THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL No. 112 OF 2009

BETWEEN

HARINATH RAMOUTAR

APPELLANT

AND

COMMISSIONER OF PRISONS

AND

PUBLIC SERVICE COMMISSION

RESPONDENTS

APPEARANCES: Mr. A. Ramlogan for the Appellant
Mr. R. Martineau, S.C, Mrs. T. Gibbons-Glen and
Ms. M. Davis for the Respondents

PANEL: W. Kangaloo, J.A.
A. Mendonça, J.A.
P. Jamadar, J.A.

DATE OF DELIVERY: 28th JUNE, 2010

I agree with the judgment of Mendonca J.A. and have nothing to add.

W. Kangaloo,
Justice of Appeal

I too agree.

P. Jamadar,
Justice of Appeal

JUDGMENT

Delivered by A. Mendonça, J.A.

1. This is a procedural appeal from the Judge's order refusing leave to the Appellant to make a claim for judicial review of the decision of the Public Service Commission (the Commission) to pass him over for an appointment as acting Chief Prisons Welfare Officer. There are two (2) issues raised in this appeal. First, the Appellant contends that the Judge erred in law in refusing leave to claim for judicial review. The correctness of that submission is a question of law and turns on the correct interpretation of regulation 26 of the Public Service Commission Regulations (the Regulations). The second issue is the question of costs. The Appellant argues that the Judge wrongly exercised her discretion when she ordered that he pay the costs of the Respondents. The resolution of this issue depends in large measure on the outcome of the appeal.

2. The relevant factual background can be briefly summarized. The Appellant was at all material times a prison officer in the prison service. In 2007 he occupied the substantive post of Prison Welfare Officer II. The next higher office was that of Chief Prisons Welfare Officer. In July 2007, Mr. Husbands, the holder of that office, was seconded to the Penal Reform and Transformation Unit for a period of three years with effect from July 9th, 2007. As a consequence Mr. Carl Mattis was appointed to act as Chief Prisons Welfare Officer. In October 2007 Mr. Mattis went on pre-retirement leave. It therefore became necessary for the Commission to appoint another to act in the office. It is not in dispute that when Mr. Mattis proceeded on pre-retirement leave, the Appellant was the next most senior Prisons Welfare Officer II being the rank immediately below that of Chief Prisons Welfare Officer.

3. Under Regulation 177 of the Regulations, the Commissioner of Prisons (the Commissioner) is required to submit to the Commission recommendations for acting appointment. He is required by regulation 178 to state the reasons why any prison officers are passed over. The Commissioner did not recommend the Appellant for the position of Chief Prisons Welfare Officer and by letter dated October 25th, 2007 the Commissioner wrote to the Appellant informing him that he was unable to recommend him to the position of acting position on the ground that he did not have a bachelors' degree in social work or equivalent from a recognized institution. The letter stated in part:

> "I am however unable to recommend you for the position of acting Chief Prisons Welfare Officer. As you are aware, the Job Specification and Description requires the incumbent to possess a Bachelors' Degree in Social Work from a recognized institution or equivalent….
>
> In view of the fact that you do not possess this imperative prequisite, it renders you unsuitable for favourable consideration."

4. It is not in dispute that the Job Specification and Description relating to the office of Chief Prisons Welfare Officer required the person appointed to have, inter alia, a bachelors' degree in social work or equivalent from a recognized institution. It is also not in dispute that the Job Specification and Description contained the requirements as established by the employer, namely the State or Government of the Republic of Trinidad and Tobago.

5. Shortly after receipt of the Commissioner's letter, the attorney-at-law for the Appellant wrote to the Commissioner on November 13th, 2007 making representations on his behalf. The attorney-at-law stated that acting appointments are governed by regulation 26 of the Regulations. This regulation provided that as a general rule the "next most senior officer in line should be appointed to act." The attorney indicated that:

> "Whilst my client does not possess a degree in Social Work, he is the most senior and experienced Prison Welfare Officer II and as such he possesses the necessary equivalent combination of training and experience."

The letter threatened legal proceedings if a response was not received by November 23rd, 2007.

6. The Commission however did not respond to the letter and in December 2007 the Appellant's attorney-at-law again wrote to the Commission calling for a response within thirty-six (36) hours. The Commission again did not respond and on January 23rd, 2008 the Appellant applied for leave to make a claim for judicial review.

7. In the leave application as originally filed, the Appellant named the Commissioner as proposed defendant and the Commission as an interested party and sought to challenge the decisions of the Commissioner and Commission to by-pass him for the appointment as acting Chief Prisons Welfare Officer. The application for judicial review was however subsequently amended to remove the Commissioner as a party to the proceedings. The proposed judicial review claim then sought to challenge the decision of the Commission to pass over the Appellant for an appointment as the acting Chief Prisons Welfare Officer. Included among the relief sought were the following two (2) declarations:

> 1) A declaration that the Commission acted illegally in by-passing the Appellant for the acting appointment in the office of Chief Prisons Welfare Officer because it failed to consider and or genuinely and or fairly consider whether the appellant was qualified to be considered for this acting appointment because he possessed the necessary equivalent combination of training and experience.
>
> 2) A declaration that the Appellant was eligible to be considered for the acting appointment in the office of Chief Prisons Welfare Officer.

The Appellant also sought other orders and declarations which apart from an order as to costs are not important to this appeal.

8. When the application for leave to apply for judicial review came before the Trial Judge she elected to treat the matter as an inter partes application and gave directions for the service of the application and the filing of written submissions with which the parties complied.

9. The Commission also filed an affidavit sworn by Gloria Edwards-Joseph, the Director of Personnel Administration, which was used in the leave application. Ms. Edwards-Joseph stated, inter alia, that when Mr. Mattis, who was appointed to act as Chief Prisons Welfare

Officer, proceeded on pre-retirement leave the Appellant was the most senior officer but he did not possess "the necessary educational skill or equivalent and specialized techniques to make him eligible for acting in the office of Chief Prisons Welfare Officer." She further stated:

> "He did not possess a Bachelors' Degree in Social Work from a recognized institution or equivalent. In fact the [Appellant] did not possess any Degree or equivalent professional qualification from any recognized institution."

10. Ms. Edwards-Joseph acknowledged that the Appellant was not recommended by the Commissioner. The Commissioner in fact recommended Mr. Earl Charles who possessed the appropriate academic qualifications. He was the holder of, among other qualifications, a Bachelor of Science Degree in Social Work from the University of the West Indies.

11. Ms. Edwards-Joseph further deposed that on January 22nd, 2008 the Commission was asked to consider the Commissioner's recommendation of Mr. Charles to act as well as the representations made by attorney-at-law for the Appellant. The Commission duly considered the recommendation of the Commissioner and the representations of the Appellant's attorney and appointed Mr. Charles to act as Chief Prisons Welfare Officer. As for the reason for not appointing the Appellant, Ms. Edwards-Joseph stated:

> "The [Appellant] does not possess a Bachelors' Degree in Social Work from a recognized institution or equivalent as required by the Job Specification and Description and so is not eligible for appointment to act in the office of Chief Prisons Welfare Officer."

12. The Judge in her judgment focused on regulation 26 of the Regulations. This regulation is as follows:

> "26. (1) Where an acting appointment falls to be made otherwise than as a prelude to a substantive appointment, the officer appointed shall -
>
> (a) as a general rule be the senior officer in the Ministry or Department eligible for such acting appointment;

(b) assume and discharge the duties and responsibilities of the office to which he is appointed to act.

(2) In submitting any recommendations for an acting appointment, the Commission shall examine whether the exigencies of the particular service would best be served by transferring an officer from another district next in line of seniority to act when there is an officer in the same district who is capable of performing the duties of the higher grade, and in such examination the question of additional Government expenditure for traveling and subsistence allowances and other expenditure shall be borne in mind."

13. The Judge opined that this regulation identified two criteria for acting appointment namely seniority and eligibility. The Judge stated that "seniority is easy enough to determine. It will be taken from the date of confirmation in the particular service." Eligibility on the other hand is "to be determined by the pre-requisites for the particular post or position." The Judge stated that these pre-requisites may be:

"… academic qualification, experience in the post or position that is the performance of the duties attendant to such and overall proficiency and competence in the performance of those duties; or a combination of both."

14. The Judge stated that for the Appellant to succeed it had to be shown either that the decision maker did not take any of the criteria into account or if he did, the decision is Wednesbury unreasonable. The Judge noted that the Appellant based his case solely on the ground of seniority. He did not address the eligibility factor in "any detail". The Judge concluded that the Appellant had not provided any evidence that he satisfied the eligibility criterion. The Judge therefore refused leave to claim for judicial review and ordered that the Appellant pay the costs of the Commissioner and the Commission.

15. The Appellant appealed. The Court as usual received written submissions and heard oral argument. At the end of the hearing the Court reserved judgment. The submissions by the Appellant and the Respondents before this Court, as in the Court below, were centered on regulation 26 of the Regulations. After the conclusion of the oral hearing the Court received a letter from Counsel of the Respondents in which he stated that regulation 26 does not apply at all. The result, it was stated, is that acting appointments are now in the complete discretion of the Commission as there are no statutory criteria that govern such appointments. In those

circumstances the Court invited further written submissions which were received from the parties. In the light of those submissions a question that has arisen, is what are the regulations that are to be applied to acting appointments in the Prison Service.

16. Counsel for the Respondents submitted that the Regulations are divided into several chapters and that regulation 26 falls within Chapter III. This Chapter is headed "Appointments, Promotions and Transfers" and as its heading suggests, deals with appointments, promotions and transfers in the public service generally. However, included in the Regulations are chapters that refer to specific branches of the Public Service such as the Fire Service, the Teaching Service and more pertinently the Prison Service. In these chapters there are provisions that refer to the appointments, promotions and transfers of officers within that particular branch of the Public Service. So that in relation to the Prisons Service, Part II of Chapter XIII contains the heading "Appointments, Promotions and Transfers" and deals with appointments, promotions and transfers within the Prison Service. Counsel submitted that it was the intention of the draftsman of the Regulations that appointments in the Prison Service, which include acting appointments, are in fact governed by Chapter XIII and not Chapter III. Chapter XIII he contended provides a separate and distinct code for dealing with appointments, promotions and transfers in the Prison Service.

17. Counsel for the Respondents further submitted that prior to 1990 the Chapter applicable to the Prison Service (which was then numbered Chapter XII) contained regulations indicating how acting appointments were to be made. Among these regulations were regulations 174 to 176. These were similar to regulations at 24, 25 and 26 in Chapter III. Regulations 174 to 176 were however revoked by the Public Service Commission (Amendment) Regulations, 1990 (see Legal Notice No. 28 of 1991). The result Counsel submitted was not to reintroduce regulations 24, 25 and 26 in Chapter III, as the clear intention of the draftsman was to create a separate code dealing with appointments, promotions and transfers in the Prison Service. The consequence of the revocation of regulations 174 to 176 relating to acting appointments in the Prison Service, Counsel submitted was that acting appointments are now within the discretion of the Commission and that there are no statutory criteria governing such appointments.

18. Counsel for the Appellant agreed with Counsel for the Respondents that where there are provisions that apply to specific branches of the Public Service they would override provisions that apply generally to the Public Service. Counsel however submitted that it is equally the case that when specific provisions are revoked the general provisions "revive" or by default apply. The consequence is that when the regulations pertaining to acting appointments in Chapter XIII were revoked, the provisions dealing with acting appointments in Chapter III, which included regulation 26, applied to acting appointments in the Prison Service. Counsel further submitted that if this were not so there would be no regulations governing acting appointments in the Prison Service consequent upon the revocation of regulations 174 to 176. This could not have been the intention of the draftsman as it would create fertile ground for arbitrariness and unfairness. This, Counsel contended, was precisely the mischief that the Regulations were intended to prevent.

19. From the arguments of Counsel it can be seen that it is common ground between them that where the Regulations contain provisions that apply to a specific branch of the public service they, and not the provisions that apply generally to the Public Service, apply to the particular branch. That is indeed a correct position to assume since where provisions of general application cover a situation for which a specific provision is made it is presumed that the situation was intended to be governed by the specific provision. Therefore insofar as Chapter XIII before the 1990 amendment contained provisions relating to appointments, promotions and transfers in the Prison Service they would apply and not those contained in Chapter III. There is therefore no disagreement between the parties that prior to the revocation in 1990 of regulations 174 to 176 relating to acting appointments in the Prison Service, that Chapter XIII applied to appointments, promotions and transfers in the Prison Service including acting appointments. Where they differ is with respect to the effect of the revocation of regulations 174 to 176 dealing with acting appointments in the Prison Service by the Public Service Commission (Amendment) Regulations, 1990. The question that arises is therefore whether upon the revocation of regulations174 to 176 in Chapter XIII dealing with acting appointments in the Prison Service, do the similar regulations in Chapter III, namely 24, 25 and 26, relating to acting appointments generally apply to the Prison Service.

20. The submission of Counsel for the Commission is difficult to understand in the circumstances of this case as the Commission saw itself as regulated by the regulations in Chapter III so far as acting appointments are concerned. In the affidavit of Ms. Edwards-Joseph with reference to the appointment of Mr. Mattis in 2007 to the post of acting Chief Prisons Welfare Officer she stated:

> "In any event having regard to his overall experience and training he was the most suitable officer to act under regulation 26 which provides the general rule. Mr. Mattis was both senior and qualified to act in the post."

Since the Commission saw itself as governed by regulation 26, Counsel's submission, if correct, would give rise to questions as to the legality of the Commission's action. I do not however believe that Counsel's submission is correct.

21. In Privy Council Appeal No. 1 of 2001 **Dougnath Rajkumar v Kenneth Lalla and Others,** the Privy Council referred to the 1990 amendment to the Regulations. The Judicial Committee was of the opinion that a result of the revocation of regulations 174, 175 and 176 relating to acting appointments in the Prison Service, was that regulations 24, 25 and 26 in Chapter III were now applicable. Lord Mackay of Clashfern who delivered the judgment of the Board stated (at para. 12):

> "The 1990 amendment regulations also revoked regulations 174, 175, 176 and 181 with a result that regulations 24, 25 and 26 are applicable to the Prison Service in relation to acting appointments. These Regulations are broadly similar to regulations 174, 175 and 176 which have been revoked.

22. Upon the revocation, therefore regulations 174 to 176, which dealt with acting appointments in the Prison Service, regulations 24 to 26 of Chapter III became applicable to the Prison Service in relation to acting appointments. Were this not the position, as Counsel for the Appellant contended, it could lead to arbitrariness and unfairness which no doubt the Regulations were intended to prevent.

23. I turn therefore to consider the submissions made by the parties in relation to regulation 26.

24. Counsel for the Appellant submitted that the failure of the Commission to consider the Appellant as eligible for the acting appointment of Chief Prisons Welfare Officer was as a consequence of its misinterpretation of regulation 26. He submitted that the general rule relating to acting appointments as set out in regulation 26 was that the most senior eligible officer is appointed. He accepted, as the Judge held, that the regulation dealt with both seniority and eligibility. But "eligible" in that regulation did not mean that the officer must be qualified for promotion to the office in which the acting appointment falls to be made. It was therefore not necessary for the Appellant to have a bachelors' degree in social work or its equivalent which was necessary for promotion to the office of Chief Prisons Welfare Officer. Counsel submitted that what eligible means is simply that the officer must occupy the next lower substantive rank and that he is willing and able to assume and discharge the duties and responsibilities of the office to which the acting appointment relates. As the Appellant was the most senior and occupied the next lower rank he was therefore eligible for the acting appointment and could not be disqualified simply on the basis that he did not possess the academic qualifications necessary for promotion to the substantive post. The Commission was therefore wrong not to consider the Appellant for the acting appointment.

25. Counsel for the Respondent submitted that under regulation 26 two factors needed to be considered namely; eligibility and seniority. This appeal turned on the meaning of eligibility. Counsel submitted that on making an acting appointment the person appointed was in fact holding the office temporarily. It could not therefore mean that a person could hold the post even temporarily if he did not have the qualifications for the post. Counsel therefore submitted that in the context of regulation 26 an officer is not eligible if he did not have the qualifications necessary to fill the substantive office. As the Appellant did not have the necessary academic qualifications he was therefore not eligible.

26. The outcome of this appeal turns on the proper construction of regulation 26. That would in fact determine not only the leave application but the substantive matter as well. If the Appellant's interpretation is correct then it seems that he would be entitled to the relief sought in the proposed claim for judicial review as he would have been eligible for appointment and was not considered to be so by the Commission. Quite obviously, in those circumstances, the Judge ought not to have refused leave. On the other hand if the

Respondents' interpretation is correct then the Appellant was not eligible and the Judge was correct to refuse leave as, clearly, the Appellant failed to establish that he had an arguable ground for judicial review having a realistic prospect of success (see **Sharma v Brown-Antoine** [2006] UKPC 57).

27. Regulation 26(1)(a) sets out the general rule for purely acting appointments. The general rule is that the most senior eligible officer is appointed. The officer appointed must therefore as a general rule satisfy two (2) criteria. He must be the most senior in the Department or Ministry and he must be eligible. Seniority is not an issue in this appeal. When Mr. Mattis went on pre-retirement leave, the Appellant was the next most senior officer. The issue in this appeal is whether he was eligible for the acting appointment of a Chief Prisons Welfare Officer. More particularly, and this is the simple issue in this appeal, was the Appellant eligible to be appointed to the acting appointment even though he did not have the academic qualifications required for the substantive post of Chief Prisons Welfare Officer.

28. In construing the Regulations the object is to arrive at the intention of the draftsman. In other words what was intended by the word "eligible" in regulation 26. The task of the Court in so deciding is to scrutinize the Regulations as a whole to ascertain the meaning that was most likely intended. It is therefore relevant to consider other provisions of the Regulations in which the word eligible was used.

29. The other Regulations which appear to me to be relevant to this discussion are regulations 18, 24 and 25. It is convenient to set them out at this stage and they are as follows:

> "18. (1) In considering the eligibility of officers for promotion, the Commission shall take into account the seniority, experience, educational qualifications, merit and ability, together with relative efficiency of such officers, and in the event of an equality of efficiency of two or more officers, shall give consideration to the relative seniority of the officers available for promotion to the vacancy.

(2) The Commission, in considering the eligibility of officers under subregulation (1) for an appointment on promotion, shall attach greater weight to -

(a) seniority, where promotion is to an office that involves work of a routine nature, or

(b) merit and ability, where promotion is to an office that involves work of progressively greater and higher responsibility and initiative than is required for an office specified in paragraph (a)

(3) In the performance of its functions under subregulations (1) and (2), the Commission shall take into account as respects each officer -

(a) his general fitness;

(b) the position of his name on the seniority list;

(c) any special qualifications;

(d) any special courses of training that he may have undergone (whether at the expense of Government or otherwise);

(e) the evaluation of his overall performance as reflected in annual staff reports by any Permanent Secretary, Head of Department or other senior officer under whom the officer worked during his service;

(f) any letters of commendation or special reports in respect of any special work done by the officer;

(g) the duties of which he has had knowledge;

(h) the duties of the officer for which he is a candidate;

(i) any specific recommendation of the Permanent Secretary for filling the particular office;

(j) any previous employment of his in the public service, or otherwise.

(k) any special reports for which the Commission may call;

(l) his devotion to duty.

(4) In addition to the requirements prescribed in subregulations (1), (2) and (3), the Commission shall consider any specifications that may be required from time to time for appointment to the particular office."

"24. (1) The Permanent Secretary or Head of Department shall ensure that any recommendation made in relation to an acting appointment as a prelude to a substantive appointment shall be based on the principles prescribed in regulation 18.

(2) Where, in the exigencies of the particular service, it has not been practicable to apply the principles prescribed in regulation 18, an officer selected for an acting appointment in consequence of a recommendation made under subregulation (1) shall not thereby have any special claim to the substantive appointment.

(3) In considering the claims of eligible candidates for a substantive appointment, the Commission shall take into account the claims of all eligible officers.

25 (1) Where an acting appointment falls to be made whether as a prelude to a substantive appointment or not, the Permanent Secretary or Head of Department shall notify those officers within the Ministry or Department who are eligible for consideration.

(2) The Permanent Secretary or Head of Department shall, after notification as required by subregulation (1), allow a period of seven days to elapse before forwarding any recommendations in relation to such acting appointment, for the purpose of allowing the officers of the Ministry or Department to make representations on the filing of such vacancy.

(3) Where representations have been made by or on behalf of any officer in the Ministry or Department, the Permanent Secretary or Head of Department shall forward such representations in their original form to the Director.

(4) Where a vacancy occurs in an office and an acting appointment falls to be made for a period not likely to exceed twenty-eight days as a result of sudden illness or other very special circumstances, the Permanent Secretary or Head of Department may appoint an officer to act for such period and the provisions of subregulations (1), (2) and (3) shall not apply to such acting appointment."

30. Regulation 18 refers to the principles of selection for promotion and provides, inter alia, that in considering the eligibility of officers for promotion, the Commission shall take into account the factors outlined in Regulation 18. Regulation 18 therefore in essence sets out that for an officer to be eligible for promotion he must satisfy the criteria set out in that regulation. In so doing it defines the meaning of eligibility for promotion. Regulations 18(1)

and (3) are similar to regulation 172 which contains the principles of selection for promotion of officers in the Prison Service. Therefore, insofar as one is dealing with eligibility for promotion of officers in the Prison Service, regulation 172 is relevant. The relevance of regulation 18 is however that it is specifically mentioned in regulation 24 which deals with principles of selection for an acting appointment as a prelude to a substantive appointment. Regulation 24(1) in effect requires the Permanent Secretary or Head of Department in making recommendations for an acting appointment as a prelude to a substantive appointment to have regard to the eligibility criteria as provided for in regulation18. The Commission is required to make acting appointments as a prelude to a substantive appointment having regard to the same principles in regulation 18. Regulation 18 therefore also defines what is eligible within the meaning of regulation 24. Regulation 25, deals with the procedure for notifying eligible officers where an acting appointment falls to be made whether as a prelude to a substantive appointment or not.

31. The **Oxford Dictionary of English** (*second edition*) defines "eligible" to mean "having the right to do or obtain something; satisfying the appropriate conditions." In the context of the Regulations the second limb of the definition appears to be more relevant. In circumstances therefore where the employer has decided that the minimum educational qualifications for the post of Chief Prisons Welfare Officer is a Bachelor of Social Work or equivalent, then the natural meaning of the word eligible would point to the conclusion that an officer who does not have that qualification is not eligible since he has not satisfied the appropriate conditions.

32. If this is not evident from the meaning of the word eligible, then 18(4) makes it clear. The meaning and effect of that provision was considered in two recent decisions of this Court namely; Civil Appeal 162 of 2006 the **Public Service Commission v Hermia Tyson-Cuffie** and Civil Appeal 58 of 2006 the **Teaching Service Commission v Robert Ramsahai**. It was held in both cases that "specification" in 18(4) should be given its ordinary meaning of "requirement" or "stipulation" so that when the requirement or stipulation was not met by the applicant he was not eligible for consideration for appointment. In the **Robert Ramsahai** case the minimum requirement for the post of Vice Principal was stated to be a degree from a recognized university, a post graduate Diploma in Education or equivalent and five (5) years

teaching service after obtaining the post graduate Diploma in Education and including two (2) years in school administration. It was held that as the applicant in that case did not have the minimum requirements at the date on the close of the applications for the post of Vice Principal he was not eligible for consideration for the appointment. The Court stated:

> "…. the words 'in addition to … the Commission shall' appear in Regulation 18(4) to indicate that it is both a separate consideration from subregulations (1), (2) and (3) and mandatory in nature. The consideration envisaged is not with a view to accepting or discarding it, but to apply it by way of defining the pool of persons eligible for consideration for appointment."

33. Therefore, in relation to appointments on promotion and acting appointments as a prelude to a substantive appointment in regulations 18 and 24, the officer who does not possess a Bachelor of Social Work or its equivalent from a recognized institution would not be eligible. In both regulations 18 and 24 the word "eligible" in my judgment is used to mean the same thing. It follows that in Regulation 25 in so far as it relates to acting appointments as a prelude to a substantive appointment that "eligible" also has a similar meaning. The question is whether eligible in regulation 26 should be given the same or a different meaning.

34. Counsel for the Appellant obviously was of the view that eligible in regulation 26 meant something different than in regulation 24 as he submitted that although the academic qualifications were necessary for promotion to the post of Chief Prisons Welfare Officer or as an acting appointment in that position as a prelude to a substantive appointment, all that was necessary for a purely acting appointment is seniority and the capability to perform the duties of the higher office. This conclusion he submitted was indicated by regulation 26(2) which provides that the Commission may appoint someone to act who is capable of performing the duties of the higher office.

35. I do not agree that regulation 26(2) can be used to derive any general principle as to eligibility for appointments under regulation 26. It allows the Commission to depart from the general rule provided for in 26(1)(a) where the exigencies of the service would best be served by appointing someone who is not the most senior but who is capable of performing the

duties of the higher office. Regulation 26(2) therefore is an exception to the general rule set out in 26(1)(a).

36. There is however some merit in the argument that with respect to purely acting appointments not as a prelude to substantive appointments under regulation 26 that it could not have been the intention that the Commission consider eligibility in the same way as in regulations 18 and 24 and what was intended was a simple, almost automatic, system of making acting appointments where seniority and the capability to perform the duties of the higher office are all that matter.

37. There are indicators that eligibility in regulation 26 might convey a different meaning than in 18 and 24. For one thing regulation 26 unlike 24 does not refer to regulation 18. This tends to point to the conclusion that it was the intention of the draftsman that "eligible" in regulations 18 and 24 is used to mean something different than in regulation 26. Another indicator is that it is difficult to conclude that "eligible" in 26(1) (a) refers to the relative efficiency of the officers which it does in regulations 18 and 24.

38. Relative efficiency in my judgment is not intended to be a condition that determines eligibility in relation to purely acting appointments. In my view it is understandable that where acting appoints may need to be made at short notice that it was not intended that the Commission should embark on an investigation of the relative efficiency of the officers. Having said that however, I do not accept that "eligible" in regulation 26 should have an entirely different meaning than in regulations 18 and 24. If that were correct the Commission could make an appointment without considering other conditions that define eligibility in regulations 18 and 24; for example the officer's general fitness and his overall performance. While it is understandable that in making acting appointments the need to embark on an assessment of the relevant efficiency of the officers may not be necessary, it is difficult to accept that it was intended that the appointment may be made without considering the officer's general fitness or overall performance. This could not have been the intention of the draftsman. Similarly in my judgment it is also difficult to accept that the Regulations could countenance the appointment of someone to a position, even on a temporary basis, who does not possess the minimum academic qualifications required for the position.

39. I think this view is endorsed when consideration is given to the meaning of "acting appointment" in the Regulations. This term is defined in the Regulations to mean "the temporary appointment of an officer to a higher office or otherwise whether that office is vacant or not." "Appointment" is defined to mean "the placing of a person in an office in the public service." According to Counsel for the Appellant the conclusion that should be reached is that as a general rule someone can be placed temporarily in a higher office even though he does not satisfy the academic qualifications for that office. That could not have been the intention of the Regulations.

40. I think this is also in keeping with a purpose of the Regulations relating to appointments which must be to ensure that the most meritorious person is appointed. This should apply even to temporary appointments, which as this case shows can extend over a significant period.

41. In my judgment therefore, as the Appellant did not possess the academic qualifications for the substantive post he was not eligible within 26(1)(a) for the acting appointment. The Commission therefore cannot be faulted for not considering the Appellant. Accordingly the Judge was correct to refuse the application for leave to apply for judicial review.

42. I turn now to the question of costs. Counsel for the Appellant submitted that even if this Court agreed with the trial Judge and held that she was correct in refusing leave to apply for judicial review, she was wrong to order the Appellant to pay the costs of the failed application for leave to apply for judicial review. The Court should have made no order as to costs. Counsel for the Appellant also submitted that in this Court as well there should also be no orders to costs.

43. Counsel for the Respondents submitted that as a general rule a proposed defendant who attends and successfully resists the leave application should not generally recover his costs. The Court may however depart from this general rule where it considers that there are exceptional circumstances for so doing. Counsel submitted that they were exceptional

circumstances as this was a hopeless case and the Appellant in effect has had the advantage of an early substantive hearing of the claim.

44. The Judge in this case ordered that the Appellant pay the costs of both the Commissioner and the Commission. This was, of course, an exercise of her discretion. It must therefore be noted that the Court of Appeal would only interfere with the exercise of the discretion of the Judge where it is of the view that she is proven to be plainly wrong. It must be demonstrated that the Judge wrongly directed herself in fact or in law or took into account some factor that was not relevant or omitted to take into account relevant factors and that the decision exceeded the generous ambit within which reasonable disagreement is possible and is in fact plainly wrong.

45. The Judge did not give explicit reasons for making the order as to costs which she did. She might have thought that costs should automatically follow the event. If that is the case then the Judge proceeded on a wrong principle as will be seen below (see **Civil Appeal 153 of 2009 Abzal Mohammed v Police Service Commission**) and it is open to this Court to look at the matter afresh. If that was not the thinking of the Judge then not having given any reasons for the order she made, this Court is also entitled to view the matter afresh and form its own opinion on the appropriate order(s) as to costs (see **Inniss v the Attorney General** 2008 UK PC 42 and Civil Appeal 154 of 2006 **Romauld James v the Attorney General**).

46. In the **Abzal Mohammed** case which was decided after the Judge gave her decision and so was not available to her, the Court of Appeal gave guidance on appropriate cost orders in judicial review proceedings. In a case such as this where the Judge treated what was an ex parte application for leave to make a claim for judicial review as an inter partes application and invited the assistance of the proposed defendants, the Court of Appeal was of the opinion that the appropriate order, where the application for permission was refused, should be no orders to costs. Kangaloo, J.A. who gave the judgment of the Court stated:

> "If leave is refused, it is unfair to the claimant to have to pay costs to the proposed defendant. In the first place, the proposed defendant is not yet a party and secondly it was brought to Court not by the Claimant but by the

> Court itself for assistance. I would think the proposed defendant would again have to bear its own costs."

47. The Court was not there laying down a rigid rule from which there can be no departure but rather setting out a general rule from which a Court may depart in exceptional circumstances. It is of course not possible to list fully what circumstances are exceptional. However in **R (Mouth Cook Land Limited) v Westminster City Council [2003] E.W.C.A Civ. 1346)** Auld LJ stated that exceptional circumstances may consist in one of several features which he described in a non-exhaustive list. These features included, inter alia, the hopelessness of the claim and whether as a result of the deployment of full argument and documentary evidence by both sides at the hearing of a contested application, the unsuccessful claimant has had in effect the advantage of an early substantive hearing of the claim.

48. I agree that exceptional circumstances may consist of those features. I mention these two not because I think that of the features mentioned by Auld LJ only those could give rise to exceptional circumstances but because these were the two mentioned in the submissions of the Respondents.

49. I however do not agree that this case can be described as hopeless. It raised a nice point on the construction of the Regulations. As to the second feature, it is true that the Appellant has had in effect the advantage of an early substantive hearing and if there were nothing more in this case, that consideration could lead to an order that the Appellant pay the costs both here and in the Court below.

50. I however think in this case there is another factor that is of overriding importance and it is this. This case raised not only a point of construction that required careful consideration but one that is of importance, not only to those members of the public who are subject to the Regulations, and there would be a significant number, but to the Commission as well. The point had not before been considered by this Court or any Court whose decision would be binding on it. It is true that the Appellant had his own personal interests for pursuing the litigation but that does not detract from the general importance of the issue on

the appeal. In those circumstances I think the most appropriate order would be that there be no order to costs both here and in the Court below.

51. In the circumstances, the appeal from the Judge's order refusing leave to apply for judicial review is dismissed. The Judge's order as to costs is set aside and there shall be no order as to costs both here and in the Court below.

Dated the 28th day of June 2010

A. Mendonça
Justice of Appeal