

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2011- 04918

BETWEEN

NIZAM MOHAMMED

Claimant

AND

**THE ATTORNEY GENERAL OF
TRINIDAD AND TOBAGO**

Defendant

BEFORE THE HONOURABLE MADAM JUSTICE JUDITH JONES

Appearances:

Mr. F. Hosein S.C., instructed Mr. G. Mungalsingh, Mr. R. Dass and Ms. S. Bridgemohansingh for the Claimant.

Mr. A. Sinanan S.C., Mr. G. Ramdeen and Mr. V. Debideen instructed by Ms. D. Dilraj-Batoosingh and Mr. B. James for the Defendant.

JUDGMENT

1. The Police Service Commission (“the Commission”) is a body established under the Constitution for the purpose of appointing persons to hold office in the Police Service including appointments on promotion or transfer and removing and exercising disciplinary control over such persons.¹ The members of the Commission are appointed by the President of the Republic of Trinidad and Tobago (“the President”) after consultation with the Prime Minister and the Leader of the Opposition.

¹ Section 123 of the Constitution of the Republic of Trinidad and Tobago.

2. The Claimant, Nizam Mohammed, was on 21st July 2010 appointed to the office of chairman and member of the Commission by the President. By an Instrument in writing under the hand of the President dated 4th April 2011 he was removed from office. In removing the Claimant from office the President advised that he was exercising the power vested in him by section 122A (1)(d) and (f) of the Constitution of the Republic of Trinidad and Tobago, as amended (“ the Constitution”).

3. With respect to the removal of members of the Commission the Constitution provides that the President shall, after consultation with the Prime Minister and the Leader of the Opposition, terminate the appointment of a member of the Commission if the member:

- (a) fails to attend four consecutive meetings without reasonable cause;
- (b) is convicted of a criminal offence which carries a penalty of six or more months of imprisonment in any court;
- (c) becomes infirm in mind or body;
- (d) fails to perform his duties in a responsible or timely manner;
- (e) fails to absent himself from meetings of the Police Service Commission where there is a conflict of interest;
- (f) demonstrates a lack of competence to perform his duties; or
- (g) misbehaves in office.²

4. The Claimant, an Attorney at Law, now challenges his removal on the basis that it was contrary to the principles of natural justice and therefore procedurally flawed. Accordingly the Claimant seeks declarations that his rights to (i) the protection of the law as guaranteed by

² Section 122A of the constitution

section 4(b) of the Constitution and (ii) a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations as guaranteed by section 5(2)(e) of the Constitution have been contravened.

5. Section 4(b) of the Constitution confirms the right of the individual to the protection of the law which protection includes the right to natural justice³. In somewhat similar vein section 5(2)(e) of the Constitution provides that, subject to certain exceptions, Parliament may not deprive a person of the right to a hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations. It is now accepted that the rights embodied in section 5 of the Constitution particularise in some greater detail what is included in the words “the due process of the law” and “the protection of the law” found in section 4 of the Constitution⁴. Insofar as these proceedings are concerned both the Claimant and the Defendant do not dispute that what both sections provide is “constitutional protection to the right to procedural fairness.”

6. It is also accepted by both sides that section 38 of the Constitution⁵ does not preclude a consideration of whether the actions of the President in arriving at his decision to remove the Claimant from office were procedurally correct. While not conceding that section 38 prohibits a challenge to the merits of the decision the Claimant accepts that the case as presented does not seek to challenge the merits of the President’s decision.

³ Rees v Crane[1994] 2 AC 173 @page 188.

⁴ Guerra v Baptiste [1995] 4 All ER 583.

⁵ section 38 provides that, subject to section 36, the President shall not be answerable to any court for the performance of the functions of his office or for any act done by him in the performance of those functions.

7. In these proceedings therefore it is not in dispute that sections 4(b) and 5(2) of the Constitution assert the right of the Claimant to procedural fairness and that in arriving at his decision to remove the Claimant the President was required by these provisions to observe and comply with the rules of natural justice insofar as procedural fairness demanded such compliance. It is also not in dispute that despite the provisions of section 38 a court is entitled to examine the process to ensure that it achieves a standard of fairness in keeping with natural justice as stipulated under our Constitution. Where the parties differ is on the application of the particular facts to these principles of law.

8. There has been no challenge to the facts as presented by the Claimant. An affidavit was however filed on behalf of the President. This affidavit, deposed to by attorney at law retained to advise the President, merely places before the court the documents which would have been available to the President at or around the time of his decision.

9. The issue at the core of these proceedings is not whether the decision of the President to remove the Claimant from office was the right decision but rather whether the President's decision was procedurally correct. To borrow a phrase from Lord Evershed: ⁶“It is not the decision as such which is liable to review; it is only the circumstances in which the decision was reached.” Accordingly the question for my determination here is whether in the exercise of his power to remove the Claimant from office the President acted in accordance with the requirements of procedural fairness. To put it another way do the facts when examined objectively provide an example of ‘fair play in action’? If they do then the Claimant has failed in his quest. If they do not then the Claimant is entitled to the declaratory relief sought.

⁶ Ridge v Baldwin [1963] 2 All ER 66 at page 91.

10. In February 2011 the Claimant, in his capacity as chairman of the Commission, was invited to attend a meeting of the Joint Select Committee of Parliament (“the JSC”) scheduled for the 25th March 2011. In preparation he arranged a meeting with the other members of the Commission. Of the four other members of the Commission only one attended the meeting called by the Claimant.

11. All the members of the Commission however attended the subsequent meeting of the JSC. During the course of that meeting certain statements were made by the Claimant with respect to the ethnic composition of the leadership of the Police Service. The unrevised verbatim notes of the JSC for that date reveal that at the meeting three of the four other members of the Commission disassociated themselves from the Claimant's statements. The statements of the Claimant caused great public controversy. There were published in the newspapers and over the electronic media public calls for his dismissal.

12. On 28th March 2011 a statement was issued from the office of the Prime Minister. Among other things, that statement contained a call for the Claimant to be held accountable for his inflammatory and unwise remarks. On the same day that the statement was issued the Prime Minister met with the President. After that meeting the Prime Minister was reported to have said that it was now for the President to act.

13. On Thursday 31st of March 2011 the Claimant was informed by the secretary to the President by way of a telephone call that the President wished to meet with him. The Claimant was given a choice of two days: the following day, Friday 1st April, or Monday 4th

April. The Claimant chose the first of the two days. The evidence as to what transpired at this meeting is given by the Claimant and has not been challenged in any way. Accordingly I accept this evidence as a truthful account of what occurred at that meeting.

14. The meeting began at 2:30 p.m. and lasted for approximately 1 hour. During the meeting the President informed the Claimant that he had consulted with both the Prime Minister and the Leader of the Opposition with respect to his contribution at the JSC meeting. The Claimant in response attributed the ensuing public reaction to false and inflammatory newspaper headlines. The Claimant also indicated that he was aware of the statement issued from the office of the Prime Minister and proffered the opinion that the remarks attributed to him were misguided and could not have been made based on the statements that he in fact made.

15. The President then informed the Claimant that he was in receipt of two letters from three members of the Commission. The Claimant advised the President that he had seen only one of the letters which he received by e-mail and which had been unsigned. It would seem that the second letter, dated the 28th March 2011, was handed to the Claimant by the President during the meeting. According to the Claimant he was unable to properly read and appreciate the contents of the letter because he was at that time fully absorbed in a running dialogue with the President, explaining his position and responding to his enquiries as best he could. While denying knowledge of the actual contents of the letter he admits that at the time he knew, on the basis of his conversation with the President, that the letter contained certain allegations made against him as chairman of the Commission.

16. The President then advised the Claimant that he had to consider whether the revocation of his appointment was warranted and that he was concerned with subsections 122 A(1)(d) and (f) of the Constitution. With respect to section 122A(1)(d) the President said that the Claimant's reference to the ethnic imbalance in the highest rank of the Trinidad and Tobago Police Service was outside the remit of the Commission and could amount to irresponsibility on his part. The Claimant replied that in his view the section really related to the actual performance of his duties and was unrelated to things which he did and which were allegedly outside his remit. With respect to the subsection 122A(1)(f) the President said that he was here considering the two letters received from the three members of the Commission and explained that their complaints against the Claimant meant that he was incompetent in failing to hold the membership of the Commission together.

17. According to the Claimant he was completely taken aback by the President's remarks since he had not envisaged having to meet an allegation of this nature. In response the Claimant told the President that:

- (i) he did not believe that the allegations could constitute or demonstrate incompetence on his part;
- (ii) it was unfair to be confronted with this issue and expect a proper response and that he should be given a proper opportunity to respond to the allegations made against him;
- (iii) the matter was very serious with grave consequences not just for him but for all members of constitutionally independent service commissions; and

(iv) he should have an opportunity to actually face the authors/signatories of the letters.

18. Thereafter the Claimant requested that he be given an opportunity to provide the President with a legal opinion from his lawyers, preferably those in the United Kingdom, and requested two weeks to do so. The President responded by saying that he could not wait that long. The Claimant then requested that he be allowed to get his local attorney to prepare an opinion. To which the President enquired whether the opinion could be provided by the morning of Monday, 4th April. The Claimant's response was that it was not feasible to expect an opinion of this nature in such a short time frame especially since he had not yet consulted the attorney and that a week would be more realistic.

19. In response to the Claimant's enquiry as to the reason for treating the matter with such urgency the President stated that the matter was hanging around for too long. The Claimant responded by stating that the matter was only a week old at which time the President told him to see what the attorney could do. The meeting ended at that point. At around 10:30 a.m. on Monday, 4th April the Claimant received the letter from the President informing him that his appointment as chairman and a member of the Commission had been revoked in exercise of the power vested in the President under section 122A (1)(d) and (f) of the Constitution.

20. It is also not in dispute that, according to the affidavit of the attorney at law retained to advise the President, during the course of his interaction with the President in this regard he received from the office of the President copies of documents which included:

- (i) the unrevised verbatim notes of the meeting of the JSC held on 25th March 2011;
- (ii) 2 letters from three members of the Commission dated 10th March 2011 and 28th March 2011 (hereinafter referred to as “the first letter” and “the second letter” respectively);
- (iii) print and electronic media reports and commentary in the public domain concerning the Commission; and
- (iv) the published statement of the Government of Trinidad and Tobago issued from the office of the Prime Minister dated 28th March 2011.

21. The inference to be drawn from these facts therefore is that at the time of arriving at his decision to remove the Claimant from office these were the documents available to and considered by the President.

22. With respect to these documents the contents of the two letters from the three members of the Commission requires some examination since it is clear that reliance was placed on them by the President. The first letter is addressed to the Claimant and from the evidence and the contents of the second letter it is reasonable to infer that it came to the President’s attention as an annexure to the second letter. The first letter can safely be described as dealing with two situations. The first part of the letter refers to certain adverse publicity surrounding the Claimant from an unrelated incident and seems to be in response to a suggestion by the remaining member of the Commission for a show of support for the Claimant. In this regard the letter contains a

suggestion by the writers that the Claimant find ways to bring a speedy and final closure to adverse media reports and negative publicity surrounding him.

23. In the second part of the letter the writers indicate their intention to address the issue of “administrative and regulatory matters”. In this regard they advise the Claimant of their following preferences:

- (i) the agendas for meetings to be decided by round robin;
- (ii) there be fixed meeting days;
- (iii) where it is necessary for there to be an emergency meeting the views and opinions of members unable to attend be canvassed so that dissenting opinions could be noted;

24. In addition they emphasize the continuing importance of strengthening and fostering good relations with the Commission’s secretariat as opposed to a belligerent antagonistic relationship. The key thing to be noted with respect to this letter is that at no point in time does the second part of the letter refer to any facts other than these members’ preferences with respect to administrative and regulatory matters. In particular there are no allegations made against the Claimant in this letter.

25. The position taken in the second letter is somewhat different however. This letter is addressed to the President. By it the said three members refer to the first letter and indicate that:

- (i) a strategy caucus meeting was never held prior the JSC meeting to

discuss a consensus position;

- (ii) the Claimant went to the meeting armed with facts and figures to present his opinion and represented that opinion to be that of the Commission;
- (iii) the members of the Commission never engaged in a discussion on the ethnic composition of the Police Service. Neither did the members agree that that was a matter for discussion at the JSC hearing;
- (iv) they were of the view that the Claimant's personal opinion approach was becoming ever more frequent and endemic to his style of chairmanship.

26. In the circumstances the three members indicated that they were not prepared to tolerate participating under that style of leadership and in the circumstances would await the President's response and guidance.

27. From the undisputed facts it is clear that the Claimant was not specifically advised as to the purpose of his meeting with the President. According to the Claimant he went to the meeting expecting that the issue of the nature and basis of his statements to the JSC would be broached but was unaware that there were further issues and in particular that issues relating to discord or disharmony in the membership of the Commission were being considered by the President.

28. It is equally as clear that with respect to the information available to the President, and upon which it is to be presumed that the President relied, the Claimant would have prior to

the meeting been aware of: what transpired at the JSC meeting; the published statement issued from the office of the Prime Minister; the tenor of the public response as contained in the printed and electronic media reports and commentary and the contents of one of the two letters from other members of the Commission. Insofar that it is evident that the President also relied on the second of these letters it is not in dispute that this letter was only disclosed and made available to the Claimant during the course of his discussion with the President. The Claimant's statement that, save that it was adverse in nature, he was unaware of its contents because at the time it was handed to him he was unable to properly read the letter as he was fully absorbed in a running dialogue with the President at the time has not been challenged.

29. According to the Claimant in coming to his decision the President failed (i) to give any notice of the charges and accusations made against him; and (ii) to provide him with a reasonable opportunity to prepare or present his case. He contends that there was no formal notification to him that the President was considering removing him from office or the grounds for such removal. Further he was taken completely by surprise when confronted with the second letter which he submits clearly played a very important part in the President's decision to terminate his appointment. The Claimant submits that in these circumstances it cannot be said that he was provided with a reasonable opportunity to correct or contradict the case against him.

30. According to the Defendant however on the facts available to the Claimant he would have appreciated that the question of the revocation of his appointment was up for consideration by the President. The Defendant submits that at the time of the meeting the Claimant was aware of the public controversy caused by his statements to the JSC and would

have been aware of the contents of one of the letters sent by three members of the Commission. While accepting that the Claimant would not have been aware of the second letter before the meeting the Defendant contends that this letter said nothing new and in any event the letter was shown to the Claimant during the meeting.

31. The Defendant submits that at the meeting with the President the Claimant was given a fair opportunity to discuss and put forward his position to the President. Indeed the Defendant points to the fact that at the meeting the only request made by the Claimant was for the opportunity to present a legal opinion from his attorneys to the President. This, the Defendant contends, in the circumstances of the President having his own legal advisor could not be considered a reasonable request. Further the Defendant submits this request must be considered in the context of the need by the President to deal with the situation urgently. In this regard it is not quite correct to state that the only request made by the Claimant to the President was to be allowed to present a legal opinion. The Claimant also requested a proper opportunity to respond to the allegations made against him and to face the persons making those allegations.

32. It would seem to me that in considering the effect of these particular facts a good starting point is by reference to a statement of Lord Mustill⁷ which though long, to my mind, succinctly deals with the issues with which I have to grapple. In dealing with what was required to achieve the minimum standard of fairness, he says:

“...what does fairness require in the present case? My Lords, I think it unnecessary to refer to by name or to quote from, any of the often cited authorities in which the courts have explained what is in essentially an

⁷ R v Secretary of State for the Home Department, ex parte [Doody] [1994] 1 A.C. 531 at 560

intuitive judgement. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised as a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he was informed of the case which he has to answer.”

33. Closer to home Kokaram J. had this to say:

“What is fair is contextual and there is no magic in the concept, so long as those achieved the standard of behaviour that is fair, and at a

minimum the participation of the person to be adversely affected by a decision in the decision-making process. The level of participation will vary with the demands of the particular administrative procedure, however, the requirement to participate is the common denominator nature in the requirement to act fairly.”⁸

34. In determining what was fair in the particular circumstances therefore it might be appropriate to begin with examining the statute which creates the discretion. In this regard of relevance must be the fact that it is this very statute, the Constitution, which confirms the existence of the rights relied on by the Claimant. The Defendant submits that of significance is the fact that, unlike the other commissions established by the Constitution, there is no longer a requirement to comply with section 126(4) and (5) in a determination of whether to revoke the appointment of a member of the Commission.

35. Prior to amendment⁹ the procedure for removal of a member of the Commission required the establishment of a tribunal to enquire into the matter, report on the facts and advise the President¹⁰. The Defendant submits that the removal of this requirement with respect to members of the Commission signifies a clear attempt by Parliament to dispense with a tribunal type enquiry in circumstances where the removal of a member of the Commission is being considered. In this regard the Defendant is quite correct. The Defendant however, quite rightly, does not suggest that the amendment obviates the need for procedural fairness and the need to observe the rules of natural justice.

⁸ Gladys Gafoor v the AG of Trinidad and Tobago and others CV 2012- 00876 at paragraph 1, page 4

⁹ Acts No 6 of 2000 and No. 12 of 2000

¹⁰ section 136 of the Constitution

36. In this regard a reference to a statement by Megarry J.¹¹ demonstrates the practical importance of this principle.

“It may be that some would decry the importance which the courts attached to the observance of the rules of natural justice. ‘When the thing is obvious’ they may say ‘why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start’. Those who take this view, do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which in the event were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.....”

37. In the instant case while a formal tribunal-type hearing is not required it is clear that the Claimant must be allowed the opportunity to make worthwhile representations with a view to producing a result favourable to him.

“If the right to be heard is to be a real right, which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.”¹²

¹¹ John v Rees [1969] 2 All E.R. 274 at page 309

¹² per Lord Denning in Kanda v The Government of Malaya [1962] A.C. 332 at page 337

38. To my mind the requirement that the party affected by the decision must know the case which is made against him necessitates two things. Notice that such a consequence, in this case removal from office, is being considered and of the facts upon which such a decision may be based. It is only then that a party is in a position to make worthwhile representations with a view to producing a result favourable to him. To my mind this is what Lord Denning means by the words “a fair opportunity to correct or contradict”. In my opinion without such information any representations made by the affected party will be meaningless.

39. The Defendant submits that one cannot look at the question of fair notice in a vacuum. It must be considered against the particular circumstances and, in particular, in the context of the knowledge of the Claimant at the time. In this regard the Defendant suggests that in the particular circumstances no formal notice to the Claimant that his removal was being considered was necessary. According to the submission the Claimant must have been aware that the proposed meeting with the President was for the purpose of the President considering his dismissal.

40. I do not accept that this is necessarily the position. While there were a lot of facts in the public domain these facts must be viewed against the background of the source of the information. What facts was the Claimant aware of at the time and from what sources? With respect to his knowledge as to the purpose of the meeting on coming into the meeting the Claimant accepts in his affidavit that he was aware of the public furore over his statements; of the fact that the Prime Minister had called for his removal and the fact that the Prime Minister had met with the President. From the newspaper reports annexed to his affidavit he must have

been aware that according to the media the Leader of the Opposition had also met with the President and that his position was the same as the Prime Minister.

41. He would of course also have been aware of the powers of the President with respect to his removal from office and in particular that he could only be removed for the reasons specified in section 122A. He would not however have been aware that allegations against him had been made to the President by three other members of the Commission.

42. In terms of the circumstances under which the meeting was arranged the Claimant would have received an invitation to attend a meeting with the President from the President's secretary by way of a telephone call. He would also have been aware that the request was to have the meeting within one or two days of the invitation. Finally the Claimant would not have been aware of the conclusions the President was prepared to draw from these facts or allegations insofar as they impacted on the statutory restrictions on his removal, that is, the requirements of section 122A (1)(a) to (g). It is, I think, fair to say that these were not obvious conclusions to be drawn from the facts either known to the Claimant at the time or indeed those relied on by the President.

43. Looking at these facts objectively, it would seem to me that there was nothing that would necessarily indicate to the Claimant that the purpose of this meeting was for him to present a case against his removal. Indeed the fact that the Claimant chose the first of the two suggested dates, which would have afforded him limited opportunity to get legal advice, seems to suggest to me that in fact the Claimant was unaware of the real purpose of the meeting.

44. In addition it would seem to me that the nature of the office held by the Claimant and the severity of the punishment would have militated against the Claimant concluding that the President would have dealt with such a serious consequence in so casual a manner.

45. It would seem to me that the fact that the Claimant in his affidavit accepts that he went to the meeting expecting that the issue of the nature and basis of his statements regarding the ethnic composition of the higher ranks of the Trinidad and Tobago Police Service would be broached would not, in my view, necessarily lead to the conclusion that the Claimant went into the meeting expecting that the question of his dismissal was being considered. To my mind going into a meeting expecting to be challenged or even chastised for a particular stance is a far different thing from an expectation that those discussions without more could result in your removal. This to my mind is particularly so in the light of the specific constitutional provisions with respect to his removal. In my opinion the fact that the question of his removal was in the public domain cannot be a substitute for the requirement that he be given some notice that the President was himself considering his removal.

46. On the facts presented it is clear that in arriving at his decision the President took into consideration two sets of facts, the statements made by the Claimant to the JSC and the representations made to him by three of the four other members of the Commission. From these facts the President made certain conclusions as to their effect in law, namely, that these facts amounted to a failure by the Claimant to perform his duties in a responsible manner and demonstrated a lack of competence to perform his duties. The question is not whether the President was correct in this regard but whether the Claimant was given a proper opportunity to

make worthwhile representations with respect to both the factual situation he was presented with and the conclusions to be drawn from those facts.

47. It is clear that there was no factual dispute as to the Claimant's statements made at the JSC meeting or the responses of the three members at the meeting to his statements. There were, in this regard, the unrevised verbatim notes. The Claimant himself does not dispute the statements attributed to him or to the other members in these notes. Given the position presented by the President on these facts the Claimant would have been required to respond to the view of the President that these statements were outside of his remit as the chairman of the Commission and that in those circumstances it was open to the President to conclude that in those circumstances the Claimant failed to perform his duties in a responsible manner.

48. With respect to the complaints of the three members the President required the Claimant to respond to the allegations contained in both letters and to the conclusion which, according to the President, could be drawn from the contents that the allegations demonstrated a lack of competence to perform his duties on the part of the Claimant. In this regard therefore the President was requiring the Claimant at that meeting to respond to these facts and the President's conclusions on the effect of the facts given the statutory grounds for the Claimant's removal.

49. On the evidence it is clear that with regard to the conclusions the President seemed prepared to make the Claimant put his position to the President. The question is whether the Claimant was in the circumstances in a position to make worthwhile representations with respect to the President's conclusions.

50. Insofar as the allegations contained in both letters are concerned the contents of the first letter had already been brought to the Claimant's attention by way of an unsigned copy of the letter being sent to the Claimant by e-mail. With respect to the allegations contained in the second letter this is a letter addressed to the President. It is not in dispute that this letter was only brought to the Claimant's attention during the meeting. The Defendant submits however that the Claimant had an opportunity to respond to the allegations made in the letter at the meeting and that in any event the letter was saying nothing new.

51. In so far as the second letter brought certain facts to the President's attention therefore it would be fair to say that the facts were as follows:

- (a) there was never a meeting of the Commission prior to the JSC meeting to discuss a consensus position;
- (b) there was never any discussion among the members of the Commission on the ethnic composition of the Police Service;
- (c) the members of the Commission never agreed that the ethnic composition of the Police Service was a matter for discussion at the JSC hearing;
- (d) the Claimant presented his opinion on the ethnic composition of the Police Service as the opinion of the Commission;
- (e) the writers of the letter were of the opinion that there was a problem with the Claimant's style of chairmanship;

and, by way of the inclusion of the first letter,

(f) the writers of the letter had on an earlier occasion indicated to the Claimant by way of a letter (i) their concern with the continuing negative publicity surrounding an incident which occurred between the Claimant and two police officers and (ii) made suggestions towards certain administrative and regulatory matters.

52. The first point to be made is that the facts raised in the second letter were never raised in the first letter. Secondly, it is clear that since the first letter was addressed to the Claimant and only brought to the attention of the President by way of its inclusion in the second letter. Prior to his attending the meeting therefore the Claimant would not have been aware that the first letter had been brought to the President's attention. In this context, the Claimant's evidence that he was taken by surprise is understandable.

53. While it is fair to say that the Claimant had prior knowledge of what the three members were saying in the first letter the statement that the contents of the second letter were not new to the Claimant is not entirely true. It is clear from the unrevised minutes of the JSC that the Claimant would have known that (i) his opinion with respect to the ethnic composition of the Police Service was not shared by these three other members; (ii) that insofar one of the members was concerned she did not think that it was something that would have been dealt with at the JSC meeting. He would also have known the view of these members with respect to the "administrative and regulatory" proposals raised in the first letter.

54. It is not however correct to state that the other facts or opinions of those other members addressed in the letters had been known to the Claimant prior to the meeting. In other words the Claimant would not have been aware prior to the meeting that those members were saying that (a) there was never a meeting of the Commission held prior to the JSC meeting to discuss a consensus position. In this regard it must be noted that the undisputed evidence is that a meeting was called but not attended by any of these members; (b) there was never any discussion among the members of the Commission on the ethnic composition of the Police Service or (c) that the writers of the letter were of the opinion that there was a problem with the Claimant's style of chairmanship. In the circumstances it would seem to me that the second letter contained information which was not known to the Claimant prior to the meeting.

55. The question that arises from this is simply: is it correct to say that in these circumstances the Claimant was afforded a real opportunity to make representations with respect to the facts as presented and the conclusions from those facts which the President seemed prepared to make and as it transpired did in fact make. Insofar as the facts presented to the President were concerned it is clear that the Claimant did not admit these facts and requested an opportunity to deal with the allegations made. Indeed the fact that the Claimant did not in answer to the allegations advise the President of the meeting of the Commission called prior to the JSC meeting for the very purpose and not attended by these three members suggests to me that the Claimant was in fact unable to properly deal with even the factual allegations at the meeting with the President.

56. With respect to the conclusions which the President seemed prepared to make, that

is that the facts amounted to a failure on the part of the Claimant to perform his duties in a responsible manner and demonstrated a lack of competence on the part of the Claimant to perform his duties, it is clear from the evidence that the Claimant did not agree with the conclusions drawn by the President and requested an opportunity to have representations on the law made by attorneys on his behalf. This it seems to me to be the only logical inference to be drawn from the Claimant's repeated requests to be allowed to present a legal opinion. The opinion could not have been to deal with the truth of the allegations that was for the Claimant but would have been pertinent to the conclusions of law drawn by the President on those allegations.

57. In this regard therefore I do not accept the Defendant's submissions to the effect that the Claimant's request to be allowed to provide the President with an opinion from his attorneys was unreasonable since, in my opinion, the purpose of the legal opinion could only have been in order to advise the President on the law and in particular the meaning to be ascribed to section 122A (d) and (f) of the Constitution. The fact that the Claimant was himself an Attorney at law is to my mind of no relevance. In this regard the old adage about a lawyer who represents himself is to my mind founded on a basic truth. Indeed it has not been suggested by the Defendant that this fact is at all relevant to my assessment of the particular circumstances.

58. This brings us to the final submission of the Claimant that at the end of the meeting the Claimant was left with the impression that the President was willing to consider representations on the law made to him by the Claimant's attorneys. Looking at the conversation as a whole it seems to me that the President's enquiry whether the opinion from the Claimant's attorneys could be received by Monday morning and his final statement to the Claimant to see

what his attorneys could do suggested that the President would be willing to consider such opinion if sent within that timeframe. It is clear however that the President did not let the time frame suggested by the President himself expire but rather served the Claimant with his removal notice at 10.30 a.m. on the Monday morning.

59. So what is a court to make of these facts? I agree with Lord Mustill when he says that a determination of what is fair is essentially an intuitive judgement. A court is required to look objectively at all the circumstances and answer the question has the Claimant been fairly treated. At the end of the day is this an example of fair play in action? The fact that it may very well be that the same decision would have been arrived at even if the Claimant had been given a fair opportunity to answer the case made out against him is in my opinion irrelevant. The fact is that a decision arrived at without compliance with the rules of natural justice or procedural fairness is no decision at all and must be declared as such by the court.

60. In the case of *Gafoor v the AG*¹³ under somewhat similar circumstances Kokaram J., accepting that the claimant was entitled to a fair hearing by the President before he exercised his discretion to appoint a tribunal to consider her removal from the Integrity Commission, was of the opinion that the President had given the claimant a fair hearing. In that case at issue was the appointment by the President of a tribunal to investigate facts alleged against the claimant.

61. On the facts accepted by the trial judge the claimant had been summoned to a meeting with the President. At that meeting the President provided the claimant with the gist of

¹³ Supra

complaints made about her by other members of the commission but not copies of the letters containing those complaints. The trial judge was satisfied that what was told to the claimant by the President was an accurate account of what was contained in the letters. At the meeting the claimant was allowed to take notes of what was told her. The claimant was then given the opportunity to respond in writing to the letters and, as accepted by the trial judge, the President waited for her response to the allegations before acting.

62. In the case before me the risk to the Claimant was much greater in this case it was instant dismissal. The Claimant was given no notice of the President's intention to consider his dismissal. Neither did he know before the meeting all the allegations being considered by the President. At the meeting the Claimant was not only faced with new allegations but as well with conclusions of law drawn by the President. Unlike in the Gafoor case no opportunity was given to the Claimant to prepare a written response or indeed, any time other than in the meeting, to respond to either the allegations or the conclusions the President seemed willing to draw from these allegations. Neither did the President await the expiration of the time suggested by the President himself for the response by the Claimant's attorneys.

63. Looking at these facts objectively I am satisfied that the Claimant was not given a fair opportunity to meet and treat with the allegations made against him and the conclusions drawn from these allegations. To my mind the circumstances under which the decision was reached when examined objectively do not demonstrate 'fair play in action'. This is without a doubt an unfortunate situation but at the end of the day the issue for my determination is not whether the decision of the President was right or wrong but whether the circumstances under

which it was made afforded the Claimant a proper opportunity to answer the case made out against him.

64. I do not think so. In these circumstances I am satisfied that the Claimant's constitutional protection to the right to procedural fairness has been infringed. The Claimant is therefore entitled to the declaratory relief sought. The Claimant has not sought any mandatory orders or damages and in the circumstances none will be granted.

65. Accordingly, there will be a declaration that the termination by the President of the Claimant's appointment as a member of the Police Service Commission in purported exercise of power under section 122A of the Constitution has contravened:

- (i) the Claimant's right to the protection of the law as guaranteed to him by section 4(b) of the Constitution; and
- (ii) the Claimant's right to a fair hearing in accordance with the principles of fundamental justice for the termination of his rights and obligations as guaranteed to him by section 5(2)(e) of the Constitution;

and is accordingly illegal, null and void and of no effect.

Dated this 5th day of February, 2013.

Judith Jones
Judge

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2011- 04918

BETWEEN

NIZAM MOHAMMED

Claimant

AND

**THE ATTORNEY GENERAL OF
TRINIDAD AND TOBAGO**

Defendant

BEFORE THE HONOURABLE MADAM JUSTICE JUDITH JONES

Appearances:

Mr. F. Hosein S.C., instructed Mr. G. Mungalsingh, Mr. R. Dass and Ms. S. Bridgemohansingh for the Claimant.

Mr. A. Sinanan S.C., Mr. G. Ramdeen and Mr. V. Debideen instructed by Ms. D. Dilraj-Batoosingh and Mr. B. James for the Defendant.

ERRATA

1. Page 27 of 27, line 2 of paragraph 65 that starts with:
“the Claimant’s appointment as a member of the Police Service Commission” in the purported exercise.”
Add “ chairman” after the word “as”.
Replace the word “a” with the word “and”