Easter Term
[2026] UKPC 20
Privy Council Appeal No 0087 and 0088 of 2024

JUDGMENT

Ian Green (Respondent) *v* Public Service Commission (Appellant) (Trinidad and Tobago); Ian Green and another (Respondents) *v* Public Service Commission (Appellant) No 2 (Trinidad and Tobago)

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

before

Lord Lloyd-Jones
Lord Briggs
Lord Burrows
Lord Doherty
Sir Anthony Smellie

JUDGMENT GIVEN ON
11 May 2026

Heard on 26 and 27 January 2026

Appellant
Rishi Dass SC
Tamara Toolsie
(Instructed by Charles Russell Speechlys LLP (London))

Respondent
Kenneth Thompson
(Instructed by Au Set Ua Zet Law Chambers (Trinidad))

Interested Party – Chief Personnel Officer
Peter Knox KC
Robert Strang
(Instructed by Simons Muirhead Burton (London))

LORD DOHERTY (with whom Lord Lloyd-Jones, Lord Briggs and Lord Burrows agree):

Introduction

1. The appellant is the Public Service Commission for Trinidad and Tobago ("PSC"), constituted by section 120 of the Constitution of Trinidad and Tobago Act ("the Constitution"). The respondent was a Fire Sub-Station Officer ("FSSO") in the Fire Service of Trinidad and Tobago between 1 August 1998 and his retirement in December 2015 at the age of 55. In 2006 he applied to the Chief Fire Officer ("CFO") for promotion to the office of Fire Station Officer ("FSO"). He was unsuccessful. This litigation arises because of his dissatisfaction with that outcome. The interested party is the Chief Personnel Officer ("CPO"). He was only joined as an interested party at the hearing of the application for leave to appeal to the Board on 5 July 2023.

The relevant statutory provisions

The Constitution

2. Section 121 of the Constitution relates to the appointment of public officers. It provides:

> "**Appointments, etc., of public officers**.
>
> 121 (1) Subject to the provisions of this Constitution, power to appoint persons to hold or act in offices to which this section applies, including power to make appointments on promotion and transfer and to confirm appointments, and to remove and exercise disciplinary control over persons holding or acting in such offices and to enforce standards of conduct on such officers shall vest in the Public Service Commission.
>
> …
>
> (7) This section applies to all public offices including in particular offices in the Civil Service, the Fire Service and the Prison Service…
>
> …

(9) In subsection (7), "Civil Service", "Fire Service" and "Prison Service" means respectively the Civil Service established under the Civil Service Act, the Fire Service established under the Fire Service Act and the Prison Service established under the Prison Service Act."

Section 129(1) provides:

"**Powers and procedure of Service Commissions and protection from legal proceedings**.

129. (1) Subject to subsection (3), a Service Commission may, with the consent of the Prime Minister, by regulation or otherwise regulate its own procedure, including the procedure for consultation with persons with whom it is required by this Constitution to consult, and confer powers and impose duties on any public officer or, in the case of the holder of an office referred to in section 111(2), a Judge or on any authority of the Government, for the purpose of the discharge of its functions."

PSC Regulations

3. Regulation 158 of the Public Service Commission (Amendment) (No2) Regulations 1998 ("PSC Regulations") states:

"**Criteria for promotion**

158. (1) In considering eligible fire officers for promotion, the Commission shall take into account the experience, educational qualifications, merit and ability, together with the relative efficiency of those fire officers.

(2) Where the Commission has to select an officer for promotion from officers who appear to be of equal merit, the Commission shall determine its selection on the basis of the relevant and relative experience of the officers.

(3) In the performance of its functions under subregulation (1), the Commission shall take into account as regards each fire officer—

(a) his general fitness;

(b) any special qualifications;

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

(d) the evaluation of the officer's performance as reflected in his performance appraisal report;

(e) any letters of commendation or special report in respect of any special work done by the fire officer;

(f) the duties to be performed in the office of which the fire officer has experience;

(g) demonstrated skills and ability relevant to the office;

(h) any specific recommendation of the Permanent Secretary or Chief Fire Officer for the filling of the particular office;

(i) any previous, relevant employment of his in the Service, the public service, or elsewhere;

(j) any special report for which the Commission may call;

(k) his devotion to duty.

…"

Regulation 146 of the regulations defines "eligible officer" as "a fire officer who satisfies the qualifications of an office".

Fire Service Act and the Fire Service Regulations

4. Section 34(1)(aa) of the Fire Service Act 1965 provides:

> "**Regulations for the Fire Service**.
>
> 34. (1) The President may make Regulations for carrying out or giving effect to this Act, and in particular the following matters:
>
> …
>
> (aa) for prescribing qualifications for appointment to an office in the Fire Service…"

5. Regulation 8 of the Fire Service (Terms and Conditions of Employment) Regulations 1998 (the Fire Service Regulations) states:

> "**Qualification for appointment—Fire Station Officer and Fire Equipment Supervisor.**
>
> 8. (1) On satisfying the requirements of subregulation (2) or (3), a candidate for appointment to the office of Fire Station Officer shall be a person holding the office of Fire Sub-Station Officer and who —
>
> (a) has passed a job-related written examination conducted by the Examinations Board; or
>
> (b) is the holder of the Graduate Diploma of the Institution of Fire Engineers or equivalent related qualification as determined by the Chief Fire Officer after consultation with the Permanent Secretary and the Chief Personnel Officer.

…

> (3) Where a candidate for appointment to the office of Fire Station Officer has served for at least five years in the office of Fire Sub-Station Officer, he shall be required to pass examinations in Management Studies conducted by the Examinations Board. …"

Factual background

6. The respondent did not pass a job-related written examination (regulation 8(1)(a) of the Fire Service Regulations) nor did he hold the Graduate Diploma of the Institution of Fire Engineers (GDIFE) (regulation 8(1)(b)). He held a Post-Graduate Diploma in Human Resource Management and a Master's Degree in Human Resource Management from the University of the West Indies. He also held an Associate Degree in Management from the College of Science, Technology & Applied Arts of Trinidad and Tobago. In 2006 he applied to the CFO for a determination for the purposes of regulation 8(1)(b) that his Diploma in Human Resource Management was an equivalent related qualification to the GDIFE. Following receipt of that application the CFO issued a memorandum dated 12 July 2006 to the CPO which concluded:

> "Subject to the concurrence of the Permanent Secretary, Ministry of National Security and the Chief Personnel Officer, the Chief Fire Officer has no objections in accepting the Post Graduate Diploma in Human Resource Management as equivalent, related qualification in accordance with regulation 8(1)(b) …"

7. However, in a memorandum dated 15 December 2006 the CPO advised the Permanent Secretary that the respondent's Diploma "cannot be considered as an equivalent qualification" in accordance with regulation 8(1)(b) "as it does not address the technical aspects of the job related to firefighting and the Fire Service." The memorandum added that, in light of the combination of the respondent's experience and qualifications, the CPO would have no objection to him being exempted from writing the Management Studies Examination required by regulation 8(3). The memorandum concluded: "Please be guided accordingly."

8. On 11 May 2007 the Fire Service's Director of Human Resources (Mr John Edwards), acting for and on behalf of the CFO, wrote to the respondent informing him that his diploma was not an equivalent related qualification in terms of regulation 8(1)(b)

"as it does not address the technical aspects of the job related to Firefighting and the Fire Service". The letter also advised:

> "…[I]n light of the combination of the courses pursued and the experience and certificates obtained by you, the Chief Fire Officer in consultation with the Chief Personnel Officer and the Permanent Secretary, Ministry of National Security has exempted you from writing the Management Studies Examination at regulation 8(3) … Please be guided accordingly."

The respondent did not challenge the determination of the CFO that his diploma was not an equivalent related qualification.

9. On 7 November 2011 the CFO prepared a memorandum with a list of candidates to be considered for promotion (the 2011 list). The respondent's name was the first name on the list. Five other FSSOs (the comparators) were below him in the list. The memorandum was addressed to the appellant but the appellant has no record of receiving it at the time.

10. On 11 January 2013 the CFO submitted to the appellant a list of 39 FSSOs (the 2013 list). The respondent was number 9 on the list. One column of the list was headed "Qualification" and indicated whether the officer had passed the FSO Exam or the GDIFE. The next column was headed "Eligible". It contained dates. All 38 other FSSOs listed had passed either the FSO exam or held the GDIFE. In the respondent's case, the Qualification column listed his Certificate in Human Resource Management and Public Relations Management and his Diploma and Master's degree in Human Resource Management, and the date in the Eligible column next to his name was 2006.

11. At a meeting on 24 March 2015 the appellant determined that five FSSOs should be promoted. All of those FSSOs had passed the FSO Exam. All were above the respondent on the 2013 list. The respondent was not promoted. The promotions were confirmed by the Fire Service Order No 4 of 2015 dated 21 April 2015.

The High Court proceedings before Seepersad J

12. The respondent sought judicial review of the Order of 21 April 2015. He sought inter alia:

(a) a declaration that the appellant's decision contravened his fundamental right to equality of treatment guaranteed by section 4(d) of the Constitution;

(b) a declaration that the decision was unreasonable and contrary to the principles of natural justice.

He also applied for damages/monetary compensation.

13. Seepersad J had affidavits from six persons, namely, the respondent; Leslie Skeete (who was CFO between 4 October 2006 and 2 October 2007); Mona Afong (the appellant's Director of Personnel Administration); Kenny Gopaul; Roosevelt Bruce; and Coomarie Goolabsingh (the appellant's acting Deputy Director of Personnel Administration). Mr Gopaul and Mr Bruce acted at various times as Deputy CFO and CFO.

14. The respondent claimed that the 2011 list was a merit list and that the 2013 list was not a merit list. He acknowledged that he had not passed the job-related examination (regulation 8(1)(a)) and that he did not hold the GDIFE, but he maintained that the other qualifications which he held were an equivalent related qualification to the GDIFE (regulation 8(1)(b)). He deposed:

"13. … Accordingly, I applied for and was granted an exemption from writing the management studies examination specified in the said Regulation …

14. Being exempt as aforesaid, I am qualified to be promoted to the office of Fre Station Officer …".

The respondent claimed that he was "similarly circumstanced" to the five officers whom the appellant promoted. He contended that the appellant took account of irrelevant considerations (none of which were specified); and that it excluded relevant considerations:

"such as my educational qualifications, my devotion to duty, my experience, my efficiency relative to the officers whom it prompted, my seniority, the position of my name on the [2011] list, my letters of commendation, and the many courses from which I have benefitted."

He argued that the failure of the appellant to promote him demonstrated that it did not properly perform the function assigned to it by regulation 158 of the PSC Regulations and was contrary to and in conflict with the policy of promoting fire officers on the basis of merit. He relied on the affidavit of Mr Skeete. In his affidavit Mr Skeete stated:

> "… I did not state in the letter dated 11th day of May 2007 … that the Claimant's Post Graduate Diploma cannot be considered as equivalent related qualification. I determined that the Claimant's Post graduate diploma was an equivalent related qualification."

Mr Skeete reasoned:

> "While it is a fact that the Claimant neither passed nor holds the Graduate Diploma stated in regulation 8, he was granted an exemption from writing the examination in management studies. As such he was eligible for promotion to FSO and was therefore similarly circumstanced to the officers who were promoted."

Mr Skeete indicated that the letter of 11 May 2007 was written on his behalf by Mr John Edwards but:

> "that I never authorised Mr Edwards to inform the Claimant that his post Graduate diploma cannot be considered as an equivalent related qualification. I consider such qualification to be considered as an equivalent related qualification …"

15. Mona Afong's affidavit deposed that the appellant did not receive the 2011 list. It received the 2013 list, which was a merit list of FSSOs. The respondent was ranked at No. 9 whereas the comparators he identified were ranked higher, at Nos 1, 2, 3, 5 and 6. The list indicated that the respondent was the only candidate who was not successful in the job-related written examination. The respondent did not qualify for promotion under regulation 8(1)(a) or 8(1)(b). He did not satisfy the minimum criteria to be eligible for promotion to FSO. He was not similarly circumstanced to the FSSOs who were promoted because they satisfied the minimum criteria and they were higher up the merit list than him. In determining whom to appoint the appellant had taken account of all of the factors specified in regulation 158 of the PSC Regulations.

16. In their affidavits Mr Gopaul and Mr Bruce deposed that the respondent's name was first on the 2011 list because he was the most senior FSSO. Mr Gopaul could not

recollect whether the list was sent to the appellant. Ms Goolabsingh deposed that the respondent was not eligible for appointment as an FSO because he did not satisfy either regulation 8(1)(a) or regulation 8(1)(b).

17. In its written submissions at first instance the appellant stated (para 4):

> "Following the consultation process provided for under regulation 8(1)(b), the CFO determined by letter dated 11th May, 2007 … that the Claimant's Diploma cannot be considered an equivalent qualification in accordance with regulation 8(1)(b)."

The respondent had failed to establish that there had been a determination of the CFO that the respondent held an equivalent related qualification. The submissions stressed that the exemption from the management studies examination was not an exemption from the requirements of regulation 8(1)(b).

18. On 14 December 2016 Seepersad J dismissed the respondent's claim. He held that the appellant was bound by the Fire Service Regulations which set out a statutory scheme for appointment to offices within its purview. The appellant could not waive the requirements of that scheme (cf *Romain v Police Service Commission* [2014] UKPC 32 at para 28). The second limb of regulation 8(1)(b) required to be satisfied. There had to be a determination by the CFO after consultation with the Permanent Secretary and the CPO that the FSSO held an equivalent related qualification. The respondent could not point to any such determination. His exemption from the management studies examination (regulation 8(3)) did not exempt him from the requirements of regulation 8(1)(b). The requirements of regulation 8(1)(a) or (b) and the requirements of regulation 8(2) or (3) had to be satisfied. Seepersad J noted Mr Skeete's evidence but observed that the appellant's decision could only be challenged on the basis of the information that was before it when it made its decision. There was no evidence of the respondent having queried or challenged the determination in the letter of 11 May 2007 nor was there any evidence of Mr Skeete having attempted to correct the letter after it was issued. If Mr Skeete had indeed determined that the respondent's diploma was an equivalent related qualification that would have involved him not following the advice which the CPO had given. Mr Skeete's evidence wrongly equated equivalence under regulation 8(1)(b) with the grant of an exemption under regulation 8(3). The 2011 list was a seniority list and the 2013 list was a merit list. The respondent was not similarly placed to the comparators on whom he relied and his case of unequal treatment under section 4(d) of the Constitution was without merit. The decision of 21 April 2015 had not contravened regulation 158 of the PSC Regulations and there had not been any breach of natural justice. At para 23 of his judgment Seepersad J observed:

> "Ultimately the Claimant's qualification was not certified as an equivalent related qualification and the decision of the CPO in that regard was not challenged by way of review before this or any other court. Consequently as it stands the caimant does not meet the requirements of the regulations and without the recognised requisite qualification he cannot be considered for promotion to the post of FSO."

Before the Board a question arose as to whether the judge's reference to CPO rather than CFO in that passage was a slip. The Board addresses that issue below.

Court of Appeal

19. The respondent appealed to the Court of Appeal. Although he did not apply to amend his pleadings, he advanced new grounds for the first time. In his notice of appeal he contended that section 34(1)(aa) of the Fire Services Act and regulation 8 of the Fire Service Regulations were unconstitutional and ultra vires. In his written submissions he argued that by including the respondent's name on the 2013 list with the date 2006 in the Eligible column the CFO impliedly represented that the respondent was qualified for promotion to FSO. The appellant objected unsuccessfully to these new issues being raised.

20. On 16 December 2022 the Court of Appeal (Archie CJ, Bereaux JA and Holdip JA) found that Seepersad J had been correct to hold that an exemption from writing the management examination specified in regulation 8(3) did not equate to an acceptance that a FSSO had an "equivalent related qualification" for the purposes of regulation 8(1)(b). He had also been correct to find that the respondent had not been discriminated against contrary to section 4(d) of the Constitution. However, it concluded that the CFO's memorandum to the CPO of 12 July 2006 was a determination by him that the respondent held an equivalent related qualification. The CPO's subsequent memorandum of 15 December 2006 gave different advice, which the appellant chose to "blindly" follow.

21. In the court's view the central issues in the appeal were (i) whether the decision of the appellant to rely on the view of the CPO was irrational and/or in breach of natural justice; (ii) whether a literal interpretation of regulation 8(1)(b) of the Fire Service Regulations would contravene the principle of the separation of powers and/or constitute an unjustified interference in the performance by the PSC of its constitutional function of appointing public officers on promotion.

22. The overriding authority to decide who was appointed or promoted resided with the PSC. That included the power to set minimum qualifications, and making decisions about regulation 8(1)(b) equivalence. If section 34(1)(aa) and regulation 8(1)(b) were

given their literal meanings the provisions would conflict with the functions of the PSC under sections 121(1) and 129 of the Constitution and under regulation 158 of the PSC Regulations. The determination of eligibility for office in the public service is the sole responsibility of the PSC (regulation 18 of the PSC Regulations). Regulation 18 no longer applied in respect of Fire Service appointments, but regulation 158 continues to apply to them. The court reasoned:

> "47 … The PSC controls the gateway for those who are to be CONSIDERED for employment/promotion. It must therefore set the criteria."

23. The legislature could prescribe minimum qualifications for office, but it would be completely irreconcilable with Trinidad and Tobago's constitutional arrangements for the executive to do so, or for the legislature to delegate the task to the executive. Prescribing minimum qualifications does not form part of the executive's function of setting officers' terms and conditions of service. The cases of *Endell Thomas v Attorney General of Trinidad and Tobago* [1982] AC 113 and *Cooper v Director of Personnel Administration* [2006] UKPC 37, [2007] 1 WLR 101 were consistent with that view. *Romain v Police Service Commission* [2014] UKPC 32 was distinguishable because there the Police Service Regulations were made under the direct authority of the Constitution and they did not contain a provision about determining equivalence. In so far as the decision of the Court of Appeal in *Teaching Services Commission v Ramsahai* Civ App 58 of 2006 regarded the requirement for the Commission to "consider" specifications made by the Minister as circumscribing its power to determine eligibility it could no longer be regarded as good law. Both section 34(1)(aa) and regulation 8(1)(b) required to be read down so as not to conflict with the functions which were reserved to the PSC. Accordingly, a determination by the CFO as to equivalence did not bind the PSC, it was merely advisory. The consultation process envisaged by regulation 8(1)(b) required the CFO to form his own view in relation to equivalence after consulting with the Permanent Secretary and the CPO. Here, the PSC had followed the advice of the CPO in determining that the respondent did not hold an equivalent related qualification. However, apart from his function under the Industrial Relations Act, the CPO's role was entirely confined within the boundaries of section 14 of the Civil Service Act, viz classification of offices, administering the Civil Service Regulations, negotiation with employees with respect to classification, grievances, remuneration and terms and conditions. He had no decision-making authority under the PSC Regulations and no power to set eligibility criteria for an office. In circumstances where there was prima facie evidence of a CFO determination of equivalence, if the appellant proposed to accept the advice of the CPO that the respondent was ineligible fairness demanded that it give him an opportunity to make representations to it about the CPO's view. In relying on the CPO's view the appellant acted unreasonably, irrationally and in breach of its duty to be fair.

24. The Court of Appeal allowed the appeal, set aside Seepersad J's decision, and granted declarations (i) that the appellant's decision of 21 April 2015 was arrived at by a

process outside that prescribed by the PSC Regulations; (ii) that the decision was unreasonable, irrational and contrary to the principles of natural justice. The court invited further submissions as to (a) whether judicial review was a prompt and effective remedy in this case; (b) whether the contravention of any rights guaranteed by the Constitution had been established; (c) whether an award of damages/compensation was appropriate, and if so the proper approach to determining quantum. After a further hearing, on 11 December 2023 the Court of Appeal by a majority (Archie CJ and Holdip JA) found that there had been a breach of the respondent's rights under section 4(b) of the Constitution and ordered that damages be assessed pursuant to section 8(4) of the Judicial Review Act. The court remitted the matter to the High Court for damages to be assessed. In his dissenting judgment Bereaux JA disagreed with damages being assessed under that Act. He would simply have declared that there had been a breach of section 4(b) of the Constitution and ordered that compensation be assessed for that breach.

25. The appellant has appealed both decisions. However, as the Board considers that the appeal against the first decision should be allowed, there is no longer any basis for the second decision and the appeal against it must also be allowed. In those circumstances it is unnecessary to discuss the terms of the second decision or the submissions which the parties made in relation to it.

The parties' submissions

26. The gist of the parties' submissions was as follows.

27. The appellant submitted that the Court of Appeal erred in permitting the respondent to raise new contentions which had not been raised before Seepersad J and which had been a complete recasting of his case. The absence of procedural rigour had resulted in unfairness, not only to the appellant, but also to the wider public interest. Had the suggestion that the 2013 list contained an implied determination by the CFO been put in issue before Seepersad J, further evidence as to the circumstances surrounding the list's preparation and/or evidence otherwise bearing upon its import would have been likely. The constitutional argument which the Court of Appeal accepted was ill founded. The court erred in declining to give regulation 8(1)(b) its plain and ordinary meaning and in reading it down. The letter of 11 May 2007 written on behalf of the CFO was a clear decision, made after appropriate consultation, that the respondent's management diploma is not an equivalent related qualification to the GDIFE. The fact that the CFO had a different provisional view was neither here nor there. The 2013 list did not contain a determination of equivalence by the CFO following consultation by him with the Permanent Secretary and the CPO. The appellant accepted that it is not entitled to decide for itself that the respondent's qualifications are not equivalent to the GDIFE and that it is bound any determination under Reg. 8(1)(b) made by the CFO. The Court of Appeal erred in holding that the decision to promote others rather than the respondent had been irrational and contrary to natural justice. In the circumstances the appellant had not been

required to give the respondent the opportunity to make representations as to whether his qualifications were equivalent to the GDIFE.

28. The appellant further submitted that the Court of Appeal took an unduly narrow view of the role of the CPO and the Personnel Department which he leads. As the representative of the employer of public servants, the CPO has a clear interest in advising on appropriate qualifications for officers

29. The interested party submitted that there was nothing unconstitutional in a construction of regulation 8(1)(b) that vests in the CFO, acting in consultation with the Permanent Secretary and the CPO, the power to prescribe necessary qualifications for office. That power had always been vested in the executive as the employer. The appellant does not have "the final say" on the issue of equivalence of qualifications under regulation 8(1)(b). Like the appellant, the interested party submitted that the Court of Appeal defined the role of the CPO too narrowly.

30. Counsel for the respondent supported the decision and reasons of the Court of Appeal. He submitted that the provision of qualifications requirements fell within the ambit of the appellant's powers and duties to make decisions concerning the eligibility of officers, and that section 34(1)(aa) and regulation 8(1)(b) had to be read down. The appellant misdirected itself by acting on the advice of the CPO on the issue of equivalence. Before departing from the view of the CFO the appellant ought, as a matter of natural justice, to have given the respondent the opportunity to be heard on the matter (*R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531). The appellant's decision to promote others rather than the respondent was irrational and contrary to natural justice.

Decision and reasons

The Constitutional issue: is the setting of qualifications a matter for the PSC or the executive?

31. The constitutional challenge to section 34(1)(aa) and regulation 8(1)(b) raises a pure question of law. It is not dependent upon the evidence which was led before Seepersad J. However, if the Court of Appeal was to permit the respondent to raise it for the first time on appeal, it was highly desirable that the executive was made aware of the challenge and given the opportunity to enter the proceedings to resist it if so advised. An obvious way forward would have been to order intimation of the proceedings to the Attorney General. That was not done. The result was that the Court of Appeal did not have the benefit of legal submissions from the executive. Fortunately, that omission has been remedied before the Board. The Board has had the advantage of full submissions, not just from the appellant and the respondent but also from the interested party.

32. The essence of the constitutional challenge is the claim that under the Constitution the power to specify qualifications for the various offices in the public services is a matter for the PSC. It founds upon the terms of sections 121 and 129 of the Constitution and, in relation to fire officers, regulation 158 of the PSC Regulations. If the challenge is correct the consequences are far reaching. All of the prescribed qualifications in the Fire Service Regulations would be merely advisory, as would regulations prescribing qualifications in respect of offices in the Civil Service, Teaching Service and Police Service.

33. In the Board's view the challenge is not well founded.

34. The starting point is that functions of the executive include the management and direction of the departments of government (sections 74 and 75 of the Constitution), Subject to legislation to the contrary, those functions include deciding what offices to create, what qualifications are needed for them, and how many officers, doing what tasks, are needed to carry out the work of each department. Absent legislation to the contrary, the only limit on the executive's general authority under the Constitution to employ officers and to define offices in the public services is that the power "to appoint persons to hold or to act" in such offices is vested in the various service commissions (section 121(1) for the Public Services Commission). Section 129(1) of the Constitution (which enables service commissions by regulation or otherwise to regulate their own procedure) does not extend the commissions' remit beyond the power to appoint and dismiss. There is no further limit in the Constitution which prevents the executive, or legislation, from laying down criteria or minimum qualifications which must be satisfied by those who wish to be appointed. That power is and always has been vested in the executive as the employer. That is sensible and understandable because the executive employs officers and builds up over the years a store of knowledge as to the qualifications various offices require.

35. In different ways the general scheme for the public service and the special scheme for fire officers properly allocate to the executive the function of setting the minimum qualifications for appointment to particular offices.

36. Chapters III, IV and V of the PSC Regulations set out the principles of selection generally to be applied by the PSC in making appointments other than in relation to the Fire Service, and Chapter XII (and in particular regulation 158) sets out principles for appointment in the Fire Service. None of these provisions vests in the service commissions the power to impose the qualifications required for the various offices. That is left to the executive as the employer.

37. The Fire Service Act established the Fire Service as a separate service and it allocated to the executive, in the person of the President, the continuing functions of creating new offices in it, varying the offices in it, classifying the offices, and changing

their classification (sections 4(1) and 6). Section 34(1) empowered the President to make regulations, among other things:

> "(a) for prescribing the terms and conditions of employment in the Fire Service;
>
> (aa) for prescribing qualifications for appointment to an office in the Fire Service…"

In the exercise of that power the President made the Fire Service Regulations. The scheme imposed under those regulations for fire officers is similar to that which applies under regulation 18 of the PSC Regulations to other offices but, instead of a provision equivalent to regulation 18(4), qualifications for appointment are prescribed. The Fire Service Regulations prescribe qualifications for the offices of Firefighter (regulation 3); Fire Sub-Officer (regulation 6); Fire Sub-Station Officer (regulation 7); Fire Station Officer (regulation 8); Fire Equipment Supervisor (regulation 8(4)); Assistant Divisional Fire Officer (regulation 9); and higher offices in the First Division (regulation 9(3)).

38. Contrary to the Court of Appeal's reasoning at para 47 of its judgment (see para 22 above), it does not follow from the fact that the PSC is responsible in terms of regulation 158 for appointing "eligible" officers that it must also be responsible for setting the eligibility criteria. The assessment of which eligible officers to appoint and the eligibility criteria are distinct questions. The Court of Appeal erred in eliding them. The task of setting minimum criteria is for the executive, whereas the task of assessing a candidate for appointment who satisfies those criteria is for the PSC.

39. It has repeatedly been held or taken as read that regulation 18(4) of the PSC Regulations (which provides that "the [PSC] shall consider any specifications that may be required from time to time for appointment to the particular office") refers to specifications made by the executive (*Ramsahai v Teaching Service Commission* (CA) Civ App No 58 of 2006 (where this was expressly decided at paras 21 to 26); *Ramsahai v Teaching Service Commission* [2011] UKPC 26; *Dipchan v Board of Inland Revenue* Civ App No 257 of 2015 at para 45; and *Boland v Board of Inland Revenue* [2023] UKPC 27 at paras 27 to 29 (in which this was taken as read)). The Board does not agree with the Court of Appeal's suggestion that the Court of Appeal decision in *Ramsahai* ought no longer to be considered to be good law. That suggestion demonstrates the error of elision already referred to.

40. It is consistent with the Constitution for the executive to prescribe the qualifications for a public office or for the legislature to allocate that function to the executive. The Court of Appeal read too much into the distinction drawn by the Board in *Endell Thomas v Attorney-General for Trinidad and Tobago* [1982] AC 113 at p 128 and

in *Cooper v Director of Personnel Administration* at para 27 between the power to set terms and conditions of employment on the one hand and the power of appointment on the other. In drawing that distinction the Board was not purporting to describe the whole ground to be divided up between the executive and the appellant or to limit the executive's function to the setting of "terms and conditions" in the narrow sense defined by the Court of Appeal at para 51 of its judgment. Indeed, in *Endell Thomas* at p 131A the Board observed that the prescribing of qualifications is properly a matter for the executive and does not intrude upon the power of appointment vested in the Police Service Commission. The court's judgment in *Boland* proceeded on the same premise.

41. Since there is no conflict between section 34(1)(aa) and regulation 8(1)(b) on the one hand and sections 121 and 129 of the Constitution and regulation 158 of the PSC Regulations on the other, it was not open to the Court of Appeal to read down the former provisions. Those provisions should be given their ordinary and natural meanings having regard to their context. The meaning of the latter part of regulation 8(1)(b) is that it is for the CFO to determine, after consultation with the Permanent Secretary and the CPO, that an FSSO holds an equivalent related qualification. If the CFO makes a determination to that effect it is not open to the PSC to disagree with that determination. Nor, in the absence of such a determination by the CFO may the PSC itself determine that an FSSO holds an equivalent related qualification. The CFO is the only person authorised by regulation 8(1)(b) to make the determination.

Was there a determination of equivalence?

42. There was no evidence before Seepersad J that the CFO made a determination of equivalence in respect of the respondent following the required consultation. That is clear. It follows that the PSC, and in his turn Seepersad J, were correct to conclude that the respondent was not eligible to be promoted because he did not satisfy the requirements of regulation 8(1)(b).

43. The CFO's memorandum of 12 July 2006 was not such a determination. It merely expressed a preliminary view prior to the required consultation with the Permanent Secretary and the CPO. Having consulted with the CPO and received his advice, the CFO's informed and concluded view, which was communicated to the respondent in the letter of 11 May 2007, was that the respondent's management diploma was not an equivalent related qualification. That letter was written on Mr Skeete's behalf. It was the outcome of a duly completed consultation process which complied with regulation 8(1)(b). Seepersad J did not accept those parts of the affidavit evidence of Mr Skeete which sought to undermine what was said in his name in that letter. That was a finding that Seepersad J was entitled to make; and, as he correctly observed, what was relevant was the material which was before the appellant when it made its decision.

44. The Court of Appeal appears to have treated the 2013 list as containing an implied determination of equivalence by the CFO. There was clear prejudice to the appellant, and to the public interest, in the court making that finding because the contention was not put in issue before Seepersad J. The Court of Appeal ought not to have permitted the respondent to raise the contention for the first time on appeal. It is not a pure point of law. Had the issue been raised at first instance it is highly likely that evidence bearing upon it would have been adduced. It may be anticipated that the meaning of, and significance of, entries in the 2013 list would have been explored, as would the question whether the consultation which regulation 8(1)(b) requires was duly carried out prior to the suggested determination in 2006. There was no evidence before the PSC, Seepersad J or the Court of Appeal that it had been. Before Seepersad J the respondent did not rely upon the 2013 list. His position was that it was merely a seniority list, and that the 2011 list was a merit list. However, Seepersad J found to the contrary. In the whole circumstances the Board is firmly of the view that the principle of finality of litigation and the policy reasons supporting it summarised in *Primeo Fund v Bank of Bermuda (Cayman) Ltd* [2023] UKPC 40; [2024] AC 727 at paras 148–155 ought to have prevailed.

45. The dearth of evidence relating to the circumstances surrounding the 2013 list is the respondent's problem, not the appellant's problem. The onus was on him to demonstrate to Seepersad J that there had been a determination of equivalence by the CFO which satisfied the requirements of regulation 8(1)(b). He failed to discharge that onus.

46. Even on the basis of the limited evidence about the 2013 list which was before Seepersad J, the Board does not consider that the inference of the suggested implied determination is one which may be drawn. The document requires to be construed in context. Although the date in the Eligible column is 2006, the evidence was that around that time the respondent had asked the CFO for a determination that he held an equivalent related qualification and that in response the CFO determined in 2007 that he did not. That is wholly inconsistent with the respondent having become eligible in 2006.

Was the appellant's decision to promote others instead of him irrational or contrary to natural justice?

47. The Court of Appeal indicated that, even if it was wrong in relation to the proper interpretation of regulation 8(1)(b), the PSC had "blindly" placed reliance on the view expressed by the CPO, that doing so was irrational, and that the process followed by the PSC was irreparably flawed. The majority of the Board disagrees.

48. The respondent's factual foundation for the rationality challenge is incorrect. There is no basis in the evidence for concluding, and Seepersad J did not find, (i) that the CFO "blindly" followed the CPO's view; or (ii) that the PSC was guided by the CPO's memorandum rather than by the CFO's letter. In relation to (ii), some unfortunate

confusion was caused because of Seepersad J's reference to the "Chief Personnel Officer" (para 12) and the "CPO" (para 23), when it is clear in context that he meant to refer to the CFO. In para 12 the judge was summarising the appellant's case—which, as is clear from the appellant's written submissions for the hearing before him, was that the respondent had failed to establish that he had obtained a determination of equivalence by the CFO. The reference to CPO rather than CFO in para 23 is also obviously a slip. The judge made it crystal clear in the first sentence of para 16 of his judgment that the law required that there must be a determination of equivalence by the CFO after consultation with the Permanent Secretary and the CPO. The CPO gives advice, but the CFO makes the decision. Para 23 discusses the decision and the decision maker.

49. In relation to natural justice, the Court of Appeal reasoned (para 134) that if the appellant was going to decide that the respondent was ineligible "based on the view of a third party [the CPO] who was not a part of the Regulation 158 process", fairness demanded that he be given an opportunity to make representations. It added (at paras 135 and 136):

> "135 … The effect of the PSC's decision was … to remove from consideration for promotion an officer who was at least prima facie eligible (based on the CFO's recommendation).
>
> 136. That it did so on the basis of a memorandum from the CPO … of which the [respondent] was unaware is, quite simply, unfair."

50. Once again, the majority of the Board disagrees. The Court of Appeal's reasoning is premised on the view that the CFO determined that the respondent held an equivalent related qualification but that the PSC preferred to be guided by the CPO's memorandum of 15 December 2016. Neither premise is correct.

51. It is not clear whether the CFO determination that the Court of Appeal adverts to is the CFO memorandum of 12 July 2006 or the suggested implied determination of equivalence in the 2013 list. Whichever be the case, neither document should have been treated as containing a CFO determination of equivalence, for the reasons already explained (at para 43 in relation to the memorandum of 12 July 2006 and at paras 44–46 in relation to the 2013 list). The appellant did not proceed on the basis of the CPO's memorandum of 15 December 2006. It proceeded on the basis that there was no CFO determination of equivalence. It was correct to do so. The material before it was not ambivalent on the point, and the respondent did not suggest to the appellant or to Seepersad J that it was. Nor, for the reasons given in para 43, was there any ambivalence about the letter of 11 May 2007 because of Mr Skeete's subsequent affidavit. In the whole circumstances it was not incumbent upon the appellant to give the respondent the

opportunity to make any further representations, and it was not incumbent upon Seepersad J to hold that there had been procedural unfairness.

The role of the CPO

52. The Board also considers that the Court of Appeal erred in taking an unduly narrow view of the CPO's role and of the circumstances in which the PSC may obtain his advice. The CPO's role under the Civil Service Act (and that of the Personnel Department of which he is the head) is not confined to the specific duties listed at (a) to (c) of section 14(1) of the Civil Service Act. Those duties are "in addition" to "such duties as are imposed on [the Department] by this Act and the Regulations" (ie those passed under the Act). In the Civil Service Regulations many functions are allocated to the CPO (eg by regulations 54, 78, 86 and 137). Similar functions are allocated to the Personnel Department in respect of the Fire Service (by section 19 of the Fire Service Act), Prison Service (by section 15 of the Prison Service Act), and Teaching Service (by section 63 of the Education Act). In each case the Personnel Department (and therefore the CPO) is given the duty to administer the regulations respecting the relevant service. In the Fire Service Regulations the CPO's role as consultee is not limited to regulation 8(1)(b). He is also to be consulted on questions of equivalence of qualifications under regulations 3(1)(b)(iv), 8(4), and 9(2)(c), and he is to be consulted in respect of other matters under regulations 10 and 24(3). The Court of Appeal defined classification of offices too narrowly. Classification requires an understanding of job specifications and the qualifications needed to do a job. In that regard the Personnel Department is a repository of the learning and expertise of the state as employer. Whenever a public body is faced with a decision concerning matters within the expertise of the CPO and the Personnel Department, and it has a discretion to consult or seek advice, it is open to it to obtain the advice of the CPO.

Conclusion

53. The Court of Appeal erred in allowing the appeal against the judgment of Seepersad J. The Board allows the appeal against the order of the Court of Appeal dated 16 December 2022. Since that order was the foundation for the Court of Appeal's order of 11 December 2023 remitting the matter to the High Court for an assessment of damages, the Board also allows the appeal against that order. Seepersad J's order of 14 December 2016, which dismissed the claim and ordered the respondent to pay the appellant's costs, is restored.

SIR ANTHONY SMELLIE (DISSENTING):

54. I agree with my Lords that there is no basis for the Court of Appeal's reading down of regulation 8. It is entirely right, as the line of cases discussed at [39] above reveal, that

the matter of qualifications for office should be for the employer who, in the case of the public service, is the executive. The concerns perceived by the Court of Appeal to preserve a separation of powers insulating the public service from improper political interference is addressed, in the constitutional arrangements, by the exclusive role of the Services Commissions in the actual recruitment, promotion and discipline of members of the service. I also agree with what your Lordships say in para 52 generally about the role of the CPO.

55. I find myself however, in respectful disagreement with my Lords on the factual merits of the appeal.

56. It is indeed so, as my Lords confirm at [41] above, that the CFO is the only person authorised by regulation 8(1)(b) to determine whether a candidate holds an equivalent related qualification.

57. As the Court of Appeal sought to explain, the material before the PSC was, at best, ambivalent. The letter of 11 May 2007 sent on behalf of then CFO Skeete was, in his unchallenged evidence at trial, disavowed by him as not expressing his own views at the time, suggesting that it had been sent by Mr Edwards without his approval. While Mr Skeete's evidence itself perhaps betrayed a lack of understanding about the workings of regulation 8(1)(b), to the extent that the letter of 11 May 2007 was relied upon by the PSC, it relied upon a view which, at best, represents a consultation process that was never completed (as indeed the Court of Appeal also found).

58. While it is true as my Lords have noted, that the respondent did not challenge the conclusions reached in the 11 May 2007 letter, that should not have been held against him in the context, six years later, when the matter finally arose for consideration by the PSC or still later when the matter came before the court. It is understandable that he might simply have decided to await the recruitment process in 2013 and rest his application on the views to be then expressed by the incumbent CFO. Such views came to be expressed by that CFO in the 2013 List. They should not have been summarily dismissed by the PSC and even more wrongly so, if dismissed in deference to the views of the CPO given in the course of an incomplete consultation process six years earlier. In this regard, it is not without moment that the Court of Appeal was moved at [22], [23] and [121] to [124] of its judgment, to comment on the opaqueness of the process before the PSC—did it rely upon and was it persuaded by the views expressed in the letter of 11 May 2007 letter or upon those of the CPO expressed in his memorandum of 15 December 2006? It is moreover, clear that Seepersad J (at [20] of his judgment), regarded the letter of 11 May 2007 as conclusive and Mr Skeete's unchallenged disavowal of it before him as impermissible because "that would be going against the advice of the CPO".

59. But the gravamen of the Court of Appeal's concern as I understand it, is that the 2013 List was, at least potentially, an expression of the decision of the then incumbent CFO that the respondent had the required qualification. It was submitted to the Department of Personnel Administration under cover of a memorandum dated July 11, 2013 in which the CFO described it as a list of FSSOs "who qualify for promotion to the rank of Fire Station Officer". The respondent was listed at "Merit No 9" in the list of 39 names. The respondent was the only FSSO who had not passed the written job-related FSO examination nor was he the holder of a GDIFE. Instead, he was listed as possessing multiple academic qualifications under the qualifications category. The 2013 List somewhat cryptically suggested that the equivalent qualifications had been acquired from 2006 which, on its face, was in conflict with the conclusions of the letter of 11 May 2007. But that, as the Court of Appeal found, was no more than a cause for enquiry. It was no proper basis for rejecting the CFO's views expressed in 2013, out of hand, in effect replacing them with those of the PSC.

60. My Lords have also expressed firmly the view that the Court of Appeal ought not to have allowed the respondent to contend, for the first time on appeal, that the 2013 List carried the implication of a finding of equivalence by the then incumbent CFO. I am unable to agree. The Court of Appeal did not proceed on the basis of its acceptance of that contention as correct in fact. The real concern identified by the Court of Appeal was one of procedural fairness. It was whether or not proper consideration had been given by the PSC to the 2013 memorandum and List or whether the PSC had been unduly persuaded to reject them in deference to the 11 May 2007 letter or the 2006 memorandum from the CPO addressed to the PS. This issue was very much at large throughout the proceedings. While the PSC appeared to the Court of Appeal not to have been forthcoming about how it regarded it, as already noted, the 2013 List was before the PSC along with the CFO's memorandum which conveyed it as a list of candidates considered by him to be suitable for promotion to FSO. The 2013 List was also considered by Seepersad J as to whether it was a "merit" or "seniority" list—see [24] and [26] of his judgment where he concluded that the 2013 List was a merit list and the relevant list for the promotions in 2015. In relation to the PSC's treatment of the 2013 list, the Court of Appeal was moved to comment at [103] that "... apart from its half-hearted embrace of the 2007 letter... the only relevant evidence that was unequivocally before the PSC of the CFO's position on the matter, at the time of its decision, was the 2013 memorandum [which conveyed the 2013 List]". And further and more crucially at [127] to [129]:

> "127. The two documents that were indisputably before the PSC were:
>
> (1) The 2013 memorandum from the then CFO that was prima facie evidence that the Appellant possessed an equivalent qualification;

(2) The 2006 memorandum from the CPO to the PS.

The PSC has not said how the various factors it allegedly took into consideration under regulations 158 and 160 were balanced against the view of the CFO, or whether it had sight of all the Appellant's certificates. However, to the extent that it, without explanation, preferred the 2006 memorandum (that it was not required to consider) over the 2013 memorandum (which it was), its decision was arbitrary, unreasonable and irrational. In the face of the apparent conflict between the two documents the PSC ought at the very least to have made further enquiry properly to satisfy itself on the equivalency issue. The CPO has no statutory role in advising the PSC.

128. If the PSC had properly considered the roles of the respective parties, then the clear inference from the face of the later memorandum was that the CFO in 2013 did not agree with the relevant portion of the earlier 2006 memorandum, which was clearly part of a not yet concluded consultation process and was not addressed to the PSC.

129. Even if the PSC had the 2007 memorandum before it (and that is not its case on the evidence) it would still have to be weighed against the 2013 memorandum and that conflict could not be resolved simply by appealing to the 2006 memorandum for reasons already stated. We now know that, because of the language used by the CFO in his memorandum to the PS and the unexplained reversal of opinion, the 2007 memorandum may well have been the result of a flawed consultation process. A reasonable enquiry could have unearthed all the material now before the court".

61. As the Court of Appeal noted at [125], the CFO (in 2013) in forming his views as to eligibility, would also have had to consider criteria specified in regulation 158 including:

"a. Any special qualifications; … and

b. Any special courses of training that he may have undergone whether at the expense of Government or otherwise …"

and that:

> "The (respondent) had submitted, among other things:
>
> i. Certification as a Fire Instructor;
>
> ii. Certificate of training in operation and maintenance of rescue tools;
>
> iii. Certificate of training in driving and manipulating and wrecking skills plus preventative maintenance and use of ancillary small gear;
>
> iv. Fire prevention"

62. The Court of Appeal continued at [126]:

> *"*These are clearly related to the technical aspects of the job, although the Court is not in a position to determine equivalency. There is no rule that equivalency cannot be acquired cumulatively. We are not told whether these documents remained with the CFO or were transmitted to the PSC. At the very least, they could have been produced on inquiry and would have been relevant to the PSC's deliberations under Reg, 158*."*

63. I do not see that the Court of Appeal can be faulted for that approach in the context of the circumstances presented. As already stated, the real concern identified by the Court of Appeal was not whether the 2013 memorandum and List were in fact tantamount to a finding of equivalency by the FCO. It was whether the PSC had given due and proper consideration to its significance. And this also goes to the important matter of the burden of proof emphasised by my Lords as resting upon the respondent. It is not, as I perceive it for present purposes, a burden to have established before Seepersad J or the PSC that he had the equivalent qualifications. For the purposes of these judicial review proceedings, it is a burden to establish that in dealing with his application, the PSC failed to act rationally and fairly. He had no right of audience before the PSC to satisfy them about his qualifications but was obliged to rely upon their proper consideration of all relevant material available to them. And this process is what I understand the Court of Appeal to have regarded as the subject of its enquiry. In fulfilling its obligations, the PSC is required, not only to be transparent but also to be scrupulously careful to ensure that

the applications of long-serving candidates for promotion are given fair consideration. The process is not merely adversarial, it must appear to be both rational and fair.

64. It is as much in the public interest, for the sake of esprit de corps and recognition of meritorious public service, as it is in the interest of candidates for promotion, that the necessary enquiries are undertaken. In this case, not only was the respondent put forward by the CFO as having the required qualifications, but as the Court of Appeal noted at [105] and [130], the PSC had itself interviewed the respondent in 2009 for the even higher position of ADFO with the clear implication that he was then regarded as having the required qualifications for that higher post. And the respondent had acted in that higher post continually thereafter. While the recognition of his candidacy for the higher post did not create any legitimate expectation in relation to the recruitment process to come in 2013, it was not acceptable, as Mr Dass proposed to the Board, that the process in 2009 should simply, without more, be regarded as a "mistake". It would have been a matter of record before the PSC and all the more reason to have enquired into the thinking of the CFO that informed his views behind the 2013 List.

65. In this case, not only was the respondent passed over in favour of the 5 comparator candidates who, objectively, might properly have been regarded as more suitable for promotion. He was subsequently passed over in deference to 15 more candidates despite being listed (whether by merit or mere seniority) at 9 on the 2013 List of 39 candidates. As the Court of Appeal noted at [31] of its judgment, there were 52 vacancies on the establishment at the time. Thus, any failure of fairness in the process carried real consequences for the respondent.

66. The Court of Appeal concluded at [133] (and by implication at [136]) that by:

> "deeming the (respondent) to be ineligible, the PSC deprived him of the opportunity to have his suitability considered. If it was going to be based on the view of a third party [(the CPO)] who was not a part of the Regulation 158 process then fairness demanded that he be given an opportunity to make representations".

In all the circumstances of the case, I do not see that the Court of Appeal can be criticised for taking that view and I would therefore have dismissed the appeal against its decision on the merits of the case (which it emphasised at [3 iii] of its judgment, did not depend on its views on the constitutionality of regulation 8).