

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. CV2020-04470**

**BETWEEN**

**ANCIL FORDE  
SYLVAN STEWART  
RONALD BRANCH  
KIRT PERRY  
IAN NASH  
JOSEPH SOLOMON  
BRENDON DANIEL  
LOU ANNE OLLIVIERRE  
WINSTON FRANCOIS  
ANDERSON GONZALES  
NICHOLAS RAMDEEN  
STERLYN TAYLOR  
TROY BRUNO  
DARREN BAPTISTE  
VOLLAN FRANCIS  
SHAWN COOPER  
ANSLIM GEORGE  
TEDDY BARREN  
DENISH DURGA  
ANSLEM KNOTT  
DESMOND DALY  
DEXTER PACHECO  
ANDREW RAMOURTAR  
ROGER RICHARDSON  
DEODATH SEEPERSAD  
PETE JERRY  
LARRY ALEXANDER  
ALLISTER JONES  
ISHAN TEELUCK**

Applicants/Intended Claimants

**AND**

**THE COMMISSIONER OF POLICE**

**PROMOTION ADVISORY BOARD**

Respondents/Intended Defendants

**Before the Honourable Mr. Justice Robin N. Mohammed**

**Date of Delivery:** Monday 21 June 2021

**Appearances:**

Mr. Kenneth Thompson for the Applicants/Intended Claimants

Mr. Justin Phelps instructed by Ms. Chinara Harewood for the Respondents/Intended Defendants

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**DECISION ON APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW  
FILED ON 21 DECEMBER 2020**

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**I. Introduction**

[1] Before the Court for determination is the Applicants'/Intended Claimants' Application filed and dated 21 December 2020 for leave to apply for Judicial Review pursuant to **section 6 of the Judicial Review Act, Chap 7:08** and **Part 56.3 of the Civil Proceedings Rules 1998 ("the CPR")**. The Application for leave to apply for Judicial Review was filed together with a Certificate of Urgency and supported by the affidavit of Ancil Forde, Police Sergeant, Regimental No. 14980, which was sworn on behalf of himself and the other 28 Applicants/Intended Claimants.

[2] The Applicants/Intended Claimants are all Police Sergeants of the Trinidad and Tobago Police Service (hereinafter "*the TTPS*"). The First Respondent is the Commissioner of Police (hereinafter "*the CoP*") who is the head of the TTPS. The CoP is responsible for the management of the TTPS and is vested with powers of disciplinary control over all police officers ranging in ranks from Constable to Assistant Commissioner and for promotion up to the rank of Assistant Commissioner pursuant to **sections 123 and 123A of the Constitution of Trinidad and Tobago**. The Second Respondent is the Promotion Advisory Board (hereinafter "*the PAB*") which is a creature of **section 18 of the Police Service Act Chap. 15:01**.

[3] The Applicants/Intended Claimants (hereinafter "*the Applicants*") sought to challenge the following decisions of the Respondents/Intended Defendants (hereinafter "*the Respondents*"):

- (a) The decision made by the CoP and/or the PAB on or about 28 September 2020 whereby they introduced a proportionate points system for awarding points to Sergeants for the Examination Component of the assessment process for promotion to the next higher office of Inspector in the TTPS.
- (b) The decision of the PAB whereby it compiled an Order of Merit List following an assessment of Sergeants of the TTPS for promotion to the office of Inspector pursuant to ***Regulation 20 of the Police Service Regulations 2007***, partly on the basis of awarding candidates proportionate points for the Examination Component of the assessment process.
- (c) The decision of the CoP made on or about 15 December 2020 whereby he published the aforesaid Order of Merit List on or about 15 December 2020, thereby preventing Applicants from examining the same with a view to ascertaining whether their names were correctly placed thereon.
- (d) The decision of the CoP capping the life of the aforesaid Order of Merit List at two years.
- (e) The decision of the PAB and/or the CoP made on or about 28 September 2020 whereby they introduced without due notice changes to the structure of the Interview Component of the assessment process.

[4] The reliefs sought by the Applicants are as follows:

- (i) A declaration that the decision of the CoP and/or the PAB made on or about 15 December 2020 whereby they awarded the Applicants a proportionate point for Examination in the assessment process for promotion of Sergeants to the rank of Inspector in the TTPS was unfair, unreasonable, contrary to ***Regulation 20 of the Police Service Regulations 2007*** as well as the principles of natural justice and **Section 20 of the Judicial Review Act.**
- (ii) A declaration that the said decision constituted an abuse of power and is ultra vires, void and of no legal effect.
- (iii) A declaration that the aforesaid decision contravened the Applicants' fundamental right to the protection of the law as guaranteed by **section 4(b) of the Constitution of Trinidad and Tobago.**

- (iv) A declaration that the Order of Merit List comprising of Sergeants for promotion to Inspector which was drawn up by the PAB on or about 15 December 2020 partly on the basis of the award to the Applicants of the aforesaid proportionate points in the 2020 assessment process for promotion to the rank of Inspector, is invalid by reason of the award of the said proportionate points.
- (v) A declaration that the publication by the CoP of the aforesaid Order of Merit List in Departmental Order No. 174 of 2020 on 15 December 2020, a few hours before the CoP published in Departmental Order No. 175 dated 16 December 2020, the promotion to the rank of Inspector of the first 91 Sergeants whose names appear on the said Order of Merit list, was unlawful.
- (vi) A declaration that prior to making promotion on the basis of an Order of Merit List, the CoP is required to publish that list in a Departmental Order of the Police Service in sufficient time to enable candidates to examine the list and raise questions as to their placements thereon.
- (vii) A declaration that the conduct of the CoP in publishing the aforesaid Order of Merit List on 15 December 2020 and promoting officers on the basis of the said list on 16 December 2020, denied the Applicants the opportunity of examining the list with a view to ascertaining whether they were correctly placed thereon, and was unfair to them.
- (viii) An order of certiorari removing into the Court and quashing the Order of Merit List.
- (ix) An order of mandamus directed to the PAB requiring it to award the Applicants 35 points for the Examination component of the promotional assessment process and prepare a revised Order of Merit List reflecting the award of such points.
- (x) An order pending the hearing and determination of the proceedings herein, restraining the CoP from making any further promotion on the basis of the existing Order of Merit List.
- (xi) Disclosure of the proportionate points awarded to the Applicants and all other candidates for the Examination component of the assessment process.
- (xii) Monetary compensation for the breach of their aforesaid constitutional right.
- (xiii) Monetary award.
- (xiv) Costs.

[5] Since the Application was filed during the Court's short vacation period, it was first considered by the emergency judge, at that time, Madam Justice Lambert-Peterson, who deemed the matter fit to be dealt with during the vacation and went on to consider same in chambers without a hearing. By Order dated 21 December 2020, Lambert-Peterson J ordered as follows:

***It is hereby ordered that:***

- 1. The Applicants are to serve the Respondents with a copy of this Order forthwith.***
- 2. As an interim order, the Commissioner of Police is hereby restrained from making any further promotions on the basis of the existing Order of Merit List for Promotion to the rank of Inspector until the determination of these proceedings or until further order of the Court.***
- 3. The hearing of this matter is adjourned to December 22nd, 2020 at 9:30 via virtual hearing.***

[6] The matter next came up for hearing on 22 December 2020 via the Microsoft Teams Virtual Platform before Lambert-Peterson J who gave directions for the Respondents to file their response affidavits. Permission was granted to the Applicants to file reply affidavit, if necessary. The Interim Order granted on 21 December 2020 was to continue until determination of this matter or until further ordered. The matter was adjourned to 23 December 2020.

[7] On 23 December 2020, Lambert-Peterson J granted an extension of time to the Respondents to file their response affidavit(s) to the affidavit of Ancil Forde and continued the interim injunction to 7 January 2021 or until further order in the meantime. The Court also ordered that the matter be transferred to my docket. The matter was therefore fixed before this Court to proceed on the 7 January 2021 at 10:30am via MS Teams Virtual Platform. On 4 January 2021, the Respondents filed a response affidavit sworn by Ms. Joanna Woodroffe-King. However, on 5 January 2021, this Court received an email from the Respondents' attorneys seeking a re-scheduling of the matter on the basis that the Respondents' counsel, Mr Phelps, had another matter booked before another Court for the same date and time. The Court was informed that Mr Thompson had given his consent to

the matter being re-scheduled. The Court therefore acceded to the request with the understanding that the interim injunction was to continue. The matter came up for hearing before me on 13 January 2021. No reply affidavit was filed by the Applicants. Counsel for both sides addressed the Court on the Application for Leave to Apply for Judicial Review and on the question of whether the interim injunction ought to continue in the event leave is granted. Decision was thereafter adjourned to a date to be announced and the interim injunction was continued until further order.

## **II. Relevant Factual Background**

[8] The Applicants are all officers of the Second Division of the TTPS created by **section 7 of the Police Service Act Chap. 15:01**. The offices of the Second Division are in ascending order of seniority – Constable, Corporal, Sergeant and Inspector. The Applicants hold the substantive office of Sergeant in the TTPS constituted under the **Police Service Act**. Promotions throughout the Second Division are governed by **Regulation 20 of the Police Service Regulations, 2007**, which introduced a system of promotion where points are awarded to officers under **three criteria**, namely, **performance appraisal**, **examination** and **interview**.

[9] In order to be promoted to the rank of Inspector, an officer must be qualified for promotion and his name placed on an Order of Merit List compiled by the PAB and published by the CoP in a Departmental Order of the TTPS. In the year 2020, there were several vacancies in the rank of Inspector and the Applicants and other Sergeants submitted themselves to the promotional assessment process.

[10] According to the Applicants, prior to 2016, all candidates vying for promotion to the rank of Inspector were awarded 35 points for Examination. The only examination that was held for those candidates was English Language where the candidates did not have a pass in GCE or CXC English Language. However, where a candidate had such a pass, he was exempted from writing the English Language examination. Nevertheless, all candidates who passed the English Language Examination or held a pass in English Language at GCE or CXC were awarded 35 points for Examination. However, in 2016, by way of

Departmental Order No. 78 of 2016, an examination in Business Communications, set by the Police Service Examination Board, was introduced for promotion from Sergeant to Inspector.

[11] Departmental Order No. 141 of 2020 published on 21 September 2020 stated, inter alia, that Sergeants will be required to write the examination in Business Communications and the marks awarded to them in that examination will be divided by the total marks and multiplied by 35 points in order to get the points to be allocated to them. According to the Applicants, the clear intent of Departmental Order No 141 of 2020 was to award points to Sergeants in proportion to their marks in Business Communications and not the maximum of 35 points stipulated by ***Regulation 20 of the Police Service Regulations***. The Applicants contended that the First and/or Second Respondent introduced the aforesaid proportionate points system despite the fact that Departmental Order No. 78 of 2016 clearly states that the pass mark for the Business Communications Examination is 50 marks.

[12] On 28 September 2020, candidates vying for promotion to the rank of Inspector attended a briefing at the Police Administration Building, which was conducted by Ms. Joanna Woodroffe-King, the independent consultant to the CoP. The Applicants and the other candidates were informed that they would be awarded points for Examination in proportion to the marks they obtained in the Business Communications paper.

[13] The Applicants contended that given the decades-old practice of awarding candidates fixed points, namely, 35 points for Examination, when they wrote and passed the Business Communications Examination, they had a legitimate expectation that they would have been awarded 35 points for the Examination criterion of the promotional assessment process. Therefore, the introduction of the system of awarding proportionate points for examination is unfair and it has violated and frustrated their legitimate expectation. Furthermore, the said failure is unreasonable, unfair and unlawful and constituted a contravention of the principles of natural justice and **Section 20 of the Judicial Review**

Act. They further contended that the said failure is ultra vires, null and of no legal effect and an abuse of power.

[14] At the briefing on 28 September 2020, the candidates were told that in addition to appearing before the PAB virtually and answering questions posed to them, they were required prior to the interview, to submit in writing their professional profiles and respond to two questions in writing. Interviews before the PAB commenced on 5 October 2020 and ended on 10 December 2020. The Applicants contended that the usual practice for several decades was that candidates appeared before the PAB in person and were interviewed orally. They further contended that they have been prejudicially affected and were aggrieved over the fact that the Interview component of the promotional assessment was modified with tremendous haste in 2020.

[15] The Applicants further contended that the proportionate points system and the aforesaid changes to the Interview Component of the assessment process were communicated to them and other candidates at the briefing session held by Ms. Woodroffe-King on 28 September 2020. However, such notice was wholly inadequate and there was no prior consultation, discussion and/or agreement for departing from the traditional manner in which interviews before the PAB were conducted.

[16] Following upon the conclusion of the promotion assessment process on or about 10 December 2020, the CoP published the Order of Merit List on 15 December 2020 in Departmental Order No 174 of 2020. The Order of Merit List contained names of 504 Sergeants. By Departmental Order No 175 of 2020 dated 16 December 2020, the CoP promoted to the rank of Inspector effective 16 December 2020, the first 91 Sergeants whose names appeared on the Order of Merit List. In doing so, the CoP filled all or nearly all the existing vacancies in the rank of Inspector. The Applicants contended that they were aggrieved over the fact that the Order of Merit List which was compiled on the basis of the 2020 promotional assessment process was not published with alacrity. They stated that **Regulation 20 of the Police Service Regulations** does not stipulate a timeframe for the publication of the Order of Merit List. However, the Applicants believe that in the



absence of such timeframe, the Order of Merit List must be published by the CoP within a reasonable time.

[17] The Applicants contended that the decades-old practice of treating the Order of Merit List as valid until it was exhausted, has created in them a legitimate expectation that the life of the Order of Merit List would not be capped at two years and the decision of the CoP and/or the PAB to cap it is unfair and has violated and frustrated their said expectation.

[18] According to the Respondents, Departmental Order No 141 of 2020 dated 21 September 2020 was circulated on the TTPS Portal. This Departmental Order signalled the imminent commencement of a promotion assessment process for promotion to the rank of Inspector. It also confirmed the eligibility criteria, including the qualifying examination, namely Business Communication, which was introduced in 2016 and communicated to officers in **Departmental Order No 78 of 2016**. Eligible Sergeants have been invited to sit this examination for consideration for promotion every year since, as published in Departmental Orders including **Departmental Order No 91 of 2018**, **Departmental Order No 34 of 2019** and most recently **Departmental Order No 27 of 2020**. Therefore, it has been widely known since 2016 that the qualifying examination for consideration for promotion to the rank of Inspector was Business Communications. Furthermore, **Departmental Order No 141 of 2020** goes further to outline the method of calculation of an officer's examinations score, up to a maximum of 35 points, as per **Regulation 20(5) of the Police Service Regulations 2007**, as directly proportionate to the percentage earned by the officer in his examination.

[19] The Respondents denied that the Applicants had a legitimate expectation to be awarded the maximum score of 35 points since it has always been made clear via Departmental Orders including **Departmental Order No 211 of 2007** and **Departmental Order No 213 of 2007** that examination scores for all ranks in the Second Division would normally be calculated based on an officer's examination mark. Therefore, to state that the Officers had a legitimate expectation of being automatically awarded the maximum of 35 points, is not accurate, as this has not been the practice since 2006.

[20] According to the Respondents, there has always been, within the Second Division, a proportionate scoring system, based on percentage ranges, in the Examinations Component of the promotion eligibility criteria. Thus, the direct proportionate system as outlined in the Departmental Order No 141 of 2020 cannot be deemed a new system but it is merely a modified one, more consistent with the Merit-Based Approach to Promotion Assessments, and in support of the transformation thrust of the TTPS. Since 2006, it has not been the enshrined policy of the TTPS to award officers in the Second Division, the maximum points for the Examinations component, regardless of their actual examination mark. It is the case that officers within the Second Division sit the qualifying examinations more than once to improve their score and their chances of promotion. This was the case for some of the Applicants who have sat the qualifying examination, Business Communications, more than once, which would not have been necessary had there been an expectation that all officers would be awarded the maximum points regardless of their examination performance.

[21] The Respondents contended that for any police officer in the Second Division to be eligible to appear before the PAB, he must have passed the qualifying examination, earning 50% or more. Therefore, to automatically award all eligible officers the maximum 35 points is, in effect, removing the examination as a component of promotion eligibility, which goes in direct contravention to **section 20 of the Police Service Act**. Nevertheless, even if the Applicants were to be awarded the full 35 points, they will not be promoted in this current promotional process as they are holding very low placements on the Order of Merit List.

[22] The Respondents further contended that the inclusion of a written portion in the promotion assessment is by no means new. In 2008, Sergeants were asked to complete a PAB Candidate Assessment Form which consisted of an 11-page document with 6 written questions and which asked for details pertaining to the officer's years of service, service in rank and academic qualifications. Such documents are very much consistent with global best practice in assessments of candidates for appointment or promotion.

[23] According to the Respondents, on 28 September 2020, an online briefing session was held with the Sergeants where Ms. Woodroffe-King briefed the officers on the assessment criteria and presented material that would aid them in preparing for their interview. She prepared a **Candidate Briefing Document**, which was shared at the forum, uploaded to the TTPS Online Portal and made available via email or hardcopy on request. Other documents including the **TTPS Strategic and Operational Plans** were also made available on the Portal to aid officers in their preparation. Therefore, it is not true to say or suggest that any material change was effected to the promotions process.

[24] Furthermore, officers were given an adequate opportunity to seek and gain clarity on all aspects of the promotion process. Consequently, the current process causes no harm to officers as it creates a transparent, valid, equal and fair opportunity for all officers and provides the organization the best chance at selecting and promoting the most eligible officers. The Applicants were given notice of the revised process since 28 September 2020. It is misleading and wrong to state that Departmental Order No 141 of 2020 was published after promotion examinations to the rank of Inspector had been written by the Applicants because promotion examinations are held on an ongoing basis from time to time without any restriction on the Applicants as to the number of times they sit them. Thus, there will always be an officer who sits an exam before a particular Departmental Order is issued.

### III. Law and Analysis

[25] The Privy Council in **Attorney General of Trinidad and Tobago v Ayers-Caesar**<sup>1</sup> confirmed that the test to be applied in an application for leave for judicial review is that laid down in **Sharma v Brown-Antoine and others**<sup>2</sup>. The Privy Council stated as follows:

*“(4) The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review*

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<sup>1</sup> [2019] UKPC 44

<sup>2</sup> [2007] 1 WLR 780

*having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: see R v Legal Aid Board, Ex p Hughes (1992) 5 Admin LR 623, 628; Fordham, Judicial Review Handbook 4th Ed (2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in R(N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ 1605, [2006] QB 468, para 62 in a passage applicable, mutatis mutandis, to arguability:*

*“...the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on a balance of probabilities. Thus the flexibility of the standard lies not in the adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.” [Emphasis added]*

The Privy Council then went on to say:

*“It is not enough that a case is potentially arguable: an Intended Claimant cannot plead potential arguability to “justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen”: Matalulu v Director of Public Prosecutions [2003] 4 LRC 712, 733.*

[26] **Clive Lewis, Judicial Remedies in Public Law**, 4th Edition (2009) at paragraph 9-046 notes the following:

*“The claimant must demonstrate that there is an arguable case that a ground for seeking judicial review exists. The Court of Appeal has indicated that*

*permission should be granted where a point exists which merits investigation on a full hearing with both parties represented and with all the relevant evidence and arguments on the law.”*

[27] In **Ferguson & Another v The Attorney General of Trinidad and Tobago**<sup>3</sup> Kangaloo

JA advocated that the Court ought not to use a stringent application of the aforesaid test. He stated that-

*“4. It would be a travesty if the words of their Lordships were taken to mean that the test of arguability lends itself to stringent application. To adopt such an approach would be to erode the very protection that is offered by the remedy of judicial review. The purpose of judicial review is to keep the executive in check and to prevent the citizen from arbitrary, unwarranted and unlawful executive action. Such protections are part of the wider concept of the rule of law which lies at the foundation of any democratic society. In this regard, the observations of Lord Phillips of Worth Matravers are worthy of note:*

*“The rule of law is the bedrock of a democratic society. It is the only basis upon which individuals, private corporation, public bodies and the executive can order their lives and activities ... The rule of law will not fully prevail unless the domestic law of a country permits judges to review the legitimacy of executive action. This is increasingly becoming the single most important function of the judge in the field of civil law, at least in jurisdiction.*

*5. The main purpose of the permission stage in judicial review proceedings is still to eliminate unmeritorious application brought by an applicant who is “no more than a meddlesome busybody”; an aim which is particularly beneficial in current times given the explosion of civil litigation which our justice system has witnessed. However in fulfilling its mandate as the guardians of democracy and the rule of law; concepts which can easily be seen as two sides of the same coin, the court must not lightly refuse a litigant permission to apply for judicial review. It must only be in wholly unmeritorious cases which are patently unarguable*

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<sup>3</sup> Civil Appeal No 207 of 2010

(barring issues of delay and alternative remedies) that the courts should exercise its discretion in refusing to grant leave.” [Emphasis added]

[28] The test, therefore, to be applied by the Court on an application for leave for judicial review is ***whether there is an arguable ground for judicial review that has a realistic prospect of success.***

[29] From the grounds set out in the Applicants/Intended Claimants’ Application, they have raised, inter alia, issues of legitimate expectation, unreasonableness, unfairness, breach of natural justice and ultra vires. The Court considered these grounds as against the test of arguability and with a view of determining whether each contention has a realistic prospect of success. The grounds of the Applicants/Intended Claimants’ Application for leave to apply for Judicial Review are as follows:

- (i) The decision of the CoP and/or the PAB on 15 December 2020 to award the Applicants/Intended Claimants a proportionate point for Examination in the assessment process for promotion of Sergeants to the rank of Inspector in the TTPS was unfair, unreasonable, contrary to ***Regulation 20 of the Police Service Regulations 2007*** as well as the principles of natural justice and **Section 20 of the Judicial Review Act.**
- (ii) The said decision constituted an abuse of power and is ultra vires, void and of no legal effect.
- (iii) The said decision contravened the Applicants/Intended Claimants’ fundamental right to the protection of the law as guaranteed by **section 4(b) of the Constitution of Trinidad and Tobago.**
- (iv) The Order of Merit List comprising of Sergeants for promotion to Inspector which was drawn up by the PAB on or about 15 December 2020 partly on the basis of the award to the Applicants of the aforesaid proportionate points in the 2020 assessment process for promotion to the rank of Inspector, is invalid by reason of the award of the said proportionate points.
- (v) The publication by the CoP of the aforesaid Order of Merit List in Departmental Order No. 174 of 2020 on 15 December 2020, a few hours before the CoP published

in Departmental Order No. 175 dated 16 December 2020, the promotion to the rank of Inspector of the first 91 Sergeants whose names appear on the said Order of Merit list, was unlawful.

- (vi) The conduct of the CoP in publishing the aforesaid Order of Merit List on 15 December 2020 and promoting officers on the basis of the said list on 16 December 2020, denied the Applicants the opportunity of examining the list with a view to ascertaining whether they were correctly placed thereon, and was unfair to them.

[30] In this matter, there was no cross-examination of any of the deponents of the affidavits before the Court. Nonetheless, the onus is still on the Applicants to provide strong evidence to demonstrate that the grounds upon which they have mounted their challenge have a reasonable prospect of success: see **R v Secretary of State for the Home Department ex p Swati**<sup>4</sup> where the UK Court of Appeal comprising Sir John Donaldson MR, Stephen Brown and Parker LJ held, inter alia, that “*in the absence of any evidence to suggest at least an arguable case that the immigration officer’s decision was irrational and flawed, there were no grounds for judicial review of her decision.*”

[31] The Applicants, in this Application, essentially challenge the Respondents’ decision to introduce a proportionate points system for awarding points for the Examination Component in the promotional assessment process from Sergeants to the rank of Inspectors; the publication of the Order of Merit List on 15 December 2020; and the introduction of changes to the structure of the Interview Component without due notice.

[32] The Applicants main argument is that there has been a decades-old practice where officers were awarded the full 35 points for the Examination Component whether the Sergeant had a pass at CXC or GCE or had passed the English Language examination. Consequently, by denying the Applicants the full 35 points for the Examination component, the Respondents frustrated their legitimate expectation over the settled practice of several years of receiving 35 points for the Examination component. Counsel for the Applicants, Mr. Thompson, relied on **Regulation 20 of the Police Service**

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<sup>4</sup> (1986) 1 WLR 477

**Regulations, Wendell Lucas and ors v The Commissioner of Police and The Promotion Advisory Board<sup>5</sup> and Ricardo Morris and ors v The Commissioner of Police and The Promotion Advisory Board<sup>6</sup>.**

[33] Mr. Thompson submitted that had the CoP or the PAB granted the Applicants their 35 points for the Examination, there is a high probability that they would have been placed higher on the Order of Merit List. Thus, the Applicants have been treated unfairly and have been disadvantaged. Mr. Thompson submitted that the Applicants take issue with the way in which the proportionate marking system was introduced. He contended that the First Respondent indicated that one had to pass the Business Communications Examination in order to qualify, and that the question of a proportionate mark never arose with respect to this examination.

[34] Mr. Thompson further contended that the procedure adopted to compile the Order of Merit List ought to have been introduced in a manner that is consistent with the principles of natural justice. Mr. Thompson submitted that due notice ought to have been given of the intended change; that there should have been a consultation with the officers bearing in mind their legitimate expectation to be awarded the maximum 35 points for the Examination component. Therefore, the award of proportionate points to the Applicants after the date of Departmental Order No 141 of 2020 ought to be regarded as null and void. Consequently, the placement of the candidates on the Order of Merit List is flawed, ultra vires and void. Mr. Thompson also submitted that the Order of Merit List must be published in sufficient time to enable candidates to scrutinize it and to raise concerns with respect to their placements on it. Counsel relied on **Ricardo Morris and ors v The Commissioner of Police and anor** (supra).

[35] Counsel for the Respondents, Mr. Phelps, in response, submitted that it is wrong in this case to treat the examination in English Language and the examination in Business Communications as the same examination; the two examinations have been treated

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<sup>5</sup> CV2013-00355

<sup>6</sup> CV2016-02527



differently in the Police Service, and from the evidence of the Applicants. Mr. Phelps further submitted that there was no decades-old practice supporting a legitimate expectation in connection with the Business Communications examination since it was only introduced in 2016. He contended that there is a distinction between English Language and Business Communications, which was communicated in Departmental Order No 141 of 2020 as it relates to the award of points. Nevertheless, the Applicants were aware of the proportionate point system in place for the Business Communications examination, which was expressly stated in Departmental Order No 141 of 2020.

[36] **Section 16 of the Police Service Act** provides that the Commissioner of Police, in the exercise of his powers under **section 123A(2)(a) of the Constitution**, shall take account of the recommendations of the Promotion Advisory Board for promotions in the Second Division. **Section 20 of the Police Service Act** provides for a qualifying examination to be held for promotion to the rank of Inspector. Such examinations are to be set by an Examination Board as may be appointed for that purpose by the Commissioner of Police: see **Regulation 15 of the Police Service Regulations 2007**.

[37] **Regulation 20 of the Police Service Regulations** states as follows:

*“20 (1) Subject to subregulation (2), the Promotion Advisory Board shall interview—*

*(a) an officer who has passed the qualifying examination for promotion and is recommended for promotion by the officer in charge of his Division or Branch;*

*(b) an officer who was allocated fifty or more points at the previous interview; and*

*(c) an officer who is eligible under subregulation (3).*

*(2) An officer shall not be interviewed by the Board unless he has been allocated forty or more points by the Board based on the criteria, other than the interview, listed in subregulation (5).*

*(3) Subject to subregulation (2), an officer who is allocated less than sixty points is eligible to be interviewed at the next sitting of the Board.*

(4) Every officer considered for promotion shall be rated according to the criteria specified in subregulation (5) and each officer who is allocated sixty or more points shall be placed on an Order of Merit List.

(5) The criteria mentioned in subregulation (4) shall be as follows:

	Maximum Points
Performance appraisal	40
Interview	25
Examination mark	35

(6) The Board shall submit the Order of Merit List to the Commissioner, who shall cause it to be published in a Departmental Order.”

[38] **Departmental Order No. 141 of 2020** states as follows:

**“5 Examination Mark**

5:1 Officers in the Second Division who have successfully passed the qualifying examination in English Language or who have been exempted from writing the qualifying examination in English Language shall be awarded thirty-five (35) points.

5:2 With immediate effect a Constable, Corporal or Sergeant who is successful in examination, will be awarded points that are directly proportionate to their examination marks (percentage) received.

5:3 A Sergeant, will be required to write one (1) component in the promotion examination to the rank of Inspector, namely Business Communications. The marks awarded to that officer in the examination shall be divided by the total marks of the examination and multiplied by thirty-five (35) points, which represent the maximum points for examination marks as stated in Regulation 20(5) of the Police Service Regulations, 2007, to get the points allocated to him.”

[39] The Court has examined both **Regulation 20(4) and (5) of the Police Service Regulations** and **Departmental Order No 141 of 2020**. On a literal interpretation of

**Regulation 20(5)**, it is stated that the maximum points to be awarded for Examination is 35 points; it does not stipulate that the full 35 points should be awarded for the Examination component. There is no mention of either an English Language or Business Communication examination, only a qualifying examination. However, it is the Applicants' own evidence that prior to 2016, candidates were awarded 35 points for Examination which was the English Language examination. Thereafter, in 2016, Business Communications was introduced by **Departmental Order No 78 of 2016**. Therefore, from the Applicants' own evidence, it is clear that the full 35 points was only awarded for the English Language examination. This was confirmed in **Departmental Order No 141 of 2020**. Additionally, though the pass mark for the Business Communications examination is 50 as provided for in **Departmental Order No 78 of 2016**, this does not lend any assistance in the award of the full 35 points. It therefore seems that the Applicants are suggesting that once the pass mark is obtained, the full 35 points ought to be awarded. However, this is not stated in any Departmental Order before the Court or in the **Police Service Regulations**.

[40] Furthermore, the Court agrees with Counsel for the Respondents that it cannot be said that there was a decades-old practice that the full 35 points would be awarded for the Examination component. Mr. Thompson relied on **Wendell Lucas** (supra) and **Ricardo Morris** (supra). However, the Court finds that those cases are not relevant in this matter. At the time **Lucas** was decided on 30 October 2013, no examination had been designed or held for the fulfilment of the examination component criteria for promotion. Therefore, in the absence of an examination, the Court found that the process adopted in allocating points for the examination component was flawed and unfair in all the circumstances. Boodoosingh J (as he then was) ordered that the candidates in that matter be awarded the maximum 35 points in the absence of an examination. A similar position was adopted by Dean-Armorer J (as she then was) in **Morris**. In this matter, the qualifying examination is now the Business Communications examination and there is no evidence before the Court that in the years 2016, 2017, 2018 or 2019, candidates applying for promotion to the rank of Inspector were awarded the full 35 points for the Business Communications

component. Further, at the time Lucas and Morris were decided, there was no Departmental Order 78 of 2016 or Departmental Order 141 of 2020.

[41] I have accepted that on 28 September 2020, the Applicants were aware or ought to have been aware that they would be awarded points for Examination in proportion to the marks they obtained in the Business Communication examination. The Applicants have compared the Business Communications examination to the English Language Examination. However, it is evident that these 2 examinations are different. Therefore, they ought to be treated differently. Based on the evidence before the Court, the Court finds that the maximum 35 points were awarded for the English Language examination prior to 2016. However, this was changed in 2016 when Business Communications component was introduced.

[42] The law was very clear in not specifically identifying the examination that must be written. Rather the law speaks only of a ‘qualifying examination.’ What is also clear from the lack of specificity in the law, is that this qualifying exam is not one that is set in stone, but rather can be changed as the relevant responsible authority deems fit to meet the aims of the TTPS. That is, the relevant responsible authority for the qualifying examination can amend and/or make modifications as deemed necessary.

[43] Whatever the examination may be, what is provided for in the law is that the maximum points for any qualifying examination is 35 points. The law does not state that the examination must be out of a total of 35 points or that the candidates must be awarded a total of 35 points once they pass the qualifying examination. Rather, however the qualifying examination is conducted, a final mark capped at 35 points is the maximum awardable.

[44] Candidates are also given the opportunity to re-sit the examination to increase their score, an option which some of the Applicants have utilised.

[45] I accept that the Applicants also had sufficient notice of a proportionate marking system since it is undisputed that they were briefed on the whole assessment process by Ms

Woodroffe-King on the 28 September 2020. There is no evidence from the Applicants that at any time after they were informed of the proportionate marking system, did they take any action to question, scrutinize or reject this modified marking system. It was always open to them to challenge this modified system, even in Court, after writing their qualifying examination. The Applicants, having missed that mark, and having not performed well enough to be high on the Order of Merit List warranting promotion at this time, seem now to be, as described by Kangaloo JA in **Ferguson v Attorney General**<sup>7</sup> (supra), no more than *meddlesome/disgruntled busybodies*, with an unfounded expectation premised on an unmeritorious application, rather than persons with an arguable case deserving of further resources of the Court.

[46] The Applicants have failed to satisfy this Court that they had any legitimate expectation to be awarded a total of 35 points.

[47] Accordingly, the decision to award proportionate points was not unfair or unreasonable or contrary to law or natural justice, did not constitute an abuse of power and is not ultra vires, void and of no legal effect. It follows that the Applicants' fundamental rights to the protection of the law as guaranteed by **section 4(b) of the Constitution of Trinidad and Tobago** were not contravened.

[48] Consequently, the Court is not satisfied that the Applicants have shown an arguable ground for judicial review with a reasonable prospect of success on this basis.

[49] Having regard to the above, it stands to reason that the Applicants have not shown an arguable ground for judicial review with a reasonable prospect of success on the ground that the Order of Merit List was invalid as a result of the proportionate point system for the Business Communications examination. In order to succeed on this point, they must have been successful on the ground hereinbefore traversed.

[50] It was incumbent on the Applicants to show to this Court, not that the proportionate marking system was the cause for them falling below what was required for promotion at

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<sup>7</sup> Ferguson & Ano v Attorney General Civil Appeal No. 207 of 2010

the time, but that the shift to a proportionate marking system was so unfair, unreasonable and unjustified, that it caused them not to rank higher on the List. This simply was not done.

[51] In his affidavit, Ancil Forde stated, *“There is a high probability that the names of the Applicants and I would have been higher on the OML had the proportionate point system not been implemented and the former practice of awarding all candidates 35 points for examination been adhered to.”*

[52] Certainly, the Applicants do not expect this Court to rule that in a merit-based system they must be awarded maximum marks solely on the basis of what was done in the past. For whatever reason the system was modified, it is not the Court’s role to question that. A new system was put in place by the powers-that-be granting the power to the CoP and the PAB to ensure the advancement and development of the TTPS, and unless there is evidence of unfair and unjust processes as a result of the new system, this Court will not interfere and overstep its bounds.

[53] Even if most of the Applicants were acting in the next higher office of Inspector, as stated by Ancil Forde, this does not guarantee any right or preference under the current law regarding promotions. Acting in a higher office is not one of the 3 criteria for assessment. It may be considered under, or form part of, one or more of the established criteria provided for by **Regulation 20(5)**, for example, “performance appraisal” or “interview”, but it is not a determining factor based on the law.

[54] There is a modified system and candidates must outperform one another to be in favourable ranking and be high on the Order of Merit List.

[55] This aspect of the Applicants’ Application must also fail.

[56] As it relates to the change in the Interview component of the assessment promotion process, the Court is of the view that even though the interview process was modified in 2020, the Applicants were reasonably notified of the proposed changes on 28 September 2020 by Ms. Woodroffe-King. In any event, there is no evidence before the Court that the

introduction of these changes in the interview process affected the Applicants in any way or that the Applicants were prevented from meeting the requirements on time. Consequently, the Court is not satisfied that the Applicants have shown an arguable ground for judicial review with a reasonable prospect of success on this basis.

[57] Neither **the Act** nor **the Regulations** provide for the exact process of conducting interviews. It is clear from the lack of specificity and rigidity that the decision on how best to conduct interviews was left in the hands of the PAB. What matters is, those to be subjected to any interviews are aware of the process and have reasonable notice. In this case, the Applicants not only had reasonable notice, but were also given assistance in preparing. Further, providing written answers to questions was not new and even if it was, the Applicants had ample opportunity to prepare. They were informed beforehand of the change and had reasonable time to become ready. In fact, the Applicants were briefed by Ms. Woodroffe-King who also presented material to aid them in preparing for the interview. They were given the opportunity to ask questions. A **Candidate Briefing Document** was also prepared for the Applicants.

[58] The Applicants have once again failed to show how a change in the interview process was the cause of their failure to be higher on the Order of Merit List in a way that makes the process unfair.

[59] The Applicants contended that the decades-old practice of treating the Order of Merit List as valid until it was exhausted, has created in them a legitimate expectation that the life of the Order of Merit List would not be capped at two years and the decision of the CoP and/or the PAB to cap it is unfair and has violated and frustrated their said expectation.

[60] The Applicants did not address this issue in any detail so as to convince this Court that capping was unfair. In any event, there was found to be no legitimate expectation, therefore this issue must also fail.

[61] As stated by Ms. Woodroffe-King in her affidavit, the purpose of the promotion process is to ensure that the TTPS is staffed and functional at the critical higher ranks so that it

can perform its duties to the public. Capping would ensure that the Order of Merit List is frequently updated and takes into account changes in circumstances in both the TTPS and the potential candidates. There cannot be a legitimate expectation that one would be permanently in a favourable rank simply because of a past process. What is necessary is that any change is reasonable and those to be affected are given reasonable notice of such change. I am satisfied that this was done.

[62] As it relates to the publication of the Order of Merit List on 15 December 2020 in Departmental Order No 174 of 2020 and Departmental Order No 175 of 2020 on 16 December 2020, the Court is of the view that the Order of Merit List ought to have been published within a reasonable time prior to the promotion list. As held in **Ricardo Morris** (*supra*), this would have enabled the Applicants to become aware of their placement on the Order of Merit List and to make enquiries as to why their placement may have been erroneous and be changed. Such adequate notice would be in keeping with the general rules as to fairness. However, as stated above, there is no evidence that there was a legitimate expectation on the part of the Applicants that they would be awarded the full 35 points for the Examination component. Therefore, their placement on the Order of Merit List cannot be said to have been erroneous. In any event, Ms Woodroffe-King has deposed that even if the Applicants were awarded the full 35 points, their position would not have significantly improved since they are low down on the Order of Merit List. Even if the list was published at an earlier time, the Applicants have failed to show how this would have put them in a more favourable position. Consequently, the Court is not satisfied that the Applicants have shown an arguable ground for judicial review with a reasonable prospect of success on this basis.

[63] The Applicants/Intended Claimants must therefore fail on all issues.

#### **IV. Disposition**

[64] Given the evidence, analyses and findings above, the Order of the Court is as follows:



## **ORDER**

- 1. The Applicants'/Intended Claimants' Application filed on the 21 December 2020 seeking leave to apply for judicial review be and is hereby dismissed.**
- 2. Consequently, the interim injunctive order of Lambert-Peterson J made on 21 December 2020 whereby the Commissioner of Police was restrained from making any further promotions on the basis of the existing Order of Merit List for promotion to the rank of Inspector and which said injunctive order was continued by this Court on 13 January 2021 until further order be and is hereby discharged.**
- 3. The Applicants/Intended Claimants shall pay to the First and Second Respondents/Intended Defendants the costs of the Application to be assessed pursuant to Part 56.14(4) and (5) of the CPR 1998, in default of agreement.**
- 4. In the event that there is no agreement on the quantum of costs, the Respondents/Intended Defendants to file their Statement of Costs on or before 7 September 2021.**
- 5. The Applicants/ Intended Claimants to file a Response, if any, on or before 28 September 2021.**
- 6. The Court shall carry out the assessment of costs in Chambers without a hearing.**

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**Robin N. Mohammed**  
**Judge**