EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

CLAIM NO. BVIHCV 2015/0083

IN THE MATTER OF AN APPLICATION BY POLICE CONSTABLE NICHOLAS TRANQUILLE FOR LEAVE TO APPLY FOR JUDICIAL REVIEW OF THE DECISION THE COMMISSIONER OF POLICE DAVID MORRIS REFUSING TO EXERCISE HIS POWER TO WAIVE THE REQUIREMENT THAT HE PASS THE PROFESSIONAL EXAMINATION FOR PROMOTION TO THE RANK OF SERGEANT AND THEREBY MAKE HIM ELIGIBLE FOR PROMOTION

AND

IN THE MATTER OF A DECISION OF THE SUPREME COURT OF THE EASTERN CARIBBEAN COURT ORDERING THE RESPONDENT TO CONSIDER A REQUEST FROM THE APPLICANT TO WAIVE THE REQUIREMENT THAT HE PASS THE PROFESSIONAL EXAMINATION FOR PROMOTION TO THE RANK OF SERGEANT AND TO THEREBY MAKE HIM ELIGIBLE FOR PROMOTION

BETWEEN:

NICHOLAS TRANQUILLE

Applicant

And

THE COMMISSIONER OF POLICE

Respondent

Appearances:
Mr. Ruggles L. Ferguson for the Applicant
Ms. Giselle Jackman-Lumy and Ms. Miglisa Cupid for the Respondent

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2015: July 9th

JUDGMENT

[1] **ELLIS, J.:** Judicial review proceedings are the proceedings by which the Court exercises supervisory jurisdiction over tribunals and public bodies. This jurisdiction enables superior courts to review decisions, acts or omissions of public authorities in order to ensure that these bodies act within the parameters of their given powers.

[2] Given the nature of this jurisdiction, it is not surprising that judicial review is not an automatic entitlement of a litigant. A person seeking to invoke the court's supervisory jurisdiction must first obtain the leave of the court. Ultimately, the principle purpose of the requirement of leave for judicial review is to facilitate the filtering out of applications which are either groundless or hopeless. It is intended to avert a waste of judicial time and unnecessary legal costs.

[3] The relevant procedural requirements for the grant of leave support this position. CPR Part 56.3 provides as follows:

[4] A person wishing to apply for judicial review must first obtain leave.

(1) An application for leave may be made without notice.

(2) The application must state –

(a) the name, address and description of the applicant and respondent;

(b) the relief, including in particular details of any interim relief sought;

(c) **the grounds on which such relief is sought**;

(d) the applicant's address for service;

(e) whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued;

(f) details of any consideration which the applicant knows the respondent has given to the matter in question in response to a complaint made by or on behalf of the applicant;

(g) whether any time limit for making the application has been exceeded and, if so, why;

(h) whether the applicant is personally or directly affected by the decision about which complaint is made;

(i) if the applicant is not personally or directly affected – what public or other interest the applicant has in the matter;

(j) the name and address of the applicant's legal practitioner (if applicable); and

(k) the applicant's address for service. **[Emphasis mine]**

(3) The application must be verified by evidence on affidavit which must include a short statement of all the facts relied on.

LOCUS STANDI

[5] In the case at bar, the Defendant does not dispute the Applicant's interest in the matter. The Applicant has satisfied the Court that it falls within Part 56.2 (2) (a) and therefore has sufficient standing to make this application.

ARGUABLE CASE

[6] Where (as in this case) an applicant is able to satisfy a Court that he has the requisite *locus standi* to make the application, he must then satisfy the Court that he can traverse the next threshold requirement for the grant of leave. He must demonstrate that there is an arguable case that a ground of judicial review exists which merits a thorough examination at a substantive hearing.

[7] The Court accepts that the relevant learning on the test for the grant of leave to apply for judicial review is set out in the case of **Sharma v Browne-Antoine**.[1] The test is expressed as follows:

> *"The ordinary rule now is that the court will refuse leave to claim judicial review* ***unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy****: see R v Legal Aid Board, Ex p Hughes (1992) 5 Admin LR 623, 628 and Fordham, Judicial Review Handbook 4th ed (2004), p 426.* ***But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application.*** *As the English Court of Appeal recently said with reference to the civil standard of proof in R (N) v Mental Health Review Tribunal (Northern Region) [2006] QB 468, para 62, in a passage applicable, mutatis mutandis, to arguability:*
>
> *'the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the*

[1] [2007] 1 WLR 780 at page 787 D-H

> *standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.'*
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> ***It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to "justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen****": Matalulu v Director of Public Prosecutions [2003] 4 LRC 712, 733"* ***[Emphasis mine]****.*

[8] This Court must therefore be satisfied that there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. The Court must therefore examine the grounds upon which the Claimant seeks to invoke the Court's supervisory jurisdiction in order to determine whether they disclose an arguable case with a realistic prospect of success.

[9] At this stage in the proceedings, the role of the court is to determine whether an arguable case has been made out on the merits. While the Court cannot proceed to try the case on the basis of the affidavits in order to determine which party has presented the true situation, there can be no doubt that in considering arguability, the nature and gravity of the issues, the cogency of the evidence before the court, and the prospect of success are integral factors which would have to be considered by the court.

Judicial Review – Burden and Standard of Proof

[10] Generally, administrative actions are presumed to be legal and valid.[2] However, this presumption is rebuttable. The classic statement of this legal principle is set out in the judgment of **R v Inland Revenue Commissioners ex p Rossminister [1980] AC 952** at 1013 F-H;

> "Where Parliament has designated a public officer as decision-maker for a particular class of decisions the High Court …must proceed on the presumption *omnia praesumuntur rite esse acta* until that presumption can be displaced by the [claimant] for review- upon whom the onus lies of doing so."

[2] See Wade and Forsyth, Administrative Law, 9th edition (2004) at pp 292-3 and the many cases there cited.

[11] Accordingly, the burden is on the party who seeks to set aside any determination, order or decision to bring sufficiently cogent evidence to show that the decision is invalid, unreasonable or unlawful.

[12] In **R v Lambeth London Borough Council *ex parte* Ireneschild**[3]**,** the English Court of Appeal made it clear that the onus is on the applicant to show the failure to take into account relevant considerations. In the Court's judgment, the applicant also bears the burden of proving that the irrelevant considerations were in fact taken into account.

[13] In the same way, the general position is that the onus is on the applicant to demonstrate unreasonableness. **Standard Commercial Property Securities Ltd v Glasgow City Council**[4]

[14] What then are the Applicant's grounds for intervention? The Application herein has been advanced on two main bases. The Applicant alleges that:

(1) The Respondent misdirected himself in considering the issue of exercise of his discretion under Force Standing Order M 7 (4) in that he addressed his mind to the issue of whether the Applicant merits promotion rather than whether it was fair that the Applicant's name be sent forward to the Police Selection Board to determine whether he merits promotion pursuant to the Promotions Policy then in force.

(2) The Respondent's refusal to exercise his power was based on consideration of irrelevant matter, failure to take into account of relevant consideration and/or was unreasonable and irrational in all the circumstances.

[15] The Application is supported by the affidavit evidence of the Applicant filed on 7th April 2015 and on 12th May 2015. At paragraph 8 of the 7th April Affidavit the Applicant essentially repeats the contention at (1) above and in paragraphs 9 – 12, he develops the case to be considered by the Court. The Applicant contends that:

[3] [2007] EWCA Civ 234 at para 45
[4] [2006] UKHL 50 at page 61 relying on R v Birmingham City District Council Ex p O [1983] 1 AC 578, 597C-D per Lord Brightman

(1) In misdirecting himself as indicated, the Defendant usurped the functions of the Police Selection Board or the Police Service Commission since it is for the Police Selection Board or the Police Service Commission to consider and determine (after interview) whether he should be promoted.

(2) The Defendant failed to consider the reason why he did not sit the examination; namely, the fact that he was out of the jurisdiction on an assignment for and on behalf of the RVIPF and that no provision was made for him to do the examination outside the jurisdiction.

(3) It was unreasonable and irrational of the Defendant not to give any consideration to the reason why he did and could not sit the examination in the process of determining whether to exercise his discretion.

(4) No reasonable and rational person properly directing himself in considering the reason why he did not and could not take the examination along with all other relevant circumstances, could have arrived at the conclusion that the Defendant arrived at; namely that there were no grounds which justify the grant of the waiver.

Ground 1 - Taking into account irrelevant considerations

[16] The Applicant contends that in considering his discretion, the Defendant addressed his mind to the issue of whether the Applicant merits promotion rather than whether it was fair that the Applicant's name be sent forward to the Police Selection Board to determine whether he merits promotion pursuant to the Promotions Policy then in force. He referred the Court to the Defendant's letter of 3rd December 2014, in particular paragraphs 3 - 5. Counsel submitted that in referring to the "positive feedback received in the performance appraisals referred to" and the "need for improvement in certain key areas [that] cannot be ignored", the Defendant was in fact considering whether the Applicant was fit for promotion. He submitted that the Defendant addressed his mind to the wrong questions and so ended up with the wrong conclusion. He further submitted that in considering these matters, the Commissioner usurped the role of the Police Selection Board whose job it is to consider an applicant's fitness for promotion having regard to the entire promotions process.

[17] Counsel further argued that in critiquing the experience and quality of the service discharged by the Applicant while acting in the position of Sergeant, the Defendant was purporting to lecture the Applicant on how to be an effective police officer which again indicates that he was improperly considering the Applicant's fitness for promotion.

[18] Counsel also submitted that the question of the Applicant's training would only be relevant to the Applicant's fitness for promotion but was again improperly considered by the Defendant. He argued that in alluding to the possible floodgates argument, it is clear that the Claimant has directed his mind to the wrong issue.

[19] Counsel for the Defendant trenchantly disputed that the Defendant took into account any irrelevant considerations. She submitted that a mere perusal of the Defendant's letter of 3rd December 2014 would reveal that the only consideration to which the Defendant addressed his mind was whether to grant the waiver of the promotion examination. This Court agrees.

[20] Both sides agree that discretion must be exercised by reference to relevant and not irrelevant considerations.[5] In considering the Applicant's first ground, the Court must have regard to the relevant provision giving rise to the discretion of the Commissioner. **FSO M 7 (4)** provides that:

> "The requirement to pass any of the Professional Examinations may be waived on the personal authority of the CP in the case of **any member who has held an acting appointment in the next senior rank for a period of six (6) months in the twelve (12) months preceding the date of the Professional Examination** and **having performed the duties, etc. of the next senior rank to the satisfaction of the CP."**

[21] It is readily apparent that the regulatory provision makes it clear that the discretion must be exercised within certain express perimeters. The Defendant must therefore take into

[5] R v Secretary of State for Trade and Industry ex p Lonhro Plc [1989] 1 WLR 525 at 533D

account the fact that the Applicant has acted in the position of Sergeant for the prescribed period and he must also consider whether he did so to his satisfaction.

[22] In the Court's judgment it is patently obvious that the matters referenced by the Applicant were relevant in considering whether the Applicant had performed his duties in a manner which would satisfy the Defendant and would therefore be relevant in determining the exercise of his discretion under FSO M7(4). The Court does not accept Counsel for the Applicant's submission that any other import could be ascribed to the matters noted by the Defendant. It follows that the Defendant would not have usurped the role of the Selection Board in determining whether the Applicant was fit for promotion.

[23] The Court is therefore not persuaded that the Applicant has or can discharge the burden upon him of establishing that the Defendant took into account irrelevant material and thereby misdirected himself. Having reviewed the terms of FSO M 7 (4) and the text of the Defendant's letter of 3rd December 2014, the Court is driven to the conclusion that the matters referred to by the Applicant were properly taken into account.

Ground 2 – Failing to take into account relevant considerations

[24] The collateral challenge raised by the Applicant alleges that the Defendant failed to take into account relevant considerations. He contends that there is no evidence that the Defendant considered that the reason why he did not sit the examination; namely, the fact that he was out of the jurisdiction on an assignment for and on behalf of the RVIPF and that no provision was made for him to do the examination outside the jurisdiction.

[25] This contention was trenchantly opposed by Counsel for the Respondent. First, she submitted that the Commissioner's correspondence clearly shows that he considered all of the matters advanced by the Applicant in his letter of 14th October 2013. At page 3 of that letter, the Applicant stated quite clearly that "*due to financial constraints in my posting at the time, I was unable to travel to the British Virgin Islands to sit the police promotion examinations*."

[26] In his letter of 20th November 2014, the Defendant referenced this letter and stated that he carefully considered the application contained in the correspondence of 14th October 2013 requesting the waiver of the requirement to pass the professional examination. In his letter of 3rd December 2014, the Defendant again referenced the letter of 14th October 2013, and at paragraph 4 of the letters, he states:

> *"Having carefully reviewed your application, I concluded that it does not contain* any grounds which justify the granting the waiver."

[27] This preface was heavily relied on by Counsel for the Defendant who submitted that in light of the express statement, it would not be correct for the Applicant to speculate that merely because this ground was not explicitly expanded or explored in the decision letter that the same was not considered by the Defendant at all. The Court agrees.

[28] The standard of proof which attaches to the test of leave to seek judicial review is the balance of probabilities. Where an applicant seeks to challenge a decision of a public authority he must advance cogent proof before such a challenge can be proved to the requisite standard.[6] Given the evidence before the Court, it is clear that the Applicant's case is largely premised on a bare supposition because the simple fact is that the decision letter unequivocally indicates that the matters raised by the Applicant were considered.

[29] It is apparent that the Defendant was in possession of the Applicant's letters which meticulously set out the basis of his application and it is not disputed that these letters were reviewed by the Defendant. The Court is therefore not persuaded that the Applicant has discharged the burden upon him of establishing that there was a failure to take into account obviously relevant matters. The Court accepts that the entirety of the Applicant's reasons advanced in support of his application for a waiver should properly be considered by the Defendant. However, the case as presented has driven the Court to the conclusion that the matters raised in the letters of application were taken into account. Certainly, the Applicant has advanced no cogent basis upon which the presumption of regularity can be

[6] Sharma v Brown-Antoine

rebutted. The Court therefore finds that on the way that the Applicant has chosen to frame this Application, that this is not an arguable ground which has a realistic prospect of success.

[30] In advancing this ground of review, the Applicant has failed to make the critical distinction between relevance which has been described as "a hard-edged question capable of hard-edged review" and weight, "a soft question for reasonableness review".[7] It is the later basis which falls to be discussed under the final ground of review advanced by the Applicant..

Ground 3 – Irrationality

[31] Counsel for the Applicant argued strenuously that no reasonable and rational person properly directing himself in considering the reasons why the Applicant did not and could not take the examination, could have arrived at the conclusion that the Defendant arrived at namely, that there were no grounds which justify the grant of the waiver. He argued that in the face of the overwhelming evidence that the Applicant had satisfied all of the requirements to be considered for promotion including years and quality of service, professional development and the excellent reports from his superiors, the Defendant's decision to refuse to grant the waiver was irrational.

[32] In opposing, Counsel for the Defendant argued that a court is only entitled to interfere with a decision if it is "so unreasonable that no reasonable body would ever come to it".[8] She submitted that there was a very clear and detailed rationale for the Defendant's refusal to grant the waiver which is set out in the letter of 3rd December 2014, which a court would be hard pressed to find was unreasonable. She reminded the Court that the appropriate test to be applied is not whether the decision is one which the Court would have come to but rather, whether the decision is one which a reasonable person acting within the four corners of their jurisdiction could have reached.

[7] Judicial Review Handbook Fordham 5th Edition para 56.3
[8] Associated Provincial Houses Ltd. v Wednesbury Corporation [1947] 2 All ER 680 at 683

[33] It is readily apparent to the Court that the Defendant gave little or no weight to the fact that due to his posting overseas and due to financial constraints the Applicant was unable to travel to the British Virgin Islands to sit the police promotion examinations. Counsel for the Defendant submitted that the question of weight is always a question for the decision maker and not the court. Counsel relied on **Tesco Stores Ltd v Secretary of State for the Environment et al**.[9] In that case, three companies had applied for permission to build retail food superstores in Witney. The Inspector had recommended Tesco's proposal, but the respondent rejected it. Tesco had offered to provide by way of an agreement, full funding for a link road as part of its application. The House of Lords held that the offer of funding for the link road was sufficiently related to the proposed development to constitute a material consideration for planning purposes, but the Secretary of State had been entitled to consider that it was of insufficient weight to justify the grant of permission. The House of Lords further held that when the decision-maker comes to balance the factors he is entitled to place in the scales, it is entirely for the decision-maker to attribute to the relevant consideration such weight as he thinks fit. It was made clear that courts will not interfere unless a decision maker has acted unreasonably in the Wednesbury sense.

[34] In discussing the difference between the materiality of a consideration and its weight, Lord Hoffmann stated:

> "The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into Wednesbury irrationality) to give them whatever weight the planning authority thinks fit or no weight at all."
>
> 'If the planning authority ignores a material consideration because it has forgotten about it, or because it wrongly thinks that the law or departmental policy (as in Safeway Properties Ltd v Secretary of State for the Environment [1991] JPL 966) precludes it from taking it into account, then it has failed to have regard to a material consideration. But if the decision to give that consideration no weight is

[9] [1995]2 All ER 636

based on rational planning grounds, then the planning authority is entitled to ignore it."

[35] It follows that the scrutiny of the particular factual matrix and the weighing of relevant considerations are matters for the decision maker and it is for him to decide the relevant weight to be given to the relevant considerations. This principle has however been qualified by the Courts. In **R (Von Brandenburg) v East London and the City Mental Health NHS Trust [2001] EWCA Civ. 239**, Sedley J correctly stated;

> "The principle that the weight to be given to such facts is a matter for the decision-maker moreover does not mean that the latter is free to dismiss or marginalise things to which the structure and the policy of the Act attach obvious importance."

[36] Counsel for the Applicant has submitted that this was a crucial matter to be considered. Counsel for the Defendant on the other hand submitted that even if this factor were accorded more weight, given the weight of the evidence militating against the application, the result would be the same. She argued that the fact that the Applicant was overseas and unable to travel to sit the exam would have very little bearing on the final outcome. She submitted that a court should only set aside or quash a decision if it held the view on objective assessment that a different conclusion would have been reached.

[37] In **R v Parliamentary Commissioner for Administration ex parte Balchin [1998] 1 PLR 1** at paragraph 15 C the relevant test was expressed in the following way;

> "Whether a consideration has been omitted which, had account been taken of it, might have caused the decision maker to reach a different conclusion."[10]

[38] Counsel for the Defendant submitted that the reasons advanced could not have been accorded sufficient weight to disturb the decision to refuse the waiver. She pointed out the

[10] In Ali v Kirklees Metropolitan Council and Another [2001] EWCA 582 "The objective question whether the evidence was capable of having made a difference.

relevant provisions of FSO M 7 (4) clearly contemplates a merits-based approach to the question of waiver. An applicant must therefore satisfy the Commissioner of Police that:

1. he held an acting appointment in the next senior rank for a period of six (6) months in the twelve (12) months preceding the date of the Professional Examination; and
2. he performed the duties, etc. of the next senior rank to the satisfaction of the CP.

[39] These are clear mandatory considerations which the Defendant was obliged to consider and it is apparent from the decision letter that he did do so.

[40] It is common ground that the Applicant fulfilled the first requirement. The Defendant's letter indicates that he considered a number of factors relative to the performance of the Applicant and at paragraph 6 of his letter, he concludes that:

> *"I am not satisfied that your performance as an Acting Sergeant while at the RPTC justifies the grant of the waiver sought."*

[41] The Defendant was unable to convince the Court that the factors relative to his inability to attend the exam could or should outweigh the Defendant's finding in regard to his inadequate performance. On the true construction of FSO M7 (4), the latter is a factor which must lawfully be taken into account and which must be given appropriate weight. In circumstances where his performance was found to be inadequate, it seems to the Court that any representations regarding his inability to attend the exam would be otiose.

[42] In any event, the Court notes with some consternation that this submission is clearly at odds with the Applicant's earlier contention that the factors underpinning the so-called *overwhelming evidence that the Applicant had satisfied all of the requirements to be considered for promotion including years and quality of service, professional development and the excellent reports from his superiors*, were irrelevant considerations which ought to have been ignored by the Defendant. And when the conflicting positions were brought to the attention of Counsel, he was unable to alleviate the Court's perplexity.

[43] Having considered this Application, the Court is not satisfied that the evidence filed in support of this ground when considered objectively, could form a sufficient basis for the view that the decision was "*so outrageous in its defiance of logic".*

[44] Interestingly, during the course of his Reply, Counsel for the Applicant sought to argue that the decision was irrational because the Defendant's conclusion that the Applicant's performance was inadequate varied significantly from his earlier written observations, and he pointed to instances where the Commissioner would have lauded the Applicant's performance. The suggestion that the Defendant's decision was perverse for that reason had not been raised as a ground of review in the Application and was therefore not traversed by the Defendant. Counsel in any event indicated that he did not wish to amend his grounds of review in order to raise this issue and the Court is therefore not required to address it.

[45] Finally, a major crux of the Defendant's objection to this Application revolved around the discretionary nature of judicial review remedies. Counsel for the Defendant argued at some length that the relief sought by the Applicant would serve no practical purpose and so it would be pointless for the Court to grant leave for review. This position was of course trenchantly opposed by the Applicant.

[46] Given the conclusions already drawn as regards the arguability of the grounds alleged, it is not necessary to rule on this objection to the Application. In the premises, the Court's order is as follows:

1. **The Application for leave to apply for judicial review is refused.**
2. **No order as to costs.**

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Justice Vicki Ann Ellis
High Court Judge