

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**Civil Appeal No. 211 of 2007**

**BETWEEN**

**GOPICHAND GANGA, RODERICK ROACH,  
JOSEPH NATHANIEL, DERRICK GEORGE,  
BICKRAM BALDEO, SHAHEED MOHAMMED  
and KRISHNA MAHARAJ**

**APPELLANTS**

**AND**

**THE COMMISSIONER OF POLICE**

**FIRST RESPONDENT**

**AND**

**THE POLICE SERVICE COMMISSION**

**SECOND RESPONDENT**

**Panel: R Hamel-Smith, JA  
M. Warner, JA  
W. Kangaloo, JA**

**Appearances:**

**Mr. A. Ramlogan Esq. for the Appellants  
Mr. R.Martineau, S.C. for the Respondents**

**Date: January 30, 2009**

## **JUDGMENT**

### **R. Hamel-Smith, JA**

1 This appeal is about promotion of police officers. The appellants, all members of the First Division of the Police Service, were by passed for promotion to the rank of Senior Superintendent. They applied for judicial review of the decision of the Commissioner of Police who had not recommended them for promotion. They sought a declaration that (i) Regulation 15 of the Police Service Commission (Amendment) Regulations 1995 (“the Regulations”) did not apply to officers of the First Division; (ii) the use of the regulation by the Commissioner was illegal, unfair and *ultra vires* regulation 15 and (iii) an order of certiorari quashing the Commissioner’s decision to apply that regulation to the promotion exercise of First Division officers.

2 The judge (Rajnauth-Lee J) dismissed the application, finding that the procedure adopted was not *ultra vires*, illegal or unfair and that the method employed to assess them was not irrational or unfair. The appeal has been limited to the resolution of these two issues. There was no allegation that the method used was illegal, with the result that the judge was not required to consider that issue and did not.

3 Having heard both sides and the several skeleton arguments filed by them, I am in agreement with the judge and would dismiss the appeal for the reasons set out below.

### ***The Regulations***

4 The Police Service Commission (“the Commission”) is the body charged with the function of promoting officers in the Police Service. Its power is derived from the Constitution (s.123) and it is guided by the Regulations. The Regulations make an apparent distinction between First and Second Division officers. When officers in the Second Division are being considered for promotion, the Commission cannot act unless the Commissioner first indicates to them who he is prepared to recommend for the post. There is no such requirement in the case of First Division officers.

Regulation 15 provides as follows:

- (1) The Commissioner shall, after taking into account the criteria specified in Regulation 20, submit to the Commission a list of 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.

- (2) The Commissioner shall also advise those officers referred to in subsection (1) (b) of their omission from the list for promotion, together with the reasons for such omission.
- (3) An officer who is advised under sub-regulation (2) may make representations on his own behalf to the Commission within fourteen days of being so advised and the Commission may invite him for interview on the basis of his representations.
- (4) The Commission shall advise those officers making representations under this regulation of the outcome of their representations;
- (5) The Commission may, after considering the representations made, endorse, or otherwise, the recommendations of the Commissioner when promoting an officer.

5 In making his recommendations, the Commissioner is required to consider the criteria in Regulation 20 in respect of each officer eligible for promotion. The purpose, or one of the purposes, of the criteria is to evaluate the merit, ability and experience of each officer. When he has completed the evaluation exercise he is required to submit to the Commission a list of the officers he is prepared to recommend and a list of those officers he is not prepared to recommend but who have more experience or longer service than those recommended. Those in the second list must be informed and invited to submit representations to the Commission if they so wish. In that way, any officer who considers that he may not have been fairly assessed can ask the Commission to consider what he has to say on the issue.

Regulation 20 provides as follows:

- (1) When considering officers for promotion, the Commission shall take into account the experience, the merit and ability, the educational qualifications and the relative efficiency of such officers.
- (2) In the performance of its functions under sub-regulation (1), the Commission shall in respect of each police officer take into account:
  - (a) his general fitness;
  - (b) any special qualification that he possesses;
  - (c) any special courses of training that he may have undergone, whether at the expense of Government or otherwise;
  - (d) the evaluation of his overall performance as reflected in his performance appraisal reports;
  - (e) any letters of commendation or special reports in respect of any special work done by him;
  - (f) the duties of which he has had knowledge;
  - (g) any specific recommendation of the Commissioner for filling the particular office; any previous employment of his in the Service or otherwise;

- (h) any special reports for which the Commission may call;
- (i) his devotion to duty;
- (j) the date of his entry into the Service;
- (k) the date of his appointment in his present office.”

6 There is a certain duality in the application of Regulation 20. The Commissioner is required to take the criteria in it into account when making his recommendations to the Commission in respect of Second Division officers and the Commission must repeat the exercise before making a final decision on promotion. In both instances however, the regulation does not make any provision as to what weight is to be attached to each factor. That is left to the discretion of the Commissioner and the Commission.

7 As regards promotion in the First Division there is no statutory requirement for the Commissioner to make recommendations before the Commission exercises its power of promotion. Accordingly, the statutory duty to consider the criteria in regulation 20 is for the Commission alone. In the instant appeal, in spite of the absence of any statutory requirement, the Commission requested the Commissioner to make recommendations to it. To understand the reason behind the request it is necessary to delve into a bit of history.

***The history behind the promotion exercise.***

8 According to the Commissioner (and there is no real challenge to his narrative), in the past the evaluation exercise in regulation 20 in respect of all officers was not properly structured and led to unfairness in the promotion exercise. That led to general dissatisfaction in the Service, particularly with the manner in which performance appraisals were conducted for the purposes of promotion.

9 The Commissioner explained that it was customary to use a standard performance appraisal form that merely indicated whether an officer's performance was outstanding; very good; good; fair or poor. Whenever there was a need to fill vacancies, therefore, the practice generally adopted was to mark the overall performance of an officer as being outstanding unless there was some particular disciplinary or other charge pending against him. If there was nothing pending, he was recommended for promotion. And, since there was no basis for distinguishing one officer from another, promotion was in effect based solely on seniority, which was one factor of many which had to be considered under Regulation 20. This was considered a rather unfair method of dealing with promotion.

10 In order to make the procedure more transparent and comprehensive and allow officers who excelled in the performance of their duties to be rewarded by being promoted on that basis, a decision was taken to introduce a policy or scheme that would, hopefully, guide the Commissioner and the Commission in their respective assessment of the criteria in regulation 20. A Committee was set up comprising the Commissioner, members of the executive of the Police Service, a representative of the Commission and representatives of the Police Social and Welfare Association and after lengthy

deliberations, a *points system* was introduced, based on the criteria in regulation 20 for the evaluation of officers for promotion.

11 Care was taken to ensure that the system was guided by the criteria as matters to be taken into account. It was divided into categories and points were to be awarded for each category. An example would be under the category 'Qualifications'. One point would be awarded for an officer holding 'O' level pass; two for one 'A' level pass; three for two 'A' level passes and so on. There would be a maximum amount of points in each category.

12 The categories in relation to the respective sub-regulation were as follows:

- (i) Academic Qualifications – 20(2) (b) and (c);
- (ii) Performance Appraisal – 20(2)(d) (f) & (j);
- (iii) General Fitness – 20(2)(a);
- (iv) Discipline – 20(2)(i);
- (v) Seniority comprising Overall Service- (2) (h)&(k);
- (w) Service in rank – (2) (l);
- (vi) Commendations (2) (e); and
- (vii) Commissioner's Award (2)(g).

### ***The introduction of the points system***

13 The system was introduced by Departmental Order No.188 of 2004 dated July 5, 2004 and later revised by several other Departmental Orders as the *core criterion* for the assessment of all qualified officers. The expectation was that this system would correct the old practice and ensure that all the criteria in Regulation 20 were fully considered. The Orders made it plain that the system applied to all officers in the Service, both in the First and Second Divisions.

14 The method of allocating points was as follows:

#### **(a) Academic Qualifications**

In the case of Academic Qualification, candidates could only earn points in one of the under-mentioned categories:

<b>Maximum Points -</b>	<b>05</b>
(i) Degrees	05
(ii) Certificates/Diplomas/Associate Degrees	04
(iii) Two Advanced Level Passes and above	03
(iv) One Advanced Level Pass	02
(v) Five O' Level Passes	01

With respect to (i) and (ii) above, Degrees etc. had to be obtained from a recognized Institution of higher learning.

**(b) Performance Appraisal**

In scoring points with respect to Performance Appraisal, the under-mentioned format applied. The average score would be calculated using the candidate's performance appraisal for the last three (3) years:

<b>Maximum Points</b>	-	<b>30</b>
(a) Outstanding		30
(b) Very Good		25
(c) Good		20

**(c) General Fitness**

General Fitness points would be awarded based on the Police Officer's Sick Leave Record for the year under review and the two previous years in the following manner:

<b>Maximum Points</b>		<b>20</b>
(a) No sick leave in the past 3 years		20
(b) No extended sick leave		15
(c) Extended sick leave up to 7 days		06
(d) Extended sick leave 8 to 30 days		04
(e) Extended sick leave 1 to 3 months		02
(f) Extended sick leave 3 months and above		00

**(d) Discipline**

The Police Officer's conduct for the past five years would be reviewed and points awarded as follows:

<b>Maximum Points</b>		<b>15</b>
(i) No Conviction within last five (5) years		15
(ii) One (1) Conviction within last five (5) years		08
(iii) Two (2) Conviction within last five (5) years		06
(iv) Three (3) Conviction within last five (5) years		04
(v) Four (4) Convictions and more		02

**(e) Seniority**

Points would be awarded for Seniority, both for overall service and for service in the rank as indicated:

**(f) Overall Service**

<b>Maximum Points</b>	<b>05</b>
(a) 21 years and above	05
(b) 16 to 20 years	04
(c) 11 to 15 years	03
(d) 6 to 10 years	02
(e) 01 to 05 years	00

**(g) Service in Rank**

(a) 5 years and above	05
(b) 4 years	04
(c) 3 years	03
(d) 2 years	02
(e) 1 year	00

The maximum points for seniority was ten (10) (5 for overall service and 5 for service in rank). In the case of Constables, points would be awarded as shown hereunder

<b>Constable</b>	<b>10</b>
(a) 21 years and above	10
(b) 16 to 20 years	09
(c) 11 to 15 years	08
(d) 06 to 10 years	07
(e) 01 to 05 years	06

**(h) Commendation**

An award of five (5) points for commendation(s) received within the last three (3) years.

<b>Maximum Points</b>	<b>05</b>
Five (5) or more Commendations	05
Four (4) Commendations	04
Three (3) Commendations	03
Two (2) Commendations	02
One (1) Commendation	01

**(i) Commissioner's Award**

The Commissioner of Police would consider the recommended list and award points in his own judgment, (not exceeding 5 points) to candidates as he deems fit.

15 Since the criteria would be evaluated by the scoring of points in respect of each category, it meant that either the Commissioner or the Commission could perform the exercise. The results would be the same.

### ***The request for recommendations***

16 It was in these circumstances that the Commission requested the Commissioner to make recommendations for the promotion of officers in the First Division for the post of Senior Superintendent. As earlier indicated, the regulations did not call for such recommendations but the Commissioner responded to the Commission's request. He applied the points system to the several criteria in regulation 20 in respect of each officer and made his recommendations based on those with the highest overall scores. Since it was a matter for his discretion, it was open to him to use that method.

17 According to the Commissioner, when he drew up his list of officers he was prepared to recommend, he recognized that the officers who were by-passed did not have an equivalent right to make representations to the Commission as their counter parts in the Second Division had. He accordingly informed them that they had been by-passed, stated the reasons why and invited them to make representations to the Commission. As he put it, he thought that it was the fair thing to do.

### ***The application for judicial review***

18 As it turned out, the appellants declined the invitation because they thought he had acted *ultra vires* the regulation. Not having had a response to their several inquiries (which is unfortunate to say the least) the appellants sought judicial review of the Commissioner's decision to act under regulation 15 and to apply the points system in making his recommendations. In the end, the parties invited the Court to decide whether the Commissioner's use of the procedure in regulation 15 was *ultra vires*, illegal or unfair and whether the adoption of the points system was an irrational application of the regulations.

19 The challenge is to what the Commissioner did in the course of the promotion exercise involving the appellants. The appellants intervened at a very early stage of the exercise viz., when they were informed that they had been by-passed for promotion, and as a result the application focused only on what the Commissioner had done. Accordingly, the dispute and, as a result, the evidence filed by the respondents focused on that aspect only. The challenge did not extend to anything the Commission did after receipt of the recommendations.

20 I highlight the shortcoming because one of the appellants' submissions was that there was no evidence to demonstrate that the Commission had acted independently of the Commissioner's recommendations in coming to a final decision on promotion. I shall deal with that aspect in due course but it seems to me that to require such evidence there first had to be a challenge to the Commission's decision. At the case management stage of the proceedings the appellants sought limited discovery but, according to the judge,

that application was never pursued. It is unfortunate, because it may have led to further enquiry, climaxing in a possible challenge to the Commission's role. This however, was not to be. The appellants had also made an application to cross-examine but that request was denied and there is no appeal against that decision.

### ***The judge's reasons***

21 The judge, in rejecting the application, found that the Commissioner could make use of the procedure in regulation 15 in order to deal with the Commission's request. There was, in her view, nothing unfair or illegal about adopting the procedure in regulation 15. It added to the fairness and transparency of the promotion exercise by giving the appellants an opportunity to make representations to the Commission, an opportunity they would not necessarily have had before.

22 As regards the irrationality of the points system, the judge considered that the key issue was whether the Commission allowed for *flexibility*. She was satisfied that reasons were given to those not recommended and they were granted the facility to make representations to the Commission. Accordingly, there was no rigidity in the system.

23 The judge further held that the Commissioner's *recommendations* did not determine any rights of the appellants and in those circumstances they remained '*recommendations*' and nothing else. As long as the Commission was not bound by the recommendations and the ultimate decision on promotion rested solely with the Commission, she found that there could be no unfairness in them.

24 The judge also considered that the weight attributed to the recommendations by the Commission would be a matter for the Commission alone. She found that there was no evidence to suggest that the Commission was bound by the recommendations. Finally, the judge did not think it necessary to examine each category in detail, having held that the appellants had received maximum points in the majority of the categories and had been given the opportunity to make representations to the Commission to raise any concerns they may have had in respect of any of the others.

### ***The case for the appellants***

25 Turning to the appellants' case, it was a two-pronged attack; firstly, they relied principally on a strict application of the regulations, particularly regulation 15. It simply did not apply to the First Division. In the result, the Commissioner was not entitled to make recommendations to the Commission or to invite the appellants to make representations to the Commission and had therefore acted *ultra vires* the regulation. On this score, counsel for the appellants relented somewhat and conceded that it may have been possible for the Commissioner to make recommendations (at the request of the Commission) but those recommendations had to be confined to performance only since the Commissioner's remit was limited to staff reports. It was the task of the Commission, he submitted, to gather all the other information in order to fully consider the criteria in regulation 20 before making a final decision. In other words, the Commission could

consider recommendations limited to performance only, provided that it did an independent evaluation of the criteria in regulation 20 in forming its final decision.

26 Counsel then extended the submission by contending that since the Commission was the sole body responsible for assessing the criteria in regulation 20, by requesting the Commissioner to make recommendations based on those same criteria, not only was the Commission in derogation of its duty but the recommendations would have had a disproportionate influence on the exercise of its free discretion. In the result, the recommendations would have effectively determined the outcome of the promotion exercise.

27 Counsel reasoned that in the absence of evidence to suggest that the Commission had reviewed the scores or had done an independent assessment of them, it could be strongly inferred that the Commissioner's assessment of the criteria under Regulation 20 (by the application of the points system) enabled him to have this disproportionate influence. It was unlikely, he submitted, that the Commission intended to do an independent assessment because if it did, then it would have rendered irrelevant or unnecessary the need for the Commissioner's recommendations that were based on the same points system.

28 Secondly, the challenge to the points system was that it did not apply to the appellants and, in any event, it was irrational and unfair. Counsel conceded that the system reflected the categories in regulation 20 but contended that it was unfair because time periods were placed on some of the categories, e.g. commendations, and so did not allow for the individual circumstances of each officer to be fully considered.

29 Counsel did concede that it was within the powers of the respondents to devise a scheme or policy for the evaluation of the criteria in regulation 20 in order *to assess the abilities of the candidates put forward for promotion*. Such a scheme could involve the award of points but it had to be a flexible one and not binding on the Commission in the sense that it in no way interfered with the free exercise of the Commission's discretion.

### ***The case for the respondents***

30 The respondents contended that the appellants' application was misconceived because the Commissioner's recommendations did not decide any rights of the appellants. As long as the Commission did not *rubber-stamp* the recommendations and carried out its own assessment of the criteria it retained the free exercise of its own discretion. It was free to attach what weight it considered necessary to the recommendations and the scores in each category in regulation 20. The Commissioner had based his recommendations on the highest scores over all but that did not necessarily mean that the Commission would do the same.

31 As regards the adoption of a policy by way of the points system, a matter conceded by the appellants, the respondents contended that since the Commission had to deal with several similar applications from time to time, it was permissible for it to adopt

such a policy that effectively decided *normal* cases, provided that the policy was itself proper and that the decision-maker retained a willingness to consider each case on its merits.

32 The points system reflected the categories in regulation 20 (as the appellants conceded) and the decision to invite the appellants to make representations to the Commission ensured that each individual case would be considered. The respondents argued that the appellants had made general observations of what they considered *flaws* in the points system, none of which however related to any of them individually. In any event, any genuine complaint could be dealt with by way of representations, an avenue not afforded as of right under the regulations. The invitation to make representations therefore added to the fairness of the procedure.

### ***The points system***

33 It is more convenient at this stage to determine whether the points system was an irrational application of the regulations because if it is not, then the other issue may not be that difficult to resolve. It cannot be denied that where a public authority such as the Commission has to deal with a multitude of applications of a similar nature, in this case the promotion of a number of officers from time to time based on identical criteria, it is convenient to develop a policy or scheme to deal with them.

34 Lord Reid in *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 at 625, emphasised that:

*“... a Ministry or large authority may have had to deal with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided that the authority is always willing to listen to anyone with something new to say - of course, I do not mean to say that there need be any oral hearing.”*

35 Counsel for the appellants therefore was correct to concede that the Commission could implement the points system to deal with the several applications for promotion. He also conceded that the points system reflected the categories in regulation 20. What he took issue with was the fact that time constraints were placed on some of the categories e.g. commendations were limited to three years. This had the negative effect of not painting a full picture of the officer in question. The other line of objection was that the recommendations of the Commissioner would limit the breadth of the Commission's discretion because there was no evidence to suggest that the Commission would do an independent assessment of the scores attained from the application of the points system but would simply adopt the recommendations.

36 As to the first issue that there are several flaws in the points system, these have been identified by the appellants but do not specifically affect any of the appellants. There are but general observations or merely attempts to show that the criteria have been

limited in some way. I would think that in any system it is going to be difficult if not impractical to eliminate every single flaw or complaint. Each person is going to have a different point of view. This is where the requirement of fairness and reasonableness comes into play, coupled with a measure of flexibility in the sense of a willingness to listen to another view.

37 The respondents have submitted that the points system is not cast in stone, so to speak, but simply a basis on which a proper assessment of each criterion can be evaluated. This anticipates that there is going to be an expression of differing views from time to time and the solution is to provide some means of having those views openly expressed and dealt with. By extending the right to the appellants to make representations to the Commission, there is opportunity to deal with issues such as the time constraints and the like. As long as the Commission is willing to listen to anything new it demonstrates that the system is a flexible one and not irrational. This built in flexibility should have the effect of taking the sting out of the appellants' complaint.

38 What in effect the respondents have accomplished is a formula to evaluate the criteria in regulation 20. Regulation 20 is itself a rigid stipulation of the matters to be considered because it fails to direct the Commission as to the weight to be attached to each criterion. That is a matter left to the Commission and to the Commissioner (when acting under regulation 15(1)). The points system is therefore a mechanism for analyzing the criteria in Regulation 20 without identifying the weight to be attached to them.

39 As mentioned earlier, the Commissioner based his recommendations on the highest scores received but it does not necessarily follow that the Commission will do the same. It is an assumption on the part of the appellants that because the Commissioner made recommendations it inexorably meant that the Commission had abandoned its statutory duty to assess the criteria in regulation 20 and had accepted the recommendations without more. That assumption was not open to them without a challenge to the Commission's actions. And without such a challenge there was no evidential burden placed on the Commission.

40 It seems that the resolution of the second aspect of the criticism of the appellants (the lack of discretion of the Commission) takes care of the criticism of the first (the flaws in the points system). Counsel for the respondents has in my view correctly submitted that the recommendations did not decide the rights of any officer being considered for promotion and the Commission was free to attach whatever weight it deemed necessary to any of the criteria that had been assessed by the points system in making its final decision. From this submission I understand the position to be that the Commissioner (at the request of the Commission) had exercised his discretion in making his recommendations, having taken into account the criteria in regulation 20, but this was no cause to conclude that the Commission had or would relinquish its right to exercise its own discretion. It was free to attach whatever weight it deemed fit to the recommendations and to the individual scores that reflected each criterion in regulation 20 and did not necessarily have to arrive at a final decision based on the highest overall scores.

41 It may be that the appellants have found themselves in a bit of a dilemma by having limited their challenge to the decision of the Commissioner. Had there been good cause to extend it to include the Commission, the Commission would have been required to demonstrate that it had acted independently of the recommendations. The officers recommended by the Commissioner were the ones who were eventually promoted, leaving the impression that the Commission might have simply adopted the recommendations. Given the relief sought by the appellants, however, there was no burden on the Commission to go that far. The burden was on the Commissioner to justify what he had done. He had been accused of acting *ultra vires* the regulations and applying a points system that was irrational and unfair and that was the case the respondents had to meet.

42 Had the appellants alleged that the Commission had not exercised its own discretion but had simply adopted the recommendations and had sought relief against that decision it may have been otherwise. No such relief was sought however, and the appellants cannot now complain that there the Commission supplied no evidence to show that it had acted independently of the recommendations. The respondents nonetheless relied on their submissions that the Commission had acted independently of the recommendations and had taken the criteria in regulation 20 into account by means of the points system.

43 In *Findlay v Secretary of State for the Home Department* [1984] 3 All ER 801, Brown-Wilkinson LJ recognised that in dealing with a subject matter as complex as the early release of prisoners sentenced to a substantial term of imprisonment the Secretary of State could lawfully formulate a policy to guide him in the exercise of the discretion conferred on him by the statute. He however, drew a distinction between a lawful policy in which great weight was to be given to one factor (e.g. the gravity of the offence) without excluding consideration of other relevant factors (e.g. prison, record, home circumstances, public risk) and an unlawful policy which would in certain classes of cases exclude a full consideration of the merits of the particular case.

44 In his view (with which the House of Lords did not agree) the policy as regards fixed sentences and life sentences was too rigid a policy because it excluded consideration of all circumstances other than the nature of the offence unless there were exceptional circumstances or compelling reasons for making an exception. The fact that the House disagreed with his conclusion is not relevant here. His distinction between a lawful policy and an unlawful one is more material in that it demonstrates that a public authority may give great weight to one factor as long as it does not exclude consideration to the other factors that must also be considered.

45 The appellants have conceded that the Commission could formulate a policy to guide it in the exercise of its discretion and it cannot be said that the policy adopted in any way excluded consideration of any of the criteria in regulation 20. The points system was such a policy and apart from the '*flaws*' complained of by the appellants, it fulfills the statutory requirement that each officer is entitled to have his promotional prospects

considered by the Commission. The further right to make representations takes into account the inherent probability of flaws being uncovered and that the Commission is prepared to listen.

46 As to the legitimacy of adopting a policy in the exercise of an administrative discretion Bankes LJ in *R v Port of London Authority, ex parte Kynoch Ltd* [1919] 1KB 176, 184, stated:

*“There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him that what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case. I think counsel for the applicants would admit that, if the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand, there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two cases. “*

47 In the instant appeal it is the case of the respondents that the appellants were aware of the policy (by the Departmental Orders) and the Commission, in addition to taking into account the several criteria in regulation 20 (by applying the points system) was willing to hear the appellants by way of representations.

#### ***Regulation 15 – ultra vires or unfair***

48 Turning now to the first issue that this Court has to decide, it would follow that if the Commission were entitled to adopt a policy to deal with the criteria in regulation 20 (which included requesting recommendations of the Commissioner) there could be nothing objectionable in the Commissioner adopting the procedure in regulation 15 (2) & (3) to inform the appellants of his decision and to invite them to make representations to the Commission. The points system was relatively new to both the Commission and the appellants and teething problems were bound to arise. By inviting representations the Commission recognised that in the course of its decision-making some material or factor of potential significance to the decision could arise and fairness demanded that the party affected should be afforded an opportunity to deal with it. By adopting the procedure in regulation 15 it demonstrated that the Commission was willing to listen to the appellants. There is therefore nothing unfair or illegal in adopting that course. As the judge noted, it added fairness to the process.

49 Before concluding, there is one concern that I must express. It is not clear whether the Commissioner informed officers in the First Division prior to this particular promotion exercise that the Commission would be adopting a similar procedure to that prescribed for Second Division officers in regulation 15. In those circumstances and given the express words used by the Commissioner in his letter to the appellants that he

was acting *in accordance with regulation 15*, it was only reasonable for the appellants at the material time to conclude that he may have been acting *ultra vires* the regulation. This undoubtedly led them to decline the invitation to make representations to the Commission. Had there been a response from the respondents that put the entire affair in its proper perspective, one may never know whether the appellants would have pursued this course.

50 My concern however is not directed at the propriety of the action taken by the appellants but to the fact that through no real fault of their own the Commission did not have the benefit of their representations. It is only fair and just therefore, given the circumstances, that at this stage the appellants should be permitted to make representations (if they so wish) for the Commission's further consideration. This would be in keeping with the undertaking given that seven vacancies were reserved pending the outcome of these proceedings.

51 Save for that reservation, I would agree with the judge that the appellants failed on both issues and I would dismiss the appeal with costs to be assessed at two thirds of the costs awarded below and paid by the appellants to the respondents.

R. Hamel-Smith  
Justice of Appeal.

I have read the judgment of Hamel-Smith JA and I agree that the appeal should be dismissed with costs.

M Warner  
Justice of Appeal

I have read the judgment of Hamel-Smith JA and I too agree that the appeal should be dismissed with costs.

W. Kangaloo  
Justice of Appeal

