

IN THE SUPREME COURT OF BELIZE, A.D. 2022

Claim No. 730 of 2021

BETWEEN

DAVE VACCARO

Applicant

AND

THE PUBLIC SERVICES COMMISSION

Respondent

AND

Claim No. 731 of 2021

BETWEEN

RACKEL WAIGHT

Applicant

AND

THE PUBLIC SERVICES COMMISSION

Respondent

BEFORE The Honourable Justice Geneviève Chabot

Date of Hearing: May 19, 2022

Appearances:

William A. Lindo, Counsel for the Applicant in Claim No. 730 of 2021

Andrea McSweeney McKoy, Counsel for the Applicant in Claim No. 731 of 2021

E. Andrew Marshalleck, Jorge Matus, and Imani Burgess, Counsel for the Respondent

DECISION ON APPLICATIONS FOR PERMISSION TO APPLY FOR JUDICIAL REVIEW

Introduction

1. The Applicant in Claim No. 730 of 2021, Dave Vaccaro, and the Applicant in Claim No. 731 of 2021, Rackel Waight (together, the “Applicants”), are Customs & Excise Officers in the Customs & Excise Department. In January 2020 and July 2020, the Respondent, the Public Services Commission, invited applications from qualified candidates for the post of Assistant Comptroller of Customs & Excise. Both Applicants applied for the post. Neither were promoted.
2. The Applicants seek judicial review of the Respondent’s decision to promote individuals who they claim were not qualified or were less qualified than them. They claim the Respondent acted unreasonably, unfairly, *ultra vires*, without jurisdiction, and abdicated its duties under the Constitution of Belize in making this decision. They also claim that the Respondent breached their legitimate expectations and their right to natural justice and equal protection of the law.
3. The Respondent opposes the Applications on the basis that an alternative remedy is available to the Applicants, namely the Belize Advisory Council, and that there was delay in filing the Applications. The Respondent also argues that the Applications are academic and futile since the six vacant posts of Assistant Comptroller have already been filled. The Respondent further argues that the Applications fail to disclose any arguable case with a reasonable prospect of success since no decision has been made to deny the Applicants a promotion, and the proper procedures have been followed.
4. The Applicants are granted leave to apply for judicial review of the Respondent’s decision not to promote them. The Applicants have the required interest to apply for judicial review. There is no alternative forum available to consider the Applicants’ matters and grant them a remedy because the Belize Advisory Council does not have the jurisdiction to consider promotion decisions. Although the Applications were not brought within three months from the date when the grounds for application first arose, the delay was not unreasonable in the circumstances and there are good reasons for extending the period within which the Applications can be made.
5. The Applications disclose an arguable case with a reasonable prospect of success. There is evidence that the Respondent may not have complied with the requirements set out in the *Public Service Regulations* and the Circulars in promoting nine individuals in July and August 2021. The Applicants have an arguable case that the Respondent breached their legitimate expectations that the process set out in the *Public Service Regulations* and the

applicable Circulars would be followed, and that their qualifications would be fairly considered. The Applicants also have an arguable case that the Respondent's failure to hear from them and provide reasons for the decisions may have breached the principles of natural justice and equal protection of the law.

The Applications

6. The Applicants filed separate Notices of Application for Permission to Apply for Judicial Review. Both Notices were filed on the same day, November 18, 2021. At a Case Management Conference held on March 28, 2022, both matters were consolidated with the consent of the parties. This decision addresses common issues raised by both Applicants, highlighting differences between the two Applications only where they are material to the analysis.
7. The Applicants apply for permission to judicially review decisions made by the Respondent in the context of a competition for promotion conducted in 2020. On January 23, 2020, the Respondent posted Circular No. 5 of 2020 inviting applications from suitably qualified persons to fill three vacant posts for Assistant Comptroller of Customs & Excise ("Assistant Comptroller"). On July 8, 2020, the Respondent posted Circular 24 of 2020 inviting applications from suitably qualified persons to fill two additional vacant posts for Assistant Comptroller.
8. The Applicant in Claim No. 730 of 2021, Dave Vaccaro, submitted his application to be promoted to the post of Assistant Comptroller on February 5, 2020. Mr. Vaccaro joined the Belize Public Service as a Customs Officer on April 11, 1995. At the time of his application, he occupied the post of Customs & Excise Officer II. Mr. Vaccaro states that he was at the time the highest ranking Customs & Excise Officer II with a Master's degree.
9. The Applicant in Claim No. 731 of 2021, Rackel Waight, also submitted an application to be promoted to the post of Assistant Comptroller. Ms. Waight joined the Public Service in the Belize Customs and Excise Department on October 23, 2000. At the time of her application, Ms. Waight occupied the post of Customs & Excise Officer III and had a Master's degree.
10. On or around August 20, 2021, the Defendant appointed nine Customs Officers to the post of Assistant Comptroller. The Applicants were not appointed. The Applicants became aware of the appointments through social media. Mr. Vaccaro was formally informed of the outcome of the competition by letter dated October 25, 2021. Ms. Waight was verbally informed of the same on or around November 4, 2021.
11. The Applicants state that the nine individuals who were promoted were not suitably qualified, or were less suitably qualified than themselves to be promoted to the post of

Assistant Comptroller. They argue that the Respondent acted unreasonably, unfairly, *ultra vires* and in excess of its jurisdiction, and breached their legitimate expectations by contravening the requirements for promotion in the Customs Department as promulgated in Regulation 38 of the *Belize Constitution (Public Service) Regulations*, 2014, and Circulars Nos. 22 of 2010, 7 of 2018, and 39 of 2013.

12. In Claim No. 730 of 2021, the Applicant also argues that the Respondent breached his rights to natural justice and equal protection of the law because he was deprived of his right to make representations and to be provided with reasons as to why he was not appointed to the post of Assistant Comptroller. The Applicant also contends that the Respondent abdicated its duties and/or powers under sections 105 and 106 of the Constitution of Belize by being influenced and/or instructed by the Minister of Public Service and Constitutional Reform, Cabinet, or some other body or committee in coming to its decision.
13. In Claim No. 731 of 2021, the Applicant adds that she has been repeatedly denied promotions for which she was clearly qualified. As a result, she claims that she has lost seniority and standing in the Department. The Applicant has attempted to appeal the denial of previous promotions to the Belize Advisory Council, but her appeals have been pending since 2019.
14. The Applicant in Claim No. 730 of 2021 applies for the following orders:
 - (1) That time be extended, if necessary, and the Applicant be granted leave for permission to apply for judicial review for orders of *certiorari* to quash the decision(s) of the Respondent in which the following individuals were promoted to the post of Assistant Comptroller of Customs & Excise:
 - a. Fred Ford;
 - b. Doyle Flowers;
 - c. Jose Marin;
 - d. Jason Menzies;
 - e. Darrel Middleton;
 - f. Abimael Sanchez;
 - g. Emelda Cocom;
 - h. Therese Martinez; and
 - i. Tricia Soberanis.
 - (2) That the Respondent furnish the Applicant's Attorneys-at-Law, within three days from the granting of this Order, a copy of all of the documents considered, minutes

and transcript of meetings and/or hearings of the Respondent in respect of the above-named individuals who were promoted to the post of Assistant Comptroller of Customs & Excise ahead of the Applicant;

- (3) That the Applicant be granted leave for permission to apply for judicial review for an order of *mandamus* directed at the Respondent requiring it to properly exercise its powers and/or duties under Regulation 38 of the *Belize Public Service Regulations* by properly considering the Applicant's eligibility for promotion to the post of Assistant Comptroller of Customs & Excise within the Customs & Excise Department together with all remuneration and perquisite attendant to that office with effect from the date of promotion of the above-named individuals;
- (4) A declaration that the decision of the Respondent to pass over the Applicant for promotion to the post of Assistant Comptroller of Customs & Excise, without any reasons being given to him for so doing was improperly motivated, unfair, irrational and in breach of his legitimate expectation and contrary to the *Belize Public Service Regulations*;
- (5) A declaration that the decision of the Respondent to pass over the Applicant for promotion to the post of Assistant Comptroller of Customs & Excise, without first giving him an indication as to why he is being passed over for promotion 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 Constitution of Belize;
- (6) A declaration that the Respondent abdicated the powers and duties conferred to it under sections 105 and 106 of the Constitution of Belize by following the dictates of the Minister of Public Service and Constitutional Reform, the Cabinet of Ministers and/or some other body or committee other than itself in coming to the decision to promote the above-noted individuals over the Applicant and is therefore null and void and of no legal effect;
- (7) Damages, including vindictory damages, in such measures as this Honourable Court deems just for the breach of the Applicant's constitutional rights; and
- (8) The costs of this Application be borne by the Respondent.

15. The Applicant in Claim No. 731 of 2021 applies for the following order:

- (1) That permission be granted to the Applicant to apply for judicial review of the decision of the Respondent denying her a promotion to the post of Assistant Comptroller of Customs.

Legal Framework

16. Rule 56.3 of the *Supreme Court (Civil Procedure) Rules, 2005* requires a person wishing to apply for judicial review to first obtain permission from this Court. Under Rule 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.
17. 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 leave 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

¹ [2006] UKPC 57.

² See for instance Claim No. 43 of 2021 *Ian Haylock v Primer Minister of Belize et al.* 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; Claim No. 761 of 2019 *Julian Johnathan Myvett v Comptroller of Customs et al.* at para. 8.

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.

18. 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 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

Analysis

Whether the Applicants have sufficient interest

19. The Applicants have the required interest to apply for judicial review. Under Rule 56.2(2)(a), a person has sufficient interest if that person has been adversely affected by the decision which is the subject of the application. The Applicants have been adversely affected by the decision of the Respondent not to appoint them to the post of Assistant Comptroller. The Applicants' interest to apply for judicial review is uncontested by the Respondent.

Whether there is an alternative remedy

20. There is no alternative forum available to consider the Applicants' matters and grant them a remedy. Despite the Respondent's suggestion that the Belize Advisory Council ("BAC") provides the Applicants with a right of appeal, the BAC does not have the jurisdiction to consider promotion decisions.
21. The Belize Advisory Council is constituted under section 54 of the Constitution of Belize. Section 111 of the Constitution of Belize sets out the BAC's jurisdiction in respect of appeals. Section 111 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,

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

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);

(b) any decision of any person to whom powers are delegated under section 110F(4) or section 106(5) or section 110D(5) of this Constitution to remove a public officer from office or to exercise disciplinary control over a public officer (not being a decision which is subject to appeal to or confirmation by the Judicial and Legal Services Commission or the Public Services Commission or the Security Services Commission);

[...]

(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.

(3) Upon an appeal under this section the Belize Advisory Council may affirm or set aside the decision appealed against or may make any other decision which the authority or person from whom the appeal lies could have made.

Applicants' Submissions

22. According to the Applicants, an appeal to the BAC is only available in two circumstances: 1) when a decision is made to remove a public officer, or 2) when a decision is made to exercise disciplinary control over a public officer. The BAC has no power to consider decisions in respect of promotional matters.
23. The Applicants submit that there is no evidence that the BAC is qualified to hear their matters. Relying on this Court's decision in *Dean Boyce v The Attorney General of Belize*,⁵ the Applicants argue that there is no evidence that the members of the BAC have the qualifications to consider the public law questions arising from their matters.

⁵ Claim No. 472 of 2010.

24. Finally, the Applicants state that the BAC is currently not properly constituted, or is newly constituted and has a considerable backlog. Ms. Waight deposed in her First Affidavit that on September 6, 2019, she filed an appeal of an earlier decision of the Respondent denying her a promotion. The BAC has not yet heard the appeal. The mere existence of a right of appeal to the BAC, if it exists, is neither an appropriate nor a practical alternative remedy at this time in light of the circumstances of this case.

Respondent's Submissions

25. The Respondent submits that the BAC has jurisdiction to hear the Applicants' matters. According to the Respondent, section 106(1) of the Constitution of Belize vests in the Public Services Commission the power to appoint persons to hold or act in offices in the public service. Their appointment and promotion is subject to the discretion of the Public Services Commission. Rules 90 and 91 of the *Public Service Regulations* provide public officers with the right to appeal decisions of the Public Service Commission to the Belize Advisory Council. The procedure as it relates to appeals is outlined in the *Belize Advisory Council Rules*.
26. The Respondent does not interpret section 111(1)(a) of the Constitution of Belize as limiting the jurisdiction of the BAC to the two circumstances outlined by the Applicants. The Respondent comes to this conclusion on the basis of what it considers as the proper contextual interpretation of section 111(1)(a). The Respondent invites this Court to read section 111(1)(a) as applying to "any decision of... the Public Services Commission... in relation to the public service". According to the Respondent, this interpretation is supported by the fact that the Governor-General acts only on the advice of the Prime Minister, and not on the advice of the Public Services Commission, the Judicial and Legal Services Commission, or the Security Services Commission, except for the appointment of the Director of Public Prosecutions which is made on the advice of the Judicial and Legal Services Commission under section 108 of the Constitution of Belize. The Respondent refers to four sections in the Constitution of Belize providing for the power to appoint and discipline public service officers: sections 106, 107, 110D and 110F. None of these provisions involve the Governor-General. As a result, the Respondent argues that it would be incoherent to read section 111(1)(a) literally as suggested by the Applicants.
27. According to the Respondent, the right of appeal to the BAC exists whether or not the BAC is properly constituted. The Applicants must try to obtain a remedy from the BAC before coming to this Court for remedies in judicial review. The fact that the BAC has a backlog is irrelevant. The right of appeal exists, even if it cannot be exercised. Other avenues of redress are available to challenge the BAC's failure to exercise its powers.

Analysis

28. This Court has weighed the Respondent's alternative interpretation of section 111(1)(a) of the Constitution of Belize. However, it has not been persuaded by this interpretation and prefers that of the Applicants. This decision is based on the following factors.
29. Firstly, there is no contradiction between section 111(1)(a) of the Constitution of Belize and sections 90 and 91 of the *Public Service Regulations*. As noted by the Respondent, sections 90 and 91 of the *Public Service Regulations* provide public officers with a right of appeal to the BAC. Sections 90 and 91 are located within Part 10 of the *Public Service Regulations*, which is entitled "Discipline of Public Officers". Part 10 lays out the procedure under which public officers can be disciplined for the acts of misconduct listed at sections 81 and 82 of the *Public Service Regulations*. Part 10 does not deal with promotions. Part 6 of the *Public Service Regulations* deals with "Promotion" but it is silent with regard to any appeal mechanism.
30. Section 78 of the *Public Service Regulations*, contained in Part 9 dealing with "Industrial Relations", provides that the "Ministry shall set procedures for resolution of disputes". Neither party raised the availability of a grievance procedure to deal with the promotional decisions at issue in these matters. While this Court cannot opine on the availability of a remedy in such a forum, if it is indeed in place, Part 9 is relevant insofar as it indicates that the legislator contemplated that disciplinary matters would be handled differently from other industrial relations concerns.
31. Section 111(1)(a) is located in Sub-Part IV of the Constitution of Belize, which deals with "Appeals in Discipline Cases". The side note to section 111 is also entitled "Appeals in discipline cases". While I agree with the Respondent that subdivision titles or side notes are not in themselves dispositive on an interpretation issue such as this one, it is certainly noteworthy that section 111(1)(a)'s position within the Constitution of Belize can be read harmoniously with sections 90 and 91 of the *Public Service Regulations*, which only refer disciplinary matters to the BAC.
32. Secondly, reading section 111(1)(a) as suggested by the Respondent would involve serious syntactical gymnastics. To read section 111(1)(a) as applying to "any decision of... the Public Services Commission... in relation to the public service", the Court would have to read in not only a comma between "any decision of the Governor-General, acting in accordance with the advice of the Prime Minister" and "or the Public Services Commission [...]", but also the word "of" between "or" and "the Public Services Commission". In the Court's view, making this syntactical contortion for the purpose of ascribing to section 111(1)(a) a meaning which does not accord with its context, as described above, would be improper.

33. This Court appreciates the Respondent's argument that the Governor-General does not act on the advice of the Public Services Commission, the Judicial and Legal Services Commission, or the Security Services Commission, except for the appointment of the Director of Public Prosecutions which is made on the advice of the Judicial and Legal Services Commission under section 108 of the Constitution of Belize. However, between two imperfect interpretations, this Court opts for the interpretation that, in addition to being more syntactically and contextually harmonious, does not ascribe to a constitutional body powers it does not appear to have. While this interpretation is admittedly difficult to reconcile with the issue of the advice to the Governor-General, this ambiguity does not have any implication in practice.
34. As a result, this Court concludes that the BAC does not have the jurisdiction to consider the Applicants' matters. There is no alternative remedy available, and therefore this discretionary bar does not apply to the Applicants' matters. Given this conclusion, it is unnecessary to deal with the Applicants' arguments as they relate to the composition of the BAC and its backlog.

Whether there was delay

35. Under Rule 56.5 of the *Rules*, an application for permission to apply for judicial review must be made promptly, and in any event within three months from the date when the grounds for the application first arose. The Court can extend this period if there is a good reason to do so. The Court can refuse permission if there has been unreasonable delay before making an application.

Applicants' Submissions

36. The Applicant in Claim No. 730 of 2021 states that he is seeking permission to apply for the judicial review of three decisions:
 - (1) The decision dated July 22, 2021 (appointing six individuals);
 - (2) The decision dated August 5, 2021 (appointing three individuals);
 - (3) The decision of October 25, 2021 (advising him that he had not been promoted).
37. The Applicant in Claim No. 731 of 2021 states that she is seeking permission to apply for the judicial review of the decision of the Respondent not to appoint her, which she first learned about on social media in August, 2021. At the hearing, Counsel for Ms. Waight sought leave to amend her Application to include an order for an extension of time should this Court find that there was a delay in filing her Application. Leave was granted. As

discussed below, neither Application was brought within three months from the date when the grounds for the Applications first arose. As such, only the arguments relating to the extension of time will be considered.

38. Both Applicants learned on social media that certain individuals had been appointed to the post of Assistant Comptroller on or around August 20, 2021. At that time, neither Applicant had been informed that they had not been selected for promotion. In the fall of 2021, both Applicants took steps to find out what their status was with respect to the promotion. Mr. Vaccaro was officially informed that he had not been selected by letter dated October 25, 2021. Ms. Waight was officially informed that she had not been selected through an oral conversation on or around November 4, 2021.
39. The Applicants argue that they acted promptly when seeking to confirm the status of their application for promotion as soon as they saw the posts on social media. Until they received formal confirmation that they had not been selected, they did not possess enough information to properly pursue judicial review proceedings. Once informed that they had not been promoted, they acted promptly by filing the instant Applications shortly thereafter.
40. The Applicants invite this Court to consider the Respondent's conduct in these matters. The Respondent held a promotional ceremony behind closed doors and offered curt responses to the Applicants' requests for information. This, according to the Applicants, indicates an intent on the part of the Respondent to stymie their ability to properly substantiate an application for leave for judicial review.
41. Relying on the Privy Council's decision in *Maharaj v National Energy Corporation of Trinidad and Tobago (Trinidad and Tobago)*,⁶ the Applicants argue that the merits of their Applications, in addition to the Respondent's behaviour, militate in favour of this Court exercising its discretion to grant permission to pursue judicial review proceedings.
42. The Applicants further submit that the grant of leave to seek judicial review will not cause any hardship on the Respondent, will not prejudice the rights of the individuals who have been promoted, and would not be detrimental to the good administration of justice. On the other hand, the Applicants would suffer hardship should an extension of time not be granted as their claims would be extinguished.

Respondent's Submissions

43. The Respondent argues that the Applications have not been made promptly. The date on which the grounds of application first arose was July 22, 2021 where approval for promotion of six applicants was given. The Applicants failed to act promptly as their Applications were

⁶ [2019] UKPC 5.

initiated three months and twenty-six days after the date on which the grounds for application arose. If further consideration is given to the date of the second decision, August 5, 2021, the Applications would still be made out of time by twelve days.

44. The evidence of the Applicants is that they learned of the promotions on August 20, 2021. The Applicants failed to act promptly in filing their Applications. The Respondent relies on the decision in *Odean Grant v The Commissioner of Police & Anor*,⁷ in which the Court states that the time limit begins from the date when the grounds for the claim arose, not from the date the claimants first learnt of the decision or action under challenge, or from the date the claimant considers that he has adequate information to bring the claim. They also cite case law in support of their contention that the Applicants' attempt at seeking alternative remedies by speaking with functionaries cannot be relied upon as a justification to extend the time limit to apply for judicial review.⁸
45. The Respondent asks that the application for extension of time be refused as it is likely to cause substantial hardship, or substantially prejudice, the rights of any person, or be detrimental to good administration. Citing *R (Sustainable Development Capital LLP) v SSBEIS*⁹ and *Julian Johnathan Myvett v Comptroller of Customs and Excise & Ors*,¹⁰ the Respondent argues that it is not in the public interest for such matters to be brought months after executive decisions have been made and Officers have taken up their posts. Granting leave for judicial review would cause substantial hardship and prejudice to the nine persons who were promoted and will likely lead to other applications for judicial review.
46. For the Respondent, the matter at bar is a policy matter of the Executive in which the Executive was able to properly police its processes and come to its decisions. The process is not flawed, there is no error of law or fact, and there is no reason for leave to be granted.

Analysis

47. The Applications were not brought within three months from the date when the grounds for application first arose. However, the delay was not unreasonable in the circumstances and there are good reasons for extending the period within which the Applications can be made.
48. Under Rule 56.5(3), "an application for permission to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose". As noted by the Respondent, the relevant time for computation of the three month timeframe begins from the date on which the grounds for the application

⁷ [2017] JMSC Civ 78.

⁸ Claim No. 14 of 2018 *WCPL 625 Debbie Reynolds v The Attorney General & Ors*.

⁹ [2017] EWHC 771.

¹⁰ Claim No. 761 of 2019.

first arose, not “from the date when the claimant first learnt of the decision or action under challenge nor from the date when the claimant considers that he has adequate information to bring the claim”.¹¹

49. The decision to promote six individuals who completed the interview process was made at the July 22, 2021 meeting of the Public Services Commission.¹² The decision to approve the promotion of three individuals recommended by the Department was made by the Public Services Commission on August 5, 2021.¹³ As such, the Applicants had until October 22, 2021, and November 5, 2021 to apply for permission to apply for the judicial review of each decision. Both Applications were filed on November 18, 2021, outside the three month time limit.
50. The delay in filing the Applications was not unreasonable. The Applications were filed twenty-six days and twelve days outside of the three month timeframe for each decision. While the question of when a claimant first learnt of the decision or action under challenge is irrelevant to the issue of whether the three month timeframe has been met, knowledge may be relevant to the question of whether an extension of time should be granted.¹⁴ In the instant matters, it was not unreasonable for the Applicants to attempt to confirm the denial of their promotion once they learned through social media that others had been promoted. As argued by the Applicants, a premature application for judicial review could have led to an early dismissal. The Court is puzzled by the Respondent’s suggestion that the Applicants should have acted on the strength of a social media post while it itself delayed notifying the Applicants of its decision not to promote them until at least the end of October 2021. Social media is not, as of yet at least, a recognized medium for communicating official decisions, and public officers should not be expected to rely on it to discover important information affecting them.
51. There are good reasons for extending the period within which the Applications can be made. In *Maharaj v National Energy Corporation of Trinidad and Tobago (Trinidad and Tobago)* the Privy Council explained that a court can take a variety of factors into account in making a decision to extend the statutory timeframe:¹⁵

37. The obligation on an applicant is to bring proceedings promptly and in any event within three months of the grounds arising. The presence or absence of prejudice or detriment is likely to be a key consideration in determining whether

¹¹ *R v Secretary of State for Transport ex p. Presvac Engineering Ltd.* (1991) 4 Admin L. Rep 121 at 133-134, cited in *Odean Grant v The Commissioner of Police & Anor*, [2017] JMSC Civ 78 at para. 28.

¹² First Affidavit of Rolando Zetina at para. 24.

¹³ Second Affidavit of Rolando Zetina at para. 24.

¹⁴ *R v Secretary of State for Transport ex p. Presvac Engineering Ltd.* (1991) 4 Admin L. Rep 121 at 133-134, cited in *Odean Grant v The Commissioner of Police & Anor*, [2017] JMSC Civ 78 at para. 28.

¹⁵ [2019] UKPC 5.

an application has been made promptly or with undue or unreasonable delay. Thus, for example, in 1991 in *R v Independent Television Commission, Ex p TV Northern Ireland Ltd* reported [1996] JR 60 Lord Donaldson MR warned against the misapprehension that a judicial review is brought promptly if it is commenced within three months.

“In these matters people must act with the utmost promptitude because so many third parties are affected by the decision and are entitled to act on it unless they have clear and prompt notice that the decision is challenged.”
(p 61)

Similarly, in *R v Chief Constable of Devon and Cornwall, Ex p Hay* [1996] 2 All ER 711, Sedley J observed (at p 732A):

“While I do not lose sight of the requirement of RSC Order 53 rule 4 for promptness, irrespective of the formal time limit, the practice of this court is to work on the basis of the three-month limit and to scale it down wherever the features of the particular case make that limit unfair to the respondent or to third parties.”

Indeed, when considering whether an application is sufficiently prompt, the presence or absence of prejudice or detriment is likely to be the predominant consideration. The obligation to issue proceedings promptly will often take on a concrete meaning in a particular case by reference to the prejudice or detriment that would be likely to be caused by delay.

38. In the same way, questions of prejudice or detriment will often be highly relevant when determining whether to grant an extension of time to apply for judicial review. Here it is important to emphasise that the statutory test is not one of good reason for delay but the broader test of good reason for extending time. This will be likely to bring in many considerations beyond those relevant to an objectively good reason for the delay, including the importance of the issues, the prospect of success, the presence or absence of prejudice or detriment to good administration, and the public interest.

52. The Court has not been persuaded that the Respondent would suffer a prejudice as a result of the additional twenty-six and twelve day delays in filing the Applications. Under the *Rules*, it is presumed that no prejudice befalls a respondent on an application for permission to apply for judicial review up to the three month mark. It is open to a respondent to rebut that presumption by proving that the delay was unreasonable in the circumstances. The presumption has not been rebutted in this case. It is assumed that the nine individuals who have been promoted took up their posts shortly after the decisions were made to promote

them. Whether the present Applications had been brought within a week, a month, or three months of the promotion, the impact on these individuals, and the Department as a whole, would be the same. No evidence has been adduced to support the Respondent's contention that the additional twenty-six and twelve day delays added substantial prejudice to the Respondent.

53. In addition, and as is discussed in the next section, the Applications raise serious issues of public interest. The Applications raise issues of fairness and transparency within the public administration. It is in the public interest to ensure that Belizeans are treated fairly, and that hiring and promotional processes be open and transparent as a necessary condition for the good administration of the public service. The Applicants have an arguable case with a reasonable prospect of success.
54. As a result, this Court decides to exercise its discretion to extend the period within which the Applications can be made.

Whether there is an arguable case with reasonable prospect of success

Applicants' Submissions

55. The Applicants allege that the Respondent acted unreasonably, unfairly, and *ultra vires* Regulation 38 of the *Public Service Regulations*, read along Circular No. 22 of 2010, Circular No. 39 of 2013, and Circular No. 7 of 2018, when considering the applications for promotion it received. Regulation 38 of the *Public Service Regulations* provides that "a public officer shall not be promoted to a post for which he is not qualified". Circulars No. 5 and 24 of 2020 set out the requirements in order to be considered for the post of Assistant Comptroller. The individuals who were promoted ahead of the Applicants were either not qualified, or were less qualified than the Applicants, in breach of Regulation 38 of the *Public Service Regulations*.
56. They also allege that the Respondent exceeded its jurisdiction by promoting three individuals who had not in fact submitted an application as required by Circulars No. 5 and 24 of 2020.
57. The Applicants further argue that the Respondent breached their legitimate expectations by failing to follow the procedure set out in Regulation 38 of the *Public Service Regulations*, read along Circular No. 22 of 2010 and Circular No. 7 of 2018. They rely on the decision of

Stephenson J. in *Zarina Matthew v Public Service Commission*¹⁶ in which the Court, citing the Privy Council in *Attorney-General of Hong Kong v Ng Yuen Shiu*,¹⁷ held as follows:

[74] The claimant also quoted and cited the dicta of Lord Fraser of Tullybelton in the case of **Attorney General of Hong Kong v Ng Yuen Shiu** when he said:

“The justification for it is primarily that, when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty. The principle is also justified by the further consideration that, when the promise was made, the authority must have considered that it would be assisted in discharging its duty fairly by any representations from interested parties and as a general rule that is correct.”

[...]

[77] Insofar as is material, the doctrine of legitimate expectation was developed by the courts as part of administrative law to protect persons from gross unfairness or abuse of power by a public authority. The constitutional principle of the rule of law underpins the protection of legitimate expectation as it prohibits the arbitrary use of power by public authorities: **Rainbow Insurance Company Limited v The Financial Services Commission and Others**.

58. They also rely on *Lovell Romain v Police Service Commission*¹⁸ for the principle that a public body does not have the discretionary power to depart from regulations in the appointment of public officers:

[...] The structure and contents of the regulations made by the Commission, with the agreement of the Prime Minister, are incompatible with the making of exceptions other than those provided for in the regulations. They provide a public appointment process which is clearly defined.

[...]

28. There is also a public interest in the process for the appointment of public officers such as police officers being clearly defined, and potential candidates

¹⁶ DOMHCV2019/0154.

¹⁷ [1983] 2 AC 629.

¹⁸ [2014] UKPC 32.

knowing what it is. To permit the Commission to waive parts of the process when it thinks it appropriate would have the potential to create an uncertain and unequal playing field.

29. For those reasons the Board accepts the submission made by Mr. Peter Knox QC on behalf of the respondent that the regulations are intended to provide a self-contained, comprehensive code governing promotions within the service. The Board recognises that it seems anomalous that the appellant should have been required to take the corporal's exam when he had passed the sergeant's exam. The anomaly was cured for the future by the amendment of regulation 14A in 2006, which precludes an officer from taking the sergeant's exam before he has passed the corporal's exam. But the appellant has not argued that as a matter of construction the regulations can be read so as to treat the sergeant's exam as a qualifying test for promotion to corporal. He has had to advance a much broader argument about the Commission having a discretion to make promotions in circumstances where the requirements of the regulations have not been met, which the Board rejects.

59. According to the Applicants, Circular No. 22 of 2010, Circular No. 39 of 2013, and Circular No. 7 of 2018, along with Circulars No. 5 and 24 of 2020, created legitimate expectations that the Respondent would be bound to follow the guidelines and criteria set therein in dealing with applications for promotions within the Customs & Excise Department. These expectations were that vacancies would be advertised, applications were necessary to be considered, and that in order for applications to be considered certain minimum requirements had to be met. The Respondent acted in a way that breached those expectations.
60. The Applicants also argue that the Respondent denied them their rights to natural justice and equal protection of the law by failing to provide them with an opportunity to make representations and to provide them with reasons in support of the decision not to promote them. While the Regulations do not provide for reasons to be given, the modern trend in administrative law is that public bodies are expected to provide reasons for their decisions.
61. Finally, the Applicants argue that the Respondent abdicated its duties and/or powers under sections 105 and 106 of the Constitution of Belize by allowing itself to be influenced and/or instructed by the Interview Panel and/or the Minister of Public Service and Constitutional Reform, Cabinet or some other body or committee in coming to its decision to promote certain individuals but not the Applicants. There is no evidence that the Public Services Commission independently considered whether the Interview Panel complied with the requirements of Regulation 38 of the *Public Service Regulations* and the applicable Circulars. In addition, both Applicants suggest that the Respondent's delay is coming to its

decision as to whom should be promoted suggests that extraneous factors may have been taken into consideration.

Respondent's Submissions

62. The Respondent argues that the Applications are misconceived as the decisions of the Respondent have been mischaracterized. The Respondent did not decide not to promote the Applicants to the post of Assistant Comptroller; it decided to appoint six other candidates to six vacant posts. There has been no decision by the Respondent that the Applicants are not to be promoted, but rather only a determination that six of the fourteen candidates that applied for the position were better suited at the relevant time for appointment.
63. The Respondent submits that the Applications are academic and futile since the six vacant posts of Assistant Comptroller have already been filled. It would therefore be futile to grant the remedies sought by the Applicants. In addition, to quash the decision of the Respondent made in relation to the Applicants would necessarily involve the termination and removal of two of the nine successful candidates who have been appointed. The two candidates to be so affected are not anywhere identified nor can they be without usurping the role and function of the interviewers who conducted the assessments and the recommendations of the Comptroller of Customs.
64. In addition, the Applicants challenge the merits of the decision made by the Respondent rather than the process. The Respondent contends that the outcome for the Applicants would not be different if the conduct complained of did not occur. The Applicants went through the necessary procedure of applying and interviewing for the posts, and they were duly considered for appointment. The Applicants did not meet the requirements to be promoted to the post of Assistant Comptroller.
65. As to whether the Applicants have an arguable case, the Respondent denies that it acted *ultra vires* as it at all times acted within the powers vested in it under section 106 of the Constitution of Belize. The Respondent is an independent body created under section 105 of the Constitution of Belize. Relying on James J.'s decision in *CPL #61 Eldon Arzu v The Commissioner of Police*,¹⁹ the Respondent argues that the Applicants had no legitimate expectations since it was an open application process, and the vacancies could have been filled by anyone. At its highest, the Applicants had a right and expectation to apply for, and be fairly considered for appointment to the six vacant posts for which they applied. The Applicants had no right to be promoted. All of the proper processes and procedures were followed in the promotion of the nine officers to the post of Assistant Comptroller. The Circulars do not emanate from the Respondent, and therefore could not have bound the

¹⁹ Claim No. 106 of 2019.

Respondent, an independent body, to certain processes and procedures. There is no evidence to support the Applicants' contention that the Respondent did not consider the merits of the recommended appointments.

66. As for the allegations of political interference, the Respondent argues that these are bald assertions which cannot form a sufficient basis for judicial review.

Analysis

67. Before addressing the issue of arguable grounds, this Court will first deal with the Respondent's argument as it relates to the nature of the decisions at issue. The Court disagrees with the Respondent's suggestion that its decision not to promote the Applicants does not amount to a decision which can be reviewed. The Respondent was faced with a choice in that it received fourteen applications for six vacant posts. The Respondent had to choose which among those fourteen applications should be promoted. Exercising that choice amounts to making a decision. The Respondent made a decision to choose individuals other than the Applicants for promotion. That decision can be reviewed.
68. The Respondent made not one, but two decisions in this matter. The Respondent decided to promote three officers who had not applied through the process advertised via Circulars No. 5 and 24 of 2020. That decision was made separately and apart from the decision to appoint six candidates who had applied through the advertised process. That decision can also be reviewed.
69. To view a decision not to promote an individual as not amounting to a reviewable decision would deprive public officers of their right to challenge the process and outcome of any hiring or promotion exercise. Any such exercise involves the selection of certain individuals over others. It would be absurd to suggest that an individual who is repeatedly passed over for appointment or promotion could never challenge that state of affairs because there remains a possibility that, in the future, they could be appointed.
70. As for the Respondent's argument that the Applications are academic and futile since the six vacant posts of Assistant Comptroller have already been filled, this argument goes to remedy and will be best considered at the merits stage. The Applicants are asking the Court to grant them several remedies, including that the Respondent's decisions be quashed, that their applications be fairly considered, certain declarations, and damages. Whether the appropriate remedy is for them to be placed into someone else's position, or whether another remedy is more appropriate in the circumstances is for this Court to decide at the merits stage.

71. The Applicants have satisfied the Court that they have an arguable case with a reasonable prospect of success. As a constitutional body, the Public Services Commission must act within the limits of the powers conferred to it by the Constitution of Belize. The *Public Service Regulations* were enacted pursuant to section 106 of the Constitution of Belize. The *Public Service Regulations* therefore bind the Respondent. Regulation 38(1) of the *Public Service Regulations* provides that “a public officer shall not be promoted to a post for which he is not qualified”. Regulation 38(2) sets out the considerations upon which the Respondent must base its promotion decisions. The use of the word “shall” in Regulation 38(2) suggests that the Respondent does not have the discretion to consider any factors other than those listed in the Regulation.
72. The Applicants argue that Regulation 38 of the *Public Service Regulations* must be read alongside the Circulars which are from time to time published by the Ministry of the Public Service. While the Respondent’s position is that the Circulars do not bind the Public Services Commission, the Applicants have made an arguable case that they are binding since the Circulars emanate from the Ministry responsible for the public service.
73. There is evidence that the Respondent may not have complied with the requirements set out in the *Public Service Regulations* and the Circulars in promoting nine individuals in July and August 2021. The evidence shows that none of the individuals who were appointed following the application and interview process met the qualifications set out in the Circulars.²⁰ Whether or not the Applicants were more qualified than the individuals who were promoted, there is an arguable case that the Respondent acted *ultra vires* by selecting individuals who did not meet the qualifications.
74. There is also no dispute that three individuals were promoted by the Respondent without undergoing the procedure outlined in the Circulars. In his First Affidavit, Rolando Zetina indicates that these promotions were recommended and justified through a Customs & Excise Memorandum. However, the Court has not been shown the authority under which the Respondent acted in making the decision to promote these individuals. There is therefore an arguable case that the Respondent acted without jurisdiction.
75. While they are ultimately dissatisfied with the outcome, it is clear from the Application Notices that what the Applicants are challenging is the process under which the promotion decisions have been made. The Applicants have an arguable case that they had legitimate expectations that the process set out in the *Public Service Regulations* and applicable Circulars would be followed, and their qualifications be fairly considered. The Applicants also have an arguable case that the Respondent’s failure to hear from them and provide reasons for the decision may have breached the principles of natural justice.

²⁰ Second Affidavit of Rolando Zetina at para. 8.

76. As a result, this Court is satisfied that all limbs of the *Sharma* test have been met and that permission to apply for judicial review ought to be granted.

Order for Disclosure

77. The Applicant in Claim No. 730 of 2021 seeks an order for the disclosure, within three days of this decision, of “a copy of all of the documents considered, minutes and transcript of meetings and/or hearing of the Respondent in respect of the individuals who were promoted to the post of Assistant Comptroller ahead of the Applicant”. The Respondent opposes the granting of this order on the basis that the Applicants have made bald assertions of political interference and they seek disclosure to substantiate those assertions.

78. The order sought by the Applicant is granted. There is a duty on the part of the Respondent to cooperate and disclose the relevant facts and the reasoning behind the decisions challenged in judicial review proceedings.²¹ This Court must ensure that cases are dealt with justly, economically, and expeditiously. These imperatives would be better served by granting the order and thus allowing the Applicants to draft their Applications for Judicial Review with the benefit of information they would in any event be provided with at a later stage. This Court will however grant five days to the Respondent to comply with the order.

IT IS HEREBY ORDERED:

1. The Applicant in Claim No. 731 of 2021 is granted leave to amend the Notice of Application for Permission to Apply for Judicial Review to seek an order that time be extended for the filing of the Application;
2. Leave is granted to extend the time for filing both Applications for Permission to Apply for Judicial Review;
3. The Applicants are granted leave to apply for Judicial Review and shall file, within 14 days of the date of this decision, one joint Application for Judicial Review;
4. The Respondent is to furnish the Applicants’ Attorneys-at-Law, within five days from the date of this decision, a copy of all of the documents considered, minutes and transcript of meetings and/or hearings of the Respondent in respect of the individuals who were promoted to the post of Assistant Comptroller of Customs & Excise ahead of the Applicants;

²¹ *Belize Alliance of Conservation Non-Governmental Organizations v The Department of the Environment & Anor*, [2004] UKPC 6.

5. Costs of this Application are granted to the Applicants and shall be costs in the cause.

Dated June 7, 2022

Geneviève Chabot
Justice of the Supreme Court