THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

PORT OF SPAIN

CA NO S 377 OF 2017
Claim No. CV 2016-04352

FRANCIS CHATTIE

Appellant/Claimant

AND

THE COMMISSIONER OF POLICE

First Respondent/First Defendant

AND

THE POLICE SERVICE EXAMINATION BOARD

Second Respondent/Second Defendant

APPEARANCES:
Mr. Anand Ramlogan SC, Ms. Jayanti R. Lutchmedial, Mr. Dexter Bailey and Ms. Chelsea J. Stewart for the appellant
Ms. Karlene Seenath instructed by Ms. Amrika Ramsook for the respondent

PANEL:
A. Mendonça JA
N. Bereaux JA
P.A. Rajkumar JA

DATE OF DELIVERY: 30 January 2019

I have read the judgment of Rajkumar J.A. I agree with it and have nothing to add.

A. Mendonça J.A

I have read the judgment of Rajkumar J.A. I also agree with it and have nothing to add.

N. Bereaux J.A.

Judgment

Delivered by P.A. Rajkumar J.A

Background

1. The appellant is a police officer who on the 1st August 2008 obtained a Bachelor of Laws degree (LL.B.). In 2007 by a departmental order No. 211/2007 (the 2007 D.O.) persons with an LL.B degree were exempted from writing the qualifying examination for promotion in the second division, and would be awarded 35 points.

2. However in 2010 departmental order No. 174/2010 (the 2010 D.O.) provided that officers with an LL.B could apply for exemption from writing the law component of the police promotion examination (second division).

3. The appellant was notified by letters dated May 1st and May 27 2009 (the May 2009 letters) from the Police Service Examination Board, as well as the Commissioner of Police, that

he was exempted from writing any further police promotional examination (second division). Yet in 2016 he was required to write the Business Communication component of the promotional examination. He contended that he had a legitimate expectation that, based on and in reliance upon the 2007 D.O. and the May 2009 letters, he would not be required to write that or any other promotional examination in the second division.

4. The trial judge accepted that the appellant did have such a legitimate expectation. However he held that that legitimate expectation could be overridden in the circumstances.

5. Although the appellant wrote, and was successful in, the Business Communication component of that examination, his mark of 68 did not entitle him to the full 35 points contrary to what the 2007 departmental order had stipulated.

Issue

6. Whether the respondent was entitled to depart from the position communicated by the 2007 D. O. so as to insist that, in accordance with the subsequent 2010 D. O that the appellant, despite having attained the LL.B. in 2008, was required to sit further promotional examinations.

Conclusion

7.

i. The appellant by virtue of the exemption communicated by the 2007 Departmental Order and letters dated May 1st 2009 and May 27th2009, did enjoy a legitimate expectation that he would not be required to write further promotional examinations for the rank of Inspector of Police.
ii. That removal or deprivation of, or resiling from that legitimate expectation required (a) compelling reason or justification and (b) evidence of such compelling reason or justification.
iii. No such compelling reason was demonstrated or justified on the evidence before the court.

iv. Accordingly any finding, based on a weighing exercise that purported to take into account evidence of such sufficient public interest where none had been substantiated, as justification for resiling from or removing the legitimate expectation of the appellant, was not justifiable on the evidence before the trial judge. It was therefore plainly wrong both as a matter of discretion and of law.

v. Were the weighing exercise to have been carried out:

a. on the actual evidence before the trial court there would have been no justification demonstrated for permitting the respondents to resile from the undisputed legitimate expectation of the appellant.

b. further, or alternatively, based on the evidence actually before the trial judge, the respondents resiling from the undisputed legitimate expectation could not satisfy the test of proportionality:

i. for the reasons above,

ii. in circumstances where other persons had been afforded the exemption now denied to him, and,

iii. where fairness required a prospective, rather than a retrospective application of the 2010 departmental order, as a relevant factor in the necessary weighing exercise.

Orders

8. In the circumstances the appeal is allowed and the following orders are made:

a. A Declaration is granted that the exemption granted to the appellant by letters dated the 27th day of May 2009 and/or the 1st day of May 2009 from the first and second respondents respectively, created a legitimate expectation that the appellant would not be required to sit promotional examinations of the Police Service for the rank of Inspector of Police.

b. A Declaration is granted that the decision that the appellant was required to sit the promotional examination in the Police Service for the rank of Inspector of Police, was unfair, and irrational.

c. A Declaration is granted pursuant to Section 20 of the Judicial Review Act Chapter 7:08 ("JRA") that the appellant was treated unfairly contrary to the principles of natural justice.

d. A Declaration is granted that the appellant is eligible and/or qualified to be considered for promotion to the rank of Inspector of Police based on the 2007 departmental order No. 211 of 2007 without regard and/or reference to his performance in and/or the results of the promotional examinations of the Police Service for the rank of Inspector of Police.

e. It is ordered that this matter be remitted to the first and second respondents for reconsideration in accordance with the findings of this court.

Analysis

Chronology

9**.** i. Departmental order 211 of 2007 dated 20th November 2007 provided that a police officer who is the holder of a Bachelor of laws degree…shall be exempted from writing the qualifying examination for promotion to the Second Division of the police service and shall be awarded 35 points in accordance with the criteria set out (at paragraph 3.5) of that order.

ii. By letters dated May 1st 2009 from the Police Service Examination Board, and May 27th 2009 from the Commissioner of Police, the appellant was advised that he was **exempted** from writing **any** further police promotion examinations (Second Division) by virtue of his Bachelor of Laws degree.

iii. On September 16th 2010 Departmental Order No. 174 of 2010 was issued which provided that police officers in possession of the LL.B or professional qualification in law may apply to the Police

Service Examination Board for exemption from writing the **law component** of the police promotion examination (Second Division). The officers will be required with immediate effect to apply to write the police duties component for the upcoming police promotion examinations.

v. By letters dated 21st of June 2016 and 27th of July 2016 the appellant inquired whether he was still required to write the Business Communication examination in connection with promotion to the rank of Inspector set for October 1st 2016.

10. On September 1st 2016 he was advised that he was required to sit the Business Communication component of the 2016 promotion examination for the rank of Inspector.

11. Although he was successful in that examination, and so informed on 1st of December 2016, he filed an application for leave to pursue judicial review proceedings on 2nd of December 2016.

12. At issue was whether, the appellant having obtained an LL.B in 2008, and having been expressly informed by letters dated 1st of May 2009 and 27th of May 2009, that, pursuant to the 2007 departmental order, he was in fact exempted, from writing any further promotional examination, there was any basis for requiring him to write a promotional examination in 2016 on the basis of the 2010 departmental order.

Legitimate Expectation

13. The trial judge found that the appellant, having obtained the LL.B degree, did in fact enjoy a legitimate expectation by reason of Departmental Order 211/2007 that he would not be required to write any further examination[1]. There has been no cross appeal of this finding. In any event that finding is unimpeachable.

[1] The appellant "*did have a legitimate expectation that he would receive an exemption and that he would not need to sit any examination for promotion within the Second Division*". (Paragraph 10 of the judgement)

Departmental Order 211 of 2007[2]

14. The relevant portion is set out hereunder:-

Exemption

An officer who is the holder of a Bachelor of Laws Degree (LLB) from an institution recognized by the Accreditation Council of Trinidad and Tobago shall be exempted from writing the qualifying examination for promotion in the Second Division and shall be awarded thirty-five (35) points in accordance with the criteria set out at 3:5.

15. The letter dated May 1 2009[3] from the Police Service Examination Board is in the following terms:

Dated: 1st May, 2009

Dear Sir,

No. 12049 Police Corporal Francis Chattie – Application for exemption from writing any further police promotional examination (Second Division)

Police Service Examination Board at its meeting ***of Friday 15th May, 2009*** *decided that you should be exempted from writing any further Police Promotional Examinations (Second Division) by virtue of you being successful in the Bachelor of Law Degree (LLB) from the University of London in 2008. Congratulations!*

16. That from the Commissioner of Police dated May 27 2009[4] referencing the letter from the Board is in similar terms as follows:

Dated: 27th May, 2009

Dear Sir,

Re: Exemption from writing any further police promotion examinations (Second Division)

[2] Record of Appeal P387
[3] Record of Appeal P61
[4] Record of Appeal P65

I refer to the subject and inform that the Police Service Examination Board has exempted you from writing any further Police Promotion Examinations (Second Division). (See letter attached) Please be guided accordingly.

Departmental Order 174 of 2010[5]

17. The relevant portion is set out hereunder.

Item 2

Police Officers in possession of the LLB or Professional qualification in Law may apply to the Police Service Examination Board for exemption from writing the Law component of the Police Promotion Examinations (Second Division).

*The officers will be required with **immediate** effect to apply to write the Police Duties component for the upcoming Police Promotion Examinations (Second Division).*

18. They could not possibly be any clearer. Accordingly, any contention that the 2007 departmental order had any contrary effect would be baseless.

Prejudice

19. The trial judge further found that *"no demonstrable prejudice was occasioned to the claimant and it cannot be said that he read for an LL.B so as to avoid having to sit any promotional exam"*[6].

20. However, it is unrealistic to infer a lack of prejudice or to ignore its existence in the instant circumstances because someone who has enjoyed an exemption from writing any examination, who is then required to write an examination, obviously suffers prejudice. Apart from the necessary time, effort, and inconvenience of having to write the examination, and the fact attested to by the appellant of having to write it at relatively short notice, (un-contradicted

[5] Record of Appeal P395
[6] Paragraph 19 of judgement RoA P20

evidence of the latter was before the trial judge), there is always the possibility of not passing the examination. In this case, although the appellant did pass, the existence of a contrary possibility with associated anxiety however minimal must amount to prejudice. Further, the appellant's mark of 68 would not have entitled him to the 35 points awardable to him for the examination component if the 2007 departmental order had applied.

21. The trial judge failed to appreciate the un-contradicted evidence before him of such prejudice. This was an important matter as it directly affects the weighing exercise that the court was required to perform in deciding whether to override his undisputed legitimate expectation.

Issue

22. Whether the respondent was entitled to depart from the position communicated by the 2007 departmental order so as to insist, based upon and in accordance with the subsequent 2010 departmental order, that the appellant, despite having attained the LL.B. in 2008, was required to sit promotional examinations.

23. This would depend on whether or not the 2010 Departmental Order, or its construction or application could permit the respondents to resile from, terminate or frustrate the legitimate expectation which the appellant enjoyed pursuant to the 2007 Departmental Order and the May 2008 letters to him.

Resiling from, terminating, or frustrating a legitimate expectation

24. In **R v North and East Devon Health Authority ex p *Coughlan* (Secretary of State for Health and another intervening) [2001] QB 213** (referred to the United Policyholders Group & Ors v The AG (infra)) the circumstances under which a party might resile from a substantive legitimate expectation were explained. (Alternative (c) relates to legitimate expectation of a substantive benefit such as in the instant case but the paragraph is set out in full to illustrate its proper context.)

[57] There are at least three possible outcomes. (a) The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course. Here the court is confined to reviewing the decision on *Wednesbury* grounds (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223). This has been held to be the effect of changes of policy in cases involving the early release of prisoners: see *In re Findlay* [1985] AC 318; *R v Secretary of State for the Home Department*, *Ex p Hargreaves* [1997] 1 WLR 906. (b) On the other hand the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontentious that the court itself will require *the opportunity for consultation* to be given unless there is an overriding reason to resile from it (see *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629) in which case the court will itself judge the adequacy of the reason advanced for the change of policy, taking into account what fairness requires. *(c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a* benefit which is substantive*, not simply procedural, authority now establishes that here too the court will in a proper case decide* ***whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power****. Here, once the legitimacy of the expectation is established, the court will have the task of* ***weighing the requirements of fairness against any overriding interest relied upon for the change of policy****.*

[58] …..In the case of the third, the court has when necessary to determine whether there is a sufficient ***overriding interest to justify a departure from what has been previously promised.*** (All emphasis added)

25. The burden of proof when resiling from a substantive legitimate expectation as described in Coughlan ibid at paragraph 57 was reiterated and explained in the case of ***Pamponette*** v **The AG [2010] UKPC 32** at paragraphs 37 and 38 as follows *(all emphasis added)*:

The initial burden lies on an applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and

that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too. Once these elements have been proved by the applicant, however, ***the onus shifts to the authority to justify the frustration of the legitimate expectation****. It is for the authority to* ***identify*** *any* ***overriding interest*** *on which it relies to justify the frustration of the expectation. It will then be a matter for the court to* ***weigh*** *the requirements of fairness against that interest.*

If the authority does not place material before the court to justify its frustration of the expectation, it runs the risk that the court will conclude that there is no sufficient public interest and that in consequence its conduct is so unfair as to amount to an abuse of power. The Board agrees with the observation of Laws LJ in Nadarajah v Secretary of State for the Home Department [2005] EWCA Civ 1363 at para 68:
"The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances." It is for the authority to prove that its failure or refusal to honour its promises was justified in the public interest. There is no burden on the applicant to prove that the failure or refusal was not justified.

26. It is not in issue that the appellant discharged the burden of proving the legitimacy of his expectation. Further there was before the trial judge evidence that the appellant relied to his detriment on the promise that he would not have to write further promotional examinations. The thirty-five (35) points promised to the appellant without the need for further examination were never forthcoming. Those elements having been proved by the appellant, the onus shifted to the respondents to: -

i. **Identify any overriding interest** relied upon to **justify that frustration**; and

ii. **Justify frustration of the legitimate expectation** as a proportionate measure in the circumstances.

27. It then became a matter for the court to weigh the requirements of fairness against that interest. It was essential therefore for the respondents to not only identify the overriding interest but to specifically justify frustration of the appellant's legitimate expectation as a proportionate measure in the circumstances.

28. This issue was also addressed by the Privy Council in the case of the **United Policyholders Group and others v Attorney General of Trinidad and Tobago** [2016] UKPC 17 paragraphs 36 - 40, 79, 107-109, 120-121 (all emphasis added). It is worth setting out the observations therein as they summarise succinctly the law crystallised up to that point.

> ***The law on legitimate expectation***
>
> *36. Before addressing the two questions identified in para 33 above, it is appropriate to summarise briefly the board's understanding of the law relating to legitimate expectation.*
>
> *37. In the broadest of terms, the principle of legitimate expectation is based on the proposition that, where a public body states that it will do (or not do) something, a person who has reasonably relied on the statement should,* ***in the absence of good reasons****, be entitled to rely on the statement and enforce it through the courts. Some points are plain. First, in order to found a claim based on the principle, it is clear that the statement in question must be "clear, unambiguous and devoid of relevant qualification"…*
>
> *38. Secondly, the principle cannot be invoked if, or to the extent that, it would interfere with the public body's statutory duty … Thirdly, however much a person is entitled to say that a statement by a public body gave rise to a legitimate expectation on his part,* ***circumstances may arise where it becomes inappropriate to permit that person to invoke the principle to enforce the public body to comply with the statement.*** *This third point can often be elided with the second point, but it* ***can go wider:*** *for instance, if,* ***taking into account*** *the fact that the principle applies and* ***all other relevant***

circumstances**, a **public body could**, or a fortiori **should, reasonably decide not to comply with the statement.

*39. Quite apart from these points, like most widely expressed propositions, **the broad statement set out at the beginning of para 37 above is subject to exceptions and qualifications**. It is, for instance, clear that legitimate expectation can be invoked in relation to most, if not all, statements as to the procedure to be adopted in a particular context (see again Ng Yuen Shiu [1983] 2 AC 629, 636). **However, it is unclear quite how far it can be applied in relation to statements as to substantive matters, for instance statements in relation to what Laws LJ called "the macro-political field"** (in R v Secretary of State for Education and Employment, Ex p Begbie [2000] 1 WLR 1115, 1131), or indeed **the macro-economic field**….*

40. For present purposes, for reasons which should become clear from the ensuing part of this judgment, it is unnecessary for the Board to consider the law on this difficult and important topic more fully.

29. However Lord Carnwath in that judgment further addressed the issue as follows:

LORD CARNWATH:

Legitimate expectation – continuing controversy

79. I agree that the appeal should be dismissed for the reasons given by Lord Neuberger. This is the second case before the Board in recent years concerning the law of legitimate expectation. In this, as in the previous case (Paponette v Attorney General of Trinidad and Tobago [2012] 1 AC 1), the parties have been content generally to adopt the law as stated in the judgment of Lord Woolf MR in R v North and East Devon Health Authority, Ex p Coughlan [2001] QB 213, without detailed argument. As Lord Neuberger explains, that has been sufficient for our decision in the appeal.

107. On the "more difficult question" whether the government was entitled to frustrate the legitimate expectation so created, Lord Dyson referred to Coughlan*, quoting Lord Woolf's formulation of the test appropriate to legitimate expectation of a benefit "which is* ***substantive,*** *not simply procedural" (****his category (c)*** *see para 90 above): in short* ***whether to frustrate the expectation*** *is "so unfair (as to) … amount to an abuse of power",* ***weighing the requirements of fairness*** *against "any overriding interest relied upon for the change of policy". Lord Dyson noted that it was not in dispute that this was the* ***test applicable*** *to the case before the Board. The critical question was whether there was a* ***sufficient public interest to override the legitimate expectation.*** *This in turn raised the further question as to the* ***burden of proof*** *in such a case (paras 34-36).*

108. The initial burden lay on an applicant to prove the legitimacy of his expectation, and so far as necessary his reliance on the promise. But ***once these elements had been proved, the onus shifted to the authority*** *to* ***justify the frustration,*** *and to* ***identify any overriding interest on which it relied (following Laws LJ in*** **Nadarajah*****, para 68).*** *It was then for the court "****to weigh the requirements of fairness against that interest".***

30. It is worth noting that *Nadarajah* was the authority cited by Sir John Dyson as **requiring objective justification** as a proportionate measure in the circumstances when resiling from a substantive legitimate expectation[7]. He then considered several possible theoretical bases for legitimate expectation before concluding at paragraph 118 that:

"It may, however, be unnecessary to search for deep constitutional underpinning for a principle, which, on a narrow view of ***Coughlan, simply reflects a basic rule of law and human conduct that promises relied on by others should be kept****. This applies in*

[7] paragraph 39 Pamponette

public law as in private law, ***unless the authority can show good policy reasons in the public interest for departing from their promise****"*

31. He continued with a comparative review of the approach of the law to legitimate expectation in a number of Commonwealth countries and the application of **Coughlan** in the context of substantive as opposed to procedural expectations. He concluded:

120. A narrower approach is also consistent with the Board's decision in Paponette. Although the group involved was much larger than in Coughlan, there was similar mutuality of specific commitments. It involved a clear promise by the authority, made to a defined group in return for specific action by them within a defined time scale, and designed to further the authority's own purposes. There was no argument that it raised wider political or economic considerations. ***The legitimate expectation having been established, it was for the authority to justify its departure from it****, applying an approach which (although not so described by Lord Dyson) can in its practical effect* ***be equated with a proportionality test*** *(as proposed by Laws LJ and Professor Elliott).*

121. In summary, the trend of modern authority, judicial and academic, favours a narrow interpretation of the Coughlan principle, which can be simply stated. ***Where a promise or representation, which is "clear, unambiguous and devoid of relevant qualification"****, has been given to an* ***identifiable defined person or group*** *by a public authority for its own purposes, either in return for action by the person or group,* ***or on the basis of which the person or group has acted to its detriment****,* ***the court will require it to be honoured, unless the authority is able to show good reasons, judged by the court to be proportionate, to resile from it. In judging proportionality*** *the court* ***will take into account any conflict with wider policy issues****, particularly those of a "macro-economic" or "macro-political" kind. By that test, for the reasons given by Lord Neuberger, the present appeal must fail.*

32. It is common ground in all the judgments above, that despite possible nuances not relevant on this appeal, the weight of authority requires the respondents to honour the representation made to the appellant, and his legitimate expectation based thereon, unless the respondents were able to show good reasons to resile from it judged by the court to be proportionate. The onus of proof was on the respondents.

Legitimate Expectation – Opportunity to comment

33. It was contended on appeal that the appellant had the opportunity to comment when he became aware of the 2010 departmental order (D.O). That might have been relevant to the weighing exercise to be conducted in determining whether it was permissible to resile from the legitimate expectation. However it was not at all clear by the terms of the 2010 D.O that it was intended to have, or did have, retrospective effect.

34. Further, the appellant had in his possession letters in unambiguous terms from both respondents confirming that he had been exempted from writing any further promotional examination in the Second Division. In those circumstances to contend that the appellant was given notice of the 2010 departmental order, and the opportunity to comment thereon ignores the evidence that the appellant had no reason to believe a. that the 2010 departmental order was intended to apply to him or b. that the 2010 DO did in fact apply retrospectively, to him.

35. Accordingly, procedurally the appellant would not have had a meaningful opportunity to comment on the 2010 departmental order which did not on its face have retrospective effect. This is especially so when the appellant's legitimate expectation that he would not be required to write any further examination, had already crystallised by May 2009. The alleged opportunity to comment and/or make representations therefore could not weigh in favour of the respondents as the appellant could not be faulted for failing to make any in 2010.

36. The fact that the appellant did enjoy such a legitimate expectation is not in issue in this appeal. What is in issue is whether that legitimate expectation could have been frustrated in the instant circumstances.

Findings of trial judge

37. The trial judge found that the expectation could be overridden. The judge's reasoning in particular is found at paragraphs 18-19 of the reasons. To appreciate the reasoning in its proper context it is set out in full. (Specific emphasis added)

> *18. It is evident that the police service faces unique challenges, the most pressing being the nation's spiralling crime rate. Consequently, revolutionary approaches have to be implemented so as to ensure the* ***efficiency and good administration of the service****. Police Officers are not lawyers and effective policing requires* ***the cultivation of specific skill sets*** *which should include,* ***inter alia, the ability to use science and technology in crime fighting****,* ***critical thinking,*** *solution oriented approaches,* ***good interpersonal people*** *skills, an acute sense of customer relations,* ***effective communication skills****,* ***proper time management ability*** *and an* ***appreciation of prevailing socio economic factors.***

38. To the extent that the trial judge identified the requirements for effective policing these were not, with the possible exception of effective communication skills, based on the evidence before him from the then acting Commissioner of Police. However to the extent that he identified ensuring efficiency and good administration of the service, it is arguable that the affidavit of Mr. Williams at paragraph 13 (infra), (where he identified the need to test writing skills by a Business Communication examination), may have been the basis therefor.

> *19. The decision taken in 2010 was well within the ambit of the Defendants' decision making ability, as they have a mandate to* ***review administrative policy****. It is the review that they engaged in which led to the issuing of Departmental Order 174 of 2010* ***which was in the Court's view, a rational one****. When systems are* ***not***

working *they must be changed and there is no room for the preservation of the status quo. The need to* ***implement dynamic, innovative*** *and* ***proactive approaches*** *in relation to* ***the administration of the service*** *is of critical importance and* ***the view adopted with respect to the need to introduce different criteria,*** *such as a business administration component, is not one which can be viewed as a position that was* ***arbitrary, irrational or unreasonable****.*

39. It is common ground that the need to introduce innovative approaches to the administration of the police service and the discretion to introduce a business administration component are not unreasonable and fall within the ambit of the second respondent. What is in dispute is whether that discretion, in the circumstances of the instant case, needed to be applied retrospectively so as to override, negate and frustrate an already crystallised exemption promised to the appellant.

40. The trial judge continued at paragraph 19

The Privy Council at paragraph 121 in the ***United Policyholders*** *decision (supra) opined that a guarded and narrow approach should be adopted when one has to consider how to treat with a legitimate expectation.* ***After the 1st August 2008 and until Departmental Order 174 of 2010 was issued the Claimant would have been entitled to an exemption from sitting any promotional exam.*** *During this period the issue in relation to his promotion to the rank of Inspector did not arise and when he eventually applied the policy had changed.*

In fact paragraph 121 of the United Policyholders decision (reproduced above) sets out the relevant test and approach in quite different terms.

41. The trial judge considered that when the appellant **eventually applied** the policy had changed. However the un-contradicted evidence is that the appellant had applied for and received his exemption by May 2009 prior to DO 174/2010. There was therefore no issue of applying for exemption **after** the 2010 DO.

42. He opined that "***No demonstrable prejudice was occasioned*** *to the Claimant and it cannot be said that he read for an LLB so as to avoid having to sit any promotional exam".* The fallacy of the lack of prejudice to the appellant has already been discussed above. It is apparent however that the trial judge did consider the alleged lack of prejudice to the appellant as an important factor which weighed in favour of permitting his legitimate expectation to be frustrated. This is revealed by the court's reasoning immediately following upon this conclusion as follows:

> *The Court cannot conclude that the inclusion of the business administrative component and the requirement to have the Claimant sit same was a position that was irrational, arbitrary or unfair nor did the process result in any violation of the Claimant's rights.* ***Any legitimate expectation which was created under Order 211 of 2007 was always subject to and contingent upon the Defendants' right to review same and effect rational and/or justified policy so as to ensure the efficient operation of the police service.*** *The Court is also of the view that there exists* ***sufficient public interest*** *viz a viz* ***the change in policy as reflected in Departmental Order 174 of 2010 so as to override the legitimate expectation that the Claimant had.*** *The Claimant established the legitimacy of his expectations and* ***the matters outlined at paragraphs 12, 13 and 17 of the affidavit of the Acting Commissioner identified the criteria that was (sic) applied to warrant the policy change****. It cannot be denied that* ***the need to have an efficient police service is paramount and the Court weighed the requirements of fairness as against the public interest.*** *By the Affidavit filed on 27th November 2017, the Defendants adduced information that the Claimant did pass the business administrative component and the Court is of the view that the argument that he has an entitlement to receive the full 35 marks pursuant to the legitimate expectation created under Order 211 of 2007, is devoid of merit.*

43. The trial judge therefore considered that the efficient operation of the police service was a sufficient public interest that could justify a change in policy which would override the appellant's legitimate expectation.

44. The trial judge considered:

i. that the matters at paragraph 12, 13 and 17 of the Affidavit of the Acting Commissioner of Police identified the criteria that applied to warrant the policy change,

ii. that there was a sufficient public interest in the change of policy reflected in the 2010 DO to override the appellant's legitimate expectation, and

iii. that policy was variously described as a. "to ensure the efficient operation of the police service", b. "the paramount need to have an efficient police service" c. to ensure the efficiency and good administration of the service and d. the need to implement dynamic, innovative, and proactive approaches in relation to the administration of the service.

45. It was in that context that the Court weighed the requirements of fairness as against the public interest. The judge considered that the appellant's legitimate expectation was **always subject to** and **contingent upon** the defendant's right to review same and effect policy so as to ensure the efficient operation of the police service.

46. In so far as the trial judge identified efficiency and good administration of the police service as the basis for the public interest that in this case outweighed the requirements of fairness, it is necessary to examine the evidence that was before the court in this regard.

Identification of public interest, overriding interest, or wider policy issues

Evidence

47. Such evidence as there is as identified by the trial judge in support of his conclusion that the public interest outweighed the appellant's legitimate expectation, is to be found in the affidavit of Mr. Williams (then acting Commissioner of Police). It is necessary to set out the

relevant paragraphs in full as they were a critical component of the trial judge's reasoning and conclusion. He stated (all emphasis added):

> 13. *In so far as paragraph 13 is concerned, DO 78 of 2016 introduced a new component of "Business Communication" to replace the English examination. Sergeants eligible for promotion to the rank of Inspector had to sit the Business Communication examination. This was the first examination that was devised solely to test skills and knowledge necessary in the police service at that rank as opposed to the English component which was traditionally used as the subject area for promotion.* ***Due to the high level of administrative responsibilities, writing skills in the form of Memoranda, letter*** (sic) ***and reports become necessary and that level of skill would be tested in the Business Communication examination.*** *As Business Communication was a new component, the procedures with regard to the previous components did not apply. A true copy of said order is hereto produced, shown to me and exhibited as* ***"S.W.3"***
>
> *17. In so far as paragraph 17 of the said affidavit is concerned* ***it is open to the defendants to amend*** *their policies through the internal publication of the relevant DOs****. LLB degrees are not indicators of police capabilities with regard to the Business Communication requirements for promotion to Inspector.***

48. Although paragraph 18 of that affidavit was not specifically identified by the trial judge it was before him and was relevant to the issue he was considering. It is therefore set out hereunder.

> *18. In so far as paragraph 18 of the said affidavit is concerned, officers have been invited in the past to seek exemption however* ***it is open to the TTPS to change its policies as it deems necessary for the proper functioning of the police service****. Up until DO 174 of 2010, exemptions were granted for all qualifying examinations to*

holders of the LLB. However the said DO changed the policy to only allow for exemptions upon request for those officers who had to sit the Law component, namely Corporals and Constables.

49. Based on these statements at paragraph 13 and 17, (12 not being relevant), and including paragraph 18, (although not specifically identified by the trial judge), the following points were made:

i. the need for the introduction of testing in Business Communication due to the high level of administrative responsibilities of Inspectors was identified.

ii. The ability of the defendants to amend their policies was identified.

iii. The general assertion was made that LL.B degrees were not indicators of *"police capabilities with regard to the Business Communication requirements for promotion to inspector".*

iv. At paragraph 18 (not a paragraph identified by the trial judge) the further assertion was made that "*it is open to the TTPS to change its policies as it deems necessary for the* ***proper functioning*** *of the police service".*

50. The court considered that the need to have an efficient police service is paramount. However Mr. Williams's affidavit asserting i. the desirability of testing a Business Communication component, and ii. the right of the TTPS to change its policies as it deems necessary for its proper functioning, does not establish any link between a. depriving the appellant of his legitimate expectation that he would not have to write a further promotion examination by virtue of his LL.B., and b. the proper functioning of the police service or its efficiency.

51. The general and formulaic language used by Mr. Williams could not provide an evidential foundation or a specific demonstrated basis for frustrating the legitimate expectation of the appellant, who had an LL.B, by requiring him to now write an examination in Business Communication, despite express written representations made to him to the contrary.

52. Apart from the vague and general statement "***LLB degrees are not indicators of police capabilities with regard to the Business Communication requirements for promotion to Inspector",*** there is no explanation as to how specifically resiling from or frustrating the appellant's legitimate expectation of a confirmed exemption could be conducive to the goal of efficient administration or operation of the police service.

53. Noticeably absent from the evidence of Mr. Williams was any further explanation that could justify resiling from the undisputed legitimate expectation enjoyed by the appellant. In particular there is no specific evidence of an overriding interest or wider policy issues that specifically outweighed that legitimate expectation. To read into those vague and general assertions such a public interest or overriding interest was therefore not justified. An **overriding public interest** has clearly not been demonstrated on that evidence such as to justify resiling from the legitimate expectation that the appellant had enjoyed. Far less was it demonstrated on such minimal evidence that resiling from the legitimate expectation created in the appellant, who possessed an LL.B degree, was proportionate to the alleged objective of the proper functioning of the police service or its efficiency, to be achieved by now requiring him to sit an examination in business communication. Any exercise which produced a result of outweighing the appellant's legitimate expectation based on such material which, objectively, was not capable of even establishing such an overriding interest, was consequently flawed.

54. The Business Communication component tested candidates on i. writing competent reports ii. structure of good letter writing and iii. effective memo writing skills. The need for Police Inspectors to write memoranda, write letters and write reports, could not justify displacing a promise that the appellant's Bachelor of Laws degree obtained from the University of London would exempt him from further written examinations.

55. The need to write an examination in Business Communication by the holder of an LL.B degree who had previously enjoyed an exemption from writing any further examination could not, objectively, or even as a matter of discretion, be considered to have been justified on the

evidence that was before the court. It would fail the requisite proportionality test referred to by Lord Dyson, Lord Carnwath and Laws LJ.

Whether the 2010 departmental order is inconsistent with 2007 departmental order

56. The trial judge found that the 2010 DO impliedly repealed the 2007 DO, "*as both cannot mutually subsist since they are inconsistent with each other"*. However the 2010 D.O would only be inconsistent with the 2007 departmental order if it were considered to have retrospective effect. If the 2010 DO is construed to have prospective effect only, leaving intact and unaffected any exemptions to LL.B holders which had crystallised prior to 2010 (on the basis of the 2007 DO), there would be no need for the application of the concept of implied repeal[8].

57. This is especially so when a. there was no demonstrated reason for the 2010 departmental order to have been interpreted or applied with retrospective effect, (as opposed to prospective effect with effect from 2010), and b. when there is evidence that the 2010 departmental order was **not consistently applied** and even persons who attained an LL.B post 2010 were the beneficiaries of complete exemptions. (see DO 28/2016 in relation to Corporal Nathaniel and Corporal Hosein[9]).

58. As a matter of construction it was not necessary to construe the 2010 DO in a manner which abrogated crystallised rights, because a prospective construction of the 2010 DO would have left intact rights to exemption acquired prior thereto. In fact there is a presumption against retrospectivity.

Presumption against retrospectivity

59. See **Bennion on Statutory Interpretation** generally 6th ed. Section 97 at page 291 et seq. Although the presumption against retrospectivity is usually discussed in the context of interpretation of statutes its basis lies in ensuring fairness. See for example Mustill LJ in L'office

[8] Referred to by Mr. Williams and adopted by the trial judge at paragraph 15 of his judgment.

[9] Record of Appeal page 301

Cherifien des Phosphates v Yamashita Shinnihon Steamship Company – the Boucraa [1994] 1 AC 486 at 525 - the basis of the doctrine against retrospectivity *'is no more than simple fairness, which ought to be the basis of every legal rule."*

60. Fairness therefore would have required the 2010 D.O. to be applied prospectively unless the presumption of retrospectivity had been displaced. Although the presumption against retrospectivity in relation to statutes can be displaced expressly or by necessary implication, neither applied here. The 2010 DO, unlike the 2007 DO itself, did not expressly stipulate that it rescinded previous D.Os.

61. Further there was nothing inconsistent with the exemption recognized by the 2007 DO applying to persons in possession of an LL.B up until the date of the 2010 DO, with the 2010 DO having prospective effect in relation to persons who either i. had not by then applied for and received exemptions from further examination or ii. had obtained the LL.B after the 2010 D.O's coming into operation. This is important because the presumption against implied retrospectivity was a highly relevant factor in assessing any consideration of proportionality, and the competing matters of a. the appellant's legitimate expectation on the one hand, and b. the alleged overriding public interest asserted by the respondents on the other.

62. The trial judge could not therefore be said to have a. properly appreciated the requisite proportionality test in law that he was required to apply b. properly appreciated the undisputed evidence before him, or c. appreciated what evidence was **not** before him. These all fundamentally affected his assessment of such evidence in relation to the application of the appropriate test for overriding an undisputed legitimate expectation. He failed to address the proportionality of, or justify the compelling need to have the appellant write the promotional examination in the subject Business Communications, when previously he did not need to and he was expressly told that he did not need to do so.

63. In the instant case there is no evidence to justify the resiling from the legitimate expectation by the appellant that he would not have to write any further promotional examinations in the second division.

Conclusion

64. The evidence of the respondents failed to substantiate the requisite overriding interest or overriding public interest in requiring a holder of Bachelor of Laws degree from the University of London, who had enjoyed a written exemption from any further examination for promotion in the second division, to write an examination whose focus was on writing reports, letters, and memos. Even when taking into account the objective of efficiency and good administration and proper functioning of the police service, resiling from the expressed exemption and the legitimate expectation to enjoy that exemption, could not satisfy the test of proportionality required to justify it. When the unfairness of interpreting the 2010 D.O as having retrospective effect, and the uneven application of the allegedly new policy are added to the balance, it is clearly in favour of upholding the appellant's legitimate expectation of the promised exemption and not permitting the respondents to resile therefrom. No overriding interest or public policy consideration had been demonstrated on the evidence to necessitate this result.

65. Accordingly the weighing exercise engaged in by the trial judge, on the basis of which he permitted the overriding of the appellant's legitimate expectation, is flawed in law and plainly wrong, both as a matter of discretion but more importantly as a matter of law. Accordingly it is open to this court to conduct that weighing exercise on the material that was before the trial judge.

66. Were the weighing exercise to have been carried out:

a. on the actual evidence before the trial court there would have been no justification demonstrated for permitting the respondents to resile from the undisputed legitimate expectation of the appellant.

b. further or alternatively, based on the evidence actually before the trial judge, the respondents resiling from the undisputed legitimate expectation could not satisfy the test of proportionality:

i. for the reasons above,

ii. in circumstances where **other persons** had been afforded the exemption now denied to him, and,

iii. where fairness required a prospective, rather than a retrospective application of the 2010 departmental order, as a relevant factor in the necessary weighing exercise. This was a matter of law. To the extent however that it has been contended that it involved an element of discretion, the trial judge was plainly wrong in his application of the law to the evidence before him.

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Justice of Appeal

Peter A. Rajkumar