

IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE

CLAIM No. CV 318 of 2023

BETWEEN:

BARTHOLOMEW JONES

Applicant

and

THE SECURITY SERVICES COMMISSION

Respondent

Appearances:

William A. Lindo for the Applicant
Jarvis Lou and Stanley Grinage for the Respondent

2023: August 4

November 1

RULING ON APPLICATION FOR PERMISSION TO APPLY FOR JUDICIAL REVIEW

[1] **CHABOT, J.:** The applicant, Bartholomew Jones (“Mr. Jones”), applies for permission to apply for the judicial review of the decision of the Security Services Commission (the “Commission”) to promote Dr. Anthony Rosado (“Dr. Rosado”) to the post of Deputy Commissioner of Police with effect from the 1st July 2021.

[2] Mr. Jones seeks the following orders:

1. That the Applicant be granted leave for permission to apply for judicial review for an order of certiorari to quash the specific portion of the decision of the Respondent made on the 14th March,

2023 (limited to the date of promotion) in which Dr. Anthony Rosado was promoted to the post of Deputy Commissioner of Police with effect from the 1st July, 2021;

2. A declaration that the decision of the Respondent to promote Dr. Anthony Rosado to the post of Deputy Commissioner of Police with effect from the 1st July, 2021 is a nullity as there was no vacant post of Deputy Commissioner of Police which existed on the 1st July, 2021 and Dr. Rosado did not qualify for promotion as at the 1st July, 2021;
3. A declaration that the decision of the Respondent to promote Dr. Anthony Rosado with effect from the 1st July, 2021, being some six months ahead of the date of the Applicant's promotion date, without first giving him an indication as to why Dr. Anthony Rosado was being promoted ahead of him and an opportunity to make representations was in breach of natural justice and the Applicant's Constitutional Rights to due process and equal protection of the law as guaranteed by section 6 of the Belize Constitution;
4. A declaration that the Respondent took extraneous matters into account and acted contrary to the request of the Commissioner of Police to have Dr. Anthony Rosado promoted with effect from the 1st July, 2022;
5. Damages, including vindicatory damages, in such measure as this Honourable Court deems just for the breach of the Applicant's Constitutional Rights; and
6. The costs of this Application be costs in the cause.

[3] The Commission objects to permission being granted on the basis that Mr. Jones has no arguable case with any realistic prospect of success. The Commission also argues that this court does not have the jurisdiction to judicially review a decision of the Governor General.

[4] For the reasons outlined in this ruling, Mr. Jones is granted permission to apply for judicial review.

Background

[5] The factual background to this application is undisputed. Mr. Jones and Dr. Rosado are both members of the Belize Police Department (the "Department"). Mr. Jones joined the Department on 1st July 1991. Dr. Rosado joined the Department in 1995. Both officers have performed their functions satisfactorily, and they both have steadily risen through the ranks.

[6] Mr. Jones was promoted to the post of Assistant Deputy Commissioner of Police on 19th February 2019. On 14th March 2023, he was promoted to the post of Acting Deputy Commissioner of Police with effect from 1st January 2022.

- [7] Dr. Rosado was promoted to the post of Acting Assistant Deputy Commissioner of Police with effect from 1st July 2020. On 8th February 2022, Dr. Rosado's promotion to the post of Assistant Deputy Commissioner of Police was confirmed with effect from 1st July 2020. On the same day, he was also appointed to the post of Acting Deputy Commissioner of Police with effect from 1st July 2021.
- [8] On 23rd January 2023, the Commissioner of Police wrote to the Chief Executive Officer of the Ministry of Home Affairs and New Growth Industries to recommend the promotion of Dr. Rosado to the post of Deputy Commissioner of Police with effect from 1st July 2022. On 15th February 2023, he wrote a similar Memorandum to the Chief Executive Officer of the Ministry of the Public Service, Constitutional & Political Reform and Religious Affairs recommending the promotion of Dr. Rosado with effect from 1st July 2022. In a Memorandum dated 15th February 2023, the Chief Executive Officer of the Ministry of Home Affairs and New Growth Industries recommended to the Chief Executive Officer of the Ministry of the Public Service, Constitutional & Political Reform and Religious Affairs, the promotion of Dr. Rosado with effect from 1st July 2021.
- [9] On 23rd March 2023, the Commission wrote to both Dr. Rosado and Mr. Jones separately to inform them that the Governor General, acting on the advice of the Commission, had approved their respective promotions to the post of Deputy Commissioner of Police. Mr. Jones' effective promotion date was stated to be 1st January 2022, while Dr. Rosado's effective promotion date was stated to be 1st July 2021. Mr. Jones received the correspondence informing him of his promotion on 8th May 2023.

Legal Framework

- [10] Rule 56.3 of the Supreme Court (Civil Procedure) Rules, 2005 ("CPR") requires a person wishing to apply for judicial review to first obtain permission from this Court. Under CPR 56.2, an application for judicial review may be made by any person, group or body which has sufficient interest in the subject matter of the application. The first step in the analysis is therefore to determine whether the applicant has the required interest to seek judicial review.

[11] The second step in the analysis is concerned with the application itself. In **Sharma v Deputy Director of Public Prosecutions & Ors (Trinidad and Tobago)**,¹ the Privy Council laid out what is now referred to as the “usual test”² for permission to apply for judicial review:

(4) 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: *R v Legal Aid Board, Ex p Hughes* (1992) 5 Admin LR 623, 628; 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)* [2005] EWCA Civ 1605, [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 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.”

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 [italics in original],

[12] For permission to apply for judicial review to be granted, therefore, an applicant must satisfy the court that she or he has an arguable case having a realistic prospect of success. The court must also be satisfied that no discretionary bar, such as delay or an alternative remedy, applies to the

¹ [2006] UKPC 57.

² See for instance *Ian Haylock v Prime Minister of Belize et al.*, Claim No. 43 of 2021 at para. 16, citing *Attorney General of Trinidad and Tobago v Ayers-Caesar* [2019] UKPC 44 and *National Commercial Bank Jamaica Ltd v Industrial Disputes Tribunal and Peter Jennings* [2016] JMCA App 27; *Julian Johnathan Myvett v Comptroller of Customs et al.*, Claim No. 761 of 2019 at para. 8.

case. The threshold to be met under the **Sharma** test is considered to be low,³ “at a height which is necessary only to avoid abuse”.⁴

- [13] In this matter, the Commission raised, as a preliminary issue of law, the jurisdiction of this court to deal with this application. It also raised a procedural issue in respect of the affidavits filed by Mr. Jones. These preliminary issues will be dealt with first.

Preliminary Issues

Jurisdiction and ouster clause

- [14] Dr. Rosado was promoted to the post of Deputy Commissioner of Police by the Governor General, on the recommendation of the Commissioner of Police and on the advice of the Commission. The Commission argues that the promotion cannot be enquired into by any court of law in Belize. Section 34(4) of the Belize Constitution provides as follows:

34(4) Where by this Constitution the Governor-General is required to perform any function in accordance with the advice of, or after consultation with, any person or authority, the question whether the Governor-General has so exercised that function shall not be enquired into by any court of law.

- [15] I decline to make a finding that the court does not have the jurisdiction to hear this matter at this time. It is acknowledged by both parties that an ouster clause in a constitution is not an absolute ouster of the court’s jurisdiction. In **The Attorney General et al. v Jeffrey Joseph, Lennox Boyce**,⁵ the Caribbean Court of Justice (“CCJ”) considered an ouster clause in the Barbados Constitution which bears similarities with section 34(4) of the Belize Constitution. The CCJ held that such a clause does not prevent courts from inquiring into the manner with which a constitutional body has performed its functions:

[40] Mr. Forde also urged us, in his written submissions, to give effect to the ouster clause contained in section 77(4) of the Constitution. That clause, in our view, provides no comfort to the Crown. Ever since the House of Lords decision in *Anisminic v Foreign Compensation Commission*, courts have made it clear that they will not be deterred by the presence of such ouster clauses from inquiring into whether a body has performed its functions in

³ Maharaj v Petroleum Company of Trinidad and Tobago Ltd (Trinidad and Tobago) [2019] UKPC 21; Attorney General of Trinidad and Tobago v Ayers-Caesar [2019] UKPC 44.

⁴ Senator Michael Peyrefitte v Minister of Finance et al., Claim No. 563 of 2021 at para. 40.

⁵ [2005] CCJ 2 (AJ) BB (“Boyce”).

contravention of fundamental rights guaranteed by the Constitution, and in particular the right to procedural fairness [references omitted]

[41] The Barbados Court of Appeal held, correctly in our view, that the BPC [Barbados Privy Council] was a decision-making body and that the Court may, in appropriate proceedings, either set aside a decision of that body or declare it to be a nullity. There was nothing to prevent the Court from examining the procedure adopted by the BPC and testing it for procedural fairness by reference to the rules of natural justice, and, for compliance with the fundamental rights and freedoms recognised in the Constitution. If the procedure adopted failed that test, then there was a breach of the respondents' right to the protection of the law, one of the fundamental human rights enumerated and recognised in section 11 of the Constitution. The right of an aggrieved person to approach the Court for redress and the power of the Court to grant such redress, are expressly conferred by section 24 of the Barbados Constitution, but only in respect of breaches that run foul of the provisions of sections 12 to 23 of the Constitution.⁶ [emphasis added]

- [16] Section 34(4) of the Belize Constitution was considered by James J. in **Ian Haylock v Prime Minister and anor.**⁷ In **Haylock**, the applicant sought to challenge a decision of the Prime Minister to advise the Governor General to designate the office of Comptroller of Customs and Excise as an office to which section 107 of the Belize Constitution applies. As in this application, in **Haylock** the respondents raised the issue of the court's jurisdiction to enquire into the matter by virtue of section 34(4) of the Belize Constitution. James J. found that section 34(4) of the Belize Constitution does not constitute an absolute ouster of the court's jurisdiction. The court retains the jurisdiction to consider whether the Governor General acted lawfully in the exercise of her constitutional powers and functions:

18. Ouster clauses are not an absolute ouster of the Court's jurisdiction. Actions of the Governor General cannot be enquired into once his actions are lawful. A Governor General's actions, like any public body's action to which an ouster clause applies, cannot be protected from judicial scrutiny if they are unlawful. The Constitution must not only be read as a whole, it has to also be given effect to as a whole.

[...]

25. It is accepted that once the Governor General acts consistently with the Constitution, then his actions cannot be challenged. It is in this context the case of **Re: Blake (1994) 47 WIR 174** is to be viewed. However, as adopted from the judgment of Justice Boodoosingh in **Devant Maharaj (supra)** it could not be that the actions of the Governor General in all circumstance cannot be challenged in Court. To so hold would undermine the supremacy of the Constitution and provide for supremacy of the Governor General. It would put the Governor General above the law and the Constitution rather than being subject to it. Surely

⁶ Boyce at paras. 40-41.

⁷ Claim No. 43 of 2021 ("Haylock").

the Respondent cannot be asking the Court to uphold one section of the constitution to the exclusion of all others.

26. In the present case the Governor General can only act on the advice of the Prime Minister after the Prime Minister consulted with the Public Services Commission. As stated in the Commonwealth the case of *Ulufa'alu v Governor General [2001] 1 LRC 425* where a Governor-General is obliged to act on advice and he could only act on that advice where it was legitimately given, since advice contrary to law or lacking legitimacy or which was unconstitutional could not be the type of advice contemplated under the Constitution for him to act upon. As stated by Mr Marshalleck, section 127(1) provides conditions precedent for the Governor General to act. Those conditions precedent are the advice of the Prime Minister after that Prime Minister has consulted with Public Services Commission. If the advice of the Prime Minister did not occur after consultation in accordance with the Constitution then that advice to the Governor General would not be legitimate and unconstitutional and therefore would mean the Governor General would have acted unlawfully and his action reviewable by this Court [emphasis added].⁸

- [17] I find this matter to be justiciable. Whether the Governor General acted lawfully in the exercise of her constitutional power to promote Dr. Rosado to the post of Deputy Commissioner of Police with effect from 1st July 2021 cannot be determined at this stage. Mr. Jones has argued that the decision to promote Dr. Rosado was made in breach of Mr. Jones' natural justice and constitutional rights. A trial of this matter is necessary to determine whether these allegations are founded and whether section 34(4) of the Belize Constitution applies.

Affidavits

- [18] The Commission argues that Mr. Jones' affidavits filed in support of this application are defective. The Commission alleges that the affidavits do not disclose the source of Mr. Jones' knowledge as required by law, and that the documents exhibited are not certified. In particular, the Commission objects to paragraphs 18, 20, and 21 in Mr. Jones' second affidavit in which Mr. Jones provides a list of pending matters before the Belize Advisory Council ("BAC") for police officers; copies of the Belize Constitution (Second Amendment) Act, 1988; and the debate in the lower chamber in respect of the Belize Constitution (Second Amendment) Act, 1988. The Commission asks this court to strike out the affidavits pursuant to CPR 30.3(3).

- [19] In reply, Mr. Jones asserts that the issue of how he came to know that certain officers have appeals pending before the BAC does not need to be resolved at this time. The purported deficiencies in Mr.

⁸ Haylock at paras. 18, 25 and 26.

Jones' affidavits can be cured by cross-examination or by the filing of a further affidavit. Mr. Jones also argues that this information does not prejudice the Respondent's position.

[20] It is not clear why the Commission asks for both of Mr. Jones' affidavits to be struck out when its objections relate to only three paragraphs in Mr. Jones' second affidavit and related exhibits. The Commission has articulated no reason to strike out Mr. Jones' first affidavit or the other paragraphs in Mr. Jones' second affidavit.

[21] I partially agree with the Commission's objections and strike out paragraph 18 of Mr. Jones' second affidavit listing alleged pending matters for police officers before the BAC. Paragraph 18 states that Mr. Jones has "obtained a list", but does not disclose anything about the list, including its author, its recipients, and its purpose. Critically, Mr. Jones does not attach the list to his second affidavit. There is nothing that would allow this court to ascertain the origin and the accuracy of this alleged list. I disagree with counsel for Mr. Jones that this deficiency can be cured by cross-examination or by the filing of a further affidavit. I also disagree that the information does not prejudice the Commission's position. The list is only relevant insofar as it supports Mr. Jones' contention that there is no alternative remedy available to consider this matter. The availability of an alternative remedy is determined at the permission stage. It would be prejudicial to the Commission if I considered the list at this stage because it may be determinative of the issue of the availability of an alternative remedy, and lead to permission to apply for judicial review being granted. It would be futile for Mr. Jones to cure the deficiency once permission has been granted because the availability of an alternative remedy would no longer be an issue.

[22] I, however, decline to strike out paragraphs 20 and 21 in Mr. Jones' second affidavit related to the Belize Constitution (Second Amendment) Act, 1988. Mr. Jones has stated the source of his information (the National Assembly) and exhibited the documents in support of his contention. Mr. Jones certified on the first page of Exhibit BJ2 that "tab 1 through 10 attached hereto and marked Exhibit BJ2-1 to Exhibit BJ2-10 are true copies of the original documents". Exhibits BJ2-9 and BJ2-10 are public documents. The fact that Mr. Jones is not the author or recipient of these documents does not prevent him from relying on them.

Analysis

Whether Mr. Jones has sufficient interest

[23] The first step in the analysis is to determine whether Mr. Jones has the required interest to apply for judicial review. CPR 56.2(1) lists the circumstances that give a person, a group, or a body sufficient interest to apply for judicial review:

56.2 (1) An application for judicial review may be made by any person, group or body which has sufficient interest in the subject matter of the application.

(2) This includes –

(a) any person who has been adversely affected by the decision which is the subject of the application;

(b) any body or group acting at the request of a person or persons who would be entitled to apply under paragraph (a);

(c) any body or group that represents the views of its members who may have been adversely affected by the decision which is the subject of the application;

(d) any statutory body where the subject matters falls within its statutory ambit;

(e) any body or group that can show that the matter is of public interest and that the body or group possesses expertise in the subject matter of the application; or

(f) any other person or body who has a right to be heard under the terms of any relevant enactment or the Constitution.

[24] Citing the case of **R v IRC, ex p National Federation of Self Employed and Small Businesses**,⁹ the Commission argues that Mr. Jones does not have a sufficient interest to challenge the decision to promote Dr. Rosado to the post of Deputy Commissioner of Police because the basis for Mr. Jones' application is unmeritorious.

[25] Mr. Jones' position is that he has been adversely affected by the decision of the Commission to recommend to the Governor General the promotion of Dr. Rosado with an effective date of 1st July 2021 because it had the effect of superseding Mr. Jones' own seniority within the Department.

⁹ [1982] AC 617 ("IRC").

[26] I find that Mr. Jones has sufficient interest to apply for judicial review. Dr. Rosado's promotion affected Mr. Jones' seniority within the Department, and as such Mr. Jones meets the requirement in CPR 56.2(2)(a). **IRC** is inapplicable to the matter at hand. In **IRC**, an interest group, the Federation of Self-Employed and Small Businesses Ltd. (the "Federation"), sought a declaration and an order of mandamus in relation to a policy decision made by the Inland Revenue Commissioners ("IRC") not to collect back tax from certain taxpayers. The policy decision did not directly affect the members of the Federation. At issue was whether the Federation had sufficient interest to ask the court to enquire into the tax affairs of taxpayers other than the applicant. A sub-issue was whether the IRC owed any duty to the members of the Federation, as opposed to the general public. It is in that context that Lord Scarman opined that "the federation, having failed to show any grounds for believing that the revenue has failed to do its statutory duty, have not, in my view, shown an interest sufficient in law to justify any further proceedings by the court on its application".

[27] Here, there is no need to enquire into the merits of Mr. Jones' application for the purpose of determining the sufficiency of his interest. Mr. Jones has demonstrated that he has been personally and directly affected by the decision he seeks the judicial review of through the alleged loss of seniority.

Whether there was delay

[28] The Governor General approved Dr. Rosado's promotion to the post of Deputy Commissioner of Police on 14th March 2023. This application was filed on 24th May 2023, promptly and within the three-month period stipulated at CPR 56.5(3). The discretionary bar of delay does not apply.

Whether there is an alternative remedy

[29] The parties dispute whether Mr. Jones is barred from bringing this application because an alternative remedy, namely the BAC, is available to consider Mr. Jones' matter. I find that the BAC is not an alternative remedy available to Mr. Jones.

[30] Mr. Jones submits that the BAC is not a suitable alternative remedy to consider a promotion decision. He notes that pursuant to Rule 12 of the Police (Promotion) Rules made under the Police Act,¹⁰

¹⁰ Cap. 138, Rev. Ed. 2020.

“promotion to the rank of inspector and above shall be made by the Governor-General on the recommendation of the Commissioner and with the advice of the Security Services Commission”. He also notes that the power of the Commission to appoint persons to offices in the security services is vested in the Commission by virtue of section 110D of the Belize Constitution:

110D.-(1) Subject to the provisions of this section, the power to appoint persons to hold or act in offices in the security services, including the power to make appointments, and to deal with all matters relating to the conditions of service of such officers and, subject to the provisions of section 111 of this Constitution, the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons shall vest in the Security Services Commission established under section 110C of this Constitution.

(2) In this section “security services” means service in the Belize Police Department, the Belize National Coast Guard Service, and in the military service as defined in subsection (3) of this section:

Provided that the provisions of this Part shall not apply to the Commissioner of Police, the Commander, Belize Defence Force or the Commandant, Belize National Coast Guard Service.

[31] According to Mr. Jones, Rule 12 of the Police (Promotion) Rules and section 110D of the Belize Constitution, read together, confer on the Governor General, acting on the recommendation of the Commissioner of Police and the Commission, the power to promote officers above the rank of inspectors in the Department.

[32] Both parties rely on section 54(12) of the Belize Constitution in support of their respective positions that the BAC cannot, or can, hear an appeal from Mr. Jones of the decision to promote Dr. Rosado to the post of Deputy Commissioner of Police. Section 54(12) provides as follows:

(12) Notwithstanding subsections (10) and (11), in any case where the Council is convened to discharge its duties under section 88, 98, 102, 105, 108 or 109 of this Constitution, or where the Council is convened to hear an appeal from an officer to whom section 106, 107, 110D or 110F of this Constitution applies, the Chairman shall preside at that meeting.

[33] Mr. Jones’ position is that section 54(12) of the Belize Constitution gives a right of appeal to the officer to whom section 110D applies, not to a third party officer challenging a decision as it relates to another officer to whom section 110D applies. The BAC’s appellate jurisdiction is clarified and limited in section 111 of the Belize Constitution, which reads as follows:

111.-(1) This section applies to-

(a) any decision of the Governor-General, acting in accordance with the advice of the Prime Minister or the Public Services Commission or the Judicial and Legal Services Commission or the Security Services Commission, as the case may be, in relation to the public service, judicial and legal service or security service, or any decision of the Public Services Commission or the Judicial and Legal Services Commission or the Security Services Commission to remove a public officer from office or to exercise disciplinary control over a public officer (including a decision made on appeal from or confirming a decision of any person to whom powers are delegated under section 110F(4) or section 106(5) or section 110D(5) of this Constitution);

[...]

(2) Subject to the provisions of this section, an appeal shall lie to the Belize Advisory Council from any decision to which this section applies at the instance of the public officer in respect of whom the decision is made.

[34] Mr. Jones contends that the jurisdiction of the BAC is limited in scope to matters where either the Governor General, acting in accordance with the advice of the Commission, or the Commission itself has decided to remove a public officer from office or to exercise disciplinary control. Section 111(2) supports the position that appeals to the BAC can only be made at the instance of the public officer in respect of whom the decision was made.

[35] Mr. Jones provided excerpts from legislative debates in relation to the Belize Constitution (Second Amendment) Bill, 1988, pursuant to which certain provisions of the Belize Constitution, including section 54, were amended. Mr. Jones states that the remit of the BAC was described by the late Hon. Philip S.W. Goldson as follows:

It is noteworthy that in the proposal made by the Prime Minister for ending (*sic*) the Constitution, it is proposed that appeals against the advice regarding senior Civil Servants, discipline of senior civil servants, should also go the Belize Advisory Council on appeal. There again he is submitting that to review by the Belize Advisory Council and providing there that this should be done under the chairmanship of someone who is trained and qualified to review matters to guide a deliberated body, a tribunal in the pros and cons of judicial matters.

[36] Mr. Jones' position is that the BAC's jurisdiction is limited to appeals in matters involving discipline or removal, and only at the instance of that particular public officer. The present matter is outside the scope of the BAC's jurisdiction.

- [37] The Commission, for its part, argues that section 54(12) specifically provides that the BAC can hear appeals of appointment decisions. Pursuant to section 123(1) of the Belize Constitution, “any reference in the Constitution to power to make appointments to any public office shall be construed as including a reference to the power to make appointments on promotions”.
- [38] Section 110C and 110D of the Belize Constitution confers on the Commission “the power to appoint persons to hold or act in offices in the security services”. The Commission appointed Dr. Rosado Acting Deputy Commissioner of Police, and later advised the Governor General to confirm the said appointment. Mr. Jones is a police officer who is aggrieved that Dr. Rosado was promoted with the effective date of 1st July 2021. Relying on this court’s decision in **Edgar Ek v Ministry of Public Service, Constitutional & Political Reform and Religious Affairs et al.**,¹¹ the Commission argues that Mr. Jones has an alternative and adequate remedy in the BAC.
- [39] Further, the Commission submits that the decision complained of was made by the Commission pursuant to its jurisdiction under section 110D of the Belize Constitution. According to the Belize Constitution, the BAC is the body designated to hear appeals from such decisions. Mr. Jones’ submission that the BAC’s jurisdiction is limited to appeals in matters involving discipline or removal is not supported by any authority. Mr. Jones has not demonstrated by affidavit why he did not file an appeal with the BAC.¹²
- [40] I find that the BAC is not an alternative remedy available to Mr. Jones because Mr. Jones does not have the *locus standi* to appeal the decision made in respect of Dr. Rosado to the BAC. Pursuant to section 54(12) of the Belize Constitution, the BAC is constituted as an appeal body to hear appeals from officers to whom various sections of the Belize Constitution, including section 110D, apply. Section 54(12) of the Belize Constitution does not specify who has the *locus standi* to bring an appeal to the BAC. As noted by the Alberta Court of Appeal in **Peavine Metis Settlement v Whitehead**,¹³ “an appeal is a statutory right. If no statute gives a person a right of appeal, a person has no appeal. In other words, a person cannot prosecute an appeal without statutory authorization”. The Belize Constitution does not give a third party, such as Mr. Jones, the right to appeal a decision from the

¹¹ Claim No. 338 of 2022.

¹² Since paragraph 18 of Mr. Jones’ second affidavit has been struck out, the Commission’s submissions in relation to this paragraph have not been considered.

¹³ 2015 ABCA 366 at para. 39.

Commission (or the Governor General, for that matter) to the BAC. This principle is implicitly reflected in the language of section 111(2) of the Belize Constitution, which provides a right of appeal to the BAC “from any decision to which this section applies at the instance of the public officer in respect of whom the decision is made” [emphasis added]. I do not wish to be understood as finding that the decision at issue in this matter falls under section 111(2) of the Belize Constitution. I do not need to determine the nature of the decision at issue to rule on the issue of standing. Regardless of how it is characterized, Mr. Jones was not a party to the decision which saw Dr. Rosado being promoted to the post of Deputy Commissioner of Police. Without statutory authorization, Mr. Jones does not have the *locus standi* to bring an appeal of that decision to the BAC.

Whether there are arguable grounds with a realistic prospect of success

Mr. Jones’ position

[41] Mr. Jones challenges the decision to promote Dr. Rosado with effect from 1st July 2021 on five grounds. The first ground is that there was no vacancy available for Dr. Rosado to fill on 1st July 2021. Dr. Rosado filled the position left vacant by the retirement of Mr. Edward Broaster. Mr. Broaster retired on 22nd November 2021. Mr. Jones argues that the Commission’s recommendation to promote Dr. Rosado with effect from 1st July 2021 is contrary to Regulation 38(2) of the Belize Public Service Regulations (“PSR”), which makes it a requirement that the Commission considers the promotion of a public officer only when there is a vacancy:

38(2) The Commission, in considering the promotion of a public officer to fill a vacancy, shall base its decision, in descending order of importance, on the following [emphasis added].

[42] The second ground, which is related to the first ground, is that the Commission’s power of appointment does not extend to the promotion of a public officer with retroactive effect. Mr. Jones argues that section 110C of the Belize Constitution, which establishes the Commission and gives it its powers, does not provide for the Commission’s power of appointment or promotion to a retroactive date. Similarly, the power to deal with matters involving the conditions of service does not confer on the Commission the power to make or recommend a date of promotion retroactive. Mr. Jones points out that under section 65 of the Interpretation Act,¹⁴ “in the absence of any express indication to the

¹⁴ Cap. 1, Rev. Ed. 2020.

contrary, a construction which would exclude retrospective effect is to be preferred to a construction which is not”.

- [43] The third ground on which Mr. Jones’ application rests is that on 1st July 2021, Dr. Rosado did not meet the requirements to be promoted Deputy Commissioner of Police under section 305.6(e) of the Belize Police Department Policies & Procedure Manual (the “Policy”) because he had not completed two continuous years in the rank of Assistant Commissioner of Police. Dr. Rosado was promoted on 8th February 2022 retroactively to the rank of Assistant Commissioner of Police with an effective date of 1st July 2020. At the same sitting, the Commission made a decision to appoint Dr. Rosado to act as Deputy Commissioner of Police with effect from 1st July 2021. This trajectory indicates the Commission’s intention to have Dr. Rosado become the next Commissioner of Police by disregarding the Department’s Policy.
- [44] The fourth ground is that under section 305.7(6) of the Policy, a promotion for appointment is made by the Commission on recommendation of the Commissioner of Police and with the concurrence of the Ministry of National Security. The Chief Executive Officer of the Ministry of National Security did not concur with the Commissioner of Police’s recommendation to confirm Dr. Rosado to the rank of Deputy Commissioner of Police with effect from the 1st July 2022. The CEO’s recommendation was that Dr. Rosado be confirmed with effect from 1st July 2021. There is no explanation as to why the Commission preferred the date of 1st July 2021 to that of 1st July 2022 as recommended by the Commissioner of Police.
- [45] The fifth ground is that Mr. Jones’ right to natural justice was breached by the Commission’s decision, which altered seniority within the Department. Under section 305.16 of the Policy, where officers hold the same rank, seniority is determined by date of appointment to that rank. Dr. Rosado has become senior to Mr. Jones notwithstanding the fact that Mr. Jones joined the Department four years before him. This has caused Mr. Jones substantial prejudice in his standing in the Department and ultimately his ability to one day become the Commissioner of Police. Considering the prejudice to Mr. Jones, the Commission had a common law duty to hear Mr. Jones prior to making its recommendation to the Governor General to appoint Dr. Rosado and Mr. Jones retroactively to those dates. It also had a common law duty to provide reasons for its recommendation. In addition, reliance by the Commissioner of Police, the Chief Executive Officer of the Ministry of Home Affairs and New Growth

Industries, and the Commission on the Policy created in Mr. Jones a procedural legitimate expectation that the Policy would have been applied in the process and estops the Commission from denying Mr. Jones' entitlement to the same.

The Commission's position

- [46] The Commission's position is that, while the parties agree that the Police (Promotion) Rules and the PSR apply, there is a dispute as to the application of the Policy. The Commission argues that the Policy is not used for promotions in the Department because it is not law. The Policy was not made by the National Assembly or assented to by the Governor General. It is not subsidiary legislation because there is no evidence that any power to make the Policy was ever delegated to the Department. Mr. Jones could not reasonably expect that the Policy would be used and relied upon by the Commission when advising and making promotions in the Department. The Commission argues that the law applicable to promotions in the Department is the PSR and the Police (Promotion) Rules.
- [47] The Commission submits that Mr. Jones' case has no realistic prospect of success and is overly speculative. Dr. Rosado is a career police officer who has performed his duties professionally and diligently throughout the years. His performance appraisals and evaluations have been satisfactory. Dr. Rosado holds a doctoral degree in business administration with specialization in police administration, and a master of arts in mathematics. He is one of the most qualified police officers in the Department with very relevant academic qualifications. Under Regulation 38 of the PSR, academic qualification is the highest consideration for promotion in the Department. Seniority is the last consideration.
- [48] Pursuant to Regulation 24(2) of the PSR, Dr. Rosado's appointment for the position of Acting Deputy Commissioner of Police was lawful and not *ultra vires* any law. Regulation 24(2) does not require a vacancy for a person to act in an office. While Dr. Rosado was acting in the post, Mr. Broaster retired and there was a need for a qualified person to be promoted to the position and rank of Deputy Commissioner of Police. Pursuant to Rule 12 of the Police (Promotions) Rules, the promotion was done by the Governor General on the recommendation of the Commissioner of Police and with the advice of the Commission.

- [49] While the Commissioner of Police recommended Dr. Rosado's promotion with an effective date of 1st July 2022, the Commission alleges that a recommendation is not binding. The party receiving a recommendation has the discretion on how they shall act on it. In this case, the Minister responsible decided, upon consideration of the recommendations from the Commissioner of Police and the applicable law, to recommend that Dr. Rosado be promoted effective 1st July 2021. Dr. Rosado had acted for more than a year in the position and rank of Deputy Commissioner of Police and at the time of the recommendation, the post was vacant. The recommendation was therefore in line with Regulation 24(1) of the PSR which states that a person cannot act in a position for more than one year if that person meets the criteria for promotion under Regulation 38 of the PSR. Dr. Rosado's performance was satisfactory and he was therefore confirmed in the post with effect from the date of appointment pursuant to Regulation 25 of the PSR.
- [50] The Commission denies that Dr. Rosado's promotion with effect from 1st July 2021 has made Dr. Rosado senior to Mr. Jones. Regulation 26(3) of the PSR provides that, for the determination of seniority, public officers of the same rank and pay grade separated by six months in dates of appointment shall be at the same level of seniority. Both Dr. Rosado and Mr. Jones were appointed to the same rank and grade of pay and their appointments are six months apart. They are of equal seniority.
- [51] Even if the promotion made Dr. Rosado senior to Mr. Jones, this is not a ground for judicial review as seniority is not a right but a privilege. It was never promised to Mr. Jones that he would always be senior to Dr. Rosado. When public officers gain academic qualifications, and perform their duties diligently, professionally, and with integrity, they are entitled to promotion, which promotion can render a public officer senior to the others. Where a promotion is done in conformity with the law, the court cannot quash such a promotion decision even though it makes another public officer senior to the other.
- [52] Because promotion is not a right but a privilege, the Commission denies that Mr. Jones was entitled to a hearing. The Commission relies on the dictum of Lord Denning MR in **Breen v Amalgamated Engineering Union**¹⁵ in which the learned jurist wrote that "if a man seeks a privilege to which he has no particular claim – such as an appointment to some post or other – then he can be turned away

¹⁵ [1971] 2 QB 175 at 191 ("Breen"), cited in *Stephen Edwards v The Attorney General of Guyana*, [2008] CCJ 10 at para. 40.

without a word". The Commission was considering Dr. Rosado's promotion, not Mr. Jones'. The right to make representations in an appointment or promotion process is only relevant to the party whose promotion is being considered. In addition, where there is a statutory procedure for promotion and the same is complied with, it would be "an unnecessary and unrealistic over stretch to ask the [Commission] to invite persons having no particular claim, and or whose appointment/promotion is not being considered to make representations". In **Senneth Martin Joseph v The Public Service Commission**,¹⁶ the High Court of Grenada opined that it would be too onerous a task for the Public Service Commission to provide each public officer with an audience to make representations before its deliberation on whether or not to permanently appoint him or her to a post. Here, Dr. Rosado's promotion is of no concern to Mr. Jones. Mr. Jones need not have made representations before the Commission considered Dr. Rosado's promotion.

[53] As for Mr. Jones' allegation that the Commission considered extraneous factors, the Commission notes that Mr. Jones has not adduced any evidence to support that allegation.

Determination

[54] I find that Mr. Jones has demonstrated he has arguable grounds for judicial review with a realistic prospect of success.

[55] First, as the Commission itself acknowledges, there is a dispute between the parties as to whether the Policy applies to this matter. Mr. Jones' position is that the Commission has breached the Policy in recommending the retroactive promotion of Dr. Rosado to the position of Deputy Commissioner of Police to a date where there was no vacancy, and less than two years after Dr. Rosado was promoted to the post of Assistant Deputy Commissioner of Police. He also relied on the Policy to argue that Dr. Rosado's promotion with effect from 1st July 2021 made him senior to Mr. Jones. The Commission denies that the Policy has the force of law. The binding nature of the Policy cannot be determined at this stage. The court has only been provided with portions of the Policy. There is nothing in the record that would allow me to conclusively determine that the Policy does not hold any legal weight. I note

¹⁶ Claim No. GDAHCV2019/0592.

that sections 305.1 and 305.2 of the Policy imply that the Policy was made in accordance with the Police Act.¹⁷

305.1 Purpose

The purpose of the Promotion Policy is to establish guidelines for the promotion of police personnel within the Department.

305.2 Policy

Promotion refers to the vertical advancement of an employee in the organizational structure from one rank or position to another pursuant to a competitive selection process, usually accompanied by an increase in responsibility and salary.

Promotion within the Department is made by selection from among those members of the Department who possess the necessary qualifications and in accordance with the Police Act, which empowers the Commissioner to establish policy and general guidelines regarding promotion of police officers [emphasis added].

- [56] Paragraph 7(g) of the Police Act empowers the Commissioner of Police to make “such rules and regulations as he thinks expedient for members of the Department, including – (g) their promotion or reduction from one rank to another”.
- [57] I also note that the Policy is referred to by the Commissioner of Police and the Ministry of the Public Service in their respective recommendations to the Commission for the promotion of Dr. Rosado, thus casting doubt on the Commission’s assertion that the Policy is not relied on when making promotion decisions.
- [58] As such, whether or not it is actually binding in law, there are arguable grounds that the Policy, which was published by the Department’s Research, Planning, Legal Affairs and Compliance Branch, may have created in Mr. Jones a legitimate procedural expectation that its provisions would be followed. Mr. Jones has demonstrated arguable grounds with a realistic prospect of success that certain provisions of the Policy may have been breached in Dr. Rosado’s promotion process.
- [59] Second, Mr. Jones has demonstrated arguable grounds that Dr. Rosado’s retroactive promotion to the post of Deputy Commissioner of Police with effect from 1st July 2021 may have been unlawful. None of the relevant legal instruments, be it the Belize Constitution, the Police Act, the Police (Promotion)

¹⁷ Cap. 138, Rev. Ed. 2020.

Rules, or the PSR, appear to explicitly allow the retroactive appointment of a public officer to a post. In addition, Dr. Rosado's promotion was made retroactive to a time where there was no vacancy. The Commission's response to this argument is grounded in Regulation 24(2) of the PSR, which applies to acting appointments and not to permanent appointments. Mr. Jones has demonstrated arguable grounds that the retroactive promotion of Dr. Rosado to a permanent position could constitute a violation of Regulation 38(2) of the PSR and section 305.6.2 of the Policy, which both require a vacancy.

[60] Third, Mr. Jones has raised arguable grounds that the process leading up to the promotion of Dr. Rosado may have been flawed. Section 12 of the Police (Promotions) Rules provides that a promotion to the rank of inspector and above is made "by the Governor General on the recommendation of the Commissioner and with the advice of the Security Services Commission". Section 305.7 of the Policy states that "promotion for appointment to the posts of Assistant Commissioner of Police and Deputy Commissioner of Police shall be made by the [Security] Services Commission on recommendation of the Commissioner of Police and with the concurrence of the Ministry of National Security". Here, the Security Services Commission advised the Governor General to promote Dr. Rosado with effect from 1st July 2021. The Chief Executive Officer of the Ministry of Home Affairs and New Growth Industries' recommendation that Dr. Rosado be promoted with effect from 1st July 2021 conflicts with the Commissioner of Police's recommendation that the promotion be made with effect from 1st July 2022. The Commission argues that a recommendation is not binding, and that any party receiving a recommendation has the discretion to decide how to act on the recommendation. The Commission provides no support for this assertion, and failed to respond to Mr. Jones' submission that the term "concurrence" requires the Commissioner of Police and the responsible Ministry to be in agreement. While both were in agreement that Dr. Rosado be promoted, their position differed as to the effective date of promotion. No explanation has been given to justify the Ministry's departure from the Commissioner of Police's recommendation. As noted by James J. in **UC Trading Company Limited v Commissioner of General Sales Tax and anor**,¹⁸ failure of a public authority to give reasons for its decisions may be unlawful:

¹⁸ Claim No. 402 of 2018 ("UC Trading").

18. It is therefore now generally accepted as sound principle in the realm of public law that a failure by a public authority to give reasons, or adequate reasons, for a decision may be unlawful. As explained by Boodoosingh J as he then was,

“There is a lot to be said for the increasing trend of modern decisions to require public authorities to give reasons for their decisions. This would allow all parties to be aware of the issues to which the Authority addressed its mind and the means by which it arrived at its decision. This can only enhance the confidence in the operations of the First Defendant. Further, providing reasons for administrative decisions can lead to improved efficiency in the administration of justice. When a decision is issued, along with the reasons for the decision, this could eliminate matters of the same nature being referred to the Recognition Board as it may become easier to predict the outcome of situations with similar facts. Consequently, this could see a reduction in time used and in resources allocated to respond to similar questions. This will also lead to increased transparency, as there would be a clear indication of the similar factors used to consider similar matters.” (see CV 2014 – 01230 Pan American Life Insurance v RRCB) [italics in the original].¹⁹

[61] Finally, Mr. Jones has raised arguable grounds that he was entitled to be heard in the particular circumstances of this case. While the decision made in respect of Dr. Rosado did not directly relate to Mr. Jones, Mr. Jones has raised arguable grounds that the decision personally affected him because it upended seniority in the Department. The Commission cited an excerpt from **Breen** suggesting that a person is not entitled to be heard where the issue is one of privilege. However, the Commission failed to note that Lord Denning MR also suggested that where a person is deprived of a right or interest, or some legitimate expectations, it may be unfair to proceed without a hearing or reasons given, “as the case may demand”:

If a man seeks a privilege to which he has no particular claim – such as an appointment to some post or other – then he can be turned away without a word. He need not be heard. No explanation need to be given: see the cases cited in **Schmidt v Secretary of State for Home Affairs [1969] 2Ch 149 at 170/171**. But if he is a man whose property is at stake, or who is being deprived of his livelihood, then reason should be given why he is being turned down and he should be given a chance to be heard. I go further: if he’s a man who has some right or interest, or some legitimate expectation of which it would not be fair to deprive him without a hearing, or reasons given, then those should be afforded him, according as the case may demand.²⁰

¹⁹ UC Trading at para. 18.

²⁰ Breen at 191.

[62] It cannot be excluded at this stage that the case at hand may have demanded that Mr. Jones be given an opportunity to be heard because he had an interest in, and a legitimate expectation that the process for the promotion of Dr. Rosado be carried out lawfully.

[63] As a result, I find that Mr. Jones has raised arguable grounds for judicial review with a realistic prospect of success. Permission is granted for him to apply for judicial review.

IT IS HEREBY ORDERED THAT

- (1) Paragraph 18 of the Second Affidavit of Bartholomew Jones dated 7th July 2023 is struck out.
- (2) The applicant is granted leave to apply for judicial review and shall file, within 14 days of the date of this decision, a claim for judicial review.
- (3) Costs of this application are granted to the applicant and shall be costs in the cause.

Geneviève Chabot
High Court Judge