

COUNCIL FOR VOCATIONAL LEGAL EDUCATION

ATTORNEYS' EXAMINATION SEPTEMBER 2018

PAPER I - CONSTITUTIONAL LAW AND
ADMINISTRATIVE LAW

(THREE HOURS)

Candidates have ten minutes to study the Examination Paper which consists of 13 pages before they start writing.

This PAPER is in TWO PARTS.

PART I contains FOUR QUESTIONS on CONSTITUTIONAL LAW out of which TWO must be answered.

PART II contains FOUR QUESTIONS on ADMINISTRATIVE LAW out of which TWO must be answered.

All questions carry equal marks. Marks will be granted, where appropriate, for correct reference to enactments and case law. Each question must be answered on separate sheets with clear marking as to the question answered and the number of pages.

MAKE SURE THAT YOU PUT ALL YOUR ANSWERS TO THE DIFFERENT PARTS IN THE APPROPRIATE ENVELOPES.

PART I _CONSTITUTIONAL LAW

ANSWER ANY TWO QUESTIONS

Question

In order to deal more effectively with drug problems in Mauritius, the National Assembly has amended the Constitution by introducing a new section which states the following:

“Notwithstanding any other provision of the Constitution, no law which

- (1) provides for the imposition of a mandatory death penalty for a drug dealing offence; or*
- (2) prohibits the release on bail or otherwise of any person arrested and detained pending his trial in connection with a drug dealing offence,*

shall be called in question in any Court or shall be held to be inconsistent with any provision of the Constitution if the law has been passed at the final voting in the Assembly by the votes of not less than three quarters of all the members of the Assembly.”

The National Assembly has further enacted a new Dangerous Drugs Act which has been supported by the votes of more than three quarters of all the members of the National Assembly. It provides that any person convicted for a drug dealing offence shall be sentenced to death.

The Act also provides that any person arrested and detained in connection with a drug dealing offence shall not be released on bail pending his trial.

Alan has, following his conviction for the sale of 10 grams of cocaine which is a drug dealing offence under the Act, been sentenced to death.

Harry, who has been arrested in connection with another drug dealing offence, has not been released and has been detained in custody by virtue of the newly enacted provisions of the Act.

Discuss the constitutional validity of the newly enacted provisions of the Dangerous Drugs Act to which Alan and Harry have been subjected and the constitutional remedies, if any, which are available to Alan and Harry.

Question 2

(a) Sally has reported several cases of assault against her spouse Dick who is a police officer. No criminal charge has been brought against Dick. Sally has, by way of a private prosecution, lodged an information on a charge of assault against Dick before the District Court of Port Louis. But the Director of Public Prosecutions has, without giving any reason, entered a *Nolle Prosequi*, in order to put an end to the private prosecution proceedings initiated by Sally against Dick.

Discuss whether Sally may contest the decision of the Director of Public Prosecutions.

(b) Edgar, who is an outspoken political activist, has in the course of a public meeting made serious allegations of corruption against a Judge of the Supreme Court in respect of a judgment in which the Judge had ordered Edgar to pay substantial damages for defamation.

The Director of Public Prosecutions has applied to the Supreme Court for an order committing Edgar for contempt of "having publicly scandalised the Supreme Court".

Edgar contends that he cannot be made to face such contempt proceedings which contravene his constitutional right to freedom of expression and that the Supreme Court has no power to punish for contempt of Court.

Discuss whether Edgar is entitled to any constitutional relief.

Question 3

The National Assembly has, following the general elections and 3 years after holding its first sitting, voted an amendment to the Constitution. The amendment has obtained the votes of more than three quarters of all the members of the Assembly and provides that all the Constitutional powers of appointment of the President in relation to the chairperson and members of the Electoral Supervisory Commission shall be exercised by the President acting in accordance with the advice of Cabinet.

The President has refused to give his assent to the Constitutional amendment when it was submitted to him for assent. The President has instead dissolved Parliament and has issued writs for a general election of the members of the Assembly to be held in 40 days.

Discuss the Constitutional validity of the President's conduct and decision.

Advise the Prime Minister as to the exercise of any Constitutional remedies which may be open to him.

Question 4

Rita's employer has issued a circular in which it is stated that the encoded

minutiae of the fingerprints of all employees will be taken and recorded in order to operate the new computerised system which is being set up to record the attendance of employees. The circular adds that any employee who refuses to do so will not be able to have access to his or her place of work which will be controlled by an automated computerised system.

Rita is firmly of the view that the obligation to provide minutiae of her fingerprints and the storage of such data by her employer are in breach of her fundamental rights guaranteed under the Constitution.

- (i) Discuss whether there is a breach of any of Rita's Constitutional rights;
- (ii) Explain the exercise of any remedy which Rita may have by way of constitutional relief.

PART II _ADMINISTRATIVE LAW

ANSWER ANY TWO QUESTIONS

Question I

Mr Gurudev claims that he has been unjustifiably denied the post of Deputy Commissioner (Community Development) of the Sugar Industry Labour Welfare Fund. He believes that he is better qualified, more senior and has greater competence than the person appointed, one Mr Gopala.

According to his version of events, Mr Gopala joined the service 6 months after him and he is aware that Mr Gopala had been convicted some 15 years ago for an offence of assault on an employee. It appears that the employee refused to follow the instructions given Mr Gopala, who was then supervisor, following which it appears that Mr Gopala slapped that employee.

Mr Gurudev counts some 25 years' service and was recently awarded, on 31 August 2018, a Masters degree in Public Administration from the University of Law, London, United Kingdom. He is not aware of any adverse comment made against him.

You have written to the Sugar Industry Labour Welfare Fund Committee which is responsible for the appointment to the post of Deputy Commissioner, subject to the concurrence of the Minister responsible for agriculture. You have put forth the case of your client, in an attempt to persuade the authorities to give due consideration to his grievances rather than facing a court action.

By return letter, the Secretary, on behalf of the Sugar Industry Labour Welfare Fund Committee, has informed you that appointment to the post of Deputy Commissioner is not by promotion but by selection from qualified staff of the Community Development Cadre who have at least 20 years' experience in the service. The Secretary further informs you that they consider that the appointment is contractual and relates to a private law employer-employee relationship. The post was advertised on 1 January 2018. The interview for the selection exercise was carried out during the second week of July 2018, and the appointment letter was issued on 13 August 2018, for the vacancy to be effectively filled on 1 September 2018. Five persons were selected and Mr Gopala topped the selection list whilst your client came out third on the list.

You are required to –

- (a) advise Mr Gurudev as to whether he may successfully challenge the appointment of Mr Gopala as Deputy Commissioner by way of an application for Judicial review;
- (b) explain the procedural steps involved, including the remedies which may be sought.

An extract of the relevant provisions of the Sugar Industry Labour Welfare Fund Act is herewith annexed.

4. *Powers of the Committee*

- (1) *Subject to subsection (2) and to the Finance and Audit Act, the Committee shall, for the purposes of this Act have the same powers as a natural person.*
- (2) *The Minister may, in relation to the exercise by the Committee of its functions, give such directions to the Committee as he considers necessary and the Committee shall comply with those directions.*

14. *Appointment of other officers and servants*

- (1) *The Committee may appoint or employ, on such terms and conditions as the Committee may, with the approval of the Minister, determine, such officers and servants as may be reasonably necessary for the purposes of or in connection with the discharge of its functions.*
- (2) *Every officer and servant shall be under the administrative control of the General Manager.*

16. *Conditions of service of staff*

The Committee may make rules, in such forms as it may determine, to govern the conditions of service of its officers and servants and in particular, to deal with -

- (a) *the appointment, dismissal, discipline, pay and leave of, and the security to be given by officers and servants;*
- (b) *appeals by officers and servants against dismissal and other disciplinary measures;*

Question 2

Your client has been the holder of a licence from the Tourism Authority for the past 10 years in order to operate a beauty salon within the premises of the Royal Sok hotel, which is a five-star hotel situated at Belle Mare. Your client learnt through the monthly newsletter of the hotel Group, issued on 1 May 2018, that the hotel has made an application to the Tourism Authority in order to operate a beauty salon in the premises of the same hotel. In addition, the hotel plans to open a Spa. These services will be offered exclusively to the hotel's residents. Your client has immediately written to the Tourism Authority and the hotel management to seek confirmation of same. At the same time, she has lodged a formal objection to the Tourism Authority and the Minister responsible for the subject matter of tourism against the granting of the licence.

The Tourism Authority has, by letter dated 15 August 2018, categorically refused to give any information as to the identity of the applicant, the date of the application of the licence and the outcome of the application. The management of the hotel has refused to provide any information and is now requesting your client to vacate its premises, in spite of the fact that her lease is due to expire in 2030.

In an attempt to sort out matters and to avoid any court action, you wrote a letter to the Tourism Authority, with copy to the Royal Sok hotel informing them of your client's grievances.

The Authority replied to inform you that the application for the licence was made in April 2018 and that the licence to operate the salon and the Spa was granted in July 2018. The hotel's management reiterated its wish that your client vacates its premises forthwith against a compensation of Rs 250,000-.

Your client considers that the Tourism Authority has acted unfairly towards her, and that its decision to grant the licence is manifestly irrational, unfair and inconsistent with its own policy not to grant more than one hairdressing licence for any one hotel premises. Furthermore, the Tourism Authority has

failed to consider her objections and/or to give her a hearing. Section 12Q of the Tourism Authority Act, which provides for an appeal against a decision of the Tourism Authority to a specially-constituted Tribunal, has not yet been proclaimed.

- (a) Discuss any judicial remedy which your client may have in the circumstances, from the administrative law point of view.
- (b) Explain the procedural steps involved.
- (c) Set out the Statement of Case of the applicant.

The following extracts of the Tourism Authority Act may be relevant:

5. Functions of Authority

The Authority shall have such functions as are necessary to further most effectively its objects, and in particular, shall –

- (a)(i) register, regulate and supervise tourist enterprises specified in Sub-part 1 of Part A of the First Schedule;*
- (ii) license, regulate and supervise tourist enterprises specified in Sub-part 1 of Part A and Part B of the First Schedule;*
- (e) carry out investigations and take measures to suppress illegal, dishonourable, unsound and improper practices in relation to any activity regulated under the Act;*
- (f) establish standards, guidelines, and codes of practice in relation to the carrying on or running of a tourist enterprise, the operation of pleasure crafts, and the activities of a skipper and a holder of a canvasser permit;*

7. Powers of Authority

- (I) *The Authority shall have such powers as are necessary to enable it to effectively achieve its objects and discharge its functions and, may, in particular –*
- (a) Issue, renew, suspend, vary or revoke licences and canvasser permits;*
 - (aa) register tourist enterprises specified in Sub-part I of Part A of the First Schedule and vary, suspend or revoke tourist accommodation certificates;*
 - (b) Upon approval of the Minister, in relation to any case or class of cases, for good cause, grant exemption or partial exemption from compliance with any standard or guideline made by the Authority, subject to such conditions as the Authority may, impose;*

Question 3

Diabolo, was employed by the Municipal Council of Camp Fatal as botanist and was in charge of the St Loulou Botanical Gardens belonging to the local authority.

On 1 January 2015, Diabolo was arrested by the Police at St Loulou Botanical Gardens and was released on bail on 3 January 2015. He was then prosecuted before the District Court for smoking cannabis and cultivation of 5 plants of cannabis. On 30 January 2018 he was convicted upon him pleading guilty to the charges, and was given a substantial fine on both counts.

The Commissioner of Police reported the conviction to the Municipal Council, which thereafter on 15 February 2018 referred the matter to the Local Government Service Commission with a recommendation that the employment of Diabolo be terminated with immediate effect. On 1 March 2018, the Commission asked for a certified copy of a court record, with which it was provided on 15 March 2018. On the same day the Commission through registered letter called Diabolo for a hearing. Diabolo failed to attend the hearing which was scheduled

on 1 April 2018. On the same day, the Commission took the decision to terminate the employment of Diabolo and this decision was communicated to Diabolo on the same day by the Municipal Council.

Diabolo appealed to the Public Bodies Appeal Tribunal against his dismissal. Following an expedited hearing held on 10 August 2018, the Tribunal, in a one-line ruling, quashed the decision of the Commission on the ground that the circumstances of the case do not fall within the purview of Regulation 36(3) of the Local Government Service Commission Regulations.

The Commission considers itself aggrieved with the decision of the Tribunal, approaches you with instructions that this decision of the

Tribunal should not be allowed to stand.

- (a) Advise the Commission on the exercise of any judicial remedy which may be available to it and the grounds which may be invoked in support of an application for Judicial review.
- (b) Explain the procedural steps involved and the remedies which may be sought.

The following extracts from the Local Government Service Commission Regulations and the Public Bodies Appeal Tribunal Act, may be relevant for your consideration.

LOCAL GOVERNMENT SERVICE COMMISSION REGULATIONS

36. Procedure on criminal conviction

(3) Disciplinary proceedings subsequently to a conviction shall not normally be taken in respect of minor offences under the Road Traffic Act, and of minor offences not entailing fraud or dishonesty and not related to an officer's employment

PUBLIC BODIES APPEAL TRIBUNAL ACT

3. Jurisdiction of Tribunal

(1) Subject to subsections (2) and (3), the Tribunal shall hear and determine an appeal made by any public officer, or any local government officer, against any decision of the Public Service Commission or the Local Government Service Commission, as the case may be, pertaining to an appointment exercise or to a disciplinary action taken against that officer.

(2) An appeal shall be made -

(a) within 21 days of the notification to the officer of the decision referred to in subsection (1),

or

within 21 days of such public notification of the decision as may have been made, whichever is the earlier; and

(b) in such form and manner as may be prescribed by the Tribunal

(3) No appeal shall lie to the Public Bodies Appeal Tribunal where the appeal relates to an appointment made following a call for application for an office by public advertisement.

(4) An officer shall have the right to appeal under subsection (1), notwithstanding the Public Service Commission Regulations, the Local Government Service Commission Act and the Local Government Service Commission Regulations.

7. Proceedings of Tribunal

(5) In performing its functions, the Tribunal shall endeavour to combine fairness to the parties with economy, informality and speed.

(6) In the hearing of an appeal, the Tribunal is not bound by the procedures or legal forms of a court of law, and rules of evidence, but shall—

(a) observe the principles of natural justice;

(b) keep a written record of its proceedings; and (c) give reasons for its decision on the appeal.

Question 4

Mr Subosh informs you of the following:

He is the holder of a taxi licence. His licence has been revoked by the National Transport Authority following a disciplinary Committee on charges of having failed to be the main driver of the taxi car during three specific periods of 2 months each from October 2015 to August 2017. He has unsuccessfully appealed to the Minister of Public Infrastructure, Land and Transport.

Mr Subosh confirms to you that he has admitted before the disciplinary committee that he was not the main driver for the specified 3 periods of time. However, he also explains to you that in view of the poor health of his wife and elder child, he often had to accompany them to the hospital. During that period, his neighbour, Mr Robertson replaced him as driver of the taxi car. In addition, he has never at any stage been given any warning by the Road Transport Inspector. He considers that the sudden revocation of the licence is a harsh, unfair, unjustified and disproportionate sanction.

In an attempt to avoid court litigation, you write a letter to the NTA informing them of your client's grievances. By return letter, the NTA informs you that the charges were based on enquiries carried out by its Road Transport Inspectors and that the NTA has evidence that the insurance, registration fees and repairs to the car were paid for by Mr Robertson.

However, the NTA has refused to provide you with any evidence which may be in its possession.

Mr Subosh would like to challenge the decision of the Minister rejecting his appeal and maintaining the decision of the National Transport Authority to revoke his licence.

- (a) Advise Mr Subosh as to the exercise of any remedy he may have by way of judicial review, setting out the grounds and reasons in support of his application.
- (b) Identify the procedural steps involved.