**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**
**Sub Registry, San Fernando**

**H.C.A. No. S-1680 of 2003**

**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO CHAPTER 1:01 OF THE REVISED LAWS OF TRINIDAD AND TOBAGO**

**AND**

**IN THE MATTER OF THE GUARANTEE OF FUNDAMENTAL RIGHTS AND FREEDOM PART 1 OF THE SAID CONSTITUTION**

**AND**

**IN THE MATTER OF AN APPLICATION BY FIREFIGHTER MICHAEL DINDAYAL FOR REDRESS PURSUANT TO SECTION 14 OF THE CONSTITUTION AND IN PARTICULAR SECTION 4(B) AND (D) IN RELATION TO THE APPLICANT WHOSE RIGHTS FOR EQUALITY BY THE LAW AND THE PROTECTION OF THE LAW AND EQUALITY OF TREATMENT FROM A PUBLIC AUTHORITY IN THE EXERCISE OF ITS FUNCTIONS HAVE BEEN AND CONTINUE TO BE INFRINGED AND VIOLATED BY THE STATE IN THE FORM OF THE TRINIDAD AND TOBAGO FIRE SERVICE, THE CHIEF FIRE OFFICER**
**AND THE PUBLIC SERVICE COMMISSION**
**AND**

**IN THE MATTER OF THE CONTINUED DISCRIMINATION AND/OR EQUAL AND/OR UNFAIR TREATMENT OF THE APPLICANT BY VIRTUE OF THE CONSTITUTION**
**DENIAL, FAILURE AND/OR REFUSAL OF TO PAY THE APPLICANT THE QUALIFYING EXAMINATION ALLOWANCE**

**AND**

**IN THE MATTER OF THE ENFORCEMENT OF FUNDAMENTAL HUMAN RIGHTS AND FREEDOM PURSUANT TO SECTION 14 OF THE CONSTITUTION AND ORDER 55 OF THE RULES OF THE SUPREME COURT**

**BETWEEN**

**MICHAEL DINDAYAL**

***Applicant***

**AND**

**THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO**

***Respondent***

**********

**Before**: The Honourable Madame Justice Dean-Armorer

**Appearances**: Mr. Anand Ramlogan assisted by Mr. Narendra Lalbeharry for the Applicant.
Ms. Ann Marie Rambarran assisted by Ms. Cielto for the Respondent.

**Date delivered:** 1st December 2005

# JUDGMENT

***Introduction:***

In this Constitutional Motion, the Applicant, is a fire-fighter with some twenty three (23) years of service in the Fire Service of Trinidad and Tobago.

The Applicant alleges that ss. 4(a), (b), (d) and 5 (2) (h) of the ***Constitution*** have been contravened in relation to him by the continued denial of the administration of the Fire Service to give him an allowance termed the Qualification Examination Allowance (Q.E.A.) which was payable by virtue of a 1991 Cabinet decision.

In this matter, the Court was required to consider whether the proof of *mala fides* ought to be a necessary element of a claim that either s. 4(b) or s. 4(d) of the ***Constitution*** has been infringed.

***Brief History of Proceedings***

1. By Notice of Motion filed on the 19th September 2003, the Applicant, Michael Dindayal, sought redress under s.14 of the ***Constitution***, and alleged that ss.4(b) and (d) and section 5(2) (h) of the ***Constitution*** had been contravened in relation to him.

2. The Applicant has sought the following declarations and relief:
    a) *A declaration that the Chief Fire Officer and/or the Public Service Commission ("P.S.C.") as agents of the State has treated the Applicant unequally and/or unfairly and has discriminated against him in contravention of Section 4 (b) and/or (d) of the Constitution.*

b) *A declaration that the Applicant's right to the enjoyment of his property and the right not to be deprived thereof except by due process of law has been and continues to be contravened.*

c) *A declaration that the qualifying examination allowance is payable to all fire officers holding office in the Second Division of the Fire Service of Trinidad and Tobago who have qualified for promotion via the Institute of Fire Engineers.*

d) *A declaration that the Applicant is entitled to be paid the qualifying examination allowance in accordance with the Memorandum dated 18th day of October 1991 from the Permanent Secretary, Ministry of Justice and National Security.*

e) *Damages.*

f) *Costs.*

g) *All such further Orders, Writs, directions and reliefs as may be appropriate or necessary for enforcing or securing the enforcement of the fundamental rights and freedoms guaranteed to the Applicant under Section 4(b), 4(d) and 5(2) (h) of the Constitution as the nature of the case and justice may require.*

3. The Applicant has also identified the following as the grounds upon which his application was based:

    a) *The Applicant is a firefighter with over twenty three (23) years experience having enlisted for service in February, 1980;*

    b) *The Applicant is qualified for promotion to the ranks of Fire Sub-Officer and Fire Sub-Station Officer;*

    c) *There has always existed in the Fire Service of Trinidad and Tobago a settled practice and/or policy that accepts qualifications from the Institute of Fire Engineers as satisfying the requirement for promotion to ranks within the Second Division which include Firefighter, FSO and FSSO;*

d) *This practice/policy was recognized, codified, incorporated expressly adopted in the Fire Service (Terms and Conditions of Employment) Regulations 1998 – see Regulations 6-8;*

e) *The right to equality of treatment from a public authority in the exercise of its functions as guaranteed by Section 4 of the Constitution of Trinidad and Tobago includes the right to equality in matters on public employment by the State. This is a corollary and incident of the application of the concept of equality to all officers employed by the State, including those in the fire service and in particular, the Applicant;*

f) *The Chief Fire Officer was authorized to pay a "Qualifying Examination Allowance" to officers in the Second Division of the Fire Service of Trinidad and Tobago who had qualified for promotion to the next higher rank but had not yet been promoted;*

g) *The Applicant has to date been denied his entitlement to payment of the qualifying examination allowance despite being qualified for promotion to the rank of FSO and FSSO;*

h) *The Chief Fire Officer has unlawfully and arbitrarily taken a decision not to pay the qualifying examination allowance to officers who have qualified for promotion via the Institute of Fire Engineers;*

i) *This failure of and/or refusal by the Chief Fire Officer to pay the Applicant a qualifying examination allowance amounts to discrimination, inequality of treatment and violates his constitutional rights under Section 4(b) and/or (d) of the Constitution.*

j) *The Applicant has been treated in an arbitrary, unequal and unfair manner because he performs the same job but receives an inferior remuneration package despite being equally qualified for promotion.*

4. After having been adjourned several times with the usual directions for the filing of affidavits and written submissions, hearing of this application began on the 17th May 2005.

5. On the first day of hearing, learned Counsel for the Applicant sought and obtained the Court's leave, with the consent of learned Counsel for the Respondent for the amendment of his Notice of Motion.

6. The amended Notice of Motion included the following plea at paragraph (g) of the grounds:

> *"This qualifying examination allowance amounts to property within the meaning of s. 4(a) of the Constitution and the continuing denial of this Applicant's right to the enjoyment of his property without due process of law contrary to s. 4(a) of the Constitution."*

**FACTS**

***The Evidence***

The totality of the evidence in this matter consisted of three affidavits:

- the supporting affidavit of the Applicant, Michael Dindayal. This affidavit was sworn by the Applicant and filed herein on the 19th September 2003;
- the affidavit sworn by John Springle, on the 23rd April 2004 and filed herein on the 26th April 2004;
- affidavit of the Applicant filed on the 2nd July 2004 in reply.

***The Affidavit of the Applicant***

1. In his supporting affidavit, which bears the filing stamp of the 19th September 2003, the Applicant deposed that he was an officer of the Second

Division of the Fire Service of Trinidad and Tobago, that he had more than twenty-three (23) years of service and that he had never been promoted.

2. At paragraph 6 of his affidavit, the Applicant testified that at the time of his recruitment in the fire service, there were two (2) routes by which an officer could become qualified for promotion. According to the applicant the two routes were:
    - success in the local examination set by the Promotion Advisory Board of the Public Service Commission. The Applicant cites Regulation 150(2) of the ***Public Service Commission Regulations.***
    - The second route, by which according to the Applicant, a Fire Officer could become qualified for promotion was by success in the examination leading to the Preliminary Certificate from the Institute of Fire Engineers (*"the I.F.E."*) in the United Kingdom.

3. Paragraph 7 of the Applicant's affidavit reinforces his earlier submission and at paragraph 8, the Applicant deposes, with no objection from the learned Counsel for the Attorney General, that the settled practice was codified in the 1998 Regulations. In the sole affidavit filed on behalf of the Respondent Attorney General there is no denial of the existence of the settled practice as alleged by the Applicant.

4. At paragraph 9 and 10 the Applicant extracts in full the contents a memorandum which was sent from the Ministry of Justice and National Security to the Chief Fire Officer. This memo has been referred to by the Chief Fire Officer as *"the Authority".* I have considered it later in this judgment.

5. At paragraph 11 of his affidavit, the Applicant deposes that Fire Officers who have passed the local examination have received the Q.E.A since

October 1991. The query of Fire Officer Sookhansingh as to the apparent discrimination has been exhibited by the Applicant as *"M.D. 3"*.

6. The Applicant stated that at paragraph 15 that he holds the Preliminary Certificate from the I.F.E. and as such is eligible for promotion.

7. The Applicant has itemized and exhibited his numerous ancillary qualifications as well his numerous letters of commendation.

***Affidavit for the Attorney General***

1. In his affidavit, Fire Station Officer John Springle after testifying as to preliminary matters, quoted the points agreed upon by Cabinet in Cabinet Minute 1738 of 30th September 1991 (the 1991 Cabinet Minute). At paragraph 8, this deponent made the following assertion:

> *"One can qualify for promotion by passing the written examinations set by the Public Service Commission…."*

Although Mr. Springle is silent as to the premise of his assertion, it appears to have been based on his interpretation of the 1991 Cabinet Minute.

2. At paragraph 9 of his affidavit, Mr. Springle alluded to the two allowances, the Qualification Allowance ("the Q.A.") and the Q.E.A. Of these, Fire Station Officer Springle testified:

> *"The payment of the Qualification Allowance and the Qualifying Examination Allowance were intended as a form of compensation to officers who have qualified for membership of the Institution of Fire Engineers and for firemen who have passed promotional exams in*

*the second division and who have not received promotions three (3) years after passing the examination."*

3. At paragraph 10 of his affidavit, Mr. Springle proffered the view that the Applicant was not qualified to receive the Q.E.A. *"….because he did not sit the written examination set by the Public Service Commission Examinations Board…."*. This deponent has omitted to identify the foundation of his assertion at paragraph 10. This assertion is consonant with that expressed by the Chief Fire Officer in his memo to Fire Officer Sookhansingh on 29th November 2002, that is to say that "the qualifying examination" referred to in the 1991 Cabinet Minute was a reference to one examination, which did not include the examination of the Institute of Fire Engineers.

4. At paragraph 11, Mr. Springle itemizes officers who have passed both examinations, in support of his assertion that officers who are duly qualified may receive both allowances.

5. At paragraph 12, Mr. Springle exhibits the Memorandum of Agreement between the Chief Personnel Officer and the Fire Services Association. This deponent testified that the effect of the Memorandum of Agreement is to increase by forty eight (48%) percent the Qualification Allowance payable to holders of a Certificate of the I.F.E.

6. At paragraph 16 of his affidavit, Fire Station Officer Springle provides extracts from the Chief Fire Officer's response to the Applicant's query of the 28th August 2003. This Memorandum, which I have considered more fully later in this judgment, repeats and reinforces the view which the Chief Fire Officer has expressed in his earlier memorandum to Fire Officer Sookhansingh.

7. At paragraph 17 of his affidavit Fire Station Officer Springle confirmed that an officer's success in the foreign examination is a factor which is considered in assessing his qualification for a promotion.

8. At paragraph 21, Fire Station Officer Springle confirmed that the Applicant was both qualified and recommended for promotion, but had failed to apply within the stipulated time.

***Affidavit of the Applicant in Reply***

This affidavit was filed on the 2nd of July 2004. At paragraph 3, the Applicant deposed that ***"****the qualifying examination****"*** in the context of the 1991 Cabinet Minute referred to the practical examination set by the Public Service Commission. The Applicant deposed that he had passed the practical examination in 1986.

It is significant that this evidence has been neither contradicted by another affidavit nor challenged in cross-examination. There was no objection on behalf of the Respondent to the admissibility of the Applicants explanation of a Cabinet Minute. For the purpose of this application therefore, I am constrained to accept paragraph 3 of the Applicant's affidavit in reply as admitted.

***Summary of the Facts***

There was no cross-examination in this matter. In fact, the Respondent has not denied any of the factual assertions of the Applicant. Instead, the Respondent has referred to the Cabinet decisions by which the Q.E.A. was

recognized by Government and provided the Court with the interpretation which the Fire Service has placed on it.

The following are the salient facts which I regard as having been proved on a balance of probabilities and in respect of which the law must be applied in this matter:

1) The Applicant, by virtue of his seniority and his success in examinations is qualified for promotion. This is the unequivocal admission which was made at paragraph 21 of the affidavit which was filed on behalf of the Respondent.

2) At present a fire officer becomes qualified for promotion by satisfying the requirements of Regulation 6 of the ***Fire Service Regulations (Terms and Conditions of Employment)*** **1998** ***("the Regulations").***

3) It has been established on the evidence that prior to the existence of the ***1998 Regulations***, there was in existence a settled practice whereby a Fire Officer became qualified for promotion by being successful at two (2) examinations:
    - a theoretical examination; and
    - a practical examination.

   The practical examination was locally set and offered. However, the fire office could satisfy the theoretical requirement by passing either an examination offered by the Public Service Commission Examination Board or by obtaining a certificate from the I.F.E. in the United Kingdom.

4) The Applicant has passed both a theoretical examination, the one offered by the I.F.E. and the practical examination, set by the Public Service Commission. This has not been denied by the Respondent.

5) Prior to 1998, there existed a settled practice, once again with no denial by the Respondent, that two routes were available by which a Fire Officer became qualified for promotion. The settled practice was codified in the ***Fire Service Regulations, 1998.*** In my view it is critical to observe that in the affidavit filed on behalf of the Respondent, there was no denial of the Applicant's allegations that he had been successful in both the theoretical and the practical examination.

6) In 1991, Cabinet reviewed the allowance, termed the Q.E.A., and decided that it should be "payable" to fire officers, who had passed "the qualifying examination" but had not been promoted for three (3) years.

7) The Applicant contends that fire officers who have passed the local examinations had been receiving the Q.E.A. since 1991, whereas officers who were qualified for promotion via the I.F.E. have been continuously denied payment.

***The Cabinet Minutes: the 1970 Cabinet Minute***

Two allowances, that is to say the "qualification allowance…" and the "qualifying examination allowance…" were recognised by Cabinet in its Minute 791, dated 9th April, 1970. There is no evidence as to the genesis of these allowances, which quite clearly pre-dated the 1970 Cabinet decision.

The Note for Cabinet, presented to Cabinet by the Ministry of Home Affairs in April 1970, referred to negotiations in respect of allowances payable to the Fire Services.

The Note for Cabinet recorded that the agreement in principle that payment should be for skill instead of rank.

Paragraph 5 of the Note for Cabinet, noted the introduction of five (5) new allowances, which included:

- the qualification allowance, and
- the Q.E.A..

Paragraph 6 of the Note for Cabinet explains the rationale for these two (2) allowances, as follows:

> *"Payment of the Qualification Allowance and the Qualifying Examination Allowance is intended as a form of compensation for membership of the Institution of Fire Engineers and for the firemen who have passed promotional examinations in the Second Division and have not received promotions three (3) years after passing the examination...."*

The Note for Cabinet in fact sought Cabinet's approval in respect of new rates for proficiency and housing allowances for fire officers.

Attached to the Note for Cabinet is a Schedule of Posts and Allowances. The Schedule shows Qualification Allowances payable in respect of various qualifications from the Institute of Fire Engineers. An officer who, like the Applicant, held the preliminary certificate from the Institute of Fire Officers was originally entitled to a monthly allowance of fifteen dollars ($15.00). The Schedule shows that by an Agreement reached in negotiation, the Qualification allowance would remain the same ($15.00). According to the evidence of Mr. Springle, there is now an agreement that the allowance would be increased by 48%.

The Q.E.A. appeared under a separate head. The sum originally proposed by the Fire Services Association was one increment. The proposal was accepted in negotiations and submitted for Cabinet's approval.

Cabinet Minute No. 791, dated 9th April 1970, reflected Cabinet's agreement to increase rates in respect of the proficiency and the housing allowances.

The issue of the Q.E.A. was revisited by Cabinet in 1991. Cabinet considered Note for Cabinet dated September 1991 (the Second Note for

Cabinet.) which is exhibited herein as *"J.S. 1"* and by which Cabinet was asked to review the Q.E.A.

This Note for Cabinet is instructive in providing a record of Government's understanding of the Q.E.A. and the officers who it was originally designed to compensate.

Paragraph 2 of the second Note for Cabinet, records the following:

> *"Following discussions between the then Ministry of Home Affairs and the Fire Service Association Cabinet…approved an agreement reached with the Association for the introduction, among other allowances of a Q.E.A. with retroactive effect from January 1st 1970; payment of this allowance being intended as a form of compensation to officers who had passed promotional examinations….but had not been promoted within three (3) years after passing the exam."*

By the Second Cabinet Minute, the Fire Service Association requested that the rate of the Q.E.A. be reviewed.

At paragraph 7 of the Note for Cabinet, the Prime Minister recommended and Cabinet was asked to agree inter alia:

> *"where a fire officer in the Second Division is not promoted within three (3) years after passing the qualifying examination for promotion, he shall be paid the Qualifying Examination Allowance as from the third anniversary of the date of the examination…."*

This recommendation was accepted by Cabinet, whose agreement was reflected in Cabinet Minute dated 30th September 1991 and exhibited herein as *"J.S. 1"*.

Additionally, Cabinet agreed as follows:

> *"(b) the Qualifying Examination Allowance shall be equal to the first increment payable in the officer's salary range;*

*(c) payment of the Qualifying Examination Allowance shall cease with effect from the date of promotion of the officer concerned;*

*(d) if on the date of his retirement from the Trinidad and Tobago Fire Service an officer in the Second Division has been in receipt of a Qualifying Examination Allowance for not less that three (3) years, the Allowance shall be regarded as part of the officer's salary for the purpose of computing his gratuity and pension."*

***Memoranda of the Chief Fire Officer***

It was an interpretation of the 1991 Cabinet Minute which formed the premise on which the Chief Fire Officer responded to the Applicant in the Memorandum dated 19th March 2004. This memorandum, large extracts from which have been placed in the affidavit of John Springle, is exhibited herein as *"J.S. 5".*

In this memorandum which post-dated the constitutional motion, the Chief Fire Officer advised that there be a dissociation of the authority for payment of the Qualifying Examination Allowance from ss.6 (a) and (b) of the ***Fire Service Regulation*** of 1998.

The Chief Fire Officer referred to the authority for payment of the Q.E.A. in the following terms:

*"The authority for payment is clear in its prescripts and states that where an officer in the Second Division…….is not promoted within three (3) years after passing the qualifying examination for promotion, the said officer shall be paid the Qualifying Examination Allowance as from the third anniversary of the examination….."*

The Chief Fire Officer in the ensuing paragraph made the following inference:

*"I wish to state categorically that the qualifying examination for promotion mentioned above refers specifically to the Public Service Commission – set promotion examination and not any other examination which has been adopted as an alternate criteria for promotion…."*

It is not clear what this assertion is based on. However, the Chief Fire Officer, in agreement with the contentions for the Applicant, makes the following assertion:

*"The payment of the Qualifying Examination Allowance…..goes way back before 1977 when the Institute of Fire Engineers certification was adopted as an alternate criterion for promotion…."*

The memo of the Chief Fire Officer continued:

*"At this point I wish to impress upon you the fact that the Institution of Fire Engineers…..never established their Preliminary Certificate Examination specifically to serve as "the" qualifying examination for promotion of officer in the Trinidad and Tobago Fire Service. As stated earlier, in 1977, it was adopted by Cabinet as an alternate criterion for the promotion of local officers. May I remind you that after its adoption, personnel including your good self, who hold the related Institute of Fire Engineers Certificate are being paid a qualification allowance."*

The Chief Fire Officer then construed the mandate of the Chief Personnel Officer:

*"Of even more importance is the fact that in the authority (Chief Personnel Officer's) the definite article "the" has been used before the words "qualifying examination for promotion", and in the context it could never be applicable to any other qualifying examination (or criterion) for promotion. If however an officer was successful at*

*another qualifying examination and the same benefit was intended for payment, the indefinite ("a") would have certainly been used…."*

***Memorandum from the Chief Fire Officer to Fire Officer Sookhansingh***

This document pre-dated the Constitutional Motion herein. It constitutes the response of the Chief Fire Officer to Firefighter Sookhansingh's query in respect of the Qualifying Examination Allowance. A copy of this document is exhibited by the applicant as *"M.D. 3"*, and is essentially the same in content as the memorandum which was addressed to the Applicant.

In his memorandum, the Chief Fire Officer referred to the "Authority for Payment". The Authority is itself exhibited herein by the Applicant as *"M.D. 2"*. The Authority is stated by the Chief Fire Officer to have been annexed to his Memorandum of the 29th November 2002.

The Chief Fire Officer engaged in the very exercise in construction in which he engaged in the later memo to the Applicant. It is useful to set it out verbatim:

> *"In essence, the Authority (from the Permanent Secretary, Ministry of National Security to the Chief Fire officer dated 20th October 1991) makes provision for an officer who is not promoted within three (3) years after passing the qualifying exam for promotion to receive the Qualifying Examination Allowance. As you will know since the definite article "the" has been used before the words "qualifying examination for promotion…." it could never be applicable to any other qualifying examination (or criteria) for promotion….".*

The Chief Fire Officer ended his letter by stating emphatically that the "Authority of Payment" of the related allowance cannot be used for payment in relation to any other criterion except that which is mentioned/referred to in section 6(a) of the ***Fire Service Regulation.***

***The Authority for Payment***

The document referred to by the Chief Fire Officer as *"the Authority for Payment…."* is a memorandum dated the 18th October 1991, from the Permanent Secretary, Ministry of Justice and National Security to the Chief Fire Officer and is stated to be on the subject of the *"Review of the Qualifying Examination Allowance payable to the Officers of the Trinidad and Tobago Fire Service…."*

The "Authority" contains no more than a brief reference to earlier correspondence and a reproduction of Cabinet's decision as recorded in Cabinet Minute 1738 of the 30th September 1991.

***Issues***

The following issues arise for my determination:

1. whether on a proper construction of the 1991 Cabinet Minute, it was the intention of Cabinet to pay the qualification allowance to all officers who had passed the practical examination regardless of whether the officer had passed the local theoretical examination;
2. Conversely, whether it was Cabinet's intention to exclude fire officers, who were otherwise qualified for promotion by virtue of a certificate from the Institute of Fire Engineers rather than from the local examiner.

3. Whether, on a proper construction of the ***Fire Services Regulations*** 1998 officers who hold the preliminary certificate of the Institute of Fire Fighters are equally

qualified for promotion as those who achieved their qualification by passing the local examination.

4. If the answer to (3) is in the affirmative, whether the officers who now receive the Q.E.A. may properly be used as comparators in respect of the entitlement of the Applicant and those who hold the preliminary Certificate of the Institute of Fire Engineers;

5. If the answer to (4) is in the affirmative whether the Applicant has received less favourable treatment then that meted out to the comparator.

6. Whether, having regard to recent jurisprudence, *mala fides* is an essential ingredient in proving a breach of s. 4(d)[1].

7. Whether there has been in respect of the Applicant a contravention of his rights as enshrined at ss.4(a), (b) and/or (d)[2].

**SUBMISSIONS**

1. In this matter, Counsel filed written arguments which were supplemented by oral submissions.

[1] Section 4(d) of the Constitution
[2] Sections 4(a), (b) and/or (d) of the Constitution.

2. In his written arguments, filed on behalf of the Applicant on the 21st April 2005, learned Counsel, Mr. Ramlogan, identified the following as the issue before the Court:

> *"The issue is whether the State is justified in discriminating against the Applicant by reason of its continuing failure and/or refusal to pay him the Qualifying Examination Allowance"* (paragraph 2).

3. Learned Counsel in arguing that the Applicant was similarly circumstanced with fire officers who had passed the local examination submitted:

> *"The accent is on whether they are legally qualified for promotion within the second division...."*

4. Learned Counsel cited the recent authority of ***Bhagwandeen v Attorney General,*** P.C. 45 of 2003, in support of the rule that the litigant who would prove discrimination must show that he received treatment which was less favourable than treatment enjoyed by persons in similarly circumstances. It was the clear contention of learned Counsel that the Applicant, having satisfied conditions imposed by Cabinet for the payment of the Q.E.A., was standing in circumstances similar to officers who were in fact receiving the allowance.

5. Learned Counsel quoted Justice of Appeal Mendonça in ***CBS and the Maha Sabha v the Attorney General*** C.A. 16 of 2004 as authority for submitting:

> *"Alleged differences which separate and distinguish the comparators must be carefully examined."*

6. At paragraph 8, learned Counsel submitted that the comparator is someone who is qualified for promotion and who has not been promoted within three (3) years after passing the qualifying examination.

7. Learned Counsel argued that the Chief Fire Officer's interpretation of Cabinet's directive was incorrect. However, argued learned Counsel, even if the Chief Fire Officer's interpretation of the Cabinet directive was correct, Cabinet's decision would be discriminatory and in violation of the Applicant's rights under ss. 4(b) and (d) of the ***Constitution***.

8. In the course of his arguments against the need to prove *mala fides* in support of an allegation under s. 4(b), learned Counsel, Mr. Ramlogan extracted select passages from the three (3) appellate judgments in ***CBS and the Maha Sabha v the Attorney General***[1]**.** These are quoted later in my judgment.

9. Learned Counsel then proffered his own view on behalf of the Applicant, that the proof of *mala fides* was not a necessary ingredient in establishing a contravention under s. 4 (b)[2].

10. Learned Counsel has submitted that the Court of Appeal erred in so holding in the cases of ***K.C. Confectionery v the Attorney General***[3] and ***Smith v Williams***[4] and citing cited ***Bissessar v the Attorney General***[5] and argued that the Indian jurisprudence was misunderstood and mis-applied in earlier local cases.

11. Learned Counsel drew a distinction at paragraph 31 of his skeleton arguments, between "differential treatment" and unequal treatment submitting that the former was transformed into the latter where it was shown to be "…arbitrary, illogical and unreasonable…."

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[1] ***CBS and the Maha Sabha v the Attorney General*** – C.A. 16 of 2004
[2] Section 4(b) of the Constitution.
[3] ***Attorney General v K.C. Confectionery*** (1985) 34 W.I.R. 387.
[4] ***Smith v L.J.Williams*** [1980] 32 W.I.R. 395.
[5] ***Khemraj Bissessar v the Attorney General*** – H.C.A. No. S-490 of 1998

12. Learned Counsel commended to the Court an objective test in determining whether discrimination has occurred.

13. Learned Counsel also cited the House of Lords decision in ***Nagaranjan v London Regional Transport***[5] [1999] 4 A.E.R. 65, in which it had been held that *"conscious motivation"* of less favourable treatment was not necessary.

14. Learned Counsel also quoted Lord Nicols of Birkenhead as observing that direct evidence of discrimination *"will seldom be forthcoming...."*[1] and commented that the grounds of the decision would have to be inferred from surrounding circumstances.

15. Learned Counsel also cited ***Equal Opportunities Commission v Birmingham CC.*** [1989] 1A.E.R. 769/774 and ***Jameson Eastleigh BC*** [1990] 2AC 751.

16. Learned Counsel argued that s.4 (d) was a separate and independent right from s. 4 (b). In arguing that *mala fides* are not required under s. 4(d), learned Counsel alluded to the watershed case of ***Thomas v the Attorney General*** [1981] 32WIR 375, and to Lord Diplock's observation that:

> *"Dismissal of individual members of a public service at whim is the negation of equality of treatment...."*

17. It was the argument of learned Counsel for the Applicant that the available local authorities on inequality of treatment all pertain to s. 4(b) and that notwithstanding the absence of proof of mala fides, it was open to me to find in the Applicant's favour under s.4(d). Learned Counsel once

[1] ***Nagarajan v London Regional Transport*** [1999] 4 All E.R. 65 at p. 71a

again commended to the Court the learning of Justice Rajnauth-Lee in ***Bissessar v the Attorney General***.[1]

18. Learned Counsel suggested as well that his case fell within the second limb of the formulation of Justice of Appeal Persaud in ***K.C. Confectionery v the Attorney General*** of the *"deliberate and intentional exercise of power...."*[2]

19. In his submissions in reply, and at the insistence of the Court, Mr. Ramlogan produced authorities in support of his submission that the Applicant has suffered a breach of his rights under s. 4 (a) of the ***Constitution.***

**SUBMISSIONS ON BEHALF OF THE RESPONDENT**

1. On behalf of the Attorney General, learned Counsel, Ms. Rambarran submitted two sets of skeleton arguments. The first Skeleton Argument was filed on 17th May 2005 and the second was not filed but passed to me in open Court. Mrs. Rambarran opted to abide by her written argument and made no oral submission.

2. Learned Counsel has submitted, as a matter of law that one can qualify for promotion in the fire service by passing the written examination which is set by the Public Service Commission and which is known as the qualifying examination. This submission was made without reference to the uncontradicted assertion in the Applicant's affidavit filed on the 2nd July 2004 in Reply to the affidavit of John Springle.

[1] ***Khemraj Bissessar v AG*** – H.C.A. No. S-490 of 1998.
[2] ***AG of Trinidad and Tobago v K.C.Confectionery*** (1985) 34 W.I.R. 387 at 405a.

3. It has been contended by Learned Counsel, Ms. Ramberran that the Applicant, not having taken the examination set by the Public Service Commission, has not passed it.

4. At paragraph 11 of her written submissions learned Counsel argued that the Authority for payment of the Qualifying Examination Allowance should be dissociated from the criteria for promotion at ss. 6 (a) and (b) of the Fire Service Regulations.

5. Learned Counsel has referred to and extracted Regulations 158 – 159 of the ***Public Service Commission Regulations***.

6. As part of her submission at paragraph 13, learned Counsel has borrowed the exact words of the memorandum from the Chief Fire Officer to the Applicant.
7. Learned Counsel has also borrowed portions of the affidavit of John Springle for use in her submissions.

8. Learned Counsel, relying on the local authorities has argued that the Applicant has failed to show that he was similarly circumstanced to those who now receive the Q.E.A.

## Law

### 1. *Fire Service (Terms and Conditions of Employment) Regulations, 1998. ("the Regulations")*[1]

***Regulation 6*** provides for the appointment of the Fire Sub-Officer (FSO):

[1] Fire Service (Terms and Conditions of Employment) Regulations 1998. L.N. 267 of 1998.

*"A candidate for appointment to the office of Fire Sub Officer shall be:*

a. *a person appointed to the office of Fire-fighter with four (4) or more years in the Service who has passed a job related written examination and a practical examination conducted for that purpose by the Examination Board; or*
b. *a person appointed to the office of firefighter with four (4) or more years in the Service who holds the preliminary Certificate of the Institute of Fire Engineers and who has passed a practical examination conducted by the Examinations Board.*

The Term "examinations board" is defined at regulation 14(1):

*"An Examinations Board" appointed in writing by the Minister shall:*

a) *set and conduct at least once a year the examination which is to be passed by an officer prior to appointment to an office in the service, and*
b) *assess each examination paper submitted…"*

***Regulation 7*** provides:

*"A Candidate for appointment to the office of Fire Sub-Station officer shall be a person holding the office of Fire Sub-Officer with at least seven (7) years in the Service and who:*

1. *has passed a job-related examination …. by the Examinations Board, or*
2. *holds the preliminary certificate of the Institution of Fire Engineers…."*

## 2. *Fire Service Act*[1]

[1] Fire Service Act Ch. 35:50

Section 34 of the ***Fire Service Act*** empowers the President to make Regulations for giving effect to the Act. Included as one subject area of such regulations was:

*"(a) for prescribing the terms and conditions of employment of the Fire Service"*

### 3. *Public Service Commission Regulations*[1]

Prior to 1998, the issues of appointments, promotions and transfers and the discipline of officers in the Fire Service had been addressed at Regulations 146 to 163 of the ***Public Service Commission Regulations***[1].

By Regulation 150, there is established a Promotions Advisory Board:

***"150.*** *(1) A Promotions Advisory Board is established which shall consist of –*

a. *member of the Commission selected by the Commission who shall be chairman;*
b. *the Deputy Chief Fire Officer; and*
c. *one Divisional Officer nominated by the Chief Fire Officer*

*(2) A fire officer in the Second Division may apply to the Promotions Advisory Board to take any promotion examination when he has been in the Service for at least four years and subject to sub-regulation (3) but the qualifying period of four years may be waived where such fire officer is in possession of the educational qualifications equivalent or superior to the qualifications prescribed in any regulations made under the Fire Service Act.*

*(3) In order to determine whether a fire officer in the Second Division who applies to take a promotion examination is a suitable candidate to take the*

[1] Public Service Commission Regulations Ch. 1:01

*examination, the Promotions Advisory Board shall examine the record of every such fire officer.*

*(4) A fire officer who is successful in the promotion examination held by the Examination Board shall be interviewed by the Commission and shall be placed in order of merit based on performance in the examination and the interview.*

*(5) A fire officer who is successful in the promotion examination for appointment to an office in the Service shall be interviewed jointly by the chairman of the Promotions Advisory Board, by a member of the Examination board nominated by such Board and by the Chief fire Officer and shall be placed in order of merit based on performance in the examination and the interview."*

The Public Service Commission Regulations, which related to the Fire Service were expressly revoked in 1998.

By the ***Public Service Commission (Amendment) (No. 2) Regulations*** of 1998, Chapter XII of the Public Service Commission Regulations was amended by the revocation of the entire Chapter and by the substitution of new regulations 146 to 164. These Regulations pertain to the Appointments, Promotions and Transfers, Confirmation, Resignation and Retirement of members of the Fire Service.

The following regulations are relevant to this matter:

- By regulation 4 of the Amendment Regulations, specified that Regulations applicable to officers of the Fire Service cease to have effect in relation to such officers "….on the commencement of the Fire Service (Terms and Conditions of Employment) Regulations 1998.

- The amended Regulation 146 includes the following definitions:

  "candidate" means a person who satisfies the qualifications in respect of an office.

  "eligible officer" means an officer who satisfies the qualifications of an office."

- Regulation 151 (1) of the Amended Regulations provides for filling vacancies in offices other than that of fire fighter. By Regulation 151 (1) and (2) the Chief Fire Officer is required to advise the Director of Personnel Administration of the existence of a vacancy.

- Regulation 158 itemises criteria for promotion. At Regulation 158 (1)":

  *"In considering eligible fire officers for promotion, the Commission shall take into account the experience, educational qualifications, merit and ability together with the relative experience of the officers…."*

- Regulation 160 of the Amended Regulations provides for the process of promotion:

  *"Where a vacancy in an office occurs, the Chief Fire Officer shall, after taking into account the criteria specified in Regulation 158, submit to the Commission –*

  *a) a list of eligible officers he recommends for promotion;*

  *b) a list of the eligible officers who are not being considered…."*

In my view two (2) features of the Amendment Regulations are noteworthy for the purpose of this Application:

- The Public Service Commission (Amendment) Regulations are linked to the 1998 Fire Service Regulations. The two sets of Regulations appear to have been designed to work in tandem.
- The process for promotion as prescribed at Regulation 160 of the Amendment Regulations is pegged to the issue of eligibility or qualification of the office. The Chief Fire Officer is required to recommend eligible officers. Eligibility is a necessary but insufficient criteria for promotion.

**LAW IN RESPECT OF PROPERTY**

**THE RIGHT TO PROPERTY**

1. Section 4(a) of the Constitution enshrines the right of the citizen to the enjoyment of property and the right not to be deprived thereof except by due process of law.

2. Justice of Appeal Davis, (as he then was) in the appeal by ***Patrice Kareem v the Attorney General***[1] considered the claim of the widow of Abdul Kareem who had been assassinated while in police custody, by a person who was never brought to justice by the police.

3. Justice Davis, with whom the other two (2) judges of appeal agreed, rejected the contention that property for the purpose of s. 4 (a) included the rights associated with the status of being married such as the right to maintenance and consortium.

[1] ***Patrice Kareem v Attorney General*** - C.A. No. 71 of 1987

4. Justice of Appeal Davis then referred to the formulation of Justice of Appeal Edoo in ***Samlal Bahadur v the Attorney General*** No. 197 of 1984:

> *"In my judgment, "property" within the meaning of s. 4 (a) of the Constitution includes tangible forms of real and personal property, but also has tangible forms such as social welfare benefits, public benefits and other things to which people are entitled by law and regulations."*

5. On the foundation laid by Justice of Appeal Edoo, in ***Samlal Bahadur***[1]***,*** Justice of Appeal Davis further extended the meaning of property in the context of s. 4(a) to *include "…..a cause of action or a chose in action…."* as *"a form of property that is to say and abstract intangible form of property…."*. The Court of Appeal held in ***Kareem v the Attorney General***, that the deliberate concealment by the police of the assailant of Abdul Kareem amounted to a deprivation of the widow's right to seek compensation under the ***Compensation for Injuries Act.*** See p. 26 of the unreported judgment.

6. In ***Hood-Caesar v the Attorney General***[2], Justice Ibrahim (as he then was) considered the contention that Government's suspension of the payment of cost of living allowances and of the increment or merit increases, resulted in the contravention of the Applicant's right under s. 4(a), of the ***Constitution***.

   Justice Ibrahim wrote:[3]

> *"The crucial question for determination in this matter is whether the Cost of Living Allowance and the incremental increase to which the Applicant is entitled constitute property within the meaning of s. 4(a) of the Constitution…."*

[1] ***Samlal Bahadur v Attorney General*** - C.A. No. 197 of 1984
[2] ***Bernadette Hood-Caesar v Attorney General*** – H.C.A. No. 3015 of 1987
[3] Supra at p. 16.

Similar to the issues in the present matter, the issues before Justice Ibrahim were firstly whether the incremental increase constituted property and *"….if the answer is yes, then the consequential question is whether the Applicant was deprived of this property without due process of law…."*[1]

At p. 17, the learned Judge formulated three (3) questions for his consideration, the first of which was whether the right to Cost of Living Allowance and increment is property. At. p. 17, Justice Ibrahim states:

> *"In my view increment is an increase of salary and once granted it becomes merged in salary and is part of it…."*[2]

Justice Ibrahim examined the leading authorities on the meaning of property including ***IRC v Lilleyman and ors.*** [1964], 7WIR 496 ***TICFA v Prakash Seereeram*** [1975] 27 WIR 329 and the ***Attorney General of Gambia v Jobe*** [1985] LRC 565, in which Lord Diplock held:

> *"Property in s. 18(1) is to be read in a wide sense. It includes choses in action such as a debt owed by a banker to his customer."*

At p. 20 of his unreported judgment, Ibrahim J held as follows:

> *"I hold therefore that the amount of Cost of Living Allowance that was withheld from the Applicant pursuant to Circular No. 5 is money and a debt that is due to the Applicant from the Government. Accordingly, it is property within the meaning of that term as used in s. 4 (a) of the Constitution."*[2]

**Law in Respect of Inequality of Treatment**

[1] Supra at p. 16.
[2] ***Bernadette Hood-Caesar v Attorney General*** – H.C.A. No. 3015 of 1987 at p. 17.

1. It is well known that the bill of rights at s.4 of our Republican Constitution recognizes and declares the existence of two differently framed rights of equality:

*"b) the right of the individual to equality before the law and the protection of the law…..and,*

*d) the right of the individual to equality of treatment from any public authority in the exercise of any function…."*

2. The Conventional starting point of any discussion of the Constitution equality provisions is the case of ***Smith v LJ Williams,***[1] which has traditionally been regarded as the *locus classicus* of the subject area.

The familiar facts of ***Smith v LJ Williams*** centered on the acts and omissions of the then Chief Immigration Officer, refusing applications which were brought by the applicant Company, LJ Williams, for work permits for foreign workers.

The words of Bernard J, as he then was, have resounded through the decades establishing two elements for a claim of inequality of treatment. The first element has been traditionally summarized as the requirement of similar circumstances.

Bernard J. having held that the right under s.4 (b) could be invoked in respect of legislation as well as administrative acts of officials stated:

> *"In so far as official acts are concerned the nub of the matter is…..that the section both guarantees and is intended to ensure that where parties are similarly placed under the law they are entitled to like treatment….."*[2]

This element has received the approval of their Lordships in ***Bhagwandeen v the Attorney General***:

[1] ***Smith v L.J. Williams*** [1980] 32 W.I.R. 395
[2] ***Smith v L.J. Williams*** [1980] 32 W.I.R. 395 at 411b.

> *"A claimant who alleges inequality of treatment or its synonym discrimination must ordinarily establish that the has been or would be treated differently from some other similarly circumstanced person or persons…."*[1]

The second element was the requirement that the applicant for constitutional relief establish the existence of *mala fides* on the part of the administrative official. The second element has suffered a less harmonious journey through jurisprudential history. An examination of the judgment of Bernard J will suggest that even then, Justice Bernard had reservations with the wholesale importation of the learning borrowed from India on equality provisions.

At p. 409, Justice Bernard (as he then was) is reported to have referred to the words of Mukherjea J, in the ***State of West Bengal v Anwar Ali Sankar*** [1952] 39 A.I.R. 75:

> *"The position is therefore that when the statute is not of itself discriminatory and the charge of violation is only against the official….the equal protection clause could be availed of ….but the officer would have a good defence if he could prove bona fides…."* (quotation from Mukherjea J in ***State of West Bengal v Sankar***)[2]

The learned Justice Bernard (as he then was) disagreed with this measure, holding that on account of the presumption of regularity in this jurisdiction the burden should be placed not on the official but on the applicant for constitutional relief.[3]

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[1] ***Bhagwandeen v Attorney General*** – P.C. 45 of 2003 para. 18, per Lord Carswell.
[2] ***Smith v L.J. Williams*** [1980] 32 W.I.R. at 409a.
[3] Smith v L.J.Williams [1980] 32 W.I.R. pages 409c.

The learned judge's ultimate finding on the right enshrined at s. 4 (b) is reported at p. 411 d:

> *"In my opinion, so long as it can be shown that the act was a hostile act or an intentional and irresponsible act, i.e. an act done deliberately and without justification that will be enough evidence to rebut the presumption of regularity…."*

In my view, it is possible to discern even in the formulation of Justice Bernard, an opening for the Court's departure from holding that *mala fides* were an essential ingredient in a claim under s. 4 (b). *Mala fides* were found to have motivated the Chief Immigration Officer in ***Smith v LJ Williams***[1]. The issue of *mala fides* was not discussed at the Court of Appeal, which endorsed the judgment of Bernard J and dismissed the appeal on behalf of the Attorney General.

For the purpose of this Application, it is pertinent to observe that at both the first instance and the appellate levels, the Courts granted declarations under both ss. 4 (b) and (d).

As observed by learned Counsel for the Applicant at p. 24 of his Skeleton Arguments, Bernard J, treated s. 4 (d) in the same way in which he treated s. 4(b), that is to say as requiring the two (2) elements of similar circumstances and *mala fides.*

The learned Judge's findings were again founded on the Indian and American cases, whose Constitution unlike that under consideration had only one equality provision.

### 3. *K.C. Confectionery v The Attorney General*[2]

The issue of *mala fides* was revisited and re-examined in ***KC Confectionery v the Attorney General*** [1985] 34 W.I.R. 387, in particular by

[1] Supra at page 413d
[2] ***K.C. Confectionery v AG*** [1985] 34 W.I.R. 387.

Justice of Appeal Persaud. ***K.C. Confectionery v the Attorney General*** has received the in depth consideration of the Court of Appeal in C.A. No. 12 of 1999 – ***PSC v the Attorney General and Wayne Hayde*** and more recently in ***Central Broadcasting Services and the Sanathan Dharma Maha Sabha v the Attorney General***.

The often cited facts of ***K.C.Confectionery v the Attorney General*** concerned the application by a confectionery company to have their goods placed on a negative list, thereby prohibiting imports by their foreign competitors.

When after one year the relevant Minister failed to reach a decision in respect of the application, the company K.C. Confectionery instituted proceedings claiming *inter alia* that their right under s. 4(d) had been infringed.

The learned trial judge upheld their claim. Twenty years later, their Lordships in ***Bhagwandeen v the Attorney General*** expressed an opinion endorsing the view of Deyalsingh J, on the issue of *mala fides.*

On appeal however, the Court of Appeal reversed the decision of Deyalsingh, J. Justice of Appeal Persaud started on the premise of the presumption of regularity and analysed the requirement of *mala fides* by holding that its proof was necessary when it was alleged:

> *"If this is correct then two situations may arise. If complaint is made that the official has been dishonest in the discharge of his duties or that he has acted out of spite towards the complainant clearly mala fides is alleged, in which event it must be proved.....If on the other hand the allegation is that the official merely contravened the law....All that needs to be proved.....is the deliberate and intentional exercise of power not in accordance with law which results in the erosion of the complainant's right...."*[1]

[1] ***Attorney General of Trinidad and Tobago v K.C.Confectionery*** [1985] 34 W.I.R. 387 at page 404h.

At, p. 405 (b), Justice of Appeal Persaud said:

> *"….proving mala fides must depend on the nature of the allegation being made."*[1]

**4. *Boodhoo and Anor v Attorney General of Trinidad and Tobago***[2]

In ***Boodhoo and Anor vs AG***, the Privy Council heard and dismissed an appeal against the refusal of the Court of Appeal and the High Court to make declarations under ss. 4 (a) (b) and (d) of the ***Constitution*** in respect of the Appellants.

The Appellants had been the unsuccessful parties to a land dispute. Their appeal to the Court of Appeal was heard and judgment reserved.

One of the Justices of Appeal died suddenly before judgement was delivered. Consequently there was a need for the appeal to be relisted. The Appellant made an unsuccessful application for assistance from the Attorney General. They then filed a Constitutional Motion

Their Lordships dismissed the appeal and endorsed the findings of Chief Justice de la Bastide (as he then was).

Chief Justice de la Bastide (as he then was) at p. 11 of 15 of the unreported judgement considered the claim of the Appellants that their rights under s. 4 (b) to equality before the law had been infringed. Chief Justice de la Bastide (as he then was) regarded it as *"well-established"* that proof mala fides were required[3]:

> *"It is to be noted that there are two rights separately stated in section 4 (b) i.e. the right to equality before the law and the right to the protection of the law. In the Constitution of the United States the two are amalgamated into a single right which is expressed as the right to 'the equal protection of the law'. It is well established that the right to equality before the law may be infringed either by legislature in making laws which discriminate between*

[1] Supra at p. 405 (b)
[2] ***Boodoo v Attorney General of Trinidad and Tobago*** [2004] 1 W.L.R. 1689.
[3] ***Boodoo v Attorney General of Trinidad and Tobago*** *C.A. No. 102 of 1999* at p. 11 of 15.

*persons on an irrational basis or by administrative action. It is also well established that if the complaint of infringement of this right is made with respect to administrative acts, then it is incumbent on the person complaining to establish some form of 'mala fides' in the person committing the act. In India, it has been said that that person must have acted "with an evil eye and an uneven hand". It has been accepted in Trinidad and Tobago that there must at least be some element of deliberateness in the selection of a person for different treatment. See e.g. Bernard J. in* ***Smith v. L.J. Williams Ltd*** *(1981) 32 W.I.R. 395 at 413 (d) and* ***The Attorney General v. K.C. Confectionery Ltd*** *(1986) 34 W.I.R. 387. Where the evidence as in the instant case, does not indicate that there has been any deliberate selection of the case in which the Court has been remiss in delivering judgement, but rather suggests that it is quite fortuitous that judgement has been delivering promptly in a number of other cases, but not in the one about which complainant in made, the element of 'mala fides' is absent and there is no infringement of the right to equality before the law. Although it does not appear to have been raised in* ***Jorsingh,*** *the same thing would apply in my view to any attempt to invoke the right enshrined in section 4 (d) to equality of treatment from any public authority."*

**5.** ***Mohanlal Bhagwandeen v Attorney General of Trinidad and Tobago*** - P.C. 45 of 2003

In this landmark decision, the Judicial Committee of the Privy Council considered the contention by a police constable that the refusal of the Commissioner of Police to recommend him for promotion contravened his rights and under s. 4(b) and (d) of the ***Constitution***. Charges against the applicant, Bhagwandeen had been dismissed and relaid. On account of the charges, the Appellant had been suspended for long periods of time. The Commissioner of Police refused to recommend him for promotion on the

ground of his lengthy suspension from duty. The Appellant named a number of officer who had been promoted after periods of suspension.

Lord Carswell who delivered the judgment on behalf of the Board identified the essential ingredient of a claim for inequality of treatment at paragraph 18:

> *"A Claimant who alleges inequality of treatment or its synonym discrimination must ordinarily establish that he has been or would be treated differently from some other similarly circumstanced person or persons described by Lord Hutton in* ***Shamoon v Chief Constable of the Royal Cluster Constabulary*** *[2003] 2AllER 26……as actual or hypothetical comparators."*

At paragraph 18, Lord Carswell's exposition continues:

> *"The phrase which is common to the anti-discrimination provisions in the legislation of the United Kingdom is that the comparison must be such that the relevant circumstances in the one case are the same or not materially different in the other…."*

At paragraph 18, Lord Carswell, stated that their Lordships rejected the suggestion that the actual comparator identified by the Appellant, Bhagwandeen was a true comparator.

At paragraph 20, his Lordship considered the requirement of *mala fides*, as instituted in ***Smith v J. Williams*** and entrenched by Persaud, JA in ***K.C. Confectionery v The Attorney General.***

Their Lordships expressed the need to consider detailed arguments before expressing a definite conclusion on the conclusions of the Court of Appeal in ***K.C. Confectionery***. On behalf of the Board, Lord Carswell then expressed the following inclination:

> *"Subject to that however, they are inclined to the view that there may have been a degree of confusion between the two distinct concepts, the presumption of regularity and the necessity for proof of deliberate intention to discriminate…."*

*"The need for proof of deliberate intention to discriminate is quite a different question. The Court of Appeal of Trinidad and Tobago accepted in* ***K.C. Confectionery Ltd. v Attorney General*** *that a party complaining of discrimination must prove, in the same terms as it was formulated in the US authorities, "intentional and purposeful" acts of unequal treatment. Persaud JA said at page 403 that the complainant must show a clear and intentional discrimination, "which in turn connotes mala fides". That this is not required in discrimination cases in the United Kingdom was established by the House of Lords in* ***James v Eastleigh Borough Council*** *[1990] 2 AC 751, when the majority preferred what Lord Lowry termed the causative to the subjective constructions and held that discrimination could be established even though the respondent council had not intended to discriminate between men and women. Accordingly the law of Trinidad and Tobago relating to discrimination by public officials may require further consideration in the light of these observations."*

**6.** ***Bissessar v the Attorney General*** – H.C.A. No. S-490 of 1998.

Learned Counsel has commended to the Court the reasoning of the Honourable Justice Rajnauth-Lee in the Constitutional Motion brought by Khimraj Bissessar against the Attorney General. The judgement of the Honourable Justice Rajnauth-Lee was among the first to be delivered following the pronouncement of their Lordships in ***Bhawandeen v the Attorney General***.

In ***Bissessar***, the Applicant, a prison officer, had been consistently by-passed for promotion. It had been his allegation that officers who were his inferiors in both merit and seniority had been promoted ahead of him.

## 7. *Central Broadcasting Services Ltd. and the Sanatan Dharma Maha Sabha v the Attorney General*[1]

The dictum of their Lordships in ***Bhagwandeen v the Attorney General*** was considered by the Court of Appeal in ***Central Broadcasting Services Limited and the Sanatan Dharma Maha Sabha v the Attorney General*** – C.A. No. 16 of 2004.

In brief, the facts in ***Central Broadcasting Services Ltd. and the Sanatan Dharma Maha Sabha -v- the Attorney General*** concerned the application by the Sanatan Dharma Maha Sabha to the Telecommunications Division of the Ministry of Information for a radio broadcasting licence in December 1999.

Having received no response, the Sanatan Dharma Maha Sabha decided to incorporate the first appellant, Central Broadcasting Services Ltd., which made a separate application on 1st September 2000.

Neither application was ever granted.

In April 2002, Citadel Limited made a comparable application, which was granted by October 2002.

The Honourable Justice Best adjudicated on the Constitutional Motion of the Appellants at first instance. Justice Best granted declarations of inequality of treatment under ss. 4 (b) and (d).

The Appellants appealed in respect of the learned trial Judge's refusal to grant declarations under ss. 4 (h) and (i). The Respondent cross-appealed contending that the appellants were not entitled to declarations under ss. 4(b) and (d).

All three (3) Justices of Appeal agreed that the Appellants were entitled to declarations under ss 4(b) and (d) and dismissed the cross-appeal.

All three Justices of Appeal conducted in-depth analyses of the requirement of the proof of *mala fides* where it was contended that there had been a breach of one or both of the equality provisions.

[1] C.A. No. 16 of 2004

At pg. 2 para. 1**,** Justice of Appeal Hamel-Smith identified as the central issue raised by counsel for the Respondent:

> *"… whether proof of mala fides is a prerequisite to the establishment of a claim for an infringement of the right to equal treatment by a public authority in the exercise of its functions under section 4(d) of the Constitution."*[1]

Justice of Appeal Hamel-Smith cited the leading case of ***K.C. Confectionery*** and ***Smith v LJ Williams*** and foreign cases such as ***State of West Bengal v Sankar*** and said at pg. 6 para. 19:

> *"….but I am in agreement with Persaud JA that proof of mala fides is not always necessary in all claims under s. 4(d). Those cases in which proof of mala fides is not required seem to me to be consistent with* ***James v Eastleigh Borough Council*** [1990[ 2 A.C. *cited by the Privy Council where the majority preferred…..the causative to the subjective construction and held that discrimination could be established even though the respondent council had not intended to discriminate.*[2]*"*

At page 6 para. 20, Justice of Appeal Hamel-Smith observed:

> *"The constitutional right under s. 4(d) is right to equality of treatment from a public authority in the exercise of its functions. The purpose of the right is to protect citizens from the arbitrary use of power by a public official.*[3]

At page 7 para. 22 (cont'd from pg. 6), Hamel-Smith, JA quoted Justice Madon in ***Union of India v Patel*** [1985] Supp. 2 S.C.R. 131:

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[1] ***CBS and the Maha Sabha v the Attorney General*** No. 160 of 2004, per Hamel-Smith, JA at p. 2 para. 1.
[2] ***CBS and the Maha Sabha v the Attorney General*** No. 160 of 2004, per Hamel-Smith, JA at para. 19.

[3] Supra at para. 20.

*"'Equality is a dynamic concept with may aspects and dimensions and it cannot be cribbed cabined and confined within traditional and doctrinair limits....equality is antithetic to arbitrariness....Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount of mala fide exercise of power...."'*

At page 7 para. 23, Hamel-Smith, JA confirmed his agreement with Mendonça J, with this reservation:

*"...while his decision maintains the need to displace the presumption with proof of mala fides I am inclined to accept that there was no such onus on the appellants"*[1].

Referring to the observation of their Lordships in ***Bhagwandeen***, Hamel-Smith, JA said at page 7, paras. 24 and 25:

*"*[24] *Their Lordships....suggested that there may have been some confusion between the two concepts viz presumption of regularity and proof of deliberate intention to discriminate....The observation is well placed because inherent in the presumption is the absence of evidence, one way or the other. Once cogent evidence of discrimination is placed before the Court, whether or not the presumption operates in the official's favour, the onus shifts to the official to show that his action was justified or reasonable.....*

*"*[25] *The requirement that an applicant prove mala fides as a prerequisite maybe to place a fetter on the right itself. Discrimination can be practiced, and usually is, by stealth....I agree with Persaud JA that if there is an allegation of mala fides then the*

[1] ***CBS and Maha Sabha v the Attorney General*** – No. 16 of 2004 per Hamel-Smith, JA at para. 23.

*applicant must prove it in order to succeed. But there will be cases where it is not alleged and need not be proved.....”*[1]

Then at page 10 para. 37, Justice Hamel-Smith said:

*“While I agree with Mendonça JA, I am prepared to accept, that there was a strong case of unequal treatment presented by the appellants, a case which had to be answered by the Minister. I also agree with Mendonça JA that the explanation offered fell far short of the mark....”*[2]

By contrast, Justice of Appeal Mendonça held the view that proof of mala fides continued to be a requirement in the proceedings.

At page 9 para. 26, of his unreported Judgment the learned Justice of Appeal Mendonça stated:

*“It is well established that an aggrieved party who alleges inequality of treatment must ordinarily establish that he has been or would be treated differently from some other similarly circumstanced person or persons. The comparison must be such that the relevant circumstances in the one case are the same or are not materially different in the other (see Privy Council Appeal 45 of 2003 - Bhagwandeen v the Attorney General of Trinidad and Tobago at. para. 18).”*[3]

At page 11 para. 27 Justice of Appeal Mendonça said:

*“Apart from establishing unequal treatment when compared with a party similarly circumstanced there are two (2) principles that.....are well-established....in this jurisdiction...The first is that there is a*

[1] Supra at paras. 24 and 25
[2] ***CBS and the Maha Sabha v the Attorney General*** – C.A. No. 160 of 2004, per Hamel-Smith at para. 10.
[3] ***CBS and the Maha Sabha v the Attorney General*** – C.A. No. 160 of 2004 per Justice Mendonça, pg. 9 para. 26.

*presumption that public officers will discharge their duties honestly and in accordance with the law."*[1]

The learned Mendonça, JA cited ***Smith v LJ Williams***[2] *and* ***K.C. Confectionery Ltd. v the Attorney General,*** quoting Bernard, JA as he then was:

*"The presumption is a salutary and sensible concept of Government action."*[3]

At page 12 para. 28, Mendonça identified the second principle:

*"….it is necessary for him to establish mala fides on the part of the public official."*[4]

Having cited the classic authorities Mendonça, JA reconfirmed at page 14 para. 34:

*"The law therefore in this jurisdiction is that for an aggrieved person to successfully establish that his right to equality before the law and equality of treatment has been infringed by administrative act, he must establish mala fides in the person committing the act…….It is not the law that once inequality of treatment is found that the onus is on the State to provide some explanation for it."*[5]

At page 14 para. 35, Justice of Appeal Mendonça quoted the formula of Persaud, JA in ***K.C. Confectionery Ltd. v the Attorney General:***

*"If complaint is made that the official has been dishonest in the discharge of his duties, or that he has acted out of spite towards the complainant, clearly mala fides is alleged, in which event it must be*

[1] Supra page 11 para. 27.
[2] ***Smith v L.J. Williams*** 30 W.I.R. 395
[3] ***CBS and the Maha Sabha v the Attorney General*** – C.A. 16 of 2004 page 11 para. 27 per Mendonça, JA.
[4] ***CBS and the Maha Sabha v the Attorney General*** – C.A. No. 16 of 2004 per Mendonça, JA at para. 28.
[5] Supra at page 14 para. 34

*proved;…..If, on the other hand, the allegation is that the official has merely contravened the law in the discharge of his functions, mala fides may not necessarily form part of the complainant's case, in which event the question of its proof does not arise. All that needs to be proved in such a case is the deliberate and intentional exercise of the power, not in accordance with law, which results in the erosion of the complainant's right the entitlement to which may become vested in him either from the Constitution itself or from an Act of Parliament."*[1]

Then at page 15 para. 36, Mendonça, JA supplied his interpretation of Persaud, JA's words:

*"What Persaud JA was there referring to as a case where proof of mala fides did not arise was a case where the allegation was that the official merely contravened the law. In a case such as that all he says that needs to be proved is the deliberate and intentional exercise of the power not in accordance with the law. This is not that kind of case. But even in such a case it was necessary to prove the "deliberate and intentional exercise of power, not in accordance with the law."….what has to be proved is an intentional and purposeful act of unequal treatment."*

***….****an applicant makes out a prima facie case upon proof of unequal treatment.…the onus shifts to the State to show that such differential treatment was reasonably and justifiably made."*[2]

At page 16 para. 38, Justice of Appeal Mendonça, said:

*"…the need to prove mala fides against the background of a presumption of regularity was accepted by the parties before this*

[1] ***CBS and the Maha Sabha v the Attorney General*** – C.A. No. 16 of 2004 per Mendonça, JA at page 14 para. 35
[2] Supra page 15 para. 36.

*Court, and it was accepted also that we were bound by that. Unless and until the law is altered, we must apply it."*[1]

At page 17 para. 39, Justice of Appeal Mendonça held:

*"The onus is therefore on the aggrieved party to establish mala fides."*[2]

Of the Appeal before him, Mendonça, JA expressed the following view:

*"There is however no denying that there was a request by the relevant Minister to expedite Citadel Ltd.'s application. It is fair to say that pursuant to this request the application was dealt with by the Telecommunications Division contrary to their own position that application at that time would not be processed until a broadcast policy was established."*

*"Further if someone is singled out for different treatment, albeit favourable treatment, that is evidence from which mala fides may be inferred. It is on the face of it arbitrary which may provide evidence of mala fides. As Bernard JA said in the case K.C. Confectionery case (at page 415) evidence of an "intentional and irresponsible act….will be enough to rebut the presumption of irregularity and infer mala fides". "An irresponsible act" is a synonym for arbitrary act……Without an explanation for dealing with Citadel Ltd. differently, that on the face of it is unreasonable and arbitrary."*[3]

It seems to me that Mendonça, JA held the view that the proof of *mala fides* continued to be necessary in claims of unequal treatment in this

[1] ***CBS and the Maha Sabha v the Attorney General*** – C.A. No. 16 of 2004 per Mendonça, JA at page 16 at para. 38.

[2] Supra page 17 para. 39.

[3] ***CBS and the Maha Sabha v the Attorney General*** – C.A. No. 16 of 2004 page 18 para. 42.

jurisdiction. However, it was his view that an inference of *mala fides* could be made from an *"intentional and irresponsible act."*

The third appellate judgment of **Warner, J.A** appeared to have been inclined against requiring the proof of *mala fides*.

At page 8 para. 12[1]**,** the learned Warner, JA

> *"In the Trinidad and Tobago Constitution, it is now recognized that the expression* ***"protection of the law"*** *in 4(b), is free standing and is capable of being breached without improper differentiation, however based, and whether in law or official treatment. In* ***Boodoo and Jagram v the Attorney General*** *– CvA No. 102 of 199 (unreported), this court held that the right to protection of the law enshrined in section 4(b) might well encompass breach by a court's delay in delivering a judgment, if the delay was of such an order as would make a mockery of the person's right to have a determination of a matter by the competent court or tribunal."*

At page 19 para. 28, **Warner, JA continued**

> *"….but if mala fides was not advanced, one would have at least to prove intentional and purposeful discrimination."*
>
> *"….In my view therefore, the dicta in* ***KC Confectionery*** *may be revisited legitimately, without breaching the stare decisis rule."*[2]

The decision of the learned Justice of Appeal Warner may be found at p. 22 para. 33 :

[1] ***CBS and the Maha Sabha v the Attorney General*** – C.A. No. 16 of 2004 per Justice of Appeal Warner page 8 para. 12.
[2] ***CBS and the Maha Sabha v the Attorney General*** – C.A. No. 16 of 2004 per Warner, JA at para. 28.

> *"The entire foundation of the appellant's case has not however, in my view, been destroyed. The relevant authority had established a procedure in accordance with powers vested in it under the Ordinance. While I would not presume to hold that the Minister is not empowered to request that an application is expedited, the relevant authority had dealt with the comparator (Citadel) an entity similar circumstanced, with expedition, but had not applied the same standard to the appellants' application.....It is no excuse that the application "**may have been lost"** or that there was a shift in the Ministry's location."*[1]

And at para. 34:

> *"This type of situation, it appears to me, has always come within the sweep of Section 4(d), as Persaud J.A. has demonstrated."*[2]

At pg. 23 para. 35 of her judgement, the learned appellate judge, summarized her findings, clearly holding that the appellants have not proved mala fides.[3] Notwithstanding this finding, her ladyship dismissed the cross-appeal, thus confirming that the appellants were entitled to declarations under ss. 4(b) and (d).

The majority of their Lordships in ***Central Broadcasting Services and the Sanatan Dharma Maha Sabha v the Attorney General***, therefore found that proof of *mala fides* was un-necessary in the light of the second segment of Persaud JA's formula in ***K.C. Confectionery Ltd. v the Attorney General.***[4]

**Reasoning and Decision**

[1] ***CBS and the Maha Sabha v the Attorney General*** – C.A. No. 16 of 2004 per Warner, JA at para. 33
[2] Supra at para. 34
[3] Supra at para. 35
[4] ***K.C. Confectionery v the Attorney General*** (1985) 34 W.I.R. 387

1. In these proceedings, the Applicant's principal contention is that he has been the victim of unlawful discrimination and as such is entitled to declarations that his rights at ss. 4 (b) and (d) of the ***Constitution*** have been contravened.
2. The authorities speak with one voice that the applicant who alleges contraventions to rights under ss. 4 (b) and or (d) must establish that he has been treated differently from some other similarly circumstanced person, who can be regarded as an actual or hypothetical comparator. See the words of Lord Carswell in ***Bhagwandeen v. A.G.***[1] The Applicant is required to prove that he has been subjected to treatment which was less favourable when compared to persons in circumstances which were either similar or not materially different from his own.
3. In adjudicating in this matter, the Court must first consider whether the circumstances of the alleged comparators were similar or at least not materially different from those of the Applicant's. It has been submitted in this case that the comparators are those fire officers, who being in the Second Division, have received the Q.E.A. since 1991.
4. It has been accepted in this matter that the beneficiaries of the QEA since 1991 have been officers who attained their qualification for promotion to the office of Fire Sub Officer by virtue of their success in the theoretical and the practical examinations offered by the Public Service Commission.
5. It is the Applicant's case that his circumstances were and continue to be similar because he was also qualified for promotion. The Applicant has contended that he became qualified for promotion by virtue of a settled practice that prevailed prior to 1998 and latterly by virtue of the 1998 ***Fire Service Regulations.***
6. It has been established on the evidence before me that a settled practice existed. The uncontradicted evidence of the Applicant was that from the

[1] ***Bhagwandeen v the Attorney General*** – P.C. No. 45 of 2003 per Lord Carswell at para. 18.

time of his recruitment twenty-three (23) years ago, there existed a settled practice whereby two kinds of officers were regarded as qualified for promotion:

- the officer who had been successful at the examinations offered by the Public Service Commission; and
- the officer, like the Applicant who had been successful at obtaining the certificate of the IFE.

7. Although there has been no express admission of the settled practice, there has been no contradiction and the evidential scale is tilted heavily in favour of my accepting the existence of the alleged settled practice.
8. I have considered whether such a practice may not have been in accordance with the pre-1998 law. The alleged practice had not been reflected in the Public Service Commission Regulations which existed prior to 1998. However, it would have been within the power of the Commission to waive Regulation 150 if an officer held the certificate of the Institute of Fire Engineers under its general power to make appointments on promotion and to regulate its own procedure under the ***Constitution***. See ss. 121 (1) and 129 (1) of the ***Constitution***.

9. The alleged settled practice is clearly reflected in the provisions of Regulations 6 (a) and (b) of the ***Regulations***[1]**.** The term *"a candidate" for promotion",* given its literal meaning is synonymous with a person who is qualified for promotion. It is mandatory under regulation 6 that the candidate for promotion to Fire Sub-Officer have at least four (4) years of service. It is also mandatory that the officer had passed a practical examination conducted by the Examination Board. Where the two mandatory requirements are met the officer may be treated as a candidate if he is a person who had passed either a job-related written examination

[1] Fire Service Regulations 1998.

conducted by the Examination Board or who holds the preliminary certificate of the IFE.

10. The regulations treat both officers equally. Both officers are required to have been successful at the local practical examinations. The officer who has the certificate of the IFE, is equal under the ***Regulations***[1] to the officer who has passed the job-related written examination set by the Examination Board.

11. The difference between the officer who has passed the written examination and the officer, who like the Applicant holds the certificate of the Institute of Fire Engineers is not a material difference under the ***Fire Service Regulations***[1]. In my judgment therefore and I so hold that the Fire Officers who have received the QEA since 1991 may properly be regarded as comparators for the purpose of this matter.

12. The second element which the Applicant is required to prove is that despite his similar circumstances, he has suffered less favourable treatment.

13. There is no dispute that the Applicant has never received the QEA. He has been in receipt of the Qualification Allowance, which interestingly is given only to holders of the certificate of the IFE. The Qualification Allowance even after the 48% increase is pegged at a substantially lower value than the QEA, which is equivalent to first increment of the rank. An increment is the merit increase which public servants receive after a year of service. It is therefore not plausible to regard the qualification allowance as a substitute for the Qualifying Examination Allowance.

14. An issue canvassed in this case was whether the differential treatment which the Applicant suffered emanated from the Chief Fire Officer or from the decision of Cabinet. Learned Counsel for the Applicant has argued that in any event the Applicant is entitled to Constitutional relief.

15. In my view, the evidence suggests that the differential treatment of the Applicant was the result of the Chief Fire Officer's faulty interpretation of the Authority for Payment, by which the Permanent Secretary Ministry of

National Security had notified the Chief Fire Officer of Cabinet's decision, as recorded in the 1991 Cabinet Minute.

16. By Cabinet's decision, a fire officer in the Second Division becomes entitled to receive the QEA if he has not been promoted within 3 years of passing the qualifying examination for promotion. The source of the dispute in this matter sprung from the interpretation placed on the words *"the qualifying examination"*.

17. The Chief Fire Officer engaged in a minute analysis of the literal meaning of the Cabinet Minute, and concluded possibly quite correctly that there could be one qualifying examination for promotion. Having decided that there was only one qualifying examination for promotion, the Chief Fire Officer apparently embarked on an exercise of ascertaining which examination was the qualifying examination. With no plausible explanation the Chief Fire Officer concluded that *"the qualifying examination"* was the written examination offered by the Public Service Commission.

18. It is not clear whether the Chief Fire Officer who had penned the Memorandum to firefighter Sookhansingh on 29th November, 2002 had been the incumbent Chief Fire Officer since 1991. It is appears however from the evidence of John Springle that the interpretation which he placed on the Authority for Payment is entrenched in the minds of those responsible for the administration of the Fire Service, admitting of no possibility of any other interpretation.

19. It is my view that having regard to the uncontroverted evidence in this case, the Chief Fire Officer's interpretation of the Authority for Payment was incorrect.

20. In his affidavit in reply, the Applicant deposed that the qualifying examination was the practical and not the written theoretical examination offered by the Public Service Commission. This evidence has remained unchallenged. There was no objection to its admissibility. There was no application to adduce further evidence to contradict the Applicant's affidavit in reply and there was no cross-examination to test the Applicant's veracity.

In the circumstances this Court has no option but to accept the Applicant's evidence.

21. The view expressed by the Applicant is however congruent with the 1998 ***Regulations***[1], which codified the earlier settled practice. As stated supra, under the ***Regulations***[1] an officer may become a candidate for promotion by either of two (2) routes. Regardless of whether an officer becomes a candidate by virtue of subsection (a) or subsection (b) the requirement which remained constant was that he succeed in the practical examination.

22. The Chief Fire Officer as well as Mr. Springle, deponent for the Attorney–General, have emphasized the need to separate the issue of the payment of the QEA from the provisions of regulation 6 of the ***Regulations***[1].

23. I respectfully agree that these are different issues. The QEA, according to Cabinet's Minute is an allowance which was designed to compensate officers who though qualified for promotion have not been promoted. The ***Regulations***[1], on the other hand, by stipulating criteria for candidates for promotion identifies the necessary minimum requirements which an officer should meet before he would be considered for promotion.

24. Although these are separate issues they are however related and the one cannot be considered in isolation from the other. The QEA is given to officers who are qualified for promotion. Whether an officer is qualified for promotion is determined by reference to the 1998 ***Regulations***[1].

25. The Chief Fire Officer and apparently his predecessors in their interpretation and application of the Authority for Payment disregarded the practical examination which was the *sine que non* of qualification for promotion under the ***Regulations***[2]. Instead the Chief Fire Officer decided, with no apparent rational foundation, that ***the*** qualifying examination could only be the local written examination. In my view, this decision was arbitrary, unreasonable and the source of discrimination against the Applicant.

[1] Fire Service Regulations 1998
[2] Fire Service Regulations 1998

26. Whether the differential treatment experienced by the Applicant justifies a finding of a contravention of the Applicant's rights at ss. 4(b) and/or (d)[1] depends on whether the proof of *mala fides* is required by law in applications of this kind.

27. Learned Counsel for the Applicant has invited the Court to find that proof of *mala fides* are no longer required in applications of this nature in this jurisdiction. Learned Counsel has cited decisions of the highest authority in support of his argument. I have found Learned Counsel's arguments to be persuasive and erudite. However, this court is bound by the reasoning of the majority of the Justices of Appeal in ***Central Broadcasting Services Limited and the Sanatan Dharma Maha Sabha v the Attorney General[2],*** in which there was no departure from the law as expounded in ***K.C. Confectionery***[3] and in which two of the three Justices of Appeal based their findings on the second limb of the formula of Persaud, JA in ***K.C. Confectionery[4],*** that is to say:

> *"If on the other hand the allegation is that the official merely contravened the law, all that needs to be proved is the deliberate and intentional exercise of power not in accordance with law…."*

28. It appears then that the current state of the law in this jurisdiction would be according to the exposition of Persaud, J.A. in ***K.C. Confectionery*** and the extent to which I could dispense with the need to prove *mala* fides is delimited by the boundaries of the second limb of Persaud, JA's formula.

29. Proof of *mala fides* continues to be necessary where it has been alleged by the Applicant. Where *mala fides* have not been alleged , the Applicant may succeed by proving "*the deliberate and intentional exercise of power not in accordance with law…."*.

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[1] Section 4(b) and (d), Constitution Ch. 1:01
[2] ***CBS and the Maha Sabha v the Attorney General*** – C.A. No. 16 of 2004
[3] ***AG v K.C.Confectionery*** (1985) 34 W.I.R. 387.
[4] Supra at 2 at 34 W.I.R. 387 at p. 404 g to h.

30. There has been no allegation in this case of *mala fides* on the part of the Chief Fire Officer or of any agent of the executive. In fact, the principal contention of learned Counsel for the Applicant is that as a matter of law the proof of *mala fides* is not required.

31. In the context of this case, it is therefore necessary for me to consider whether the Applicant has proved on the part of the Chief Fire Officer a deliberate and intentional exercise of power not in accordance with law.

32. The Applicant's request for payment of the Q.E.A. was not considered by the Chief Fire Officer until this Motion had been filed. It is common ground that the Chief Fire Officer refused the payment sought in almost identical terms in which he had refused the earlier request of Fire Officer Sookhansingh.

33. There could be no question that his refusal was both deliberate and intentional. The term "*deliberate*" according to the Concise Oxford English Dictionary means *"done consciously and intentionally fully considered not impulsive...."* The word "*intentional*" bears a similar meaning and is synonymous with "deliberate."

34. Whereas the words of Persaud, JA are not legislative and are not susceptible to the precision with which the rules of interpretation are applied to legislation, it is necessary to define their ambit in order to decide whether they are applicable to the instant situation.

35. In my view a "*deliberate and intentional exercise of power"* refers to positive action on the part of a public official as opposed to omissions caused by negligence or oversight.

36. In my view the refusal by the Chief Fire Officer was deliberate. The Chief Fire Officer took positive steps to impose his interpretation on the Authority for Payment. The Chief Fire Officer's deliberate refusal became apparent with his first letter of refusal to Fire Officer Sookersingh which was exhibited herein as "*M.D.3"*.

37. The deliberate exercise of power on the part of the Chief Fire Officer and his predecessors would attract the Court's intervention only where it was not in accordance with law.

38. In order to assess whether the exercise of power was or was not in accordance with law, it is convenient to identify two distinct periods of time demarcated by the advent of the ***Regulations***[1].

39. The interpretation which the Chief Fire Officer applied to the Authority for Payment was, as I have stated supra clearly inconsistent with the ***Regulations***[1] which placed the Applicant and his comparator on an equal footing. Under the regime of the ***Regulations***[1], the actions of the Chief Fire Officer were clearly not in accordance with the law.

40. Pre-1998, there were no regulation analogous to the ***Regulations***[1]. There was a settled practice whereby the Public Service Commission treated holders of the Preliminary Certificate of the Institute of Fire Engineers as qualified for promotion if they had been successful in the practical examination. The settled practice conferred no legal right on the Applicant. In my view, at its highest the settled practice would have entitled the Applicant to conceive a legitimate expectation that he would not be treated as unqualified unless he had first been given an opportunity to be heard. See ***CCSU v Minister for the Civil Service*** [1984] 3 AllER 935.

41. Between 1991 and 1998 however, there was in existence a directive of Cabinet, by way of the 1991 Cabinet Minute.

42. It is unnecessary to observe that the Cabinet is placed under the ***Constitution*** at the highest point of the stream of authority in the public service. See s. 75(1) of the ***Constitution***. By s. 85(1) of the ***Constitution***, general supervision of a department of government falls to the Permanent Secretary, who is subject to the general direction and control of the Minister who had been assigned responsibility for the department of Government.

[1] Fire Service Regulations 1998.

43. The Authority for payment was a directive flowing from the Cabinet through the Minister to the Permanent Secretary and ultimately to the Chief Fire Officer as Head of Department. Under the Public Service Commission Regulations the Chief Fire Officer had a duty of obedience to a lawful command. It seems to me if there was doubt, as there clearly was, as to the true meaning of the directive, the Chief Fire Officer was obligated to seek clarification instead of imposing his own interpretation on the Cabinet directive. His almost obstinate application of his own interpretation amounted to action which was deliberate, intentional and not in accordance with law.

44. I therefore hold that the Applicant is entitled to declarations sought at ss.4(b) and (d) of the ***Constitution***.

45. The Applicant has invested less effort in the claim under s.4(a) and it was at my insistence the learned Counsel on both sides located and cited authorities relevant to this ground.

46. There could be little doubt that an allowance, which is a monetary perquisite of an office constitutes property for the purpose of s. 4(a)[1]. One has only to refer to the compelling reasoning of Justice Ibrahim (as he then was) in ***Hood–Caesar v. A.G.***[2] as supporting authority.

47. Learned Counsel for the Attorney-General has quite correctly conceded that the allowance constitutes property, but has argued that there was no deprivation as required by s. 4(a) of the ***Constitution***.

48. By the evidence of the Respondent the Applicant was qualified for promotion. (See para. 21 of the affidavit of John Springle). He was so qualified as by virtue of the alleged and accepted settled practice and subsequently under the ***Regulations***[3]. Being thus qualified, the Applicant became entitled to receive the allowance as long as he had four years of service and had not been promoted within three years of passing the

[1] S. 4(a) of the Constitution.
[2] ***Bernadette Hood-Caesar v the Attorney General*** –H.C.A. No. 3015 of 1987
[3] Fire Service Regulations 1998.

qualification examination. The applicant was recruited in the Fire Service in 1980. By 1991, he had eleven (11) years of service to his credit. The un-contradicted evidence is that he passed the qualifying examination in 1986. See para. 3 of the Applicant's affidavit in reply. Any withholding of an allowance to which Applicant was entitled amounted to a deprivation of property for the purpose of s. 4(a)[1].

49. The Applicant is entitled to monetary compensation. No evidence has however been led as to the quantum of the increment which he would have received from 1991 to the present. Accordingly his monetary entitlement must be assessed by a Judge in Chambers.

50. In the Applicant's Notice of Motion, he identified a breach of s. 5(2) (h)[2] as one of his grounds for relief. The *locus classicus* on s. 5(2) (h)[4] is the Privy Council decision in ***AG v Whiteman*** [1991] 39 W.I.R. 397. Whereas the phrase "settled practice" appears to have been designed to invoke the case of ***Whiteman***[3], in my view the criteria for qualification for promotion cannot in ordinary language be regarded as procedural. It may have been for this reason that there was no argument on the Applicant's behalf in support of a breach of s. 5(2) (h)[4].

**Orders:**

Having regard to the foregoing the Court held the view that judgment should be entered for the Applicant with the following orders:

a) A declaration that the Chief Fire Officer has treated the Applicant unequally and/or unfairly and has discriminated against him in contravention of Section 4 (b) and/or (d) of the ***Constitution***.

[1] Section 4(a) of the Constitution
[2] Section 5 (2) (h) of the Constitution
[3] ***AG v Whiteman*** [1991] 39 W.I.R. 397.
[4] Section 5(2) (h) of the Constitution

b) A declaration that the Applicant's right to the enjoyment of his property and the right not to be deprived thereof except by due process of law has been and continues to be contravened.

c) A declaration that the qualifying examination allowance is payable to all fire officers holding office in the Second Division of the Fire Service of Trinidad and Tobago who have qualified for promotion by holding the Preliminary Certificate of the Institute of Fire Engineers and by having been successful in the practical examinations set by the Examination Board under the ***Fire Service Regulations*** 1998.

d) A declaration that the Applicant is entitled to be paid the qualifying examination allowance in accordance with the Memorandum dated 18th day of October 1991 from the Permanent Secretary, Ministry of Justice and National Security.

e) Monetary Compensation to be assessed by a Judge in Chambers in default of agreement

f) The Respondent to pay to the Applicant's costs fit for Advocate Attorney-at-Law.

**Dated this 1st day of December, 2005.**

**Madame Justice Dean-Armorer**
Judge of the High Court