

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE  
SUB-REGISTRY, SAN FERNANDO

H.C.A. NO. S-490 OF 1998

IN THE MATTER OF THE CONSTITUTION OF TRINIDAD AND TOBAGO BEING THE SCHEDULE TO THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO (ACT NO. 4 OF 1976) CHAP. 1:01 OF THE REVISED LAWS OF TRINIDAD AND TOBAGO

AND

IN THE MATTER OF THE APPLICATION BY KHIMRAJH BISSESSAR FOR THE REDRESS IN PURSUANCE OF SECTION 14 OF THE SAID CONSTITUTION OF TRINIDAD AND TOBAGO AND IN PARTICULAR SECTIONS 4(a), 4(b) AND 4(d) IN RELATION TO THE APPLICANT WHOSE RIGHTS TO THE ENJOYMENT OF PROPERTY AND TO EQUALITY BEFORE THE LAW AND THE PROTECTION OF THE LAW HAVE BEEN AND ARE BEING AND ARE THREATENED TO BE TAKEN AWAY BY THE PUBLIC SERVICE COMMISSION (HEREINAFTER REFERRED TO AS THE "PSC") OF TRINIDAD AND TOBAGO IN THE EXERCISE OF ITS FUNCTIONS.

IN THE MATTER OF THE ACTION AND/OR CONDUCT OF THE PSC DURING THE PERIOD AUGUST 1994 – FEBRUARY 1996 WHEREBY IT UNFAIRLY RETROACTIVELY PROMOTED SEVEN (7) JUNIOR PRISON OFFICERS AS A CONSEQUENCE OF WHICH THE APPLICANT'S POSITION ON THE SENIORITY LIST FOR PRISON OFFICERS WAS ERODED.

IN THE MATTER OF THE ARBITRARY UNFAIR AND RETROACTIVE APPOINTMENT OF MR. PETERSON LAMBERT AS AN ASSISTANT SUPERINTENDENT OF PRISONS (HEREINAFTER REFERRED TO AS "ASP") ON THE 5<sup>TH</sup> DAY OF FEBRUARY, 1995 WITH EFFECT FROM THE 14<sup>TH</sup> DAY OF NOVEMBER, 1994 WHICH UNLAWFULLY AND UNFAIRLY PLACED MR. LAMBERT IN A HIGHER POSITION/RANKING ON THE 1996 SENIORITY LIST THAN THE APPLICANT.

IN THE MATTER OF THE DECISION OF THE PSC ON OR ABOUT THE 25<sup>TH</sup> DAY OF AUGUST 1997 TO PROMOTE MESSRS. VERNE SYLVESTER, MARTIN MARTINEZ AND KENNETH FORGENIE TO THE RANK OF SUPERINTENDENT OF PRISON WITHOUT HOLDING ANY INTERVIEWS AND/OR WITHOUT CONSIDERATION OF THE APPLICANT WHO WAS AN ELIGIBLE CANDIDATE FOR THE POST.

BETWEEN

KHIMRAJH BISSESSAR

APPLICANT

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

RESPONDENT

***BEFORE THE HONOURABLE MADAM JUSTICE RAJNAUTH-LEE***

APPEARANCES:

Mr. Anand Ramlogan and Mr. Kevin Ratiram instructed by Mr Krishendath Neebar for the Applicant

Miss Carol Hernandez and Miss Nadine Nabbie instructed by Miss Grace Jankey for the Respondent

## **JUDGMENT**

### **INTRODUCTION:**

1. By his Notice of Motion dated and filed 22<sup>nd</sup> May, 1998 and amended on the 16<sup>th</sup> December 2002 (hereinafter referred to as “the Amended Notice of Motion”), the applicant sought the following reliefs:

“1. A declaration that the Respondent by consistently and repeatedly appointing and promoting Prison Officers of inferior merit and/or seniority to positions and/or ranks superior to that of the Applicant’s has treated the Applicant less favourably and/or discriminated against the Applicant and in derogation of the Applicant’s right to equality of treatment by the Respondent in the exercise of its functions as guaranteed by Section 4 (d)

has been contravened and/or his right to property and/or the protection of the law as set out in sections 4 (a) and (b) of the Constitution of Trinidad and Tobago have also been contravened.

2. A declaration that the Respondent acted unlawfully and/or unreasonably and/or arbitrarily and/or unfairly discriminated against the Applicant by purporting to promote retroactively and and/or all of the following Prison Officers viz. Dalton Stewart and/or Verne Sylvester and/or Martin Martinez and/or Kenneth Forgenie and/or Joseph Narsiah and/or Errington St. Louis and/or Peterson Lambert to superior positions and/or ranks from dates which gave them precedence and seniority over the Applicant and permanently undermined the Applicant's position on the Seniority List of Prison Officers in contravention of the Applicant's constitutional right to equality of treatment.
3. A further declaration that the correct date for the purpose of determining an officer's place on the Seniority List is the date when the PSC *actually* makes the appointment (and not the retroactive date), in accordance with regulation 31 of the Public Service Commission Regulations [PCSR].
4. Such further and/or other relief as the nature of the case may require.
5. Damages and compensation.
6. Costs."

## **GROUND**

2. The grounds upon which the application is brought, is set out in the Amended Notice of Motion as follows:-

- “1. The right to equality of treatment from a public authority in the exercise of its functions as guaranteed by section 4 of the Constitution of Trinidad and Tobago includes the right to equality in matters of public employment by the State. This is a corollary and incident of the application of the concept of equality to all officers including those in the Prison Service.
2. Regulation 13 of the Public Service Commission Regulations (PSCR) sets out the procedure for the filling of vacancies. The Respondent Commission failed to observe the procedure laid down in Regulation 13 in that vacancies for the position and/or rank of Assistant Superintendent of Prisons and/or Superintendent of Prisons remained vacant for periods in excess of three (3) months without any request for recommendations by the Director of Personnel Administration and/or any reasons being adduced as to why no requests for the filling of the said vacancies were forthcoming.
3. The 1996 Seniority List was erroneously compiled based on the retroactive date(s) of the newly appointed ASPs and this unfairly eroded and relegated the Applicant’s to a low position on the Seniority List. The correct date for the purpose of determining an officer’s place on the Seniority List is the date when the PCS actually makes the appointment and/or promotion. This is the correct and lawful date when an officer assumes office under Section 31 of the PSCR.
4. The Applicant was never notified of any vacancies for the position of Superintendent of Prisons and was therefore deprived of the opportunity to apply for any of the said vacancies or to make representations on his behalf in connection therewith.
5. The Applicant was the most Senior Supervisor of Prisons on the 1993/1994 Seniority List, Mr. John Morris having retired. The Applicant

acted in the position of Assistant Superintendent of Prisons longer than any of the other candidates and performed his substantive and acting duties in an efficient manner and without complaint. The Applicant was of higher merit with an unblemished record and deserved to be and should have been promoted in precedence to his juniors.

6. The Respondent acted arbitrarily and in bad faith in promoting Mr. Peterson Lambert to the rank of Assistant Superintendent of Prisons with effect from the 14<sup>th</sup> day of November, 1994 thereby unlawfully giving him precedence and Seniority over the Applicant by fourteen (14) days. The consequence was that the Applicant unfairly and illegally lost seniority to Mr. Lambert in the Prison Service.
7. The retroactive promotion of Mr. Lambert constitutes an abuse of the Respondent's discretion and powers and unlawfully deprives the Applicant of property (in the form of income) because Mr. Lambert would now have an unfair advantage over the Applicant for future promotions and priority before the Applicant for all Acting appointments (together with the perquisites thereof) under regulation 175 of the PSCR.
8. No genuine or no annual staff reports to assess the Applicant's performance were prepared and/or made available to the Selection/Promotion board in accordance with regulations 34 and 172 of the Public Service Commission Regulations. The annual staff reports for the relevant periods confirmed the Applicant's excellent record of performance as an Acting Assistant Superintendent of Prisons and would have certainly enhanced his claim for promotion to Assistant Superintendent of Prisons. The State unlawfully discriminated against and severely prejudiced the Applicant by failing to cause these annual reports to be brought to the attention of the Promotions Board at interviews in August, 1994.

9. The Applicant was entitled by virtue of his seniority to be promoted to the rank of Assistant Superintendent of Prisons in priority to Officers Dalton Stewart, Verne Sylvester, Martin Martinez, Kenneth Forginie, Joseph Narsiah and Errington St Louis.
10. Alternatively, the Respondent acted arbitrarily and in bad faith in promoting the Applicant to the rank of Assistant Superintendent of Prisons with effect from the 28<sup>th</sup> day of November, 1994, with intent to erode his Seniority and giving the said Dalton Stewart, Verne Sylvester, Martin Martinez, Kenneth Forginie, Joseph Narsiah and Errington St Louis precedence and seniority over him to which they were not entitled.
11. If any adverse annual staff reports were in fact prepared in accordance with regulation 34 the Applicant was never informed of the same and was therefore treated unequally and unfairly in that he was not given an opportunity to rectify his shortcomings if any. To the Applicant's knowledge his service was at all material times without blemish.
12. The date of appointment to an office/rank position is the date on which the officer assumes substantively the duties of that office. The Applicant assumed the duties of Assistant Superintendent of Prisons on the 29<sup>th</sup> day of May 1995 and Mr. Peterson Lambert on the 5<sup>th</sup> day of February 1996 and hence, the Applicant is entitled to be ranked as Senior to Mr. Lambert on the 1996 List of Assistant Superintendents.
13. Mr. Lambert could not assume substantive duties as an Assistant Superintendent of Prisons before the Applicant so as to give him Seniority and priority over the Applicant because the Respondent had already acknowledged the fact that the Applicant was the more Senior, qualified and suitable officer of the two (2) by promoting the Applicant to Assistant

Superintendent of Prisons in priority and in precedence to Mr. Lambert when the earlier vacancy arose.

14. Recommendations for promotions and acting appointments and/or promotions and acting appointments (actually made) for the rank of Superintendent of Prisons after the publication of the 1996 Seniority List were made on the basis of an unconstitutional and/or illegal and/or unlawful 1996 Seniority List which unlawfully and unconstitutionally demoted the Applicant.
15. The State was under duty to observe, follow and have regard to the principles for promotions and/or acting appointments set out in Regulations 172 to 178 of the PSCR and the Commissioner of Prisons was required to abide by the said Regulations in the performance of his functions.
16. The Commission and the Commissioner acted unlawfully in promoting and/or placing Mr. Peterson Lambert ahead of and in precedence to the Applicant on the 1996 Seniority List which had been compiled illegally contrary to Regulations 172 to 178 of the PSCR and/or caused the same to be done unlawfully knowingly and with intent to prejudice the position and rights of the Applicant in the Prison Service.
17. The Applicant had a legitimate expectation to be interviewed and/or heard by the Commissioner of Prisons and the Commission before they arrived at the decisions complained of herein in respect of the creation of the Seniority List and the appointments and the promotions above the Applicant.

18. The Applicant was/has not been given any reason for the demotion of his ranking/placement on the Seniority List for 1996 has been severely prejudiced thereby in relation to his fundamental and legal rights.
  19. The Commission in promoting Messrs. Sylvester, Martinez and Forgenie to the position of Superintendent of Prisons ahead of and in priority to the Applicant acted unfairly and discriminated against the Applicant contrary to the right the protection of the law and to equality of treatment of the Applicant as guaranteed by the Sections 4 (b) and 4 (d) of the Constitution of Trinidad and Tobago.
3. The applicant swore an affidavit in support of the Notice of Motion on the 22<sup>nd</sup> May, 1998 and thereafter filed the following affidavits:
- The affidavit of the applicant sworn and filed 11<sup>th</sup> December, 1998.
  - The affidavit of the applicant sworn and filed 19<sup>th</sup> March, 1999.
  - The affidavit of the applicant sworn and filed 28<sup>th</sup> November, 2002.
4. The following affidavits were filed on behalf of the respondent:
- The affidavit of Herman Rougier sworn and filed 8<sup>th</sup> October, 1998.
  - The affidavit of Jeanne Roseman sworn 29<sup>th</sup> October, 1998 and filed 30<sup>th</sup> October, 1998.
  - The affidavit of Herman Rougier sworn 5<sup>th</sup> March, 1999 and filed 8<sup>th</sup> March 1999.
  - The affidavit of Jeanne Roseman sworn and filed 12<sup>th</sup> March, 1999.



- The affidavit of Jeanne Roseman sworn and filed 17<sup>th</sup> March, 1999.
- The affidavit of Michael Mahabir sworn 5<sup>th</sup> September, 2002, and filed 6<sup>th</sup> September, 2002.

5. The applicant was cross-examined. The deponents Herman Rougier and Jeanne Roseman were also cross-examined. There was no cross-examination of Michael Mahabir.

**UNDISPUTED FACTS:**

6. The following undisputed facts are gleaned from the several affidavits filed.

(1) The history of the applicant's career in the Prison Service was as follows:

August 1, 1970	Entered Prison Service as a Night Watchman
January 1, 1971	Became a full-fledged Prison Officer – appointed Prison Officer I.
April 18, 1976	Promoted to the rank of Prison Officer II.
August 1, 1981	Promoted to the rank of Prison Supervisor.
May 29, 1995	Promoted to the rank of Assistant Superintendent of Prisons with retroactive effect from November 28, 1994.
March 30, 2000	Promoted to the rank of Superintendent of Prisons.

February 7, 2002

Voluntarily retired from the Prison Service  
after having attained the age of 59 years.

- (2) In 1985, there was compiled an Order of Merit List for the post of Assistant Superintendent of Prisons which is set out hereunder and is hereinafter referred to as “the 1985 Merit List”:

No.	Name	Marks Awarded by		Total
		Mr. Punch	Mr. Charles	
364	Lennox A. Watson	56	40	96
1101	Martin W. Martinez	53	37	90
513	Carlo C. Mc Honey	53	35	88
876	John P. Rougier	51	37	88
461	Rafael Sequea	56	30	86
313	Atcanasues Boney	50	35	85
469	John Morris	54	30	84
229	Joseph N. Timothy	48	35	83
454	Julien R. Alexander	52	30	82
374	Peter M. Hill	50	28	78
680	Khimraj Bissessar	49	29	78
696	Herman Rougier	47	30	77
676	Lennox M. Simmons	52	24	76
363	Arneaud L. Baptiste	50	22	72
485	Paterson K. Lambert	52	20	72
347	Ralph Layne	44	20	64
481	Stanley Martin	40	22	62

The applicant was not promoted pursuant to the 1985 Merit List.

(3) Subsequently, in 1989, there was compiled an Order of Merit List for the post of Assistant Superintendent of Prisons which is set out in part hereunder and is hereinafter referred to as “the 1989 Merit List”:

1. Mr. Joseph Timothy
2. Mr. Peter Hill
3. Mr. Julien Alexander
4. Mr. John Rougier
5. Mr. Dalton Smith
6. Mr. Herman Rougier
7. Mr. Stanley Martin
8. Mr. Lennox Simmons
9. Mr. Arnim Inniss
10. Mr. Khimrajh Bissessar
11. Mr. Peterson Lambert

The applicant was not promoted pursuant to the 1989 Merit List.

(4) As at 31<sup>st</sup> December, 1994, the applicant had acted as Assistant Superintendent of Prisons (hereinafter referred to as “ASP”) and Superintendent of Prisons (hereinafter referred to as “SOP”) for the following periods and in the following circumstances:

<b><u>PERIOD</u></b>	<b><u>ACTING</u></b>	<b><u>CONSEQUENT ON</u></b>
17/7/90 – 9/8/90	ASP	P. Hill Ag. SOP
10/8/90 – 19/8/90	ASP	P. Hill Ag. SOP
20/8/90 – 26/8/90	Vacation Leave.	
27/8/90	ASP	P.Hill Ag. SOP
15/2/91 – 25/2/91	ASP	J.Timothy ASP Vac. Leave
26/2/91 – 7/4/92	ASP	P.Hill Ag. SOP
8/4/92 – 9/6/92	ASP	P. Hill Ag. SOP

10/6/92 –20/10/92	ASP	P. Hill Ag. SOP
21/10/92 – 30/12/92	ASP	P.Hill Ag. SOP
31/12/92 – 22/8/93	ASP	Vacancy -J.Rougier Promotion
23/8/93 –5/9/93	-----	Sick Leave
6/9/93 – 27/2/94	APS	J. Rougier (Vacancy)
28/2/94 – 4/3/94	SOP	C. Mc Honey Ag. Asst. COP
5/3/94 – 15/4/94	SOP	C. Mc. Honey Ag. Senior SOP
16/4/94 – 14/6/94	SOP	J. Alexander, Vacation Leave
15/6/94 – 25/8/94	SOP	P. Hill Vac. Leave
26/8/94 – 13/9/94	SOP	P. Hill Ag. Senior SOP
14/9/94 – 26/9/94	SOP	J. Alexander Ag. Senior SOP
27/9/94 and cont'g	SOP	J.Timothy Pre Retirement Leave

(5) In August, 1994, the Promotions Advisory Board conducted interviews for the post of ASP. At that time, there were seven (7) vacancies for the post of ASP. The first sitting of the Promotions Advisory Board was subsequently declared a nullity because of inter alia complaints about the composition of the Board. After the Promotions Advisory Board was properly constituted, a second set of interviews was held. At the second interview, the Chairman of the Promotions Advisory Board, Mr. Leon Martinez, did not interview the applicant on the ground that he had already interviewed him and would rely on his notes from the first interview. The other two members interviewed the applicant.

(6) Consequent on the said interviews, an Order of Merit List was compiled for the post of ASP, which is set out fully hereunder and is hereinafter referred to as “the 1994 Merit List”:

Name of Candidate	Seniority	MARKS AWARDED			Average Mark
		Mr. Martinez	Mr. Baptiste	Mr. Mc Honey	
1) Dalton Stewart	5	85	85	85	85
2) Verne Sylvester	6	85	81	80	82
3) Martin Martinez	8	88	79	78	82
4) Kenneth Forgenie	11	78	78	77	78
5) Joseph Narsiah	7	79	72	78	76
6) Errington St. Louis	12	78	70	76	75
7) Peterson Lambert	3	83	67	68	73
8) Kimraj Bissessar	2	75	68	74	72
9) Edwin Grell	13	72	75	67	71
10) Winston Pierre	4	78	65	65	69
11) Elton Isles	20	72	65	63	67

(7) Subsequent to the said interviews, the applicant instructed his Attorney to write a letter of complaint (dated 21<sup>st</sup> September, 1994) to the Deputy Commissioner of Prisons to the effect that it had come to the applicant's attention that he was not to be promoted to the post of ASP, and he questioned the relevance of the criteria applied in the selection

process. The said letter of 21<sup>st</sup> September, 1994 was responded to by the Deputy Commissioner of Prisons by letter dated 4<sup>th</sup> October, 1994. The Deputy Commissioner stated inter alia that it appeared that the applicant was privy to information not available to him, the Deputy Commissioner, and further that promotions into the Second Schedule of the Prison Service were the responsibility of the Public Service Commission.

- (8) At the time of the said interviews, the Seniority List 1993/1994 reflected the following seniority for Prison Supervisors:

<u>Names</u>	<u>Present Appointment</u>
Khimrajh Bissessar	01/08/81
Peterson Lambert	24/05/82
Winston Pierre	04/06/83
Dalton Stewart	20/12/89
Verne Sylvester	29/12/89
Joseph Narsiah	29/12/89
Martin W. Martinez	29/12/89
Frank Modeste	21/12/90
Kenneth Forgenie	21/12/90
Errington St. Louis	21/12/90
Edwin Grell	21/12/90
Jean Newsam	31/12/92
Elton Iles	31/12/92
Samuel Sealey	31/12/92
Hector Jack	31/12/92
Isaiah Roachford	31/12/92
Leonard Callender	31/12/92
Francis O'Neil	31/12/92
Deokaran Singh	31/12/92"

The applicant was the most senior Prison Supervisor and the longest acting ASP among the Prison Supervisors interviewed in August, 1994.

- (9) On 3<sup>rd</sup> February, 1995, General Order No. 4 of 1995 was published. Six officers, being the first six on the 1994 Merit List, were promoted from the post of Prison Supervisor to the post of ASP as follows:

Mr. Dalton Stewart with effect from January 1<sup>st</sup>, 1993

Mr. Verne Sylvester with effect from July 11<sup>th</sup>, 1994

Mr. Martin Martinez with effect from July 11<sup>th</sup>, 1994

Mr. Kenneth Forgenie with effect from July 11<sup>th</sup>, 1994

Mr. Joseph Narsiah with effect from July 11<sup>th</sup>, 1994

Mr. Errington St. Louis with effect from November 11<sup>th</sup>, 1994.

The applicant was not promoted.

- (10) Subsequent to the publication of General Order No. 4 of 1995, the applicant wrote to the Director of Personnel Administration complaining that six Prison Supervisors junior to the applicant had been promoted ahead of him. The applicant received no response.

- (11) Subsequently, the applicant together with Prison Supervisors Peterson K. Lambert (hereinafter called "Lambert") and Winston Pierre (hereinafter called "Pierre") commenced High Court proceedings No. 1078 of 1995 for leave for judicial review against the Public Service Commission, challenging the promotions made on the grounds inter alia that the Promotions Advisory Board failed to interview the applicant, Lambert and Pierre during the second set of interviews. Leave was granted on the 27<sup>th</sup> April, 1995 to review the decision of the Public Service Commission in respect of those promotions. On 16<sup>th</sup> June, 1995

the applicant received a letter dated 29<sup>th</sup> May, 1995 from the Director of Personnel Administration stating that he had been promoted to the rank of ASP with effect from the 28<sup>th</sup> November, 1994.

(12) On the 9<sup>th</sup> October, 1995, in the said High Court Action No. 1078 of 1995, Cipriani Baptiste, Commissioner of Prisons, swore to an affidavit. Paragraphs 6, 7 and 8 of the said affidavit are set out in full hereunder:

“6. On 20<sup>th</sup> December, 1994, funds were made available to ensure that permanent appointments were made in respect of 6 offices of Assistant Superintendent of Prisons. Thereafter, 6 candidates other than the applicants were promoted thereto, (These 6 officers had acted previously in the offices of Assistant Superintendent of Prisons.

7. Subsequently, additional funds were made available for a seventh office of Assistant Superintendent of Prisons. Accordingly, on 16<sup>th</sup> May, 1995 the Public Service Commission (hereinafter referred to as “the Commission”) decided to promote the first applicant to the office of Assistant Superintendent of Prisons with effect from 28<sup>th</sup> November, 1994. The first applicant was informed of this appointment by letter dated 29<sup>th</sup> May, 1995.

8. At the same time, funds were also made available for an eighth office of Assistant Superintendent of Prisons. The promotion of the second applicant was considered by the Commission. However, this has been deferred pending the consideration of a report dated 15<sup>th</sup> May, 1995 prepared by an investigating officer into certain allegations of misconduct made against the second applicant.”



Baptiste in the said affidavit did not depose to the fact that Lambert was on suspension, and certainly did not state that Lambert was on a disciplinary charge.

- (13) On becoming aware that he had been promoted to the post of ASP, the applicant complained to the Public Service Commission via the Commissioner of Prisons and the Personnel Department about the effective date of his promotion/appointment on the ground that he would rank after all the other officers who were promoted in February, 1995 pursuant to General Order No. 4 of 1995.
- (14) In or about 21<sup>st</sup> August, 1995, the applicant received a letter from the Commissioner of Prisons dated 17<sup>th</sup> August, 1995, inquiring whether the applicant had withdrawn his representation which claimed that he had been overlooked for promotion to the post of ASP. The applicant responded by memorandum dated 28<sup>th</sup> August, 1995, setting out the history of his career, alleging calculating and systematic discrimination against him, and indicating that he felt duty bound in the circumstances to let the courts adjudicate on the merits of the matter.
- (15) By memorandum dated 29<sup>th</sup> March, 1996, the applicant wrote to the Director of Personnel Administration requesting copies of the ratings and markings of the Promotions Advisory Board which had conducted the interviews in August, 1994. There was no response to the applicant's request.
- (16) On or about 2<sup>nd</sup> October, 1996, the applicant was asked by the Acting Deputy Commissioner of Prisons, Mervyn Harris, to initial certain staff reports pertaining to the applicant for the following periods:

6<sup>th</sup> March, 1993 – 5<sup>th</sup> March, 1994  
6<sup>th</sup> March, 1994 - 27<sup>th</sup> November, 1994  
28<sup>th</sup> November, 1994 - 27<sup>th</sup> May, 1995

By letter dated 2<sup>nd</sup> October, 1996, the applicant wrote to the Director of Personnel Administration complaining that staff reports which should have been relevant to his promotional interviews had only been marked some two years after the said interviews. There was no response to the said letter. The staff reports made no adverse comments on the applicant's performance and rated his ability highly.

(17) By General Order No. 12 of 1996 dated 5<sup>th</sup> February, 1996, Lambert was promoted to the post of ASP with effect from 14<sup>th</sup> November, 1994, consequent upon the retirement of Mr. Dalton Smith as at 13<sup>th</sup> July, 1994, effectively causing Lambert to become senior to the applicant. The applicant became aware of Lambert's promotion in or about May, 1997.

(18) The applicant orally complained to Mr. Leo Abraham, Commissioner of Prisons, that Lambert's retroactive promotion had catapulted him into a higher place on the Seniority List for ASPs, giving Lambert automatic entitlement and priority to all acting positions (together with all perquisites) before the applicant in accordance with Regulation 175 of the Public Service Commission Regulations.

(19) On the advice of the Commissioner, by letter dated 19<sup>th</sup> May, 1997, the applicant wrote to the Director of Personnel Administrative alleging that his seniority had been further eroded by the retroactive promotion of Lambert. By letter dated the 2<sup>nd</sup> June, 1997, the Chairman of the Public Service Commission acknowledged receipt of the applicant's letter and informed him that the matter was receiving attention.

(20) On or about 25<sup>th</sup> August, 1997, General Order No. 61 of 1997, was published, whereby ASP Verne Sylvester, ASP Martin Martinez and ASP Kenneth Forgenie were promoted to the rank of Superintendent of Prisons. As an eligible officer, the applicant was never notified of these vacancies, and no promotional interviews were held. The applicant enquired of the Personnel Officer as to the promotions of these officers without interviews and/or notification to eligible officers. He was advised to write to the Director of Personnel Administration.

(21) On or about 11<sup>th</sup> May, 1998, the applicant was shown for the first time a copy of the 1996 Seniority List, which is set out hereunder with respect to the post of ASP:

<u>Names</u>	<u>Present Appointment</u>
Verne Sylvester	11/07/94
Martin Martinez	11/07/94
Kenneth Forgenie	11/07/94
Joseph Narsiah	11/07/94
Errington St. Louis	11/11/94
Peterson Lambert	14/11/94
Khimrajh Bissessar	28/11/94
Edwin Grell	23/06/95

(22) By letter dated 14<sup>th</sup> May, 1998, the applicant yet again complained to the Director of Personnel Administration, alleging inter alia discrimination, malice and bad faith in the publication of this Seniority List without any adjudication on his several complaints. According to Herman Rougier who swore to an affidavit on behalf of the respondent, the said 1996 Seniority List was compiled by the Personnel Department of

the Prison Service. It was not the official Seniority List, but was used by the Personnel Department for internal guidance for vacation leave, allocation and movement of prison officers.

### **THE MEMORANDUM OF AUGUST 12, 1988**

7. This is a convenient point to set out the facts and matters surrounding the issue of the Memorandum of August, 1988 by the Commissioner of Prisons to the Director of Personnel Administration on the subject: Letter of Protest – Prison Supervisor, Khimraj Bissessar.

8. In response to the applicant's allegations as to his excellent work record and in particular that he never received any oral or written complaint as to shortcomings in the performance of his duties, the respondent through Jeanne Roseman, then Director of Personnel Administration (and now retired) exhibited the Memorandum dated August 12, 1988. According to Miss Roseman the applicant had received letters of warning from the Commissioner of Prisons for neglect of duty and had asked that the letters be withdrawn. The Commissioner of Prisons thereupon informed the Director of Personnel Administration that the warning was justified. The Memorandum read as follows:

“Forwarded herewith is a Letter of Protest by Prison Supervisor, Khimraj Bissessar who previously was stationed at Carrera Convict Prison and now at the Port of Spain Prison. Also attached is a report from the Superintendent of Prisons, Carrera, relevant to some of the allegations made, and copies of Letters of Warning issued to Mr. Bissessar.

Mr. Bissessar voices his dissatisfaction with the marking of his Staff Report which covers the period March 6, 1987, to March 5, 1988.

The Reporting Officer was Ag. Assistant Superintendent of Prisons, J. Alexander and the Countersigning Officer, Superintendent of Prisons, T. Guy. Prison Supervisor Bissessar has also made several allegations against Senior Administrative personnel of this Division.

This officer has opened his integrity to question not only in the present circumstances but on previous occasions.

He was removed from positions of trust demanding high confidence namely Training Officer and Personnel Officer when he was found to be undermining the confidence reposed in him. His Letters of Warnings were justified, and his attempts to lay blame on the Management for his predicament are indicative of the extent to which he would go.

For your continued attention.”

9. By letter dated 10<sup>th</sup> August, 1987, the applicant was warned of the lateness of his arrival at Small Boats Bay on 19<sup>th</sup> July, 1987, and as the Supervisor in charge causing the launch with officers going to Carrera Convict Prison to leave late. The applicant did not protest this letter of warning and heard nothing further of this matter.
10. By letter dated 24<sup>th</sup> February, 1988, the applicant was warned of an incident involving his failure to be present to give evidence in a matter involving convict Ancil Hutchinson. By letter dated 1<sup>st</sup> March, 1988, the applicant protested this letter of warning on the ground that he was never notified that his presence was requested on the 4<sup>th</sup> February, 1988 to give evidence against convict Ancil Hutchinson.
11. By letter dated 13<sup>th</sup> May, 1988, the applicant had been informed that for the period 6<sup>th</sup> March, 1987 to 5<sup>th</sup> March, 1988, adverse markings were reflected

on his staff reports as a result of letters of warning received by him on the 10<sup>th</sup> August, 1987 and the 24<sup>th</sup> February, 1988. By letter dated 20<sup>th</sup> May, 1988, the applicant protested the adverse markings on his staff report.

12. It was in those circumstances that the said Memorandum of the 12<sup>th</sup> August, 1988 was written. The applicant had no knowledge of the said Memorandum and has questioned the basis for the Commissioner's conclusion that he (the applicant) had "opened his integrity to question not only in the present circumstances but on previous occasions." The applicant has also questioned the Commissioner's statement that he (the applicant) had been "removed from positions of trust demanding high confidence namely Training Officer and Personnel Officer when he was found to be undermining the confidence reposed in him." The applicant was never given an opportunity to answer the allegations contained in the said Memorandum. Indeed, although, according to Miss Roseman, the said Memorandum remained on the applicant's file at the Public Service Commission, the applicant complains that no reference was ever made to the said Memorandum either at his interviews in 1989 or in August, 1994 and that he was never given an opportunity to defend himself before the Public Service Commission.

**CONSTITUTIONAL FRAMEWORK AND THE REGULATIONS MADE THEREUNDER**

13. The applicant claims that his fundamental rights enshrined in sections 4(a), (b) and (d) of the Constitution have been contravened. The sections read in part as follows:

"4. It is hereby recognized and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely -

- (a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law;
- (b) the right of the individual to equality before the law and the protection of the law;
- (d) the right of the individual to equality of treatment from any public authority in the exercise of any function.”

14. The applicant has argued with leave that his fundamental rights contained in sections 5 (2) (e) and (h) of the Constitution have also been contravened. The sections read in part as follows:

“Section 5(2) Parliament may not ...

- (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;
- (h) deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms.”

15. The procedure for promotion and related matters affecting the careers of Prison Officers are regulated pursuant to the Constitution by the Public Service Commission Regulations Chap. 1:01 (hereinafter referred to as “the Regulations”).

Regulation 13 of the Regulations provides for the filling of vacancies. Regulation 13 (4) provides as follows:

“(4) The Director shall, from time to time by circular memorandum or by publication in the *Gazatte*, give notice of vacancies which exist in the particular service and any officer may make application for appointment to any such vacancy. Such application shall be forwarded through the appropriate Permanent Secretary or Head of Department to the Director, but the failure to apply shall not prejudice the consideration of the claims of all eligible public officers.”

16. Regulation 34 regulates the preparation of staff reports and reads as follows:

“34(1) A Permanent Secretary or Head of Department shall forward to the Director in each year -

- (a) in respect of all officers who are within the scale of pay, a staff report not later than sixty days before an increment is due to an officer; and
- (b) in respect of all officers who are at the maximum in the scale of pay or who receive a fixed pay, a staff report not later than the anniversary of the date of appointment of an officer to the office.

(2) A staff report shall relate to the period of service during the immediately preceding twelve months.

(3) In the preparation of a staff report, the Permanent Secretary or Head of Department shall be guided by his own deliberate judgment and shall in such report-

- (a) make an unbiased assessment of the officer's performance and conduct over the past twelve months, and
- (b) give an indication of the future prospects of the officers.



(4) A staff report shall be in such form as may from time to time be prescribed by the Commission and shall be made in respect of every officer whether he holds an acting appointment, a temporary appointment or is employed for a specified period.”

17. Regulation 35 provides for an officer to be informed of an adverse report and reads as follows:

“35. In order that an officer may be given every opportunity to correct any shortcomings which he might evince during the course of the twelve months’ period of service to be reported on, a Permanent Secretary or Head of Department shall –

- (a) as and when such shortcomings are noticed, cause the officer to be informed in writing thereof;
- (b) when adverse markings are included in the staff report cause the officer to be informed in writing thereof before he submits the report to the Director.”

18. By virtue of Regulation 36 (1), a staff report made in respect of an officer under Regulation 34 shall be the basis for determining the eligibility of an officer for an increment and/or promotion (emphasis mine)

19. Chapter XII deals with matters relating specifically to the Prison Service.

Regulations 167 (1) and (2) provide for the procedure for the appointment to an office of ASP and offices in higher grades, and are set out in full hereunder:

“167. (1) Every application for appointment to an office of Prison Assistant Superintendent and offices in higher grades shall be made in writing to the Director on the prescribed form.

(2) A candidate who has the prescribed qualifications may be selected for appointment to the office of Prison Superintendent, either from an office in a lower grade or on an open competitive basis prescribed by the Commission.”

20. Regulation 168 as amended by the Public Service Commission (Amendment) Regulations, 1990, provides for the establishment and functions of the Promotions Advisory Board and reads as follow:

“168. (1) A Promotions Advisory Board is established which shall consist of -

- (a) a member of the Commission selected by the Commission who shall be chairman;
- (b) the Commissioner or the Deputy Commissioner of Prisons;
- (c) a Senior Superintendent of Prisons nominated by the Commissioner.

(2) The Promotions Advisory Board shall interview a prison officer who has qualified for promotion to an office up to Range 53F (Assistant Superintendent of Prisons) as specified in the First Schedule to the Act.

(3) An officer being considered for promotion to an office by the Promotions Advisory Board shall be rated according to the criteria specified in regulation 172 and be placed in accordance with that rating on a list to be known as an Order of Merit List.

(4) Notwithstanding subregulation (2), the Commission may interview an officer for promotion to a higher office.”

21. The principles of selection for the promotion of prison officers are set out in regulations 172(1) and (2) which read as follows:

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

(2) In the performance of its functions under subregulation (1), the Commission shall take into account as regards each prison officer -

- (a) his general fitness;
- (b) his position on the seniority list and on the list of results of the promotion examinations;
- (c) any special qualifications;
- (d) any special courses of training that he may have undergone (whether at the expense of government or otherwise);
- (e) an evaluation of the officer’s overall performance as reflected in the annual staff reports;
- (f) any letters of commendation or special reports in respect of any special work done by the prison officer;
- (g) the duties of which he has had knowledge;
- (h) any specific recommendation of the Permanent Secretary for filling the particular office;
- (i) any previous employment of his in the Service or in the public service, or otherwise;

- (j) any special reports for which the Commission may call;
- (k) his devotion to duty.”

22. Regulation 173 (1) stipulates that the Director of Personnel Administration shall keep up-to-date seniority lists of all prison officers. Subregulations (2) and (3) of regulation 173 provide further for the keeping of seniority lists and the determination of the seniority of a prison officer respectively and are set out hereunder:

“(2) The Commissioner shall ensure for purposes of making recommendations for promotion and acting appointments that up-to-date seniority lists are kept of all prison officers showing in respect of each officer the date of appointment to his present office, date of appointment to his previous office, and date of first appointment in the Service.

(3) The seniority of a prison officer shall be determined by the date of his appointment to the particular office in which he is serving. The seniority of prison officers promoted to the same office from the same date shall be in accordance with their seniority in their previous office.”

23. Regulation 173 (5) provides that where any doubts arise as to the seniority of a prison officer, the Commission shall determine the seniority of such prison officer.

## **THE LAW AND FINDINGS:**

### **A. INEQUALITY OF TREATMENT:**

24. In the well-known case of Attorney General v K.C. Confectionery Ltd. (1985) 34 W.I.R 387 the Court of Appeal reviewed the judgment of Smith v L.J. Williams (1982) 32 W.I.R. 395. Persaud J.A. set out the following principles as to proof of unequal treatment.

At pages 404 letter g – 405 letter d:

“The question canvassed before this court is whether the complainant must prove mala fides when he complains of a breach of his constitutional rights? It seems to me that we must start off with the presumption that public officials will discharge their duties honestly and in accordance with the law; this is another way of saying that “there is a presumption of regularity in the acts of officials”, and that the burden of proving the contrary rests on him who alleges otherwise. If this is correct, then two situations may arise. If complaint is made that the official has been dishonest in the discharge of his duties, or that he has acted out of spite towards the complainant, clearly mala fides is alleged, in which event it must be proved; and perhaps it is unnecessary to observe that the onus of proof rests on the complainant. If, on the other hand, the allegation is that the official has merely contravened the law in the discharge of his functions, mala fides may not necessarily form part of the complainant’s case, in which event the question of its proof does not arise. All that needs to be proved in such a case is the deliberate and intentional exercise of the power, not in accordance with law, which results in the erosion of the complainant’s right the entitlement to which may become vested in

him either from the Constitution itself or from an Act of Parliament.

In my judgment, therefore, proving mala fides must depend on the nature of the allegation being made, always bearing in mind the presumption referred to above. In the instance case, the complaint was of inequality of treatment. So if to the trial judge's statement to the effect that upon the true construction of section 4(d) of the Constitution where –

“an applicant makes out a prima facie case upon proof of unequal treatment ... the onus shifts to the State to show that such differential treatment was reasonably and justifiably made”

is subsumed the presumption of the rectitude of the acts of officials, I do not find any fault. But I do not agree, with respect, that the time has come to remove the presumption from the common law of Trinidad and Tobago.”

25. Earlier in his judgment, Persaud J.A. had stated that he did not accept that such proof had to be beyond reasonable doubt. According to the learned Judge, “a prima facie case that remained unanswered would be enough” (page 401 letter b). The applicant must show not that he has been treated differently from others, but that he has been so treated from persons similarly circumstanced without good reason (page 400 letter c).

26. In the earlier case of **Smith v L.J. Williams** (supra), Bernard J. examined the law as it relates to section 4 (b) and section 4 (d) of the Constitution. According to Bernard J, section 4 (b) applied to both legislation and the administrative acts of officials. Insofar as the acts of officials were concerned, section 4 (b) guaranteed and was intended to ensure that where parties were similarly placed under the law they were entitled to like treatment under the law.

Having set out the principles of the presumption of regularity and of the burden of proof of unequal treatment, Bernard J. went on to state (at page 411 letter c):

“Of course, mala fides particularly in cases of this sort is not normally expressed. However, it can be and is usually to be implied from overt acts. In this connection it is not necessary, in my view, to prove “an evil eye” although I do not doubt that in some cases the evidence may be such that the act complained about can be seen to transcend both the concept of the “unequal hand” and an “evil eye” at the end of the day. In my opinion, so long as it can be shown that the act was a hostile act or an intentional and irresponsible act, i.e. an act done deliberately and without justification, that will be enough evidence to rebut the presumption of regularity.”

27. The learned Judge’s treatment of the principles underpinning section 4 (d) was similar to that set out above. While “a pattern of unjustified and deliberate discrimination” could be shown, that was not necessary. A single act could be sufficient.
28. The principles set out in the earlier cases of **Smith and K.C. Confectionery,** were examined by Sharma J.A. (as he then was) in the unreported case of **The Police Service Commission of Trinidad and Tobago and the Attorney General v Wayne Hayde** (Cv.A. No. 12 of 1999).
29. On more than one occasion during the judgment, Sharma J.A. made the point that a claim that a public authority has violated a citizen’s right to equal treatment was one that must be supported by cogent evidence (page 8). The quality of evidence should reach a high degree of cogency where the contention was that a body of public officials appointed by the President after consultation with the Prime Minister and the Leader of the Opposition were collectively engaged in acts of discrimination against an officer (page 9). Compelling and

cogent evidence was required. (page 10). Sharma J.A. recalled that in **Smith's** case there was extensive cross-examination lasting an entire month. Sufficient evidence must be placed before the Court to raise a case of unequal treatment.

30. Sharma J. A. also cited with approval the dictum of Mukherjea J. in **Ameerunnissa Begum v Mahboob Begum** [1953] S C R 404 at page 414:

“To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the objects which the legislature has in view.”

31. Prior to the above dictum, Mukherjea J. had reiterated that mere differentiation or inequality of treatment did not per se amount to discrimination within the inhibition of the equal protection clause.

**B. THE APPLICANT'S CONTENTIONS RE MALA FIDES:**

32. With the above principles and cases in mind, the applicant's Attorney launched the following highly interesting and inventive arguments:

(1) that section 4 (d), by its plain and literal meaning, does not impose the requirement that the aggrieved party must prove mala fides, dishonest motive, evil eye, or evil hand. According to the applicant's Attorney, these ingredients are of judicial making and the Constitution itself has not imposed such an evidential hurdle. There is no good reason why any of the fundamental rights enshrined in the Constitution should be treated differently and an inconsistent evidential burden applied.



- (2) whilst recognizing that this Court is bound by precedent, the applicant's Attorney submitted that the imposition of the requirement of proof of mala fides is wrong in law; that the decided cases, inclusive of **K.C. Confectionery**, **Smith** and **Wayne Hayde** are wrong in law and for the sake of the development of jurisprudence the Court should make an observation or express a view on the matter.
- (3) section 4 (d) must be treated as a separate fundamental right, separate and distinct from section 4 (b). The decided cases have treated sections 4 (b) and 4 (d) similarly and have never recognised section 4 (d) as a distinct right. The Indian cases which were relied on in the decided cases were based on provisions similar to section 4 (b) and not section 4 (d), which provision or like provision does not exist in the Indian Constitution.
- (4) the decision of the Judicial Committee of the Privy Council in the case of **Thomas v Attorney General** (1981) 32 W.I.R. 375 supports the applicant's contention that mala fides is not a necessary ingredient of the right to equality of treatment. According to Lord Diplock in **Thomas**, dismissal at the Commission's whim or at pleasure would conflict with one of the human rights recognized and entrenched in section 1 (d) of the Constitution. [the equivalent of section 4 (d)]. In Lord Diplock's words: "Dismissal of individual members of a public service at whim is the negative of equality of treatment." (page 385 letter a).

33. After the close of the arguments and pending delivery of the judgment, Attorneys made further submissions with the leave of the Court. The applicant's Attorney submitted that the recent Privy Council decision of **Mohanlal Bhagwandeem v The Attorney General of Trinidad and Tobago** (Privy

Council Appeal No. 45 of 2003) had set the stage for a further consideration of the law of Trinidad and Tobago relating to discrimination by public officials. It had been argued by the applicant in **Bhagwandeem** as had been cogently reasoned by Deyalsingh J. in his first instance judgment of **KC Confectionery** that mala fides as a necessary ingredient in the proof of unequal treatment under the Constitution and the presumption of regularity in the acts of public officials rested on unsatisfactory foundations and should not be accepted as correct. It is necessary, in the Court's view, to set out in full what their Lordships said in **Bhagwandeem** at paragraphs 21, 22, and 23:

“21. Their Lordships would require detailed argument on the issue before attempting to express any definite conclusion on the correctness of the propositions accepted by the Court of Appeal on this issue and would wish to give fuller consideration to the Indian authorities on which the Court of Appeal relied. Subject to that, however, they are inclined to the view that there may have been a degree of confusion between two distinct concepts, the presumption of regularity and the necessity for proof of deliberate intention to discriminate in a claim of inequality of treatment.

22. The presumption of regularity comes into play in this context when there is no evidence either way whether a public authority or official has taken into account the correct considerations in reaching an administrative decision. In such case the decider is entitled to the benefit of the presumption of regularity and is not obliged to adduce evidence to establish that he took only the correct factors into account. In consequence, in the absence of contrary evidence the application for judicial review will fail.

23. The need for proof of deliberate intention to discriminate is quite a different question. The Court of Appeal of Trinidad and Tobago accepted in *Attorney General v KC Confectionery Ltd* that a party complaining of

discrimination must prove, in the same terms as it was formulated in the US authorities, “intentional and purposeful” acts of unequal treatment. Persaud JA said at page 403 that the complainant must show a clear and intentional discrimination, “which in turn connotes mala fides”. That this is not required in discrimination cases in the United Kingdom was established by the House of Lords in *James v Eastleigh Borough Council* [1990] 2 AC 751, when the majority preferred what Lord Lowry termed the causative to the subjective construction and held that discrimination could be established even though the respondent council has not intended to discriminate between men and women. Accordingly, the law of Trinidad and Tobago relating to discrimination by public officials may require further consideration in the light of these observations.”

34. Several cases were relied on by the applicant which in effect held that there was no obligation on the applicant to show an intention to discriminate; that there could be discrimination through inadvertence; that the test should be an objective and not subjective test: see **James v Eastleigh Borough Council** [1990] 2 A.C. 751, **Vishundas Hundumal, etc v State of Madhya Pradesh and Others** [1981] 3 S.C.R 235, **Nagarajan v London Regional Transport** [1999] 4 ALL E.R. 65. Reliance was also placed on the American case of **Iowa-Des Moines Bank v Bennett** 284 U.S. 239 and the case of **Belize Broadcasting Authority v Courtenay and Hoare** [1988] LRC (Const) 276.

### C. SIMILAR CIRCUMSTANCES – DIFFERENT TREATMENT

35. The applicant has argued that he has been treated differently from persons similarly circumstanced without good reason. The Court has taken the time to set out in detail the history of the applicant’s career in the Prison Service. The applicant entered the Prison Service and was appointed a Prison Officer I, on 1<sup>st</sup> January, 1971. According to the 1993/1994 Seniority List, Herman Rougier who had been first appointed along with the applicant on the said 1<sup>st</sup> January, 1971,

was already holding the post of Superintendent of Prisons with effect from the 1st October, 1992. John Rougier who was first appointed in 1973 was also holding a similar post with effect from the 1<sup>st</sup> July, 1992.

36. Further, according to the 1993/1994 Seniority List, Lennox Simmons who was first appointed on the said 1<sup>st</sup> January, 1971, was holding the post of Assistant Superintendent of Prisons with effect from the 1<sup>st</sup> July, 1992.

37. As to the post of Prison Supervisor, the applicant was the most senior officer having been appointed to that post on the 1<sup>st</sup> August, 1981; Lambert was No. 2; Pierre No. 3; Dalton Stewart No. 4; Verne Sylvester No. 5; Joseph Nariash No. 6; Martin W. Martinez No. 7; Frank Modeste No. 8; Kenneth Forgenie No. 9 and Errington St. Louis No. 10.

38. The Regulations make it clear that seniority is an important factor (albeit not the only factor) to be taken into account when consideration is given to the eligibility of prison officers for promotion.

39. In this regard, Miss Roseman's evidence in cross-examination is important. According to her, there was a concern at the Public Service Commission that the interview system was flawed and that staff reports were not being properly done. Miss Roseman testified that one of the underlying reasons for the concerns of the Commission was that senior officers were being by-passed for promotion and the senior officers who were being by-passed had had good staff reports.

40. According to Miss Roseman, therefore, a policy was introduced by the Commission whereby (1) officers had to be shown their staff reports and had to sign them; and (2) where senior officers were being by-passed for promotion, they had to be told that they were doing wrong things. Further, where senior officers

were being by-passed, their staff reports had to indicate their shortcomings or adverse markings.

41. It is undisputed that apart from the earlier staff report, the applicant had no adverse markings on his staff reports; neither did he evince any shortcomings during his service. Despite his seniority, however, the applicant for reasons not advanced by the respondent, was placed No. 8 on the 1994 Merit List. Although he was eventually promoted to the post of Assistant Superintendent of Prisons, the effective date of his appointment, that is to say, the 28<sup>th</sup> November, 1994, eroded his seniority and caused him to become junior in the post of Assistant Superintendent of Prisons to seven officers who had been junior to him in the previous post of Prison Supervisor.

**D. STAFF REPORTS:**

42. The applicant submits with considerable force that the failure to have placed before the Promotions Advisory Board his relevant staff reports amounted to maladministration and a breach of regulation 34. Reliance is placed on the Privy Council decision of **Rajkumar v Lalla and Others**, [2002] 4 LRC 40. In that case, it had been accepted on behalf of the respondents that no staff reports having been prepared between the year 1991 and 1994, this failure amounted to maladministration and a breach of regulation 34 (page 49, paragraph 13). It was argued on behalf of the appellant that there was serious prejudice to him by reason of the failure to provide staff reports (page 50, paragraph 15) Lord Mackay had noted that the Court of Appeal had said that the absence of staff reports was something that had affected all applicants for promotion, but not necessarily equally. “For some the way they had done the work might commend them more effectively for promotion than answering questions in an interview.” (page 51, paragraph 20).

43. Accordingly, their Lordships reached the conclusion that in restricting consideration of the appellant's promotion to the order of merit list of 1995 – already three years old – and disregarding the other matters referred to in regulation 172, in particular (e) an evaluation of the officer's overall performance as reflected in the annual staff reports, the approach taken to the decision on the appellant's promotion was fundamentally flawed (page 52, paragraph 21).
44. Although the applicant, in the instant case, has not complained of the age of the order of merit list, he does complain that regulations 34 and 172 (e) have been disregarded, indeed breached, in that his staff reports for the relevant periods immediately preceding both the interviews and the promotions were not placed before the Promotions Advisory Board, and therefore not available for the Board's consideration in determining the 1994 Merit List and the consequent promotions.
45. Unlike **Rajkumar**, where the absence of staff reports had affected all the applicants for promotion, in the instant case, the Court finds that only this applicant was so affected. It has been contended on the part of the applicant that the presumption of regularity would apply to the instant case and in the absence of evidence to the contrary, the Court should find that the applicant was the only officer whose staff reports were not prepared in time for the August, 1994 interviews and the subsequent promotions. The Court considers untenable the position of the respondent on whose behalf it was submitted that in the absence of positive evidence from the applicant, the Court could not come to such a conclusion. It cannot lie in the mouth of the State with its abundant resources to remain silent on the issue of the staff reports of the other officers and then to argue that the applicant should have brought positive evidence to the Court. The Court notes with interest that in **Rajkumar**, the respondent had made it clear, and the Court of Appeal had accepted, that the absence of staff reports had affected all applicants for promotion. In the absence of like evidence from the respondent, the Court agrees with the contention advanced on behalf of the applicant.

46. By virtue of regulation 36 (1), a staff report made in respect of an officer under regulation 34 shall be the basis for determining the eligibility of an officer for promotion. Pursuant to regulation 168 (3), the Promotions Advisory Board is obliged to rate an officer being considered for promotion according to the criteria specified in regulation 172. The Order of Merit List is to be prepared on the basis of that rating.
47. The applicant also placed reliance on two cases argued before the European Court of Human Rights, that is to say, **Eva Rittweger v Commission of the European Communities** [1971] ECR and **Kuno Ditterich v Commission of the European Communities** [1978] ECR 1855. In particular, in Ditterich, the Court held that a staff report prepared on an official's ability, efficiency and conduct in the service in accordance with Article 43 of the Staff Regulations must be drawn up in order to ensure the proper administration and rationalization of the services of the Community. It constituted an **indispensable basis of assessment** each time an official's career is taken into consideration by the administration. (emphasis mine)
48. In cross-examination, Miss Roseman conceded that at the time of the August, 1994 interviews for the post of ASP, having regard to the four (4) year lapse since the last Merit List, the most current staff report which reviewed the period immediately preceding the interview, would have been a most important document. Indeed, according to Miss Roseman, the most current staff report would have been one of the things of which the Promotion Advisory Board should be apprised in the evaluation of the applicant's claim for promotion.
49. The applicant's staff reports for the periods: 6<sup>th</sup> March, 1993 – 5<sup>th</sup> March, 1994 and 6<sup>th</sup> March, 1994 – 27<sup>th</sup> November, 1994, were not prepared until October, 1996 and were never placed for consideration before the Promotions

Advisory Board either at the interview stage or subsequently at the promotion stage.

50. The Court holds that there has been a contravention of the law by the Public Service Commission in that there has been a breach of regulations 34, 36 (1), 168 (3) and 172. In my judgment, this constitutes a deliberate and intentional exercise of the powers of the Public Service Commission not in accordance with the law, which has resulted in the erosion of the applicant's rights, the entitlement to which have become vested in him from the Constitution and the regulations made thereunder.

51. In the circumstances, the applicant's complaint falls under the second limb of unequal treatment set out by Persaud J.A. in **K.C. Confectionery**. Accordingly, mala fides is not a necessary ingredient.

**E. THE MEMORANDUM OF AUGUST 12, 1988.**

52. The Court has earlier set out the contents of the Memorandum of August 12, 1988 and the circumstances in which it was written.

53. Pursuant to regulation 35 (a), an officer must be given every opportunity to correct any shortcomings which he might evince during the course of a period of service and to provide that said opportunity, the officer as and when such shortcomings are noticed, must be informed in writing either by a Permanent Secretary or a Head of Department.

54. In the case of Rittweger, (cited earlier), the assessment made on the work of five officials applying for the post of reviser were never communicated to the persons concerned. Article 43 of the Staff Regulations required the administration to communicate to the official assessments made of the manner in which he worked and the official was entitled to make any comments thereon



which he considered relevant. In the opinion of the Advocate – General delivered on the 16<sup>th</sup> December, 1970, the following pertinent statements are made:

“To accept that the reports which were not communicated may be taken into account for a promotion is practically, in my opinion, to render Article 43 of the Staff Regulations devoid of any content.

It should furthermore be mentioned that in all the countries where the staff regulations in public service include an obligation on the administration to communicate all their reports to the officials, the taking into account for promotion of reports not communicated makes the work of promotion illegal.”

55. It is undisputed that the Memorandum of August 12, 1988 remained on the file of the applicant at the Public Service Commission and was therefore available to the members of the Promotions Advisory Board and the Public Service Commission in the determination of the question of promotions both in 1989 and in 1994. The applicant was the subject of two most serious accusations:

- (a) that he had opened his integrity to question not only in the present circumstances but on previous occasions; and
- (b) that he had been removed from positions of trust demanding high confidence namely Training Officer and Personnel Officer when he was found to be undermining the confidence reposed in him.”

56. Miss Roseman in cross-examination admitted that if an officer working in the Prison Service opened his integrity to question on more than one occasion that would have been a most serious thing.

57. The Court accepts the reasoning of the Advocate General in Rittweger, as being relevant to the instant case.

58. The Court holds that there has been a breach of regulation 35 (a) of the Public Service Commission Regulations in that the applicant was not informed in writing of the serious accusations made against him in the Memorandum of August 12, 1988. Contrary to the regulation 35 (a), the applicant was afforded no opportunity to be informed of the allegations, to respond to them or to correct them. Indeed, such damaging and potentially harmful correspondence remained on his file at the Public Service Commission, without the Commission ever giving him an opportunity to respond or to defend himself. Such an omission is contrary to the rules of natural justice, the spirit of the Constitution in which public officials are protected from arbitrary interference and a contravention of regulation 35 (a).

#### **F. PROMOTIONS TO THE POST OF SUPERINTENDENT OF PRISONS**

59. The applicant has contended that the Public Service Commission made promotions to the post of Superintendent of Prisons without considering him. It is submitted on his behalf that this is clear evidence of mala fides, unreasonableness and arbitrariness, and raises a prima facie case of unequal and/or unfair treatment that remains unanswered.

60. Regulation 167 (2) provides for appointments to offices of Superintendent of Prisons. A candidate who has the prescribed qualifications may be selected for such an appointment either from an office in a lower grade or on any open competitive basis prescribed by the Public Service Commission. Miss Roseman (in her affidavit sworn 29<sup>th</sup> October, 1998, paragraph 17), confirmed that the filling of the post of Superintendent of Prison and offices of a higher grade is governed by regulation 167 (2); appointments are made by the Public Service Commission. According to Miss Roseman's affidavit (paragraph 17) the procedures which are usually adopted by the Public Service Commission in

considering persons for the office of Superintendent of Prisons are inter alia, advertising, interviewing and consideration of recommendations of the Commissioner of Prisons.

61. It is undisputed that the relevant posts were not advertised and that there were no interviews. Miss Roseman confirmed (paragraph 17) that the Public Service Commission at a meeting held on 29<sup>th</sup> April, 1997, considered the recommendations of the Commissioner of Prisons and made a decision to promote ASP Verne Sylvester, ASP Martin Martinez and ASP Kenneth Forgenie to the rank of Superintendent of Prisons. Miss Roseman was cross-examined on the Minutes of the Meeting of the Public Service Commission of the 29<sup>th</sup> April, 1997. It is interesting to note that the recommendation of the Commissioner of Prisons that ASP Verne Sylvester should be promoted was based primarily on two (2) matters:

(1) no serving ASP junior to Mr. Sylvester should be pitch-forked ahead of him; in other words Mr. Sylvester's seniority should be preserved; and

(2) Mr. Sylvester was well-qualified and the most senior.

62. The Court notes with disapproval the inconsistency of approach between these appointments and the appointments to the posts of ASP in February, 1995. Seniority appears to be the most significant factor in the promotions of Sylvester, Martinez and Forgenie (the three (3) most senior ASPs) but counted for very little in the applicant's claim for promotion to the post of ASP.

63. Although Miss Roseman deposed (paragraph 17) that the applicant, as well as all other serving Assistant Superintendents of Prison were considered for promotion to the post of Superintendent of Prisons, in cross-examination, she conceded that the applicant and the other Assistant Superintendents of Prisons

were not considered by the Public Service Commission because they were not included in the recommendations of the Commissioner of Prisons sent to the Public Service Commission.

64. In the circumstances, the Court finds that there has been a breach of the procedures normally adopted by the Public Service Commission for the promotions of persons to the post of Superintendent of Prisons. The Court accepts the submission advanced on the part of the applicant, that the failure of the Public Service Commission to notify the applicant that the Commission was considering the filling of the vacancies for the post of Superintendent of Prisons deprived the applicant of the opportunity to apply for promotion to this post and to make representations in his favour. The applicant has been treated differently from persons similarly circumstanced without good reason. The Court finds that the Commission's approach smacked of arbitrariness without any justification.

**G. THE LAMBERT PROMOTION:**

65. The applicant has complained that Lambert's promotion to the post of Assistant Superintendent of Prisons with a retroactive date of 14<sup>th</sup> November, 1994 was unlawful and contrary to the regulations.

66. In her affidavit sworn 29<sup>th</sup> October, 1998 (paragraph 7) Miss Roseman deposed that the 7<sup>th</sup> position of ASP was not filled because the person who ranked 7<sup>th</sup> on the (1994) Order of Merit List was Mr. Peterson Lambert who was on a disciplinary charge and as a result his position was held pending the outcome of the disciplinary matter. According to Miss Roseman, it was the usual procedure that vacancies were held pending the determination of disciplinary matters against officers in the event that they were exonerated. According to her, the position of ASP was therefore held pending the outcome of the disciplinary matter.

67. Attorney for the applicant has contended that up to the time of the swearing of the affidavit of Cipriani Baptiste on 9<sup>th</sup> October, 1994 in the judicial review proceedings referred to earlier in this judgment, there was no indication that Lambert was either on a disciplinary charge or was even on suspension as was suggested by Mr. Herman Rougier, deponent for the respondent, in cross-examination. I have examined Baptiste's affidavit and I agree with the applicant.
68. What is more interesting, however, is the issue whether having appointed the applicant Bissessar to the 7<sup>th</sup> office as deposed by Baptiste, Lambert could have been promoted subsequently with a retroactive date which eroded the applicant's seniority.
69. Throughout the proceedings before this Court, both Attorney for the respondent and the witness, Miss Roseman, alluded to a circular memorandum apparently from the Public Service Commission to Heads of Department in the Public Service which communicated the Commission's policy that once an officer was on a disciplinary charge or was on suspension, and entitled to promotion as was the case of Lambert, then a position was held for that officer pending the outcome of the disciplinary charge and his resumption of duty. Despite several requests from Attorney for the applicant for the production of the document, and diligent efforts on the part of the respondent to locate same, this memorandum has not been produced to the Court. The Court can only arrive at the conclusion that such a document does not exist.
70. Throughout the cross-examination of Miss Roseman could be gleaned the clear policy of the Commission that an officer's seniority should not be eroded without justification and without the officer's being informed as to the reasons for such erosion.
71. In the circumstances, having regard to the non-production of the relevant circular memorandum, the Court finds that the subsequent promotion of Lambert

with a retroactive date of appointment causing him to become senior to the applicant is contrary to the clear policy of the Commission to preserve seniority in the prison service and has not been justified by the respondent.

#### **H. THE JAROO POINT:**

72. On 28<sup>th</sup> October, 2002, the respondent gave notice that it intended to take a preliminary point of law at the hearing of the notice of motion, that judicial review proceedings being available, the applicant's Notice of Motion was an abuse of process and ought to be dismissed.

73. Although there was much argument advanced on the part of the both the applicant and the respondent, the Court is of the view that the Jaroo point can be dealt with briefly. In the unreported case of **Mohanlal Bhagwandeem v The Attorney General of Trinidad and Tobago** cited above, in the judgment of their Lordships of the Judicial Committee of the Privy Council, delivered by Lord Carswell, it was stated at paragraph 17:

“The issue of the appellant's entitlement to a constitutional remedy was not argued in or adverted to by the courts below, and their Lordships would be reluctant to decide it at this stage. They would confine themselves to observing that there may be substance in the appellant's second argument. If the appellant is not entitled to claim damages on an application for judicial review which involves a claim that a public authority has deprived him of a constitutional right, then there is a viable argument that he was justified in bringing a constitutional motion in order to advance that claim, which should not be regarded as frivolous, vexatious or an abuse of the process of the court. This would constitute a valid ground of distinction from the decision in *Jaroo v Attorney General of Trinidad and Tobago* [2002] 1 Acc 871, in which the appellant had a sufficient claim in detinue. It could be said to constitute a bona fide resort

to rights under the Constitution, which, as Lord Steyn said in *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294 at 307, ought not to be discouraged. Their Lordships are accordingly willing, without deciding the point finally, to proceed on the assumption that the appellant is entitled to advance his claim for damages by way of the constitutional motion the subject of the appeal.”

74. As to the applicant’s entitlement to claim damages, the **Judicial Review Act, 2000** provides that on an application for judicial review, the Court may award damages to the applicant in the circumstances set out at section 8 (4) (a) and (b) of the Act. That was not the position in the year 1998 when the instant proceedings were commenced.

75. Further, in the case of **Observer Publications Ltd v Matthew and Others** (2001) 58 W.I.R. 188 in delivering the judgment of the Judicial Committee of the Privy Council, Lord Cooke of Thorndon at page 206 paragraph 52, emphasized the oft-repeated dicta of Lord Diplock in **Harrikissoon v Attorney General** (1979) 31 W.I.R. 348 at page 349:

“In an originating application to the High Court under s 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

76. At page 206 (paragraph 53) of Observer Publications Ltd, Lord Cooke remarked as to the dicta in Harrikissoon:

“The last words of that passage are not to be put aside. With respect, the image of the Constitution as secluded behind closed doors is not one which their lordships adopt. Nor would it be right to think of the Constitution as if it were aloof or, in the famous phrase of Holmes J, ‘a brooding omnipresence in the sky’. On the contrary, human rights guaranteed in the Constitution of Antigua and Barbuda are intended to be a major influence upon the practical administration of the law. Their enforcement cannot be reserved for cases in which it is not even arguable that an alternative remedy is available. As Lord Steyn said, delivering the advice of the Privy Council in *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294 at 307 ‘... bona fide resort to rights under the Constitution ought not to be discouraged”.

77. This Court adopts the approach of their Lordships in **Bhagwandeem and Observer Publications Ltd**, and holds that these constitutional proceedings are not an abuse of process. Serious allegations of inequality of treatment and the contravention of human rights and fundamental freedoms have been made by the applicant. This applicant must be allowed a bona resort to his rights under the Constitution.

#### **I. THE OUSTER CLAUSE:**

78. The respondent contends that by virtue of section 129 (3) of the Constitution, the Court cannot enquire into the performance of the functions of the Public Service Commission in this matter. It has been argued on behalf of the respondent that by virtue of section 121 of the Constitution, the Public Service Commission has power to make appointments and promotions and by virtue of section 129 (1) to regulate its own procedure.



79. As long ago as the year 1981, in the case of **Thomas v Attorney General** (cited earlier), their Lordships of the Judicial Committee of the Privy Council remarked that it was for the Court and not for the Commission to determine what, on the true construction of the Constitution, were the limits to the functions of the Commission (page 393). At page 394, their Lordships went on to say:

“There is also, in their Lordships’ view, another limitation upon the general ouster of the jurisdiction of the High Court by section 102(4) of the Constitution; and that is where the challenge to the validity of an order made by the commission against the individual officer is based upon a contravention of “the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations” that is secured to him by section 2(e) of the Constitution, and for which a special right to apply to the High Court for redress is granted to him by section 6 of the Constitution. “*Generalia specialibus non derogant*” is a maxim applicable to the interpretation of constitutions. The general “no *certiorari*” clause in section 102(4) does not, in their Lordships’ view, override the special right of redress under section 6.”

Accordingly, since the applicant is challenging the validity of the decisions of the Commission as a contravention of rights guaranteed by the Constitution, section 129 (3) does not oust the jurisdiction of the Court.

80. The Court notes with interest that several matters have been determined by the courts without any reference to the provisions of section 129 (3) of the Constitution as ousting the jurisdiction of the courts to hear these matters in which applicants have complained either about the decision made by a service commission or that their human rights and fundamental freedoms have been infringed by the actions of the commissions. In the case of **Charles v Judicial and Legal Service Commission and Another** [2003] 1 LRC 422, the applicant

had appealed to the Privy Council, alleging that regulation 90 of the Public Service Commission Regulations had been breached. In their discussion set out in the judgment, their Lordships stated (page 428, paragraph 12):

“The terms of reg 90 have already been set out. At the outset their Lordships observe that it seems highly unlikely that the Commission can have intended that breaches of time limits at the investigation stage would inevitably prevent it from discharging its public function and duty of inquiring into and, if appropriate, prosecuting relevant indiscipline or misconduct. A self-imposed fetter of such a kind on the discharge of an important public function would seem inimical to the whole purpose of the investigation and disciplinary regime. The proposition that this was intended is also hard to reconcile with the then existence of s 129(3) precluding inquiry into procedural irregularities not of a fundamental kind (see **Thomas v A-G of Trinidad and Tobago** [1982] AC 113).”

81. Section 129 (3) has been repealed by the provisions of section 3 of the Constitution (Amendment) Act 2000 [Act No. 43 of 2000].

#### **CONCLUSIONS:**

82. Having regard to the above findings, the Court does not consider it necessary to examine either:

- (1) whether mala fides has been proved by the applicant; or
- (2) whether the requirement of the proof of mala fides should continue to be part of the law of Trinidad and Tobago where a citizen alleges discrimination by public officials.

83. It may very well be that, having regard to the trend towards transparency in public affairs and by public officials, not only in Trinidad and Tobago but also throughout the democratic world, it may now be the appropriate time for the courts of Trinidad and Tobago to re-consider the requirement of the proof of mala fides in unequal treatment cases.

84. Accordingly, the Court grants the following relief:

1. A declaration that the Respondent has treated the Applicant unequally and/or has discriminated against the Applicant, in derogation of the Applicant's right to equality of treatment by the Respondent in the exercise of its functions as guaranteed by section 4 (d) of the Constitution.
2. A declaration that the Respondent has acted unlawfully and/or unreasonably and/or arbitrarily and/or has unfairly discriminated against the Applicant by promoting the following Prison Officers namely Dalton Stewart, Verne Sylvester, Martin Martinez, Kenneth Forgenie, Joseph Narsiah, Errington St. Louis and Peterson Lambert to superior positions and/or ranks from dates which gave them precedence and seniority over the Applicant and permanently undermined the Applicant's position on the Seniority List of Prison Officers in contravention of the Applicant's constitutional rights to equality before the law as guaranteed by section 4 (b) of the Constitution and equality of treatment as guaranteed by section 4 (d) of the Constitution.
3. An order that monetary compensation be paid to the Applicant by the Respondent as a consequence of the said infringement and/or contravention of the Applicant's constitutional rights as may be

assessed by a Judge in Chambers on a date to be fixed by the Registrar.

4. The Respondent shall pay to the applicant his costs certified fit for two (2) Advocate Attorneys, to be taxed in default of agreement.

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**MAUREEN RAJNAUTH-LEE**  
**JUDGE**