



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2024: No. 346

BETWEEN:

KAMANI LAWRENCE

EUGENE JOHNSTON

Plaintiffs

and

THE PUBLIC SERVICE COMMISSION

AND OTHERS

Defendants

RULING
(In Chambers)

Ex parte application for leave to issue proceedings for judicial review under RSC Order 53

Date of Hearing: 21 January 2025

Date of Ruling: 22 January 2025

Appearances: Eugene Johnston (In Person)

Amani Lawrence (In Person)

Ruling on *ex parte* applications of Martin, J

Introduction

1. These are the reasons for the Court's decision in relation to two applications for leave to commence proceedings for judicial review under RSC order 53.
2. The application proceeded on an *ex parte* basis in accordance with the requirements of RSC order 53 rule 3. The applicants had notified the prospective respondents of their intention to apply for leave to issue proceedings, and the prospective respondents (in particular the Public Service Commission) indicated that they were keen to appear on the *ex parte* hearing, to which the applicants had consented. However, the Court declined the invitation to hear the application on an *inter partes* basis and it is appropriate briefly to explain why.
3. The express terms of RSC order 53 rule 3 (2) require that the initial application for leave to issue proceedings for judicial review **shall** be made *ex parte* in the first instance. There are sound practical and procedural reasons for this rule. The purpose of an *ex parte* application is to screen out cases that do not qualify for judicial relief. This avoids incurring the expense and delay of holding lengthy preliminary hearings at which the parties set out their provisional cases.
4. Once the Court has been satisfied that the case qualifies for the grant of leave, the rules then require the applicant serve the originating motion setting out the grounds for relief together with a supporting affidavit (or affirmation). For the reasons set out in this judgment, in this case much of the relief sought in the form 86A statement of grounds was not appropriate for the grant of leave for judicial review and leave to pursue that relief is refused for the reasons explained below. This example illustrates the value of the rule of procedure requiring the initial application to be made *ex parte*.

Summary and Disposition

5. For the reasons given below, leave is granted to Mr. Johnston and Ms. Lawrence to issue proceedings for judicial review by way of Originating Motion to quash the decisions of the Public Service Commission (the "PSC") (i) to recommend Ms. Dill-Francois for appointment as Solicitor General and (ii) to recommend Ms. Nalini Salick for appointment as Chief Parliamentary Counsel.
6. The Court has granted leave limited to the following grounds in each case:
 - (i) In the case of the PSC's recommendation to appoint Ms. Dill-Francois as Solicitor General, on the grounds that there is an arguable case that the wrong advertisement was used to advertise the post which included a requirement for "5 years management at a senior level in a government environment with

responsibility for staff” which was not a requirement in the job description for the post when it was advertised¹.

Mr. Johnston alleges that he was thereby led to understand that he was not eligible to apply for the post when in fact he possessed the relevant minimum qualifications for the approved job description for the post and alleges that he was thereby unlawfully deprived of the opportunity to apply for the post.

- (ii) In the case of the PSC’s recommendation to appoint Ms. Salick as Chief Parliamentary Counsel, on the grounds that there is an arguable case that the PSC failed to give priority to a qualified Bermudian applicant for the post contrary to rule 19 of the Public Service Commission Regulations 2001 (“PSCR 2001”).

- 7. These are the grounds set out in paragraphs 4 and 5 and 9 and 10 of the statement of relief sought in the Notice of Application dated 21 November 2024.
- 8. The grant of leave to issue the proceedings for judicial review is obviously not to be taken as an indication of what the Court’s ultimate views will be on the merits of the case for judicial review. The merits of the case will be determined upon all the evidence, after any appropriate disclosure has been given, and a trial has been conducted.
- 9. For the reasons I have also set out in detail below in this Ruling, the application made for judicial review of the other matters set out in the Notice of Application are refused.

Background

- 10. This is an application for leave to issue judicial review proceedings made by two members of the government service both employed in the Attorney General's chambers. Mr. Johnston is currently serving in the capacity of crown counsel and Ms. Lawrence is serving in the capacity as parliamentary counsel.
- 11. In opening his case, Mr. Johnston, who appeared in person, said that this was a “joint application” with Ms Lawrence, who also appeared in person. The Court makes the preliminary observation that while the two applications may raise some matters which make it convenient for the determination of the two applications for leave to be taken together, they are not a “joint” application in any legal sense. Each application is based upon very different facts and gives rise to a different legal analysis. They are

¹ These facts are admitted by the PSC in a letter dated 26 August 2024 (see footnote 8 below).

different applications and should be treated as such when it comes to determining the issues.

12. Mr. Johnston wishes to challenge the recommendation and subsequent appointment of Ms Dill-Francois as Solicitor General. Ms Lawrence wishes to challenge the recommendation and subsequent appointment of Ms Salick as Chief Parliamentary Counsel. Mr Johnston and Ms Lawrence are each are dissatisfied with the process of advertisement, interview and selection in different respects. They each say (for different reasons) that the recruitment process of the Solicitor General and Chief Parliamentary Counsel was unlawful and unfair in a number of respects. I shall deal with the details of their respective complaints separately below.

Preliminary matters

13. Before looking at the facts, it is convenient to set out a general principle that governs applications for judicial review which reduces the scope of the matters which the applicants are entitled to ask the Court to consider. This principle is that the Court only has power to review quasi-judicial or administrative action: i.e. the decisions made by persons administering public functions. The matters in respect of which permission is sought to challenge in this application go far beyond decisions made in the performance of public functions and the applicants seek to add parties who are not relevant to the applications to set aside the decisions to appoint Ms Dill-Francois and Ms Salick.

Parties

14. The applicants have sought permission to issue judicial review proceedings against the Public Service Commission (the “PSC”), the Minister for the Cabinet Office, the Head of the Public Service, the Attorney General of Bermuda and HE the Governor, and they have also sought to join the successful applicants for the posts in their personal capacities as interested parties. To use a colloquial expression, this is “overkill”.
15. The relevant decision maker is the Public Service Commission, who made the recommendation of the appointments of the Solicitor General and the Chief Parliamentary Counsel to HE the Governor, who then formally made the appointments. This is the procedure set out in section 82 (1) of the Bermuda Constitution Order 1968 (the “Constitution”).
16. In a case in which the applicants wish to challenge decisions of this kind, the appropriate claim is to seek what was historically called an order of ‘*certiorari*’ to quash the relevant decision. This type of relief can be based on the grounds that the decision was unlawful, in breach of the rules of natural justice, or that the decision maker took irrelevant matters into account, or failed to take relevant matters into

account, or that the actual decision fell outside the range of decisions that the decision maker was reasonably entitled to make (i.e. that it was perverse or irrational in some respect that vitiated its validity).

17. For the reasons I explain in more detail below, in this case, that relief can only lie against the Public Service Commission. Therefore, the addition of the Minister for the Cabinet Office, the Head of the Public Service and the Attorney General and the successful candidates as interested parties is not necessary or appropriate. Leave to add them as respondents is therefore refused at the outset. I shall deal with the addition of HE the Governor as a party separately below.

Scope of Relief

18. The applicants have also included permission to seek *certiorari* relief to quash various documents that they say relate to the decisions to recommend candidates for appointment to the posts of Solicitor General and Chief Parliamentary Counsel. The scope of relief for which permission has been to commence includes an order to quash the relevant job descriptions, the acceptances, the recommendations, the approvals, the Civil Service Recruitment Code, the Guidance for Appointment, the organisational chart, and the decisions relating to the acceptance of the job descriptions.
19. Most of these matters are not susceptible to challenge by way of judicial review. The only matters which are capable of being set aside are the *actions* taken in relation to the appointment of the persons to the posts of Solicitor General and Chief Parliamentary Counsel. This means permission to issue proceedings for the relief sought set out in paragraphs 1, 2, 3, 6, 7, 8, 11, 12, 13, 14, 16, 17, 18, and 19 of the Notice of Application must be (and are hereby) refused².
20. There are also two separate applications for relief that do not relate to the matters about which the applicants complain. These relate to applications for the Court to declare that (as a matter of interpretation of the Constitution) (i) the Attorney General may not be appointed as a cabinet Minister because it is said that these offices are mutually incompatible and (ii) that the head of the Attorney General's Chambers is and can only be the Attorney General.
21. The Court takes the view that these matters do not arise on the application to set aside the recommendations to appoint and the appointments of Ms Dill-Francois and Ms Salick to their respective posts of Solicitor General and Chief Parliamentary Counsel. Put another way, those questions are immaterial to the decisions about which the applicants wish to complain. Therefore, the applications for permission to issue judicial review proceedings on these grounds (items of relief sought in paragraphs 15 and 20 of the Notice of Application) are also refused. The Court refrains from making

² See also paragraphs 83 to 89 below.

any observations or expressing any views on the likely merits of these points in case these questions arise in a different context on another occasion in the future.

Crown immunity

22. Finally, it is proposed to add HE the Governor as a party to the proceedings because it was his predecessor who acted on the recommendation of the PSC in making the relevant appointments.
23. It is a well-established convention that the Sovereign, and his constitutional representative HE the Governor, is immune from suit in respect of the exercise of his prerogative powers and functions under the Constitution.
24. The Crown can only properly added as a party to proceedings which are brought in respect of the executive functions of the government which are carried out in the Sovereign's name³. The relevant appointments were exercises of prerogative powers. It is therefore not appropriate to join HE the Governor as a party to proceedings of this type, even for the formal purpose of binding HE the Governor to the court's decision. These are His Majesty's courts and the constitutional convention is that the Sovereign (acting through HE the Governor) will follow the decisions made by His Majesty's courts on matters of law.
25. Therefore, if the Court were to determine at trial that the procedure followed by the PSC in relation to the relevant appointments in this case to have been unlawful, then the constitutional convention described above would require HE the Governor to recognise the effect of that ruling and take appropriate action in compliance with what has been declared by the Court to be the law. HE the Governor does not need to be made a party in order to bind him to the Court's decision, and therefore the Court rules that HE the Governor is also not a proper party to the proceedings in respect of which leave is requested.

Mr. Johnston's application

26. I now turn to the essence of the applications made by each of the applicants in turn. It is convenient to take the application made by Mr. Johnston first.
27. Mr. Johnson's case in support of his application for leave rests on three main foundations⁴. First, Mr. Johnston says that the job was not advertised to the public contrary to regulation 11 of the Public Service Commission Regulations 2001⁵.

³ See section 11 of the Crown Proceedings Act 1966 and the historical explanation of the Crown's immunity from suit in **M v Home Office** [1993] UKHL 5 (in particular by per Lord Templeman).

⁴ The Court has had to untangle the main themes from the discursive presentation of the background and the grounds that flow from them. They are not clearly stated.

⁵ This appears to be the substance of grounds 56 and 57 of the Statement of Grounds.

28. Second, he says that the job description for the post of Solicitor General was created on 25 April 2024, replacing an earlier job description dated 25 August 2008. He says that the 2024 job description included the requirement of *“five years management, at a senior level in a government legal environment with responsibility for the professional development of staff.”*
29. Third, he says that while the decision to make the recommendation was left to the PSC, all of the steps taken up until that point were “controlled”⁶ by the Department of Organisational Development which falls under the Ministry for the Cabinet Office.
30. Mr. Johnson says that he saw the post advertised internally but was discouraged from applying for it because the job description seemed *“overbearing”*⁷ and that it was misleading because he said (a) it misdescribed the legal structure of the Attorney General's chambers and (b) the Civil Service Recruitment Code provided for a process that required an inappropriate level of involvement from the executive branch of government⁸. He accepted that the decision or recommendation under the procedure is left to the PSC, but he complains that everything else is controlled by the Head of the Public Service.
31. On the face of this application, a fundamental omission in Mr. Johnson's case is that he did not apply for the post. Therefore, it was difficult to see how he has a sufficient standing to complain about the decisions made by the PSC or the resulting appointment of Ms. Dill-Francois. On the grounds set out in the affirmation in support of the application, I would have refused leave on the basis that Mr. Johnston did not have a sufficient interest in challenging the legality of the recommendation to appoint Ms. Dill-Francois.
32. However, when the Court raised this aspect of the application in the course of the hearing, Mr. Johnston explained that he would have applied for the post if the advertisement had not included the requirement that the applicant must have *“5 years’ management at a senior level in a government legal environment with professional responsibility for staff.”* Mr. Johnston said that he did not have that experience, so he thought he did not meet the minimum requirements for the post, and therefore he did not apply.
33. However, on investigation he says that he later discovered that in fact the approved job description at the time the advertisement was run did not have this requirement. He says that the approved job description (the 2008 job description) required *“15 years’ post qualification experience in all aspects of civil law preferably in a government environment.”* He says he had the requisite experience to meet those

⁶ Paragraphs 5 and 43 of the Statement of Grounds. This point is not addressed in Mr. Johnston's affirmation but is referred to in Ms Lawrence's affirmation at paragraph 30.

⁷ See paragraphs 13 and 14 of the affirmation of Mr Johnston.

⁸ Paragraph 13 of Mr. Johnston's affirmation in support of the application.

requirements and complained that he was shut out of making an application for the post as a result of the wrong job description being advertised.

34. The Court had two concerns about the admissibility of this explanation. First, it is not set out in Mr. Johnston's affirmation expressly in these terms. Second, the Court had serious doubts that a mistake over the advertisement amounted to an error of law that would render a decision to appoint Ms. Dill-Francois unlawful.
35. As to the first concern, Mr. Johnston pointed to paragraph 28 of his affirmation which said he wished to apply for the post. He then referred to the letter from the PSC which admitted that it had used the wrong job description in the advertisement⁹. Therefore, the Court was satisfied that there was a sufficient evidential basis upon which Mr. Johnston could make the submission that he was misled into believing that he did not have the relevant minimum experience to meet the requirements of the post as advertised, albeit by a very fine margin.
36. In relation to the second concern, Mr. Johnston submitted that the PSC's response was insufficient to deal with his objections in law. The PSC said that it had decided not to re-run the advertisement for the post because the job description which had been used in the advertisement (the 2024 job description) had subsequently been approved. Therefore, the PSC said it would have had to have re-advertised the post with the 2024 job description, which would have reached the same result.
37. Mr. Johnston's response was that this was not a sufficient answer because the 2024 job description had been approved by the Deputy Head of the Public Service not the Head of the Public Service and he submitted that the approval of the job description was a non-delegable function of the Head of the Public Service, so that the purported approval of the 2024 job description by the Deputy Head of the Public Service was not lawful.
38. Reliance was placed on Regulation 18 (1) of the PSQR 2001 which provides that:
- "...the qualifications or relevant experience, or both, for any post shall be those for the time being specified by the Head of the Public Service for that office."*
39. Reliance was also placed upon the Bermuda Court of Appeal's decision in **DPP v Clarke**¹⁰ for the proposition that there is no provision for the delegation of that duty

⁹ 26th August 2024 letter from PSC to Mr. Johnston at page 138 of Exhibit ELJ 2 to Mr. Johnston's affirmation (relevant extracts): *"In this case the relevant job description was drafted by the PS...The Commission regrets this error, which means that the wrong job description was used in the advertisement.... The Commission has considered whether...it should re-run the advertisement. It has concluded that it should not do so. If the Commission did re-run the advertisement (and selection) process, it would now have to use the 2024 job description--since the 2024 job description has now been approved by the (Deputy) Head of the Civil Service. Since a re-run of the process would use the current job description...the result would be the same."*

¹⁰ [2019] CA (Bda) 8 Civ 21 June 2019 at paragraphs 36-9 per Clarke P

to the Deputy Head of the Public Service, and therefore the purported approval of the 2024 job description by the Deputy is ineffective in law.

40. Mr. Johnston also submitted that the PSC's explanation was not to the point. He says he was deprived of the opportunity to apply for the post when it was advertised because of the PSC's mistaken use of an unapproved job description, and he says that if the correct job description had been used, he would have had a right (or legitimate expectation) to be considered for the post. He also says that the recommendation to appoint Ms. Dill-Francois on the basis of the wrong (unapproved) job description was unlawful.

Sufficient interest

41. The legal requirement for standing to challenge a decision of an administrative body is that the applicant must be a person who has a "*sufficient interest in the matter to which the application relates*"¹¹. This has a technical meaning: it is not anyone who is unhappy or offended by the decision who can apply to challenge it.
42. The person who seeks to challenge the decision must (generally) be able to show that he or she has have been deprived of or refused something to which he or she is legally entitled, or that he or she has been subjected to a legal burden, or otherwise has a sufficient interest in the outcome of the decision or will be (or has been) affected by it in some identifiable way¹². The question is fact specific and is a matter for the assessment of the judge on the application for leave and falls within the exercise of judicial discretion.
43. The rules for determining whether a person has standing have not been uniformly applied over the years and, although reform has been debated, none has been introduced. Standing is now often extended beyond persons who allege they have been denied a legal right to persons who have a legitimate expectation of the grant of a benefit or who have a legitimate expectation to be entitled to a discretionary benefit as a result of a course of conduct¹³.
44. Usually, a private individual has to show that he or she has been directly affected by the decision or action taken. Sometimes public interest groups will be held to have standing because they represent the wider public interest in an issue of public concern or impact, and the Court recognizes the legitimate public interest in activists giving voice to concerns and to participate in challenging decisions as part of the operation

¹¹ RSC Order 53 rule 3 (7)

¹² **Minister for the Cabinet Office and the Postmaster General v Mailboxes Unlimited Ltd** [2024] CA (Bda) 23 Civ at paragraphs 71-2 per Smellie JA citing **R (Chandler) v Secretary of State for Children Schools and Families** [2010] PTSR 1245.

¹³ See the discussion of the development of the law in this area by Smellie JA in **Min for the Cabinet Office and anor v Mailboxes Unlimited** (supra) at paragraphs 24 to 38.

of an open democracy to allow the public to hold those in power to account for the decisions they make¹⁴.

45. Here, Mr. Johnston says he had the right to apply for the post, and a right (or legitimate expectation) that his application would be considered in the light of the relevant job description that was currently approved at the time. He says he was wrongly excluded from consideration as a result of the admitted mistake of the PSC and the subsequent correction of the mistake did not render lawful that which was unlawful at the time the recommendation to appoint Ms Dill-Francois was made.
46. The Court considers that the responses Mr. Johnston has given are sufficient to show that Mr. Johnston (i) has a sufficient interest in the matter because he was led to believe he was ineligible to apply for the post when in fact the relevant approved job description would have been wide enough to make him eligible and (ii) has an arguable case that the decision to appoint Ms. Dill-Francois to the post on the basis of the wrong job description was unlawful in that (i) it excluded other qualified applicants from applying for the post who would have been qualified to apply at the time it was advertised, and (ii) that the recommendation which was made on the basis of the wrong job description was unlawful¹⁵.
47. Accordingly, the Court considers that Mr. Johnston qualifies for the grant of leave to bring the proceedings for judicial review¹⁶.
48. However, the Court notes that Mr. Johnston's motives for making the application are expressly grounded in a dissatisfaction with the way the Attorney General's Chambers are managed¹⁷. For the reasons I have already set out above, those are not matters for which the Court has given leave to seek judicial review. The scope of the leave which has been granted to him is limited to a challenge to the legality of the appointment of Ms. Dill-Francois based on the recommendation of the PSC which was arguably based on a legally flawed procedure. The Court emphasizes that the judicial review proceedings for which leave has been granted are not a platform for the ventilation of historic grievances or to level complaints about the management and internal administration of the Attorney General's Chambers¹⁸.
49. In **Min of Cabinet Office and anor v Mailboxes Unlimited Ltd** (cited above) the Bermuda Court of Appeal drew the clear distinction between the situation in which an applicant has a sufficient interest because they are affected by the act or omission of a government agency and a philosophical opposition to the decisions of a government

¹⁴ See for example **Ming v Commissioner of Education** [2012] Bda LR 48 and **Minister for the Cabinet Office v Mailboxes Unlimited Ltd** (supra) per Kawaley JA at paragraph 94.

¹⁵ The PSC 2001 are delegated legislation, which makes their provisions binding as a matter of law.

¹⁶ These are grounds 9 and 10 of relief sought in the Notice of Application.

¹⁷ See paragraphs 28 and 32 of Mr. Johnston's affirmation.

¹⁸ See paragraph 33 of Mr. Johnston's affirmation: "*In my view there is currently an ideology which seeks to infect the whole of Chambers...*"

agency, in respect of which leave to issue judicial review proceedings would be refused (as it was in **R (Chandler) v Secretary of State for Children, School and Families** cited above). In this case, leave to pursue Mr. Johnston’s “philosophical” objections by way of judicial review is expressly refused.

Ms Lawrence’s application

50. Ms Lawrence puts her application on very different factual and legal grounds. There is no complaint about the advertisement, but there is a complaint about the content of the job description. The substance of Ms Lawrence’s complaint is that she says that her application for the post of Chief Parliamentary Counsel was refused contrary to the requirement that a qualified Bermudian must be given priority in applications for posts in accordance with regulation 19 of the PSCR 2001. This regulation provides:

- “19 (1) This regulation states the principles that apply where under section 82 of the Constitution the Commission is to make a recommendation to the Governor about an appointment to an office.*
- (2) Subject to this regulation, the person who in the Commission’s opinion is the best candidate shall be preferred.*
- (3) The Commission shall not recommend a person for appointment to an office if he is not fit to be appointed.*
- (4) For the purposes of appointment to an office, a person with Bermudian status (“a Bermudian”) who is not already an officer shall, other things being equal, rank equally with a Bermudian who is already an officer unless the Commission for special reasons decides otherwise in the particular case.*
- (5) The Commission shall not recommend a person who is not a Bermudian for permanent appointment to an established office unless the person is the spouse of a Bermudian.*
- (6) A Bermudian shall be preferred to a person who is not a Bermudian (a “non-Bermudian”).*
- (7) A non- Bermudian who is the spouse of a Bermudian shall be preferred to any other non-Bermudian, except another non-Bermudian who is the spouse of a Bermudian.*
- (8) Where in a competition for an office—*
 - (a) one of the candidates is in a higher category of preference under this regulation than another candidate; and*
 - (b) the candidate in the higher category of preference is fit to be appointed,*

The Commission shall recommend the candidate in the higher category of preference even if the other candidate is more fit or no less fit.

- (9) The Commission shall not recommend a non-Bermudian for appointment to an office for a term exceeding three years unless the non-Bermudian is the spouse of a Bermudian or the recommendation is allowed by paragraph (10) or (11).*
- (10) The Commission may recommend a non-Bermudian for an appointment to an office for a term exceeding three years but not exceeding five years if either—*
 - (a) the Commission for special reasons sees fit to do so in the particular case; or*
 - (b) the office in question is in the Police Force.*
- (11) Notwithstanding paragraphs (5), (9) and (10)., where a non-Bermudian has been employed for a period of not less than five consecutive years as an officer in the Police Service, the Commission may recommend him for a permanent appointment to an established office in that Service.*
- (12) For the purposes of paragraphs (5) (7) and (9) of this regulation, a person is the spouse of a Bermudian if the person has spouse's employment rights under section 60 (3) of the Bermuda Immigration and Protection Act 1956.*

51. Ms Lawrence sets out her background and experience in the drafting section of the Attorney General's Chambers over the last 19 years, first as assistant parliamentary counsel and then as parliamentary counsel. She explains that she has had the relevant experience that meets the requirements of the advertised post. Further she says that she served as the acting Chief Parliamentary Counsel for 18 months prior to the appointment of Ms Salick to the post¹⁹.

52. Ms Lawrence also makes other complaints about the process of selection and the interview in support of the complaint that her application has been passed over in favour of another candidate who is not a Bermudian.

53. The case is put on the basis that there was no relevant distinction between her application and that of Ms Salick, in that her own credentials adequately met the requirements of the post. She says that she clearly had the ability to do the job as she served as the acting postholder for 18 months. Ms Lawrence points to Regulation 19

¹⁹ The facts are set out in Ms. Lawrence's affirmation in support of the application dated 28 October 2024. In particular, Ms. Lawrence refers to the approved Guidance for Appointments under regulation 18 PSCR 2001 which allows the PSC to treat persons who have been acting in post for more than 12 months to qualify for a permanent appointment to the post (exhibited at page 30 of Exhibit KAL 1 to her affirmation).

(6) (7) and (8) of the PSCR 2001 and says that these regulations required the PSC to recommend her for the post of Chief Parliamentary Counsel.

54. Without expressing any views on the merits of the points Ms Lawrence wishes to advance at the hearing of her substantive application, it seems to me that her application meets the requirements for the grant of leave to issue proceedings for judicial review of the PSC's decision to recommend Ms Salick for the post of Chief Parliamentary Counsel. This is for the following reasons.
55. First, Ms Lawrence obviously has a "sufficient interest" in the decision to recommend Ms Salick for appointment instead of herself. Because she was not recommended for the post, she has a legitimate interest in challenging the legality of the PSC's decision not to recommend her.
56. Second, she says that the breach of Regulation 19 (if it is established) makes the recommendation of the PSC to appoint Ms Salick unlawful. This is clearly arguable.
57. Alternatively, Ms Lawrence says that the reference to Ms Salick's greater management experience is an irrelevant consideration that ought not to have been taken into account by the PSC. Further she says that the PSC did not take into account (or give appropriate weight to) the fact that Ms Lawrence had acted in the post for 18 months. She says these factors mean that the decision to appoint Ms Salick fell outside the range of decisions that the PSC could reasonably have made, and that the decision is therefore liable to be set aside.
58. It seems to me that these points are cogent and plainly arguable and so her application for judicial review meets the test for the grant of leave to issue judicial review proceedings.
59. Accordingly, the Court grants Ms Lawrence leave to issue proceedings for judicial review of the PSC's decision to recommend Ms Salick for the post of Chief Parliamentary Counsel²⁰.

Alleged Improper delegation of functions

60. Ms Lawrence makes the broader point that the PSC did not "control" the process of advertisement and selection of candidates and it is suggested in a very broad way that this makes the process unlawful²¹. It is suggested by Ms Lawrence that the PSC does not exercise independent judgment at all²². In addition, because of the extent to which

²⁰ These are paragraphs 4 and 5 of the relief sought in the Form 86A Notice of Application.

²¹ This ground is not easy to extract from the materials supplied to the Court. It seems to be a theme in the general statement of grounds, but no facts are offered in support of it. It is alleged at paragraph 22 of her affirmation that the Department of Employee and Organizational Development is "*the body in charge of the recruitment process*", and at paragraph 30 of her affirmation that the PSC "*hands the functions of application and recruitment to the Department of Employee and Organizational Development*", but the allegation is not supported by any factual averments to say what aspects of the process are improperly delegated.

²² See paragraph 11 of the affirmation of Ms. Lawrence.

control of the interview and selection process was in the hands of the Department of Employee and Organisational Development, it is said that the PSC had “*no control of any of the processes that would allow it to reach a lawful decision*”²³.

61. It is also alleged that the participation in the interview process was not conducted by the PSC itself but by a panel which did not include a member of the PSC²⁴. It is therefore to be deduced from what is said in Ms Lawrence’s affirmation that the argument lies that the PSC improperly delegated its Constitutional function to the panel in respect of the recommendation to appoint Ms Salick.
62. A delegation of powers in respect of members of the Attorney General’s Chambers has not been authorised under the Public Service Commission (Delegation of Powers) Regulations 2001. It seems to me that it is therefore arguable that the PSC relied upon the recommendation of the interview panel instead of exercising its own independent judgment in making the recommendation. This is one of the matters in respect of which relief is sought and although specific relief is not sought in respect of this aspect of the complaint, it fairly falls within the relief sought to set aside Ms Salick’s appointment. I therefore grant leave to seek judicial review of the decision to recommend Ms Salick for the post of Chief Parliamentary Counsel on the basis of paragraph 6 on page 2 of the Form 86A Notice of Application.
63. However, this allegation is not made in relation to the appointment of Ms Dill-Francois: there is no averment in Mr. Johnston’s affirmation, nor a statement in the grounds, that the PSC failed to exercise control over the recruitment process of Ms Dill-Francois²⁵. This alternative argument is therefore not open to Mr. Johnston in relation to his application.
64. In summary, leave is granted only in respect of challenging the legality of the appointment of Ms. Dill-Francois Ms Salick on the grounds permitted, namely paragraphs 4 and 5 and 9 and 10 of the “Relief sought” and paragraphs 6 and 10 of the matters in respect of which relief is sought as set out in the Form 86A Notice of Application.

Stay

65. Both Mr. Johnston and Ms Lawrence have sought a stay of the permanent appointments of Ms Dill-Francois and Ms Salick pending the outcome of their respective applications for judicial review.

²³ Paragraph 50 of the Statement of Grounds.

²⁴ Paragraph 4 of the affirmation of Ms. Lawrence.

²⁵ As noted above in footnote 6, this point is only supported in the evidence in respect of the appointment of the Chief Parliamentary Counsel.

66. Under RSC Order 53 rule 3 (10), where the relief sought is for *certiorari*, the grant of leave operates as a stay of the proceedings to which the application relates, until the determination of the application. In this case, there are no “proceedings” to which the application relates, but there is a six-month period of probation before the appointments may be made permanent, and the each of each of these probationary periods falls within the next several weeks (in early February and in March 2025).
67. In order to enable their applications to have any meaningful effect, they submit that it would be unjust if their right to be considered for appointment for each of the posts were to be foreclosed by the making of a permanent appointment of Ms Dill-Francois and Ms Salick before their applications have been heard on their merits.
68. By contrast, they submit that neither Ms Dill nor Ms Salick would suffer any prejudice by the grant of a stay pending the determination of their respective applications. They are each in post and performing their functions, and any delay in making their appointments permanent will not prejudice them or the Attorney General’s Chambers in any meaningful way. In particular, Mr. Johnston refers to the provisions of PSCR 2001 Regulation 21 (7) which preserves Ms Dill-Francois’ position in the event that her appointment as Solicitor General is ultimately not confirmed.
69. The Court has acceded to the application for a stay of the making either appointment permanent until the determination of Mr. Johnston and Ms Lawrence’s applications for judicial review on the grounds briefly set out below.
70. First, the express terms of RSC Order 53 rule 3 (10) contemplate that a stay will be granted automatically on the grant of leave. Even though the relevant decisions that are subject to review are not “proceedings” within the express terms of the rule, I can see no meaningful distinction that would justify in refusing a stay on the basis that the permanent appointments are not “proceedings”.
71. Second, there is obvious potential prejudice to each of the applicants if the appointments of Ms Dill-Francois and Ms Salick are made permanent before the determination of the judicial review applications. If the applications are successful, it may very well render the grant of relief moot, or at least make a difficult situation even more complicated. It also seems to me that the only prejudice to Ms Dill-Francois and Ms Salick is delay (and the understandable anxiety that the uncertainty over their position may give rise to). However, I am satisfied that the balance of justice clearly falls on the side of maintaining the position as it stands until the Court can adjudicate on the matter.
72. The effect of the interim stay relief is akin to an interim injunction restraining the PSC from confirming the respective appointments of Ms Dill-Francois and Ms Salick

under PSCR 2001 Regulation 21(6) pending the determination of the judicial review proceedings.

73. In the light of the effect of the stay, taking into account the impact on Ms Dill-Francois and Ms. Salick, the PSC and the intrusion into the ordinary administration of the Attorney General's Chambers that this interim stay will undoubtedly cause, the Court has set out below a tight timetable for the progress of these proceedings on an expedited basis. The times allowed for steps to be taken set out below are intended to be the maximum periods in which the steps to prepare for the hearing each of the applications must be taken. They are not to be regarded as general guidance or aspirational targets.

Directions

74. Mr. Johnston and Ms Lawrence are each required to file an Originating Motion supported by an affirmation in support of the grounds for which leave has been granted within 14 days (RSC Order 53 rule 5 (5)). For the avoidance of doubt, these are to be conducted as separate proceedings, not as a joint application in one Originating Motion. At the directions hearing referred to in paragraph 77 below the Court will give directions in respect of the hearing of each of the Originating Motions (i.e. as to whether it is appropriate to hear the applications at the same time or separately).
75. Mr. Johnston and Ms Lawrence are to serve their respective Originating Motions with their respective supporting affirmations upon the PSC within 7 days of its issue.
76. The PSC is to file and serve its evidence in response to each of the Originating Motions within 28 days of the date of service of the Originating Motions and Mr. Johnston's and Ms Lawrence's respective affirmations in support.
77. Thereafter Mr. Johnston and Ms Lawrence are to seek directions within 14 days of service of the evidence in answer by the PSC. Such directions may include an application for permission for Mr. Johnston and Ms Lawrence to serve evidence in reply to the PSC's evidence or applications for disclosure. For the avoidance of doubt, such further directions are to be limited in scope, due to the nature of the proceedings, and the need for the matter to proceed in an efficient manner and on an expedited timetable.
78. The costs of Mr. Johnston's and Ms Lawrence's applications for leave to issue the judicial review proceedings will be reserved.
79. Mr Johnston and Ms Lawrence's respective applications are to be set down for trial before a Judge alone in open court within 14 days of the Order for directions referred

to in paragraph 77 above or (if no directions are sought) within 14 days of the time limited for seeking those directions (i.e. the case must be set down within 80 days of the date of this Order). All witnesses who provide affirmations or affidavits must attend the trial for cross-examination unless (i) the parties agree otherwise or (ii) the Court directs otherwise.

80. In the event that either Mr. Johnston or Ms Lawrence fails to issue and serve the proceedings in accordance with the directions given above (in the absence of an extension of time for doing so on proper grounds) their respective application will stand dismissed, and the stay order will automatically lapse. In the event that either Mr. Johnston or Ms Lawrence fails to seek directions for the hearing of their respective matters set out in paragraph 77 above or set down their respective matter in accordance with paragraph 79 above, the PSC is given liberty to apply to dismiss the proceedings on 4 clear days' notice.
81. These directions are given to ensure that there is no delay in determining the issues so that none of the parties concerned are kept in a state of suspended animation for any longer than is absolutely necessary for the due administration of justice in this case.
82. Mr. Johnston and Ms. Lawrence are directed to prepare an Order for signature by the Court reflecting the above terms and to serve a copy of the Order upon the PSC at the same time as they serve their respective Originating Motions and supporting affirmations together with a copy of this Ruling.

Postscript

83. After the conclusion of the hearing, and (just) before the release of this Ruling, the applicants put in further written submissions with supporting authorities directed to a point that the Court raised in the course of argument for which the applicants were unprepared. This is irregular and should not be done without the permission of the Court. However, the Court has reviewed the materials and (again) confirms that they do not support the proposition for which they are advanced.
84. The applicants renewed their submission to the effect that the Court has power to quash the internal procedures of the government (eg the Civil Service Recruitment Code) because it is issued under the powers conferred on the Head of the Public Service under the PSCR 2001.
85. This is a misconceived submission. In the first place, in this context, the only decision in relation to the Civil Service Recruitment Code that could be reviewed by the Court under RSC Order 53 would be the decision of the Head of the Public Service to issue a procedural code. RSC Order 53 does not give the Court power to declare that the

Civil Service Recruitment Code is or some part of it is not valid on a judicial review application. The same analysis applies to all the other documents referred to.

86. As was explained during the hearing, the Court's function on a judicial review application is to review the administrative action of a statutory body or authority (very often a decision of an organ of government or one of its officers). This is apparent from all the cases cited by the applicants which each concern the review of administrative or quasi-judicial decisions, **not** the underlying procedures that led to them²⁶.
87. If an administrative decision is based on a procedure which is unlawful, then the decision may be liable to be set aside (although it does not always follow that the decision will necessarily be set aside as being unlawful). If this happens, then the relevant body will take the appropriate action to amend or change the procedure which the Court has determined led to an unlawful result. In my view the Court would be overreaching its powers and its proper function of reviewing the decision by also declaring that the whole procedural code (or some part of it) is unlawful or purport to set it aside.
88. Second, the only sufficient interest the applicants have is to challenge the recommendations for the specific appointments made by the PSC on the limited grounds set out above.
89. Finally, even if the Court had the requisite power to do so (which for the reasons already given, in my view, it does not), the Court would not grant leave to the applicants to challenge the internal recruitment procedures and guides on this application for judicial review

Dated this 24 January 2025



THE HON. ANDREW MARTIN

PUISNE JUDGE

²⁶ **Ramjohn v Permanent Secretary, Minister of Foreign Affairs** [2012] 2 LRC 362 (judicial review of exercise of veto power: ie a **decision**); **R v Home Secretary ex p Simms** [1999] 3 WLR 328 (judicial review decision of Home Secretary to put ban on press interviews by prisoners: ie a **decision**); **R v (Munjaz) v Mersey Care NHS Trust** [2003] 3 WLR 1505 (judicial review of a decision to seclude mental patients: a **decision**); **R v Kent Police Authority, ex p Godden** [1971] 2 QB 662 (judicial review of a **decision** on permanent disability); **R v Panel on Take-overs and mergers ex p Datafin** [1987] QB 815 (jurisdiction to review the panel's **decision**); **Mohitt v DPP of Mauritius** [2006] 1 WLR 3343 (review of DPP's **decision**). (Emphasis added).