



JUDGMENT

Harinath Ramoutar (Appellant)

v

**(1) Commissioner of Prisons (2) Public Service
Commission (Respondents)**

**From the Court of Appeal of the Republic of Trinidad
and Tobago**

before

**Lord Walker
Lord Kerr
Lord Sumption
Lord Carnwath
Sir Stephen Sedley**

**JUDGMENT DELIVERED BY
LORD SUMPTION
ON**

16 August 2012

Heard on 27 June 2012

Appellant
Sir Fenton Ramsahoye SC
Tom Richards

(Instructed by Bankside
Commercial Solicitors)

Respondent
Peter Knox QC

(Instructed by Charles
Russell LLP)

LORD SUMPTION

1. This appeal arises out of an application for judicial review of the decision not to consider Mr. Harinath Ramoutar for an appointment as acting Chief Prison Welfare Officer of the Trinidad and Tobago Prisons Service. Technically, the Board is dealing with an application for leave to apply for judicial review, since Mr. Ramoutar was refused leave by both Pemberton J and the Court of Appeal. But the matter was treated by both courts below as 'rolled up' application in which the merits were fully examined. The Board will therefore adopt the same approach.

2. The facts are that in July 2007, the office of Chief Prisons Welfare Officer became temporarily vacant as a result of the transfer of the office-holder to other duties for a period of three years. The position was initially filled on an acting basis by a Mr. Mattis, who was then the senior Prison Welfare Officer holding the rank of Prison Officer II, the rank immediately below that of Chief Prisons Welfare Officer. Mr. Mattis, however, was due to leave on 29 October 2007, when the position would become vacant once more. It was decided to replace him with another acting holder of the office until the permanent holder should return. Mr. Ramoutar was the next most senior Prison Welfare Officer II, and he applied for the job.

3. Prison officers are public officers whose appointment and promotion are the responsibility of the Public Services Commission, an independent body established under the Constitution. The Commission is empowered to publish Regulations for the discharge of its functions. The relevant regulations were the Public Service Commission Regulations. Chapters III to X of the Regulations contain provisions applicable generally to the public service. They are subject to the more specific provisions of subsequent chapters governing particular services, including Chapter XIII which deals with the prison service.

4. Under Regulation 168, part of Chapter XIII, the procedure is for the Commissioner of Prisons to submit to the Public Service Commission a list of Prison Officers II whom he considers suitable for promotion to the office in question. He is required to submit with it a list of Prison Officers II who, although not considered suitable for promotion, have been in the service for longer or have more experience in performing the duties of the office in question than those recommended. Under Regulation 168(3), officers on this second list must be notified. They are then entitled to make representations to the Public Services Commission. Finally, the Commission makes the appointment having regard to the recommendations of the Commissioner of Prisons and any representations received from an officer who has been by-passed.

5. On 25 October 2007, the Commissioner of Prisons wrote to Mr. Ramoutar in response to his application. He referred to the “Job Specification and Description” for the office of Chief Prisons Welfare Officer. This was a document agreed in 1998 between the Permanent Secretary of the Ministry of National Security, the Chief Personnel Officer of the Prison Service and the Prison Officers’ Association. It contains a brief description of the functions of the office, a list of the qualities required most of them described in very general terms, and a summary of the working conditions, reporting relationships and duties, together with certain criteria by which performance of those duties would be assessed. Among the formal qualifications shown as required is a “bachelor’s degree in social work from a recognised institution or equivalent.” In his letter, the Commissioner pointed out that Mr. Ramoutar did not have such a degree, and said that for that reason he was unable to recommend him for promotion. He concluded:

“In view of the fact that you do not possess this imperative prerequisite, it renders you unsuitable for favourable consideration. Hence, in accordance with 168(3) of [the Regulations] you are advised that you will not be considered at this time to perform in the post of Chief Prisons Welfare Officer.”

6. Mr. Ramoutar exercised his right to make representations to the Public Service Commission. The Commission considered the recommendation of the Commissioner of Prisons together with the representations of Mr. Ramoutar on 12 February 2008, and decided to appoint a Mr. Charles as acting Chief Prisons Welfare Officer. Mr. Charles, who was the candidate recommended by the Prisons Commissioner, was the next most senior Prison Welfare Officer II after Mr. Ramoutar and the most senior to possess a degree in social work. The affidavit sworn on behalf of the Public Service Commission confirms that it agreed with the Commissioner of Prisons that in the absence of a relevant degree, Mr. Ramoutar was not eligible for appointment. It was common ground before the Board that this was treated as a matter of threshold eligibility, and that in those circumstances no consideration was given to the merits of his application.

7. Chapter III of the Regulations deals with the general principles for appointments, promotions and transfers in the public service. It distinguishes between permanent appointments, acting appointments made as a prelude to a permanent appointment, and acting appointments which are not the prelude to a permanent appointment. The principles governing these three categories are different.

8. Permanent appointments by way of promotion are required by Regulation 18 to be made by reference to a number of criteria whose relative weight will vary. It provides:

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

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

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

Regulation 18(3) then lists a number of matters to be taken into account in arriving at these assessments. Regulation 18(4) then provides:

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

9. In the case of prison officers, the provisions of Regulation 18 are superseded by the specific provisions of Chapter XIII relating to such promotions in the prison service. These are very similar. Regulation 172(1) provides:

“172. (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.”

There follows in Regulation 172(2) a list of matters to be taken into account which is somewhat similar to that in Regulation 18(3). There is no equivalent of Regulation 18(2) or 18(4).

10. Acting appointments which are to be a prelude to a permanent appointment are dealt with by Regulation 24, which provides that they are to be made on the principles prescribed for permanent appointments in Regulation 18, unless it is not practical to apply them. In the case of prison service appointment, the cross-reference to Regulation 18 should be read as a cross-reference to Regulation 172.

11. Acting appointments which are not the prelude to a permanent appointment, are dealt with in a different way. Regulation 26, which governs such appointments, establishes a general rule of appointment by seniority. It provides:

“26. (1) Where an acting appointment falls to be made otherwise than as a prelude to a substantive appointment, the officer appointed shall –

- (a) as a general rule be the senior officer in the Ministry or Department eligible for such acting appointment;
- (b) assume and discharge the duties and responsibilities of the office to which he is appointed to act.

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

The present issue turns on the meaning of this Regulation.

12. Regulation 26 does not impose an absolute rule of appointment by seniority, but only a “general rule” to that effect. In other words, it is capable of being displaced by other relevant considerations. But this is irrelevant to the issue before the Board. In Mr Ramoutar’s case, the general rule of appointment by seniority was not displaced by other considerations. He was not considered at all. The only legal basis on which

that could be justified is that although he was the senior officer, he was not “eligible for such acting appointment” within the meaning of Regulation 26(1)(a).

13. Normally the word “eligible” imports a threshold condition of appointability. It does not normally mean “suitable”. It means capable of being appointed if found suitable. The position is, however, complicated by the fact that the Regulations do not consistently use the term in its normal sense. In the introductory words of Regulations 18 and 172, it is clear that the draftsman intended “eligibility” to mean the same as “suitability”, for the criteria of eligibility which follow all relate to the assessed qualities of the candidate. On the other hand, it is equally clear that Regulation 25, which requires the Permanent Secretary or Head of Department to notify forthcoming acting appointments to all officers within his service “who are eligible for consideration”, is referring to eligibility in its normal sense. In the Board’s opinion, “eligible” in Regulation 26(1)(a) is used in the same sense. It is a threshold condition of appointability. Otherwise, appointment on seniority would hardly count as the general rule that it is clearly intended to be. But it does not matter, for it is only on the footing that “eligible” in Regulation 26(1)(a) imports a threshold condition of this kind that the decision of the Public Service Commission in this case can be defended. If it meant “suitable”, then it would have been incumbent on the Commission to assess Mr. Ramoutar’s suitability, which it never did.

14. On the footing that eligibility in Regulation 26(1)(a) is a threshold condition, what are the relevant criteria of eligibility? None are specified in Regulation 26, except that that the person appointed must be a current officer of the prison service. Nor is there anything in the Regulations which can be described as a criterion for eligibility for acting appointments generally. The Respondent Commission submits, as it has to, that the possession of a degree in social work was a threshold condition. But the only basis for that submission is that it was part of the Job Specification and Description for the corresponding permanent appointment. The Board rejects this submission for three reasons.

15. The first is that it is apparent from Chapter III of the Regulations read as a whole that the criteria for making permanent appointments and acting appointments as the prelude to permanent appointments have no application to acting appointments where the person appointed is simply standing in for permanent office-holder. Appointments of the latter kind are subject to a distinct regime. In the case of permanent appointments and appointments intended as the prelude to permanent appointments, seniority is one factor among many in the assessment of candidates, but it is never conclusive, and for the more responsible appointments it may be of very limited weight; whereas for purely acting appointments it is stated to be the general rule. This reflects significant differences in the nature of these appointments. The appointment of a stand-in on an acting basis is essentially an internal reallocation of the duties of existing staff to meet the exigencies of the service. It is temporary. It may fall to be made at short notice and sometimes for short periods. Those who are chosen

will necessarily be within the prison service already and have satisfied the criteria for appointment to an office at the next level down. This is, as it appears to the Board, the reason why the Regulations require acting appointments which are the prelude to permanent appointments to be made on the same principles as permanent appointments, but impose no corresponding requirement for the appointment of stand-ins on a purely acting basis.

16. Second, the Job Specification and Description has no statutory status. It is a government document, agreed with the relevant professional association for the prison service. It was suggested to the Board on behalf of the Commission that it had statutory force under section 15 of the Prison Service Act, which provides that it is the duty of the service's Personnel Department to "provide for and establish procedures for consultation and negotiation between the Personnel Department and an appropriate recognised association or associations in respect of... (iv) the terms and conditions of appointment." But this simply means that they must consult upon and negotiate the terms of the contract of service. The Job Specification and Description appears to have been the result of consultation and negotiation between the Personnel Department and the relevant association, but it does not record of the terms of the contract of service. It is exactly what it says it is: a job description, including a statement of qualities required to perform the duties.

17. Third, even if the Board were persuaded that the Job Specification and Description was produced pursuant to a statutory duty of the prison service, it would not follow that it defined the criteria for eligibility even of those appointed to permanent positions. It is one thing for the prison service to agree a job description with the relevant officers' association, but quite another to bind the Public Service Commission to treat it as a statement of the criteria for threshold eligibility. Moreover, the document itself appears to the Board to be wholly unsuitable for that purpose. Threshold eligibility, if it is to operate as a basis for excluding an application from consideration on its merits, has to be based on some objectively verifiable litmus-paper test. Eligibility of this kind cannot be a question of degree. However, the qualifications expected of a Chief Prisons Welfare Officer are described in the Job Specification and Description in terms which call for an exercise of judgment about the strength of the candidate's personal qualities for the job. They refer, for example, to his "expert counselling skills" or "sound observational skills", to his "expert knowledge of principles and practices of correctional administration", his "sound knowledge of principles and practices of social work", to his "basic knowledge of relevant computer application." It is true that a few of the qualities said to be required are susceptible to a litmus paper test yielding a Yes/No answer, and one of these is the requirement for a degree in social work. But even in these cases, the document is not wholly prescriptive. Many of the specified qualities overlap. Read as a whole, the document leaves open the possibility, for example, that "sound knowledge of principles and practices of social work" (another of the listed criteria) may have been acquired by some means other than a degree.

18. The Board considers that in Regulation 26(1)(a), “eligible” officers are existing officers of the prison service who are capable of performing the duties. This is, as it seems to them, consistent with Regulation 26(2), which addresses the situation where the officer who is next in line of seniority comes from another district, and there is an officer in the same district who is “capable of performing the duties of the higher grade.” In that case, the Commission is empowered to take account of the cost to the government of paying the more senior officer’s travel and subsistence allowances, in a way that would not otherwise be open to them. As between officers who are capable of performing the duties, the most senior is entitled to be appointed unless there are reasons for displacing the “general rule”. The Commission has a very wide discretion to determine what reasons it will regard as sufficient to justify departing from the general rule in a particular case. But this is not a discretion that can be exercised without considering the result of applying the general rule of appointment by seniority. To do that, they must at the very least consider the qualities of the most senior eligible officer.

19. The Board accepts that if every officer capable of performing the duties is eligible, this may sometimes give rise to practical difficulties under Regulation 25(1), which requires the Head of Department (in this case the Prisons Commissioner) to notify all those “eligible for consideration”. But these difficulties should not be overstated and are unlikely to be insuperable. For present purposes, it is enough to point out that the difficulties would be even greater if eligibility fell to be decided in accordance with the numerous and highly subjective criteria listed in the Job Specification and Description.

20. The courts do not sit as a court of appeal from the decisions of the Commissioner of Prisons or the Public Service Commission, and are in no way concerned with the merits of candidates for promotion or the micro-management of personnel decisions in the prison service. The courts are, however, concerned to ensure that public bodies carry out the functions that the relevant legislation assigns to them. The difficulty in this case has arisen from the fact that the Prisons Commissioner and the Public Service Commission treated the possession of a degree as a matter of threshold eligibility when it was not. They therefore never performed their statutory function of considering Mr. Ramoutar’s application on its merits. They neither applied the general rule of selection by seniority prescribed by their Regulations, nor considered whether to depart from the general rule in all the circumstances of this case.

21. The appeal will therefore be allowed. The Board will grant Mr. Ramoutar leave to apply for judicial review. Since the appointment of Mr. Charles as acting Chief Prison Welfare Officer has taken effect and the period for which an acting officeholder was required has now expired, there is no point in quashing the decision or remitting it for reconsideration. The Board will therefore deal with the substantive application by making a declaration that the Public Service Commission acted

unlawfully in treating Mr. Ramoutar as ineligible to be considered for appointment as acting Chief Prison Welfare Officer by reason only that he did not have a degree in social work from a recognised institution or equivalent. The Respondent must pay the Appellant his costs of the proceedings, including this appeal.