prison officer II...”*

7. It is also of relevance that the Commissioner of Prisons admitted that he had considered the respective staff reports of the Applicants and that there were no adverse markings, *“...which hindered their prospect of promotion....”*

8. In his affidavit, the Commissioner of Prisons deposed that on the 4<sup>th</sup> December, 2002, he received a list of the names of officers who had been promoted to the rank of Prison Officer II, and that the names of the Applicants were not included thereon.

9. A supplemental affidavit was sworn by the Commissioner of Prisons. On this occasion, the Commissioner of Prisons sought to correct an error which he had inadvertently made, when he exhibited the incorrect list of recommended officers. The correct list was exhibited to the supplemental affidavit as “L.A. 5”. The correct exhibit, like the list, which had been incorrectly exhibited, bore the names of the Applicants as numbers 20 to 25 on a list, which contained in excess of 80 names.

10. One affidavit was filed on behalf of the Public Service Commission. This was the affidavit of the Director of Personnel Administration, Mr. Michael Mahabir. At paragraph 6 of his affidavit, Mr. Mahabir deposed that he received the list, (Exhibit “L.A.5”), in which the Commissioner of Prisons had recommended Prison Officers for promotion.

11. At paragraphs 11 to 13, Mr. Mahabir deposed further that the Public Service Commission requested documentation to support the recommendations of the Commissioner of Prisons. Because this was not forthcoming, the Director of Personnel Administration held a meeting with the Commissioner of Prisons and Mr. Gomez, who was an officer of the Service Commissions Department. Mr. Gomez, according to the unchallenged testimony of the Director of Personnel Administration, bore the

responsibility of liaising with Mr. Rougier, Assistant Commissioner of Prisons for the purpose of procuring the requested supporting documentation.

12. Quite surprisingly, and apparently in response to the request for supporting documentation, Mr. Rougier, the Assistant Commissioner of Prisons forwarded an amended list of recommended officers. This new list, which was exhibited as “M.M.2”, did not contain the names of the Applicants.

13. The Director of Personnel Administration, Mr. Mahabir testified that it was the amended list of the Assistant Commissioner of Prisons which received the consideration of the Public Service Commission and it was upon this list that the Public Service Commission acted in making the promotions which excluded the Applicants.

**Law:**

1. The central feature of this cause is the mandate of regulation 168(2) of the ***Public Service Commission Regulations***. The germane aspects of the regulation are to be found at sub-regulations (2) and (6) of the ***Public Service Commission Regulations***, the provisions of which are set out hereunder:

2. *The Commissioner of Prisons shall after taking into account the criteria specified in regulation 172 submit to the Commission a list of the Officers in the Second Division:*

(a) *whom he considers suitable for promotion to an office, and*

(b) *who are not being considered for promotion yet but who have served in the Service for a longer period in an office, or who have more experience in performing*

*the duties of that office than the officers being recommended.*

*(3) The Commissioner shall, also advise those officers referred to in sub-regulation 2(b) of their omission from the list for promotion, together with the reasons for such omission.*

*(4) An officer who is advised under sub-regulation 2(b) may make representations on his own behalf to the Commission within fourteen days of being so deemed and the Commission may invite him for interview on the basis of his representations.*

*(5) The Commission shall advise those officers making representations under this Regulation of the outcome of their representations.*

*(6) The Commission may, after considering all the representations made, endorse or otherwise, the recommendations of the Commissioner when promoting an officer”*

2. The amended **Regulations** speak for themselves. They require the Commissioner of Prisons to submit two lists to the Public Service Commission: a list of officers of the Second Division whom he considers suitable for promotion and a second list showing officers who are not recommended for promotion but who may be senior to those recommended. The officers whose names appear on the second list may in turn make representations to the Public Service Commission. The Public Service Commission is required to consider all representations and then to endorse or otherwise the recommendations of the Commissioner of Prisons.

It is clear that Regulation 168 (2), in the institution of a new procedure, intended that the rejected officers should be fully informed, at every step of the procedure. A rejected officer is entitled not only be informed, but to make representations to the Public

Service Commission and to be advised as to the outcome of their representations. It is equally clear that the discretion to promote continues to reside in the Public Service Commission, which may choose to endorse the recommendations of the Commissioner of Prisons. The Public Service Commission may also do “*otherwise*”. This suggests that the Public Service Commission may depart from the recommendations altogether. The Service Commission may not however proceed to promote officers without “*considering all recommendations made.*” In my view, it would also be wrong for the Public Service Commission to proceed to promotion on the basis of a list emanating from anyone other than the Commissioner of Prisons. In the exercise of its discretion, the Public Service Commission is required, as all administrative bodies, to act rationally and with regard to the dictates of fairness.

3. The case of Dougnath ***Rajkumar v. Lalla and Others*** was an application for Judicial review, in which the Applicant had been appointed to the post of Prison Officer I in 1968. He had passed the required promotion examinations and had acted as Prison Officer II from 1980 to 1990 and from 1997 until the determination of the case. The applicant’s complaints in 1990 were met by assurances from the Director of Personnel Administration that his name appeared on the merit list and that he would be promoted when there was another set promotions. He instituted proceedings for judicial review when in 1998 ten officers were promoted and he was by-passed. It was contended on behalf of the Applicant that he suffered prejudice by the failure of the Prison Administration to complete staff reports.

Lord Mackay of Clashfern at p.52 of the Report stated:

*“Against that background, to refuse him promotion because his term as determined by the out of date merit list had not yet come is not substantial compliance with ....regulation 172 and is unfair to the appellant.....”*



It was also necessary for the Judicial Committee to formulate the appropriate Order. Their Lordships rejected the Order which had been made by the Honourable Justice Lucky when the learned Judge, at first instance, ordered the promotion of Rajkumar.

Lord Mackay made the following order:

*“.....the case should be remitted to the Public Service Commission urgently to review the appellant’s applicant for promotion ....”*

The Judicial Committee ordered further that reasons be supplied by the Public Service Commission to the applicant if the Commission decided against promoting him.

**Application of Law to facts:**

1. Learned Attorney-at-Law for the Respondents, Mr. Narinesingh very commendably refrained from attempting to salvage what he saw as a clear case for the Applicants. He readily conceded that the Public Service Commission had proceeded illegally in considering and acting on the list of Mr. Rougier, the Assistant Commissioner of Prisons.

It has been admitted on the evidence of the Respondent in this matter, that the Public Service Commission acted on the list which had been submitted by the Assistant Commissioner of Prisons rather than that which had been earlier submitted by the Commissioner of Prisons. This was clearly in contravention of the regulation 168(2), which does not empower the Public Service Commission to act on the unsolicited recommendation of the Assistant Commissioner of Prisons. The Public Service Commission ought properly to have disregarded those later illicit recommendations and ought to have had recourse to the recommendations of the Commissioner of Prisons.

Accordingly, this Court is drawn to the inescapable conclusion that the Public Service Commission acted illegally in its decision to make promotions on the basis of the list of the Assistant Commissioner of Prisons and that the Applicants are entitled to the declaration sought at paragraph (e).

This Court, of course, on an application for judicial review has no power to order that the Public Service Commission make the promotions, of which the Applicants are hopeful. This Court is however invested with the power to order, following the Judicial Committee of the Privy Council in the case of *Doudnath Rajkumar v. Lalla and Others*, that the Public Service Commission consider and act upon the original list of the Commissioner of Prisons and if the Public Service Commission decides against awarding the promotions to the Applicants, it shall provide reasons to the Applicants for their unsuitability for promotion.

Learned Counsel for the Applicant, by the amended Notice of Motion, sought an Order directing the Public Service Commission to “reconsider” the Applicants’ suitability. In my view, such an Order would be inappropriate, since the Public Service Commission never considered the suitability of the Applicants. In my view, the appropriate Order would direct them to consider the list, which they ought properly to have considered, that is to say, the list of the Commissioner of Prisons.

Learned Counsel for the Applicants has urged that the Court specify a time during which the decision should be made by the Public Service Commission. In the absence of an agreed position, I can find no basis for stipulating a time-frame from a body such as a Service Commission. I can go no further than to order that the issue be reviewed urgently and to urge the Public Service Commission to be mindful of the colossal disadvantage with which the Applicants now contend. Even if they are now promoted, their elevation would take effect long after the promotions of those officers who, with the Applicants, had been recommended by the Commissioner of Prisons on the original list. In my view it would be unfair to delay consideration of the Applicants’ promotion any further.

## Orders

1. A declaration that the Public Service Commission acted illegally when it considered, relied on and made promotions based on a list of recommended candidates prepared by the Assistant Commissioner of Prisons.
2. An Order directing the Public Service Commission to consider the list of the Commissioner of Prisons exhibited herein as “LA5” and Applicants’ suitability for promotion in accordance with the findings of the Court and the Public Service Commission supply reasons to the Applicants for their non-promotion in the event that it is decided not to promote them after considering their suitability for promotion.
3. The Respondents do pay to the Applicants the costs of this Application fit for advocate attorney

Dated the 30th day of September 2003.

M. Dean-Armorer  
Acting Judge