

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO. 3562 of 2003

**IN THE MATTER OF THE FUNDAMENTAL RIGHTS AND
FREEDOMS GUARANTEED BY THE CONSTITUTION OF THE
REPUBLIC OF TRINIDAD AND TOBAGO (“THE CONSTITUTION”)
ENACTED AS THE SCHEDULE TO THE CONSTITUTION OF THE
REPUBLIC OF TRINIDAD AND TOBAGO ACT, CHAP. 1:01**

AND

IN THE MATTER OF THE RULES OF THE SUPREME COURT 1975

AND

**IN THE MATTER OF THE FAILURE AND/OR REFUSAL OF THE
STATE TO TAKE ANY OR ANY NECESSARY STEPS TO EQUATE THE
TERMS AND CONDITIONS OF EMPLOYMENT AND/OR SERVICE OF
THE APPLICANTS AS MEMBERS OF THE S.R.P, WITH THOSE OF
MEMBERS OF THE TRINIDAD AND TOBAGO POLICE SERVICE OF
EQUIVALENT RANK WHILE REQUIRING THE APPLICANTS TO
REFORM THE SAME DUTIES AND FUNCTIONS AS MEMBERS OF THE
TRINIDAD AND TOBAGO POLICE SERVICE OF EQUIVALENT RANK**

AND

**IN THE MATTER OF THE FAILURE AND/OR REFUSAL AND/OR
INACTION OF THE STATE ACTING THROUGH THE MINISTER OF
NATIONAL SECURITY TO MAKE REGULATIONS UNDER
SECTION 22 OF THE S.R.P. ACT, CHAPTER 15.03.**

AND

**IN THE MATTER OF THE FAILURE AND/OR REFUSAL OF THE
STATE TO TAKE ANY STEPS OTHERWISE OPEN TO IT TO
REGULARISE THE TERMS AND CONDITIONS OF SERVICE AND
EMPLOYMENT OF THE APPLICANTS AS S.R.P OFFICERS SO
AS TO EQUATE THE SAME WITH THE TERMS AND CONDITIONS OF
EQUIVALENT MEMBERS OF THE TRINIDAD AND TOBAGO
POLICE SERVICE**

AND

**IN THE MATTER OF AN APPLICATION FOR REDRESS
PURSUANT TO SECTION 14 OF THE CONSTITUTION**

BETWEEN

1. Annisia Webster
2. Awai Akim
3. Bernadette Fraser
4. Edward Nigel Glaud
5. Ingrid Groden
6. Lyndon Ramsden
7. Marion H. Francis
8. Gerard Bain
9. Lisa Dumas
10. Marcia Dennis
11. Andy Griffith
12. Abena Oliver
13. Alana A. Weekes
14. Anthony Rudolph George
15. Avalon Walker-Glasgow
16. Bernadine Callender
17. Chad Antoine
18. Cindy Lashley
19. Cindy Prescod
20. Ellen S. Henry
21. Gail Salvary
22. Hilton Gardiner

23. Jason Mejias
24. Joycelyn Huggins
25. Kerry Lopez
26. Laverne Nicholson
27. Lystra Solomon
28. Marsha Burgan
29. Raenette Jackie
30. Rayanne Murray
31. Ryan Maxwell
32. Sharon K. Williams
33. Stacey-Ann Charlerie
34. Waldron Adams
35. Wendy-Ann Morton
36. Ajit Ramdass
37. Alana Celeste Alfred
38. Albert Fortune
39. Allan Marcano
40. Allison Henry
41. Anand Sookraj
42. Ancil Henry
43. Ancil Hosanine
44. Ancil Huggins
45. Anderson Corneal
46. Andre Renaud
47. Andrew Rooplal
48. Andy Mohammed
49. Angela Dillon
50. Anil Bharat
51. Anson Gopaul
52. Anson Young
53. Anthea Jack
54. Anthony Clarke
55. Anthony Dulie
56. Anthony Espinoza
57. Anthony Dale Regis
58. Anthony Garette
59. Anthony Joseph
60. Anthony Lashley
61. Anthony Pierre
62. Anthony Prince (Regimental No. 2650)
63. Anthony Prince (Regimental No. 3002)
64. Anthony Richards
65. Anthony Williams
66. Antonette Osmond

67. Antoni Sealey
68. Arlene Simon
69. Arnold Harrilal
70. Ashton Beharry
71. Ashton Khadoo
72. Assa Maharaj
73. Aulton John Brown
74. Avon Harewood
75. Ayesha Bishop
76. Azam Mohammed
77. Aziz Mohamed
78. Basdeo Sookraj
79. Bernard Moore
80. Berry Davidson
81. Bhagwandeem Seelochan
82. Bhim Balroop
83. Bishnu Cholai
84. Bissoonath Samaroo
85. Brereton Oswyn
86. Brian Cornell
87. Brian Ddiaz
88. Brian Durant
89. Bridglal Polwah
90. Bryan Affoon
91. Bryan Sylvester
92. Bryan Walrond
93. Buda Ramsaroop
94. Cameile Ramsey
95. Capildeo Duncan
96. Carl B. Hector
97. Carl Bickram
98. Carlisle Soanes
99. Carlon Denoon
100. Carlyle Cayenne
101. Carlson Warrick
102. Carva Vincent
103. Catherine Rosales
104. Cavelle Mills
105. Cecil Hamilton
106. Charlene Allen
107. Charles Lyons
108. Charles Wallace
109. Charlie Hewitt
110. Chriscynthia Taitt Sealey

111. Christopher Cromarthy
112. Christopher Dookie
113. Christopher Downes
114. Christopher George
115. Christopher Williams
116. Clarence Baptiste
117. Clarence Findlay
118. Clarke (Regimental Number 2417)
119. Claudette Eckstein
120. Cleaver Rose
121. Clifford St. Rose
122. Clint Johnson
123. Clinton alric Thomas
124. Clydie Earl Pierre
125. Courtney John
126. Crispino Cyrus Gomez
127. Crompton Pearson
128. Curtis Campbell
129. Curtis Farris
130. Curtis Frith
131. Curtis Orr
132. Curtis Rogers
133. Curtis Valentine
134. Cynthia Trim
135. Cyril Giles
136. Cyril Smith
137. Dale Hosein
138. Dale Mayers
139. Daniel Dilchand
140. Daniel Fraser
141. Darrell Dickson
142. Darryl Alexander
143. Dave Chambers
144. Dave Inniss
145. Dave James
146. David Alexander
147. David George
148. David Mc Gregor
149. David Terrence
150. Dayne Quintin Russell
151. Denise Huggins
152. Dennis Barton
153. Dennis Frederick
154. Dennis James

155. Denzil Regis
156. Deon Alexander
157. Deoram Maharaj
158. Deoraj Ramjattan
159. Derick Hinds
160. Desmond Graham
161. Dexter Brian Edwards
162. Dexter Hernandez
163. Dexter Patrick
164. Diana Sealey
165. Dipnarine Balkaran
166. Don Hope
167. Doniphon Thompson
168. Donna Dillon
169. Douglas Foster
170. Earl Humphrey
171. Edward Caesar
172. Eldred Bailey
173. Elizabeth A. Sutherland
174. Eric Trinidad
175. Ericson Gomez
176. Errol Baptiste
177. Errol Daniel
178. Errol Thomas
179. Esdel Nero
180. Eugene Capriata
181. Eugene Francis
182. Eusebius Daacloir
183. Everton Ayres
184. Farah Hercules
185. Fareed Mohammed
186. Farook Khan
187. Felicia Lacoa
188. Felix Langtan
189. Fitzroy Thomas
190. Floyd Anderson
191. Francis Bishop
192. Francis Ramlal
193. Frank Mohammed
194. Franklyn Mc Donald
195. Gabriel Davidson
196. Gabriel Merrique
197. Garthlyn Joefield
198. Gemma Charles

199. George Caldeira
200. George Ryan
201. Gerald Kisson
202. Geraldine Joy
203. Gerard Assing
204. Gerard Barnwell
205. Gerard Logan
206. Germain Malchan Alvarez
207. Giselle Patrina Sandy
208. Gokool Rampergas
209. Gordon C. burton
210. Gregory Richards
211. Gurney Chadband
212. Haroon Mohammed
213. Harrilal Mahipath-Bachoo
214. Harrinarine Ramlochan
215. Harry Persad Koolanjan
216. Hayden Miller
217. Himchan Jugmohan
218. Hollis Browne
219. Hollis Garcia
220. Hudson Mc Clatchie
221. Ian Regis
222. Indarjit Jagdeen
223. Inniss Charles
224. Inool Mohammed
225. Irvin Primus
226. Isaac Grant
227. Isaac Nayan
228. Jacob John
229. Jaimungal Harrinarine
230. Jaiprakash Sarran
231. James Moses
232. Jamie Holder
233. Jasmine Edward
234. Jeffrey James
235. Jillian Charles
236. Joel Thomas
237. John Daniel
238. John Junior Victory
239. John Kilvin Marrison
240. John Lewis
241. John Parsons
242. Joseph Alfred

243. Joseph Bonaparte
244. Joseph Campbell
245. Joseph George
246. Joseph James
247. Joseph Sookram
248. Joseph Valentine
249. Josiah Glasgow
250. Judith Burnette
251. Julie Waterman
252. Juliet Roberts
253. June Trotman
254. Junior Benjamin
255. Junior Nothingham
256. Junior Persad
257. Karim Cassim
258. Karl Franklyn
259. Kashar Persad
260. Keith Anderson
261. Keith Stewart
262. Keith Sookdeo
263. Kelly Persad
264. Kelly Ramlal
265. Kelson Thom
266. Kelvin Guy
267. Kenmore Cumberbatch
268. Kenneth Alexander
269. Kenneth Burgess
270. Kenneth sirju
271. Kenneth Superville
272. Kenrick De Silva
273. Kenrick Driggs
274. Kent Chambers
275. Kent Samaroo
276. Kevin Hall
277. Kevin James Shades
278. Kevin Sheldon Smith
279. Kime Baptiste
280. Kofi Barrow
281. Krishna Ramnarine
282. Krishna Singh
283. Kumar Balgobin
284. Kumar Fulchan
285. Kumarsingh Ramsingh
286. Kurban Ali

287. Kurt Eastman
288. Landy Bynoe
289. Larry Martin
290. Laverne Villafane
291. Lawrence Cromarty
292. Lawrence Moses
293. Lennox Joseph
294. Lenwayne Leopold
295. Leon Wayne Smith
296. Leroy Euzebe
297. Leslie Assang
298. Lester Mollineau
299. Lisa Sambury
300. Liston R. Brown
301. Loopchan Persad
302. Louis York
303. Lucius St. Vincent
304. Lymroy Martin
305. Lyndell G. Charles
306. Lystra Marcelle
307. Marcia Stewart
308. Margaret Cruickshank
309. Marlene Baird
310. Marlene Bedeau
311. Marlon Roberts
312. Marsha Simmons Carmichael
313. Martin Roy Villafana
314. Matthew Jason Haywood
315. Maurice Rodriguez
316. Max Mc Clashie
317. Mc Kenely Perry
318. Meed Jones
319. Melinda Daniel
320. Mervin Atwell
321. Michael Adolphus Beckles
322. Michael Antoine
323. Michael Bournes
324. Michael Clarke
325. Michael Lennard
326. Michael Remy
327. Michael Scipio
328. Michael Sealy
329. Michael Spring

330. Michael Thompson
331. Michael Wilson
332. Michelle Mahabir
333. Miguel Hannibal
334. Mirza Mohammed
335. Mohan Maharaj
336. Moonasar Poonwassie
337. Morino Fiagro
338. Morris Taylor
339. Motiram boodoo
340. Murray Glenford
341. Narine Salick
342. Nazir Hosein
343. Nazmudeen Mohammed
344. Nemchand Ramsumair
345. Neville Kennedy
346. Nigel Roche
347. Nigel Syvester Banfield
348. Nizamadeen Ali
349. Norris Neaves
350. Oarnley A. Romeo
351. Omah Maharah
352. Otis Horsford
353. Owen Toussaint
354. Paponatte Bede
355. Patrick Ransome
356. Peter Thomas
357. Petronilla Jules
358. Phillip Vaughn
359. Pollina Andrews
360. Pooran Ramlogan
361. Prabhoodial Lalla
362. Prame Santia
363. Princess Sylvester
364. Quinton Phillips
365. R. Raghbir
366. Rajendranath Singh
367. Rajkumarie Tambie
368. Rambaran Ramroop
369. Ramchan Ramrattan
370. Ramdass Ramlakhan
371. Ramdeo Ramdhanie
372. Ramesh Ramsamooj

373. Ramesh Sookdeo
374. Ramish Radgeman
375. Ramjohn Khan
376. Ramleakha Kanhai
377. Ramon Mohammed
378. Rampartapsingh Ramsingh
379. Ramsamuj Dukeran
380. Randon Dickson
381. Rawle Cooper
382. Rawle Quintyne
383. Ray Kent
384. Raymond Moore
385. Ricardo Lewis
386. Richard Nicome
387. Richard Sammy
388. Robert Ramirez
389. Roberta Henry
390. Roger James
391. Roger Khan (Regimental Number 3232)
392. Roger Khan (Regimental Number 3855)
393. Rohdill Kirk
394. Roland Melville
395. Roland Smith
396. Ronald Nathasingh
397. Ronnie Forde
398. Rooplal Ramnath
399. Rooplal Thachuvie
400. Roopwan Singh
401. Roslyn Mohip
402. Russell George
403. Russell Murray
404. Ruthella George
405. Ruthven Duchesne
406. Sam Beharry
407. Samlal Bisson
408. Samlal Ramanan
409. Sandra Marshall
410. Schubert Jack
411. Sean Timothy
412. Selwyn Callender
413. Selwyn Forteau
414. Shahood Mohammed
415. Sheldon Gaston
416. Sheldon Kistow
417. Sheldon Theodore

418. Sherwin Ochoa
419. Simon Clapham
420. Sookdeo Ramoutar
421. Stanislaus Garraway
422. Stanley Stuart
423. Stephen Gour
424. Stephen Harrylal
425. Stephen Jerome
426. Stephen Maharaj
427. Stephen Nelson
428. Stephen Windsor
429. Steve John
430. Steve Monderoy
431. Steve Thomas
432. Suraj Sonnyram
433. Surlan Ballantyne Salazar
434. Susan Casimire-Henry
435. Susan Guy
436. Susette Jack
437. Suzette Woodley
438. Sydney Gill
439. Teddy Martin
440. Terrance Carrington
441. Terrance Murrancie
442. Terrance Woodley
443. Theodore Lezama
444. Thomas Baptiste
445. Thomas Mahase
446. Toolsie Jaggesar
447. Trevor Merrick
448. Trevor Peter John
449. Ulrick Neverson
450. Valentine Lamy
451. Valentino St. Martin
452. Vaughn Nicholson
453. Vernon Sampson
454. Victor Acevero
455. Victor Baptiste
456. Vincent Birot
457. Vincent Hinds
458. Vincent Monroe
459. Vishnu Patel
460. Viventine Richards
461. W. Satnarine
462. Wayne Charles

463. Wayne Lewis
464. Wendell Campbell
465. Wendy John
466. Wendy Pierre
467. Winston Davis
468. Winston Jebode
469. Adolphus George
470. Ahamad Mohammed
471. Alpheus Grant
472. Andrew Cunin
473. Anthony Simmons
474. Arnim Ranjitsingh
475. Arthur Beckles
476. Arthur Caesar
477. Baldeo Ramdass
478. Baldeo Ramroop
479. Balliram Rampersad
480. Barkar Hosein
481. Claudius Rennie
482. Clemenson Daniel
483. Clement Roach
484. Daniel Greenidge
485. Daniel Swingburn
486. David Moses
487. Deonarine Ramtahal
488. Deosaran Doodhai
489. Edward Figaro
490. Elfret Dalrymple
491. Errol Miguel
492. Eustace Romeo
493. Everard Mc Bain
494. Franklyn Charles
495. Gabriel Baptiste
496. Gangadeo Gopaul
497. Garvin Grenidge
498. George Martin
499. Hubert La Foucade
500. Ivan Hamilton Caesar
501. James Stafford
502. John Martin
503. Joseph John
504. Junior Singh
505. Keith Hamilton
506. Kenneth Baksh

507. Krishna Jagdeosingh
508. Leford Cooper
509. Lennox Shade
510. Leroy Greaves
511. Marquis De Four
512. Mc Donald Constantine
513. Michael Brown
514. Michael Maraj
515. Michael Murray
516. Norman Leroy Gonzales
517. Otis Horsford
518. Peter Garcia
519. Rajendranath Singh
520. Ramdeo Sampath
521. Ramesh Sookdeo
522. Ramjattan Sankar
523. Ramlogan Ramjattan
524. Raymond Joseph
525. Raymond Reyes
526. Reginald Mc Kenna
527. Ricardo Mollineau
528. Ricardo Smith
529. Richard Mc Kenzie
530. Robert Alphonso James
531. Rodrick Murray
532. Roland Gray
533. Roy Joseph
534. Rudy Mohammed
535. Sahaeed Mohammed
536. Sankar Baboolal
537. Seramanie Ramcharan
538. Seudath Dass
539. Shaphait Hosein
540. Shellford Johnson
541. Sookram Rampersad
542. Victor Williams
543. Vincent Rivers
544. Winston Mc Gillivery
545. Abraham Isreal
546. David Mohan
547. Doyle Powder
548. Edwin Seebaran
549. Gerard Barnwell
550. Jiwan Dwarika

551. Karen Brisbane
552. Kevin Fraser
553. Krishna Sankar
554. Martin Cumberbatch
555. Michael Jitta
556. Nazab Mohammed
557. Norbert Rogers
558. Ravi B. Goolabsingh
559. Ramnath Jaimungal
560. Sandra Seemungal
561. Surase Maharaj
562. Bryan A. Forbes
563. Carlton A. George
564. Cassim M. Toussaint
565. Dennis Leon
566. Dorset Phillips
567. Doyle Louis
568. Edgar Frank
569. Edward Francis
570. Emmanuel Boucher
571. Erwin George
572. Felton Leith
573. Francis K. Callender
574. Glenton Williams
575. Herman Edwards
576. Harris Daniel
577. Hugh Stephen
578. James Graham
579. Kenneth Nimblett
580. Lennox Joefield
581. Mc Carthy Jack
582. Pius Letren
583. Ramesh Besai
584. Richard Derrick Prospect
585. Theophilos Solomon
586. Thomas Victor Williams
587. Vernon Matthews
588. Walter Denys Farrell
589. Wesley Roberts
590. Wilbert Abraham
591. Winston Dick
592. Winston Yorke

Before the Honourable Justice P. Moosai

APPEARANCES:

*Ramesh Maharaj SC, Ricky Harnanan, Mark Rawlins,
instructed by Darryl Allahar and Vijaya Maharaj for Applicants
Fyard Hosein SC, Kavita Jodhan, Sasha Bridgemohansingh
and Carla Soverall for Respondent*

JUDGMENT

A. Introduction

(a) The dispute

1. The Applicants as past and present members of the Special Reserve Police are alleging that they have been subjected to unequal treatment or been discriminated against by the State in that they perform/performed the same or equal work when compared to members of the Trinidad and Tobago Police Service of equivalent rank, but do not receive equal benefits. Accordingly they have been denied their right to equality of treatment from a public authority in the exercise of its functions pursuant to section 4 (d) of the Constitution.

The Applicants further contend that the failure and/or neglect and/or refusal of the executive arm of the State to take the necessary steps to make Regulations pursuant to the Special Reserve Police Act, Chapter 15:03 (“the SRP Act”) to govern the terms and conditions of service of members of the Special Reserve Police, and its refusal and/or neglect to have the necessary legal and/or administrative infrastructure to give effect to their entitlements, constitute a denial to them of their fundamental rights under section 4 (b) of the Constitution to equality before the law and the protection of the law.

(b) The categories of Applicants and relief claimed

The 592 Applicants are either past or present members of the Special Reserve Police established under the SRP Act. At the time of filing this action they comprised six (6) categories, namely:

- (i) Applicants Nos. 1 to 10 are persons who are employed at present as part-time members of the Special Reserve Police and are called out on part-time duty.
- (ii) Applicants Nos. 11 to 35 are persons who are employed at present as part-time members of the Special Reserve Police but are called out on full-time duty.
- (iii) Applicants Nos. 36 to 468 are former members of the Special Reserve Police who were absorbed into the Police Service by virtue of a Cabinet decision (“the said Cabinet decision”) contained in Cabinet Minute No. 1279 dated July 12, 2000 that, among other matters, members of the Special Reserve Police who had been continuously employed on a full-time basis for periods in excess of two years, and who also met the further criteria specified in the said Cabinet Minute, would be so absorbed.
- (iv) Applicants Nos. 464 to 544 are former members of the Special Reserve Police who, pursuant to the said Cabinet decision, were summarily dismissed from the Special Reserve Police upon attaining 55 years of age, the age of retirement of Second Division police officers in the Police Service, and paid a separation package calculated at one month’s salary for every year of service plus a 20% enhancement, without pension.
- (v) Applicants Nos. 545 to 562 are former members of the Special Reserve Police who, having been continuously employed on a full-time basis for more than two (2) years, were eligible for absorption into the Police Service but either (a) were deemed to have not met

the further criteria for absorption, or (b) were on suspension from duty while absorption was underway which suspension ended after the absorption process was completed, and were summarily dismissed from the Special Reserve Police without the payment of any type of severance benefit.

- (vi) Applicants Nos. 563 to 592 are former members, or represent former members, of the Special Reserve Police who retired from service at age 60 before the said Cabinet decision and were paid an *ex gratia* “compassionate” gratuity.

However their Attorney, Mr. Maharaj SC, has indicated that there are now no members in Category 5. Thus the Applicants the subject matter of this action (Categories 1, 2, 3, 4 and 6) are contending that they are entitled to the following relief under the Constitution:

- (i) A declaration that the State, by refusing to take any or any necessary steps to equate the terms and conditions of employment and/or service of the Applicant as members of the Special Reserve Police with those of members of the Trinidad and Tobago Police Service of equivalent rank, while requiring the Applicants to perform the same duties and functions as members of the Police Service of equivalent rank, has contravened and/or contravenes sections 4 and 5 of the Constitution in relation to the Applicants and is accordingly illegal and unconstitutional.
- (ii) A declaration that the failure and/or refusal (which is continuing) of the State, acting through the Minister of National Security or any other Minister of Government duly authorised to make regulations pursuant to section 22 of the SRP Act in respect of the matters prescribed therein and/or in terms similar to those of the Police Service Regulations, Chapter 15:01, has contravened and/or

contravenes sections 4 and 5 of the Constitution in relation to the Applicants and is accordingly illegal and unconstitutional.

- (iii) A declaration that the continued failure and/or refusal of the State to take any other steps open to it to regularise or to have regularised the terms and conditions of service and employment of the Applicants, as members of the Special Reserve Police so as to equate the same with the terms and conditions of equivalent members of the Police Service, has contravened and/or contravenes sections 4 and 5 of the Constitution in relation to the Applicants and is accordingly illegal and unconstitutional.
- (iv) An order that the State do pay to the Applicants monetary compensation for the contravention of Chapter 1 of the Constitution in relation to them to be assessed by a Judge in Chambers.

(b) Summary of conclusions

3. I have come to the conclusion that members of the Police Service cannot be true comparators with members of the Special Reserve Police as the legislature has clearly created two distinct classes of officers, with members of the Special Reserve Police being assigned duties of significantly lesser responsibility. Consequently the Applicants have not been deprived of their right to equality of treatment.

Further the Applicants have not been deprived of their right to the protection of the law by the failure of the Minister to make regulations, as there was no legally enforceable duty on the Minister to promulgate the regulations within any specific time frame. The non-implementation of the regulations could not therefore have provided the basis for the remedies sought. Moreover the Applicants could access all or substantially all the benefits proposed by the unimplemented regulations under the subsisting legislation. In the final analysis the determination of the terms and conditions of service of members was a matter of policy.

B. Equality Before The Law

(a) Analysis of the law

4. It is manifest that equality is a comparative concept, the discernment of which invariably requires comparisons with others. In *Mohanlal Bhagwandeem v AG* PC App No. 45 of 2003, [18] Lord Carswell propounded the test applicable in cases of unequal treatment:

“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 Ulster Constabulary* [2003] 2 All ER 26 at paragraph 71 as actual or hypothetical comparators. The phrase which is common to the anti-discrimination provisions in 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.”

5. It is therefore for a claimant to establish by cogent evidence that he has been or would be treated differently from some other similarly circumstanced person or persons. Where apparently discriminatory treatment is shown, it is for the alleged discriminator to justify it as having a legitimate aim and as having a reasonable relationship of proportionality between the means employed and the aim sought to be realised: *Bishop of Roman Catholic Diocese of Port Louis and Others v Suttihudeo Tengur and Others* PC App. No. 21 of 2003 [19]. The differential treatment must therefore be objectively justified.

6. From the foregoing it is apparent that differential treatment of itself is not determinative of whether there has been a constitutional violation. “To differentiate is not necessarily to discriminate”: per Rault J in *Police v Rose* [1976] MR 79, 81. It is only action which produces arbitrary, capricious or irrational discrimination that is prohibited

by the Constitution. The term descriptive of this is invidious discrimination. Legislative classifications which are reasonable and not arbitrary would therefore be constitutionally permissible. Thus in *Ong Ah Chuan v Public Prosecutor* [1981] AC 648 [PC], Article 12 (1) of the Constitution of Singapore provided: “All persons are equal before the law and entitled to the equal protection of the law.” The defendants claimed that they were deprived of equality before the law and the equal protection of the law. The contention was that s.29 of the Misuse of Drugs Act was in conflict with Article 12(I), as the former imposed a lesser punishment on persons trafficking in less than 15 grammes of heroin. It was held, inter alia, that article 12 (I) guaranteed an offender equal treatment with other offenders in similar circumstances and, provided that the factors adopted by the legislature as constituting a dissimilarity of circumstances were not purely arbitrary but bore a reasonable relation to the social object of a law, there was no conflict with Article 12 (1). Accordingly, since it was not unreasonable for the legislature to have provided for a stronger deterrent in the case of persons dealing in more than 15 grammes of heroin than in that of those dealing in less, in differentiating between those two classes section 29 of the Misuse of Drugs Act was not arbitrary, and the sentences passed on the defendants were not unconstitutional. At pages 673-674 Lord Diplock elucidated:

“Equality before the law and equal protection of the law requires that like should be compared with like. What article 12 (1) of the Constitution assures to the individual is the right to equal treatment with others in similar circumstances. It prohibits law which requires that some individuals within a single class should be treated by way of punishment more harshly than others; it does not forbid discrimination in punitive treatment between one class of individuals and another class in relation to which there is some difference in the circumstances of the offence that has been committed.

The discrimination that the defendants challenge in the instant case is discrimination between class and class; the imposition of a capital penalty upon that class of individuals who traffic in less than 15 grammes of heroin. The dissimilarity in circumstances between the two classes of

individuals lies in the quantity of the drug that was involved in the offence. The question whether this dissimilarity in circumstances justifies any differentiation in the punishments imposed upon individuals who fall within one class and those who fall within the other, and, if so, what are the appropriate punishments for each class, are questions of social policy. Under the Constitution, which is based on the separation of powers, these are questions which it is the function of the legislature to decide, not that of the judiciary. Provided that the factor which the legislature adopts constituting the dissimilarity of circumstances is not purely arbitrary but bears reasonable relation to the social object of the law, there is no inconsistency with article 12 (1) of the Constitution.”

7. The Applicants have chosen members of the Trinidad and Tobago Police Service of equivalent rank as appropriate comparators. The real issue for determination in the instant case would therefore be whether the Applicants as past and present members of the Special Reserve Police are appropriate comparators with Regular Police Officers of equivalent rank.

8. Applying *Bhagwandeem and Shamoan* I therefore propose to consider whether as past and present members of the Special Reserve Police, the Applicants were similarly circumstanced with members of the Police Service of equivalent rank. Or to put it another way, whether the relevant circumstances in the case of the Applicants are the same, similar, or not materially different from those of Regular Police Officers of equivalent rank. This would involve a weighing of the competing considerations, both similar and dissimilar.

9. A great deal of argument centred around *Matthews et al v Kent and Medway Towns Fire Authority et al* [2006] U.K. HL 8 which dealt with the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000. However in my view the test propounded in *Bhagwandeem* is of sufficient width, making it unnecessary to import a test designed by the Parliament of the United Kingdom: (i) for the specific purpose of

securing that people in part-time employment were treated no less favourably than people in full time employment; and (ii) for the purpose of complying with the United Kingdom's obligations under European Council's Directive 97/81/EC.

b. Mala fides

10. One of the issues raised was whether proof of mala fides is a prerequisite to a finding of unequal treatment under the Constitution. This issue was determined by the majority of the Court of Appeal in *Central Broadcasting Services Ltd v AG* Civ. App. No. 16 of 2004, where it was held that proof of mala fides was not a prerequisite to establishing a case of infringement of the right to equal treatment. I am accordingly bound by the decision of the Court of Appeal.

11. In coming to that decision in *Central Broadcasting Services Limited*, Hamel-Smith JA at para. 19 agreed with Persaud JA in *AG v KC Confectionery Ltd* (1985) 34 WIR 387 [CA] that "proof of mala fides is not always necessary in claims under s.4 (d)." At para 25 his Lordship went on to state.

"[25] The requirement that an applicant prove mala fides as a prerequisite may be to place a fetter on the right itself. Discrimination can be practised, and usually is, by stealth. That feature makes it difficult to discern particularly when the applicant is on the outside depending, so to speak, on the good faith and integrity of the decider on the inside. I agree with Persaud JA that if there is an allegation of mala fides then the applicant must prove it in order to succeed. But there will be cases where it is not alleged and need not be proved. In either instance the presumption [of regularity] is of little use and to insist that it be displaced with proof of mala fides may be lifting the bar to an extraordinary and unnecessary height."

12. The decision of the Court of Appeal was arrived at after the Privy Council in *Bhagwandeem* at para 23 opined that in relation to whether proof of a deliberate intention to discriminate was necessary, the law of Trinidad and Tobago relating to discrimination by public officials may require further consideration. The Privy Council in coming to that decision relied on:

- (i) the cogent reasoning of Deyalsingh J at first instance in *AG v K C Confectionery Ltd.* HCA No. 1279 of 1982 that the necessity for proof of mala fides rested on an unsatisfactory foundation and should not be accepted as correct; and
- (ii) the fact that mala fides, as established by the majority decision of the House of Lords in *James v Eastleigh Borough Council* [1990] 2 A.C. 751, was not required in discrimination cases in the United Kingdom, the majority preferring the causative to the subjective construction, and holding that discrimination could be established even though the respondent council had not intended to discriminate between men and women.

13. In *James* a pensioner, aged 61, claimed he had been unlawfully discriminated against due to his sex. Both the pensioner and his wife, both aged 61, used a local authority swimming pool. The council provided free admission to people who reached state pension age, which in the case of a man was 65, and in the case of a woman 60. The pensioner's wife, being over the pensionable age for women (60) was admitted free. However the pensioner, not being over the pensionable age for men (65), had to pay 75 pence. It was held by the majority that the imposition of different pensionable ages for men and women was of itself discriminatory. The court had to apply the objective test formulated by the House of Lords in *R v Birmingham City Council Ex p Equal Opportunities Commission* [1989] AC 1155 [HL]. The appropriate question therefore was whether a man, such as this pensioner, aged 61, would receive the same treatment as his wife of the same age but for his sex. As the answer to that question was "yes" the

council was in breach of the Sex Discrimination Act, 1975, sections 1 and 29. Lord Bridge of Harwich at page 755, after referring to Lord Goff's test in *R v Birmingham City Council*, stated:

“Lord Goff's test, it will be observed, is not subjective, but objective. Adopting it here the question becomes: “Would the plaintiff, a man of 61, have received the same treatment as his wife but for his sex? An affirmative answer is inescapable.

The judgment of the House in the *Reg. v. Birmingham City Council, Ex parte Equal Opportunities Commission* was delivered after the instant case had been argued in the Court of Appeal but before they delivered their judgment. They did not, therefore, have the advantage of argument as to the effect of the decision. They sought to distinguish it. But it is, in my opinion, quite indistinguishable. It would not have availed the Birmingham City Council to say that the condition for grammar school entry was to have passed the entrance examination because the pass mark was set at different levels for boys and girls and discriminated against girls on the ground of their sex. By precise parity of reasoning it does not avail the council in this case to say that the condition for free admission to the swimming pool is to have attained pensionable age because pensionable age is set at different levels for men and women and discriminates against men on the ground of their sex. Similarly the subjective reason for the differential treatment in both cases is quite irrelevant. The Birmingham City Council had the best of motives for discriminating as they did. They could not otherwise have matched the entry of boys and girls to the grammar school places available. The council in this case had the best motives for discriminating as they did. They wished to benefit “those whose resources were likely to have been reduced by retirement” and “to aid the needy, whether male or female.” The criterion of pensionable

agwas a convenient one to apply because it was readily verified by possession of a pension book or a bus pass. But the purity of the discriminator's subjective motive, intention or reason for discriminating cannot save the criterion applied from the objective taint of discrimination on the ground of sex.”

14. The Canadian jurisprudence can also provide some useful guidance in this area. In *Re Canadian Odeon Theatres Ltd v. Saskatchewan Human Rights Commission* [1985] 18 DLR (4th) 93 (Sask CA), a movie theatre was alleged to have violated the Saskatchewan Human Rights Code because the only space it made available for wheelchairs was at the front of the Theatre, ahead of the first row of regular seats. While members of the theatre staff were willing to help transfer wheelchairs to any available aisle seats, they had no special training for that task, nor any plan to deal with the evacuation of such moviegoers in case of fire or other emergency. For some individuals the theatre seats were, moreover, less comfortable and less secure than their own wheelchairs. The decision of a board of inquiry established under the Human Rights Code that these arrangements were discriminatory was upheld by the Court of Appeal. The absence of an intention to discriminate did not preclude a finding of discrimination. At para. 68 Mr. Justice Vancise explained:

“The absence of a motive to discriminate is not determinative of whether there has been discrimination. It is not discriminatory intent which is prohibited by the legislation but the discriminatory result..”

15. In *Andrews v Law Society of British Columbia* [1989] 2 WWR 289, the Supreme Court of Canada acknowledged that motive was not essential to claims under section 15 of the Charter. Section 15 (1) states “Every individual is equal before the law and under the law and has the right to the equal protection and equal benefit of the law without discrimination...” Mr. Justice Mc Intyre at page 307 approved of what was held by the Supreme Court in *Ontario Human Rights Commission v Simpson-Sears Ltd.* [1985] 2 SCR 536 and stated:

“no intent was required as an element of discrimination for it is in essence the impact of the discriminatory act or provision upon the person affected which is decisive in considering any complaint.”

16. It would follow that a person who alleges a violation of his constitutional right to equality of treatment from a public authority in the exercise of its functions would ordinarily be entitled to redress if the action of the public authority unintentionally results in him being arbitrarily or capriciously or irrationally discriminated against.

C. Constitutional proceedings and delay

17. Having regard to my findings, it is not strictly necessary to deal with the issue of delay. However the courts continue to seek to formulate a test applicable to delay in constitutional proceedings and, therefore, I propose to say something on the subject

18. Chapter 1 of the Constitution of Trinidad and Tobago makes provision for the recognition and protection of fundamental human rights and freedoms. The machinery for the enforcement of the said rights and freedoms is contained in section 14 within Part V of the Constitution. Section 14 empowers the High Court to hear and determine disputes about contraventions of the Chapter 1 provisions and to grant the appropriate remedy in respect thereof. The grant or refusal of a remedy in Constitutional proceedings is a matter in respect of which the Court has a judicial discretion by virtue of its inherent jurisdiction to prevent abuse of process that applies as much to constitutional proceedings as it does to others. **Section 14** provides:

“(1) For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without

prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion.

(2) The High Court shall have original jurisdiction - (a) to hear and determine any application made by any person in pursuance of subsection (1), and (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (4), and may, subject to subsection (3), make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled.

(3) The State Liability and Proceedings Act shall have effect for the purpose of any proceedings under this section.”

19. In the case of *Durity v. Attorney General of Trinidad and Tobago* [2003] 1 A.C. 405 [PC], the question before the Board was whether, on a proper interpretation of section 14 of the Constitution, the incorporation of the State Liability and Proceedings Act into the Constitution by section 14(3) had the effect of rendering constitutional proceedings subject to the limitation provisions of section 2(1) of the Public Authorities Protection Act. Their Lordships considered section **33(1)** and **2(1)** to be the crucial provisions of the **State Liability and Proceedings Act** and the **Public Authorities Protection Act**, respectively. Section **33(1)** states:

“(1) This Act shall not prejudice the right of the state to take advantage of the provisions of a written law although not named therein; and it is hereby declared that in any civil proceedings against the state, the provisions of any written law which could, if the proceedings were between subjects, be relied upon by the defendant as a defence to the

proceedings, whether in whole or in part or otherwise, may, subject to any express provision to the contrary be so relied upon by the state."

On the other hand, section 2(1) of the latter Act provides:

"No action shall be brought against any person for any act done in pursuance, or execution or intended execution of any Act, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty or authority, unless it is commenced before the expiration of one year from the date on which the cause of action accrued except that where the act, neglect or default is a continuing one, no cause of action in respect thereof shall be deemed to have accrued for the purposes of this subsection, until the act, neglect or default has ceased."

20. Their Lordships found section 33(1) of the former Act to be quite inapplicable to the conduct of constitutional proceedings and thought that section 2(1) of the latter Act had a presence, if at all, in proceedings of this nature by virtue only of the State Liability and Proceedings Act. Hence it too had no place in said proceedings. Their reasons were articulated as follows at para 29:

"If section 33 were sought to be applied to constitutional proceedings it would lead nowhere. It would achieve nothing. If section 33 were applied to constitutional proceedings, the defences thereby made available to the state would be those which would have been available to a defendant "if the proceedings were between subjects". But, in the case of constitutional proceedings, there are no such defences. Constitutional proceedings are not capable of being brought between subjects. Of their nature they concern claims brought by a claimant against the state in respect of the failure, or alleged failure, of the state to secure to the claimant the fundamental human rights and freedoms and protections enshrined in Chapter 1 of the Constitution. This being so, there is no question of

section 2(1) of the Public Authorities Protection Act applying to constitutional proceedings. The limitation period prescribed by the Public Authorities Protection Act rides into constitutional proceedings, if at all, only on the back of section 33 of the State Liability and Proceedings Act. Once it is appreciated that, for the reason just given, section 33 of the State Liability and Proceedings Act does not apply to constitutional proceedings, then it follows that the Public Authorities Protection Act also does not apply to constitutional proceedings.”

21. Their Lordships at para 30 further strengthened their position by highlighting the prestigious nature of the Chapter 1 fundamental provisions and identified how one should treat with them:

"If there should be any lingering doubts on this score, they are disposed of by a further, vitally important consideration. At the forefront of the Constitution is a resounding declaration of fundamental human rights and freedoms. It is axiomatic that these rights and freedoms, expressly declared, are not to be cut down by other provisions in the Constitution save by language of commensurate clarity. The Constitution itself so declares.”

When one examines the express words of the Constitution, any suggestion regarding rigid time frames or limitation periods with respect to initiating constitutional proceedings is absent:

“...the Constitution itself contains no express limitation period for the commencement of constitutional proceedings.”

The guidance given in respect of that acknowledgment was that:

“The court should therefore be very slow indeed to hold that by a side wind the initiation of constitutional proceedings is subject to a rigid and short time bar. The very clearest language is needed before a court could properly so conclude.”

Additionally, their Lordships made it abundantly clear that in entertaining a section 14 application, the Court has a discretion to exercise:

“Clearly, the inherent jurisdiction of the High Court to prevent abuse of its process applies as much to constitutional proceedings as it does to other proceedings. And the grant or refusal of a remedy in constitutional proceedings is a matter in respect of which the court has a judicial discretion.”

22. Quite significantly, their Lordships alluded to the concept of unexplained delay at paragraph 35:

“When a Court is exercising its jurisdiction under section 14 of the Constitution and has to consider whether there has been delay such as would render the proceedings an abuse or would disentitle the claimant relief, it will usually be important to consider whether the impugned decision or conduct was susceptible of adequate redress by timely application to the Court under its ordinary, non-constitutional jurisdiction. If it was, and if such an application was not made and would now be out of time, then failing a **cogent explanation** the court may readily conclude that the claimant’s constitutional motion is a misuse of the court’s constitutional jurisdiction.” [Emphasis Added.]

This hints at the fact that the courts are exercising a discretion and more explicitly states that if there is delay for which no **cogent explanation** is proffered, relief may in fact be refused.

23. In Durity's case their Lordships felt that the requisite language that was required to construe a particularly short time frame with respect to the current action was "noticeably absent". Thus, the suggested incorporation of the inflexible, one-year time limit in section 2(1) of the Public Authorities Protection Act, not itself mentioned in the Constitution, via section 33 of the State Liability and Proceedings Act lacks the clarity of intent necessary for this purpose. The foregoing authority was integral in reiterating:

- (i) Owing to the *nature of the fundamental rights and freedoms* guaranteed under the Constitution, there can be no rigid or short time bar given to said provisions. In other words, it is not a foregone conclusion that constitutional relief would be denied owing to delay in applying for same;
- (ii) Where delay is a live issue in a case involving fundamental rights and freedoms, the Court has a *judicial discretion* to exercise in respect of the granting or refusal of relief or remedies in respect thereof; and
- (iii) Delay for which no cogent explanation is proffered may result in a refusal of constitutional relief.

24. Additionally, it must be added that the issue of delay was not originally dealt with in the aforementioned manner, neither at the High Court nor the Court of Appeal level. However, when the case was remitted to the Court of Appeal to consider the issue of delay, the following factors were identified as integral:

- (i) Whether the impugned decision or conduct was susceptible of adequate redress by timely application to the court under its non-constitutional jurisdiction;
- (ii) The effect of the prolonged suspension and the fact that it was a past and irreversible event; and
- (iii) Whether the existence of judicial review proceedings and the negotiations **sufficiently explained** the delay.

25. In the Court of Appeal, Civil Appeal No. 140 of 1998, Warner JA at paragraph 48 of her judgment focused on the concept of inordinate delay:

“It is to be expected that in a matter of this nature, some delay was inevitable- the question however, is whether it was so *inordinate* to deny the appellant relief”

26. From the foregoing, it would seem that, given the extraordinary sanctity of our fundamental human rights and freedoms, the courts are reluctant to shut out a deserving applicant on the ground of mere delay. However where the delay is inordinate, then, failing a cogent explanation, a court may deny an applicant relief. Everything must depend on the circumstances, including the particular right or rights involved. This test accords with that in India. In *Basu’s Commentary on the Constitution of India*, Vol. E (1975) 19, the author, in dealing with the issue of delay in commencing constitutional proceedings and whether the doctrine of laches was applicable, opined that “assuming that laches is applicable to a petition under Art. 32, the condition for its application is not the length of time after which the petitioner comes to court but his absence of explanation for the delay. In other words, the test is not “unreasonable delay”, but “unexplained delay”...”

D. Historical background

27. The Special Reserve Police was established in 1946 as a supplemental body of Police which might be called out by the Commissioner, Deputy Commissioner or any other First Division Officer in cases of external aggression or internal disturbance: section 4 (1) SRP Act. Further, whenever additional police might be required for the preservation of good order, the protection of persons or property or the performance of any other duty exercisable by members of the Police Service, the Commissioner may call out members of the Special Reserve Police on full-time, part-time or temporary service: section 4 (2). Full-time service means that members perform duties to augment the shifts

of police officers for an extended period. They usually work for 8 hours per day for 5 days a week. Part-time service is usually used to describe a situation where a member works 16 tours per month, each tour comprising a period of 4 hours. Temporary service means that members of the Special Reserve Police work from time to time as and when required.

28. The purpose of the Special Reserve Police was to provide a body of persons who were otherwise employed but who, out of civic responsibility, were prepared to assist the police by rendering part-time service. However since about 1969, due to the increasing demand for manpower in the Police Service without corresponding increases in its sanctioned strength, members of the Special Reserve Police were being called out on what appeared to be a permanent basis instead of full-time or part-time or temporary service, as contemplated by the SRP Act: para. 5 affidavit of Hetty-Mohammed Libert.

29. Section 22 of the SRP Act empowered the Minister to make regulations generally for giving effect to the provisions of the Act, including the power to make provision for the organization of the Special Reserve Police. As no regulations had been made for, inter alia, the organization of the Special Reserve Police, Cabinet agreed on October 29, 1998 for regulations to be made to give effect to the SRP Act. While the process of preparing the regulations was taking place, it was recognized that it would be disadvantageous to members of the Special Reserve Police when the regulations were made, since there were some members who were called out on a permanent full-time basis, which was not envisaged by the SRP Act: para 7 of affidavit of Hetty Mohammed-Libert.

30. In those circumstances Cabinet on April 1, 2000 agreed in principle that members of the Special Reserve Police who had been continuously employed on a full-time basis for a period in excess of 2 years would be “absorbed” into the Trinidad and Tobago Police Service. Cabinet also agreed that the practice of utilizing the service of members of the Special Reserve Police for extended periods on a full-time basis be discontinued with immediate effect, and such persons were to be employed on “call-out” duty only.

31. At that time there were 1,110 members of the Special Reserve Police, and of these 969 (approximately 87%) had been continuously employed on a full-time basis for periods in excess of 2 years and were eligible for absorption. It was recognized that the qualifications for appointment for members of the Special Reserve Police were totally different to those of members of the Police Service. Additionally, with absorption, a way had to be found to deal with various employee relations issues that would arise in attempting to accommodate members of the Special Reserve Police alongside members of the Police Service who had met the requirements for entry and had gone through 5 months' training. **Thus absorption of members of the Special Reserve Police at the rank of Police Constable was considered to be in the best interest of stable employee relations in the Police Service.**

32. It was therefore decided that absorption would take effect from August 1, 2000, subject to members of the Special Reserve Police meeting certain criteria, namely, fitness for service determined by a medical examination which would include a psychological evaluation, a successful drug test and a satisfactory record of good conduct and performance. Additionally they were required to take part in a phased induction training course. It was also decided that the services of those members who did not meet the stated criteria for absorption were to be terminated.

33. In those circumstances "a separation package" was to be offered to those members who did not qualify or declined the option for absorption, based on the formula provided under section 18 (3) of the Retrenchment and Severance Benefits Act, with a 20% enhancement. Cabinet also decided that those members who accepted the separation package would no longer be eligible for re-employment in the Special Reserve Police.

To ensure that those members who held the rank of corporal and sergeant at the time of absorption did not suffer any financial disadvantage, the difference in salary between what they were to be paid as a Police Constable and their existing salaries as

members of the Special Reserve Police were to be paid to them as a taxable allowance which would be taking into account in computing their superannuation benefits. This taxable allowance would eventually merge into salary when the salary for Police Constables was increased.

E. The evidence

(i) Introduction

34. I must now go on to consider the evidence. Neither party has elected to cross-examine any of the deponents and there are some conflicts in the evidence. In such a scenario, the Privy Council has emphasized the need to properly evaluate the evidence by critically examining the whole of the evidence, including the contemporaneous documents, and the inherent probability or improbability of the rival contentions in the light in particular of facts and matters which are common ground or unchallenged, or disputed only as an afterthought or otherwise in a very unsatisfactory manner: *Horace Reid v Charles and Bain*, Privy Council Appeal No. 36 of 1997 at page 6; *AG v Samlal* [1987] 36 WIR 382 [PC] at pp. 387-388.

35. In that regard and applying the foregoing principles, I prefer the evidence of the Respondent's deponents. There is a sufficient foundation of undisputed material corroborated by documentary evidence emanating from the Respondent, as opposed to what was essentially the general and on occasions inaccurate statements of the Applicants, to make it inherently more probable that the Respondent's evidence is to be preferred.

(ii) The Legislation

36. In my view the Applicants cannot be valid comparators with members of the Police Service of equivalent rank. It is pellucidly clear that members of the Special Reserve Police and of the Police Service are classified differently by the legislature. As indicated earlier legislative classifications which are reasonable and not arbitrary are

constitutionally permissible. In this regard the legislature has created the following bodies:

- (i) the Police Service under the Police Service Act, Chapter 15:01;
- (ii) supplemental bodies of Police under the Supplemental Police Act, Chapter 15:02, namely: (a) a Rural Police; (b) an Estate Police;
- (iii) A Special Reserve Police Service under the SRP Act.

37. Pursuant to section 4 (1) of the Supplemental Police Act, the Rural Police in time of peace **shall act as an auxiliary to the Police Service** in the performance of its ordinary duties and in time of internal disturbance or external aggression shall assume the ordinary duties of the Police Service. The Rural Police were clearly designed to provide extra help and support to the Police Service.

38. Section 3 of the SRP Act expressly declares that **in addition to the supplemental bodies of Police established under the Supplemental Police Act**, a new supplemental body of police Special Reserve Police was thereby established. The Act makes clear that the Special Reserve Police is an additional supplemental body of police liable to be called out generally when the exigencies of the service so demand. Their duties are set out at section 4.

39. The Special Reserve Police or any part thereof may be called out for service by the Commissioner, Deputy Commissioner or any other First Division Officer in cases of external aggression or internal disturbances actual or threatened: section 4 (1). The Commissioner may whenever additional police may be required for the preservation of good order, the protection of persons or property or the performance of any other duty exercisable by members of the Police Service, call out members of the Special Reserve Police on full-time, part-time or temporary service: s.4 (2).

40. **Additionally, a Municipal Police Service has been created.** Pursuant to section 48 (1) of the Municipal Corporation Act, Chapter 25:04, a Municipal Police Service for

each Municipality was established for service in connection with the duties of the Corporation. The Statutory Authorities Service Commission may, in consultation with the Commissioner of Police, appoint for the purpose aforesaid a sufficient number of commissioned officers, subordinate police officers and constables.

(ii) (a) Qualification for Appointment

41. The statutory requirements for appointment to the Police Service and the Special Reserve Police are quite different. It is clear therefore that the legislature has created distinct classes of persons. This is further illustrated by the fact that the appointment of any member of the Special Reserve Police may be revoked **at any time** by the Commissioner: section 12 of the SRP Act. However a police officer holds office for **an indeterminate period**: section 9 of the Police Service Act.

42. Moreover the members of the Police Service, due to their status as permanent employees are afforded a far higher degree of political insulation than that which is afforded to members of the Special Reserve Police. Accordingly matters relating to their appointment, transfer, discipline, resignation and termination fall under the purview of the Police Service Commission, an autonomous body established under the Constitution. The purpose for the creation of such independent bodies was, according to Lord Diplock in *Endell Thomas v. AG* [1982]AC [PC] 113 at 124:

“The whole purpose of Chapter V1111 [now Chapter IX] of the Constitution which bears the rubric “The Public Service” is to insulate members of the civil service, the teaching service and the police service in Trinidad and Tobago from political influence exercised directly upon them by the government of the day. The means adopted for this was to vest in autonomous commissions, to the exclusion of any other person or authority, power to make appointments to the relevant service, promotions and transfers within the service and power to remove and exercise disciplinary control over members of the service. These autonomous

commissions, although public authorities, are excluded by section 105 (4) (c) from forming part of the service of the Crown.”

This constitutional underpinning is noticeably absent in the case of members of the Special Reserve Police, no doubt because of their temporary status. Basically matters relating to their appointment, discipline and removal fall under the purview of the Commissioner of Police.

43. Another significant feature of their distinction is the fact that members of the Special Reserve Police of whatever rank retire at age 60 giving them an additional 5 years of income. However their colleagues in the Second Division of the Police Service (Inspectors, Sergeants, Corporals and Constables) must retire at age 55: section 62 of the Police Service Act.

44. The qualifications for appointment for members of the Special Reserve Police are substantially lower than that of members of the Police Service. Regulation 4 (1) of the Police Service Regulations provides that candidates for appointment as police constables shall:

- (a) be of good character and be citizens of Trinidad and Tobago;
- (b) be not less than 18 years and not more than 35 years of age on the 1st January of the year in which the appointment is made;
- (c)
 - (i) in the case of men, be of good physique and at least 5 ft 6½in in height;
 - (ii) in the case of women, be of good physique and at least 5 ft 4 ins in height;

- (d) possess at least 3 General Certificate of Education passes with a minimum of three passes at Ordinary Level, Grade A, B or C including English Language or, at least three Caribbean Examination Council Certificate passes including English Language at the level of General Proficiency Grade I, II, III or Basic I and two other subjects at the level of General Proficiency Grade I, II, III or basic I, or II;
- (e) be required to pass a physical examination and an educational test for intelligence and scholastic ability;
- (f) if successful in the educational test referred to in paragraph (e) be required to pass a medical examination.

Pursuant to Regulation 4 (2), candidates who fulfil the requirements of regulation (1) may be enrolled as trainees whenever vacancies occur in the Service and shall be required to undergo a course of training at the Police Training College. A trainee who fails to satisfy the requirements of the course of training or is otherwise not considered fit to be a member of the Service shall be discharged from Service in accordance with the Police Service Commission Regulations: Reg. 5.

45. The qualifications for appointment as a member of the Special Reserve Police are simply that every male person who is:

- (a) over 18 years of age
- (b) able-bodied; and
- (c) of good character

shall be deemed to be qualified for appointment thereof.

46. As can be seen, the physical requirements which apply to members of the Police Service are less stringent in the case of members of the Special Reserve Police who can even be over 35 years of age when first appointed. Significantly the educational qualifications are absent in the case of members of the Special Reserve Police. From a general standpoint it can be stated that academic qualifications may provide a legitimate basis for the differential treatment of persons.

47. So far as the difference in training goes, members of the Police Service undergo an intensive six-month training programme. However members of the Special Reserve Police receive basic induction training over a four to six week period on a part-time basis. As a consequence, members of the Special Reserve Police are trained to perform basic police duties. This would explain why in the past, members of the Special Reserve Police, regardless of their rank, would have had to successfully complete a separate Induction Training Course to upgrade their knowledge of police work, as one of the requirements for appointment by the Police Service Commission into the Police Service. Even the Special Reserve Police officers who were absorbed into the Police Service in August 2000 were required to undergo an expanded induction training programme: See para. 14 of affidavit of Wayne Richards.

48. Moreover, Hetty Mohammed Libert states at paragraph 5 of his affidavit that the purpose of the Special reserve Police is and was to provide for a body of persons **who were otherwise employed**, but who out of civic responsibility were prepared to assist the police by rendering part-time service. The premise for the appointment of members of the Police Service is completely different.

(ii) (b) Duties

49. The Applicants argue that during the period of time that a member of the Special Reserve Police is called out for service, he is deemed to be on duty and, by section 18, while he is on duty he shall exercise and enjoy all the powers, authorities, privileges and immunities, and shall perform all the duties and have all the responsibilities of a member

of the Police Service constituted under the Police Service Act. That right to so exercise and enjoy all the powers, duties and responsibilities of a Police Officer constituted under the Police Service Act, would include the powers of a police constable under sections 32, 33 and 35 of the Police Service Act. In essence the Applicants are contending that as they perform/performed the same duties and functions as members of the Police Service, they should be entitled to the same remuneration and benefits.

50. Section 18 (1) and (2) of the SRP Act provides:

“18 (1) Every member of the Special Reserve Police while on duty in the capacity of a member shall have, exercise and enjoy all the powers, authorities, privileges and immunities, and shall perform all the duties and have all the responsibilities of a member of the Police Service constituted under the Police Service Act.

(2) A member of the Special Reserve Police shall be deemed to be on duty in the capacity of a member when he is called out for service under section 4 (1) or (2).”

51. I agree with Mohammed J in *Bernard Martinez v AG* who, faced with a similar argument, was of the view that Section 18 merely serves to empower and protect members of the Special Reserve Police in like manner to Regular Police Officers, but cannot be looked at in isolation so as to propel the claim that both are similarly circumstanced. They are therefore empowered and protected while exercising their duties. This provides the requisite degree of flexibility obviating the need for a formal conferment of power on each occasion a member is on duty. At page 21 he stated:

“In my respectful view, all this section [section 18] does is to empower and protect Special Reserve Police Officers in like manner to Police Officers in the execution of their public duties. Such a provision would have been necessary to enable Special Reserve Police Officers to perform their various functions and to cloak them with the requisite statutory

authorization and protection without which they could not act. It cannot however be extrapolated from this section, looked at purely in isolation and a vacuum and not a broader background, that Special Reserve Police Officers are similarly circumstanced to Police Officers. A broader review of the respective governing Acts must be conducted...”

52. This would therefore be an opportune time to consider the nature of the activities performed by members of the Special Reserve Police and of the Police Service. The Applicants are contending that members of the Special Reserve Police perform the same or substantially the same duties as their counterparts in the Police Service. They go on to submit that the core functions and role of members of the Special Reserve Police, like that of Regular Police Officers, is the enforcement and maintenance of law and order. Further the decision in 2000 to absorb members of the Special Reserve Police into the Police Service constitutes an acknowledgement by the executive arm of the State that the relevant circumstances of members of the Special Reserve Police and Regular Police Officers were the same or similar or not materially different.

53. While there are similarities in the work performed by both groups, in my view there are also significant differences. These are highlighted by ASP Anthony Andrews in his affidavit filed on November 1, 2006, and lead to the conclusion that while members of the Special Reserve Police perform many of the functions of their counterparts in the Police Service, they perform same at a lower level in terms of scope, complexity and concomitant risk. Specifically with regard to:

(i) Conducting investigations

While such officers are sometimes required to conduct investigations, in general they only investigate minor offences, such as traffic offences, simple theft, obscene language, breach of the peace and obstruction. However if an officer performs exceptionally, he may be

given an opportunity by his superior officer in the station to investigate more serious offences.

(ii) Special duties

Although some members of the Special Reserve Police were assigned to the Special Branch and Homicide, most of them were assigned as drivers, and not in an investigative capacity. Further they are not equipped to perform the more specialised investigations performed by officers in the Police Service such as arson, murder, sexual offences, kidnapping, larceny and domestic violence.

(iii) Presidential guard and escort

Even though some members of the Special Reserve Police were assigned to this area, they were assigned as drivers and not usually as part of the guard detail.

Even when assigned to CID, Guard and Emergency duties, duties at the Prime Minister's and President's houses and Parliament, members of the Special Reserve Police are usually assigned as drivers. Special Branch duties which consisted of intelligence gathering operations and functioning as bodyguards for the Prime Minister and President are not generally assigned to members of the Special Reserve Police.

Superintendent Wayne Richards sums up the position at para. 14 of his affidavit:

“...Most members of the SRP are drivers, data entry clerks and artisans, or perform guard and escort duties, traffic duties and basic clerical duties. A member of the SRP may also assist in the charge room but is not normally in control of it. He may for example lay charges in simple criminal matters, for example minor assault and battery. Members of the SRP do not usually take up heavy responsibility even when they are attached to special units. Members of the SRP do not head any major enquiries. They assist police officers...”

54. The general position therefore is that members of the Special Reserve Police are usually assigned duties of significantly lesser responsibility than members of the Police Service. Moreover the Special Reserve Police (Extra Duty Pay) Regulations, unlike the Public Service Act, provide expressly for members of the Special Reserve Police who volunteer for extra duty outside of official duty hours at functions or occasions approved by the Commissioner of Police to be paid for their services at the rates specified therein.

(iii) Conclusion

55. By reason of the foregoing, it is manifest that members of the Police Service cannot be valid comparators with members of the Special Reserve Police. Their creation has come about through different statutory routes, with the legislature creating two distinct classes of officers, and granting members of the Police Service a degree of constitutional protection not enjoyed by the other, no doubt because the latter were intended to be a supplemental body of police liable to be called out when the exigencies of the service required. Now even though a substantial number of members of the Special Reserve Police were being called out on what appeared to be a permanent full-time basis, a position not contemplated by the SRP Act, it seems that great care was always taken to ensure that the distinction between the two classes of officers remained by assigning members of the Special Reserve Police duties of significantly lesser responsibility. To do otherwise could have proved inimical to the proper functioning of the Police Service. Further the qualifications for appointment as a member of the Police Service are of a higher standard than that required for appointment as a member of the Special Reserve Police. Additionally the training programme is far more intensive for the former when compared with the latter. I hold therefore that both are not similarly circumstanced.

F. Equality before the law and the protection of the law

(i) Applicants' arguments

56 The Applicants argue that their claim is grounded on the constitutional duty and responsibility which the government owes to the Applicants. The Constitution and in particular Chapter 1 thereof imposes an obligation on the part of the government as part of the executive arm of the State to have made Regulations under section 22 of the SRP Act to ensure that the Applicants were not treated unequally or denied the protection of the law. The government under the Constitution was fettered in the exercise of its powers and functions towards the Applicants in that in the exercise of its powers to them and/or in relation to them, it had a duty to ensure that by its acts or inactions it treated the Applicants equally and did not deny them the protection of the law.

The Applicants further argued that even if it could be said that some of the Regulations were ultra vires, that cannot absolve the government from its constitutional responsibility and duty. If therefore the government believed that the SRP Act was deficient for it to have made the Regulations, it had a duty to fix the Act by, for example, amending it.

(ii) Respondent's arguments

The Respondent is contending that the Applicants have not been deprived of the protection of the law as they can neither point to any impediment in their way to access a court of justice for determination of their rights or to any subversion of the procedural provisions necessary to ensure them a fair trial or hearing. Further the failure of the Executive to make regulations pursuant to section 22 of the SRP Act cannot, without more, amount to any infringement of section 4 (b) of the Constitution. Moreover, there was no statutory duty upon the Minister to make such Regulations within any given period. In any event some of the Regulations, if made, would on their face appear to be ultra vires.

The Respondent distinguished *Oswald Alleyne v AG* HCA No. 3133 of 2003, on the basis that Tiwary-Reddy J found that there was a breach of the applicant's right to the protection of the law as the applicant's ability to access the Industrial Court was impeded by the failure of the State to make certain regulations under the Municipal Corporations Act.

The Respondent went on to submit that essentially the Applicants' claim is for better terms and conditions of employment and nothing prevents them from seeking representation from a recognised trade union or forming their own union and approaching the Industrial Court for relief.

(iii) Analysis

(a) Introduction

58. It is apparent that the Applicants relied to a substantial extent on a certain degree of overlap between their claim to equality of treatment and their right to the protection of law. However having regard to my earlier findings on the issue of inequality of treatment, the Applicants in their protection of the law argument cannot resort to any comparison with members of the Police Service as being similarly circumstanced. Bearing that in mind, I can now go on to consider the arguments on the denial of the right to the protection of the law. I should mention at this juncture that this was the most difficult aspect of the case. It should be borne in mind that there is no comprehensive definition of the expression "the protection of the law" in section 4 (b) of the Constitution. "The problem of defining what is included in each of the fundamental rights and freedoms referred to in the lettered paragraph of sections 4 and 5 (1) is best dealt with on a case to case basis" : per Lord Diplock in *AG v Mc Leod* (1982) 32 WIR 450 [PC] at pp. 459-460.

59. In *Mc Leod*, the issue was whether an Act of Parliament purporting to amend the Constitution was void under section 2 of the Constitution because it was not supported at the final vote thereon by not less than three-quarters of all the members of the House of Representatives. His Lordship at page 459 opined that access to a court of justice for the purpose of establishing the invalidity of an impugned law was itself the protection of the law to which all individuals are entitled under section 4 (b):

“For Parliament to purport to make a law that is void under section 2 of the Constitution because of its inconsistency with the Constitution, deprives no-one of “the protection of the law”, so long as the judicial system of Trinidad and Tobago affords a procedure by which any person interested in establishing the invalidity of that purported law can obtain from the courts of justice, in which the plenitude of the judicial power of the State is vested, a declaration of its invalidity that will be binding upon the Parliament itself and upon all persons attempting to act under or enforce the purported law. Access to a court of justice for the purpose is itself “the protection of the law” to which all individuals are entitled under section 4 (b).”

60. Lord Diplock stressed the need for vigilance to prevent misuse by litigants of the important safeguard of the rights and freedoms enshrined in sections 4 and 5 that is provided by the right to apply to the High Court for redress under section 14. He cited two examples of such misuse. Firstly in *Chokolingo v AG* (1981) 1 WLR 106 [P.C]. where it was held that the procedure for redress under the Constitution was not to be used as a means of collateral attack upon a judgment of a court of justice of Trinidad and Tobago acting within its jurisdiction, whether original or appellate.

61. Secondly in *Harrikissoon v AG* [1980] AC 265 [PC], where a teacher argued that his transfer against his will from one school to another contravened his right to equality

before the law and the protection of the law. This was held to be manifestly untenable. “What the appellant was entitled to under this paragraph was the right to apply to a court of justice for such remedy (if any) as the law of Trinidad and Tobago gives to him against being transferred from one post to another against his will. There is nothing in the material before the High Court to give any colour to the suggestion that he was deprived of the remedy which the law gave him. On the contrary he deliberately chose not to avail himself of it”: p. 269 *ibid.* As the transfer was on the face of it an administrative act performed by the Teaching Service Commission under the procedure for transfer set out in their regulations, **those regulations defined the legal rights enjoyed by the appellant in relation to his transfer from one post to another in the Teaching Service. It was in the exercise of those rights that he was entitled to the protection of the law.**

62. In *Thornhill v AG* [1976] 31 WIR 498 [PC] the Privy Council was of the view that section 5 goes on to give, as particular examples of treatment of an individual by the executive or the judiciary, which would have the effect of infringing those rights, the various kinds of conduct described in paragraphs (a) to (h).

63. In *Lewis and ors v AG of Jamaica* [2001] 2 AC 50 [PC], the Privy Council approved of what Forte JA said in the Court of Appeal to the effect that the constitutional right to the protection of the law speaks to the right to involve the judicial processes to secure the rights and freedoms declared in the Constitution. Lord Slynn of Hadley stated at page 82:

“In respect of all the rights and freedom guaranteed by Chapter 111 of the Constitution, the redress offered by its very provisions is founded on the right to the ‘protection of the law.’ The words therefore, like the ‘due process’ clause, speak to the right to involve the judicial processes to secure the rights and freedoms declared in the Constitution. So in spite of section 20 which deals with litigious matters i.e. criminal charges, and

civil disputes, the citizen has the right to seek the assistance of the court, in circumstances where his constitutional rights and freedom have been, or likely to be breached. In my view, the protection of law, gives to the citizens the very right to the due process of law that is specifically declared in section 4 (a) of the Trinidad and Tobago Constitution. You cannot have protection of the law unless you enjoy ‘due process of the law’ - and if protection of law does not involve a right to the due process of the law, then a provision for protection of the law would be of no effect. In my opinion the two terms are synonymous, and consequently as in Trinidad and Tobago the People of Jamaica through the ‘protection of law’ guarantee in section 13 of the Jamaican Constitution are endowed with ‘constitutional protection to the concept of procedural fairness’ [See *Thomas v Baptiste* [2000] 2 A C 1 [PC].].”

64. In *Boodram v AG* [1996] 2 W.L.R 464 [PC], the Privy Council held that the appellant’s complaint in seeking to terminate a prosecution for murder, on the ground that his right to a fair trial had been infringed by adverse pre-trial publicity and the failure of the Director of Public Prosecutions to stop it, should have been raised in the criminal proceedings themselves either at the start of the trial or in advance of it, if necessary. The right which the appellant had, to obtain from a judge in the criminal proceedings an order that measures to ensure him a fair trial be implemented, or if that was not possible, an order terminating or staying the prosecution, provided him with the ‘protection of the law’ to which he was entitled. **The only circumstances in which the Privy Council envisaged that redress by way of a constitutional motion would be available in such circumstances was where exceptionally all chances of a fair trial would be destroyed.** Lord Mustill at page 854 stated:

“A similar flaw vitiates the arguments based on section 4. The ‘due process of law’ guaranteed by this section has two elements relevant to the present case. First, and obviously, there is the fairness of the trial itself. Secondly, there is the availability of the mechanisms which enable the trial

court to protect the fairness of the trial from invasion by outside influences. **These mechanisms form part of the ‘protection of the law’ which is guaranteed by section 4 (b), as do the appeal procedures designed to ensure that if the mechanisms are incorrectly operated the matter is put right. It is only if it can be shown that the mechanisms themselves (as distinct from the way in which, in the individual case, they are put into practice) have been, are being or will be subverted that the complaint moves from the ordinary process of appeal into the realm of constitutional law.’**[Emphasis added.]

65. Similarly in *Boodhoo v AG* [2004] 1 WLR 1689 [PC] it was held that neither a delay of over 13 months in delivering judgment on an appeal nor the death of a judge without having prepared or given judgment automatically constituted a breach of a litigant’s constitutional rights to due process or protection of the law or to a fair trial. **Delay was capable of depriving an individual of his rights to the protection of the law but only where by reason of the delay the judge could no longer produce a proper judgment or the parties were unable to obtain from the decision the benefit they should. For example, on an application to prevent the threatened abduction of a child, any delay in giving judgment might deprive both the applicant and the child of the benefit which the legal remedy was there to provide.**

66. In *Thomas v Baptiste* [2000] 2 AC 1 [PC], Lord Millett analysed the ‘due process of law’ provision in section 4 (2) of the Constitution referred to in *Lewis* supra and stated at page 22:

“In their Lordships’ view “due process” is a compendious expression in which the word “law” does not refer to any particular law and is not a synonym for common law or statute. Rather it invokes the concept of the rule of law itself and the universally accepted standards of justice observed by civilized nations which observe the rule of law...

The clause thus gives constitutional protection to the concept of procedural fairness. Their Lordships respectfully adopt the observation of Holmes J in *Frank v. Magnum* (1915) 237 US 309,347: “Whatever disagreement there may be as to the scope of the phrase ‘due process of law,’ there can be no doubt that it embraces the fundamental concept of a fair trial, with opportunity to be heard.” Whether alone or in conjunction with section 5 (2) their Lordships have no doubt that the clause extends to the appellate process as well as the trial itself. In particular it includes the right of a condemned man to be allowed to complete any appellate or analogous legal process that is capable of resulting in a reduction or commutation of his sentence before the process is rendered nugatory by executive action.”

And at page 22 Lord Millet noted that the right which was invoked in this case was “the general right accorded to all litigants not to have the outcome of any pending appellate or other legal process pre-empted by executive action. This general right is not created by the Conventions; it is accorded by the common law and affirmed by section 4 (a) of the Constitution. The applicants are not seeking to enforce the terms of an unincorporated treaty, but a provision of the domestic law of Trinidad and Tobago contained in the Constitution. By ratifying a treaty which provides for individual access to an international body, the government made that process for the time being part of the domestic criminal justice system and thereby temporarily at least extended the scope of the due process clause in the Constitution.”

67. The decided cases therefore clearly reveal that the protection of the law provision of the Constitution speaks to the right to involve the judicial processes and gives constitutional protection to the concept of procedural fairness, including the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights. Section 5 can be said to throw light upon the question of what kind of rights are encompassed in the concept of “the protection of the law”: *Matadeen v*

Pointu [1999] 1 AC 98 [PC] at 113. Access to a court of justice for establishing the invalidity of an impugned law is itself the protection of the law to which all persons are entitled. There may be cases in which there has been a subversion of the mechanisms of the trial designed to protect the fairness justifying a court giving redress under section 14: *Peters and Chaitan v AG* Civil Appeal No. 22 of 2001 per de la Bastide CJ at page 11. . Further there may be cases in which there has been a complete deprivation of the benefit which the legal remedy was intended to provide as to warrant a court holding that an applicant has been deprived of his right to the protection of the law. Finally the protection of the law is not an immutable concept, but is best left to be determined on a case-by-case basis.

68. Against the backdrop of the foregoing principles I can now go on to consider whether the Applicants have been deprived of their right to the protection of the law by the failure of the Minister to make regulations pursuant to section 22 of the SRP Act. It might be helpful at this stage to set out some of the provisions of the relevant statutes.

b. The legislation

Special Reserve Police Ordinance Chapter 11 No. 3

Section 12

“Every member of the Special Reserve Police shall be provided with a short manual describing the powers and duties of members of the Special Reserve Police, a badge, a baton and such clothing and other equipment as may be approved by the Commissioner. Such Badge shall be evidence of the office of any member of the Special Reserve Police and shall in all cases be displayed by every such member when exercising the duties of his office. The cost of these articles of clothing and equipment shall be defrayed from such funds as may be provided by the Legislative Council.”

Section 20 (2)

“Every member of the Special Reserve Police shall, when called out for service or attending parades or drills, be paid for his services from such moneys as many be provided therefor by the Legislative Council at the rates approved by resolution of the Legislative Council on the 29th October, 1943, for the Special Reserve Police established under the Defence (Special Reserve Police) Regulations, 1942, as amended, or at such rates as may from time to time be approved by resolution of the Legislative Council.”

Section 21

“(1) When any member of the Special Reserve Police, through no fault of his own, contracts an illness or sustains bodily injury while in the actual discharge of his duties as such –

- (a) he shall be provided with medicines, medical comforts and medical attendance at the public expense on the written authority of the Commissioner or Deputy Commissioner;
- (b) he shall receive full pay according to his rank in the Special Reserve Police during any period of incapacitation, but not exceeding three months without a recommendation from a medical board, and in no case exceeding twelve months;
- (c) he shall receive such compensation from the Reward Fund, not exceeding twenty-five dollars, as may be awarded by the Commissioner, or such other sum as may be authorised by the Governor.

- (2) When any member of the Special Reserve Police through no fault of his own, sustains bodily injury while in the actual discharge of his duties as such and is thereby permanently disabled (either totally or partially) it shall be lawful, if there be no other law in force regulating the grant of compensation in such cases for the Governor in Council to grant him a pension or gratuity, the amount of which shall be subject to the approval of the Legislative Council.
- (3) In case of death of any member of the Special Reserve Police from bodily injury sustained in the circumstances specified in the next preceding subsection of this section it shall be lawful for the Governor in Council, if there be no other law in force regulating the grant of compensation in such cases, to grant to his dependants a pension or gratuity the amount of which shall be subject to the approval of the Legislative Council.

Section 22 of the SRP Act

Section 22 (1) of the SRP Act provides that the Minister may make Regulations generally for giving effect to the provisions of the Act. Section 22 (2) provides that without prejudice to the generality of the power conferred by subsection (1), Regulations made under that subsection may provide for, among other matters:

- (a) the organization of the Special Reserve Police;
- (b) the establishment of different ranks and the precedence and command to be had or exercised by the holders of such ranks;
- (c) the conditions of their service, enrolment, promotion, demotion, resignation, dismissal or

- (d) suspension of members of the Special Reserve Police;
- (e) the training of members of the Special Reserve Police;
- (f) the discipline and guidance of the Special Reserve Police;
- (g) the setting up of Disciplinary Boards to investigate breaches of discipline and to award punishment, if necessary, and the powers and duties of the Disciplinary Boards;
- (h) ensuring the compulsory attendance of witnesses and the production of documents before any Disciplinary Board;
- (i) the payment of wages and of subsistence allowances, travelling allowances and out of pocket expenses to members of the Special Reserve Police and the rates at which such wages or allowances or both shall be paid to different ranks of the Special Reserve Police;.
- (j) medical attention and examination of any member of the Special Reserve Police who sustains injury whilst on duty;
- (k) the grant to members of the Special Reserve Police who are injured in the execution of their duty of sick benefit and the conditions upon which and the rates at which the benefit shall be payable to members of different ranks;
- (l) the grant to members of the Special Reserve Police who consequent upon injuries received in the course of their duty as such are permanently incapacitated **from following their normal**

employment or whose earning power in such employment is impaired, pensions or gratuities and the conditions upon which and the rates at which such pensions or gratuities may be granted to different ranks of the Special Reserve Police.

- (m) the grant, subject to the following conditions and such other conditions as may be prescribed, at such rates as may be prescribed, of a pension or gratuity to the widow and child or children, or dependent, of any member of the Special Reserve Police who dies as a result of injuries received –
 - (i) in the actual discharge of his duty; and
 - (ii) without his own default, and
 - (iii) on account of circumstances specially attributable to the nature of his duty.

(c) Failure to make regulations.

69. The SRP Act was passed in 1946. Act No. 38 of 1967 amended same and included for the first time the power of the Minister to make regulations generally for giving effect to the provisions of the Act. In amending same, the legislature was careful enough to ensure that members of the Special Reserve Police would retain the benefits conferred by sections 12 (supply of equipment), 20 (2) (payment for services), 21 (1) (illness, bodily injury), 21 (2) (permanent disability), and 21 (3) (death) of the Special Reserve Police Ordinance. The method of doing this was by repealing and re-enacting same, until other provisions were substituted therefore by regulations made under section 22 (4). There were further amendments to the Act in 1979. To date no Regulations have been made by the Minister pursuant to section 22 (1) and (2). The evidence reveals that

in 1998 Cabinet contemplated the making of Regulations for, among other matters, the organization of the Special Reserve Police. However it was recognized that it would be disadvantageous to members since there were some who were being called out on a permanent full-time basis, a scenario not contemplated by the SRP Act. This had been the situation since 1969. Cabinet therefore agreed to their absorption. It is clear therefore that from 1969 to 1998 the Minister, although empowered by section 22 of the SRP Act to promulgate subordinate legislation, did nothing. No reasons have been advanced for this inaction.

70. In *R v Secretary of State for the Home Department Ex p. Fire Brigades Union* [1995] 2 AC 513 [HL], the Secretary of State announced his intention not to bring into force sections 108 to 117 of the Criminal Justice Act 1988, which contained statutory provisions for a criminal compensation scheme similar to the scheme which had been in force since 1964, and decided instead to introduce a new tariff scheme to replace the existing scheme. The applicants representing persons liable to suffer injury as victims of violent crime applied for judicial review of the decision. It was held that: (i) section 171 (1) of the Act imposed a continuing obligation on the Secretary of State to consider whether to bring the statutory scheme in sections 108 to 117 into force; that he could not lawfully bind himself not to exercise the discretion conferred on him; that the tariff scheme was inconsistent with the statutory scheme; and that, accordingly, the Secretary of State's decision not to bring sections 108 to 117 into force and to introduce the tariff scheme had been unlawful; (ii) section 171 (1) did not impose a legally enforceable duty on the Secretary of the State to bring sections 108 to 117 into force at any particular time.

The implementation of the statutory scheme depended on section 171 (1), which stated: "... this Act shall come into force on such day as the Secretary of State may by order made by statutory instrument appoint..." No day was ever appointed. Lord Browne-Wilkinson was of the view that the form of words used conferred a discretion on the Secretary of State with which the courts ought not lightly to interfere. However his

Lordship opined that the Secretary of State was under a clear duty to keep under consideration from time to time the question whether or not to bring the sections and therefore the statutory scheme into force. At page 550 he stated:

“The form of the words to be found in section 171 (1) is used in many statutes where Parliament considers, for one reason or another, that it is impossible to specify a day for the statutory provisions enacted to come into force. Therefore although the case before your Lordships turns on the construction of 171 (1) it cannot be construed in isolation. Such a widely used statutory formula must have the same effect wherever Parliament employs it. The words of section 171 (1) are consistent only with the Secretary of State having some discretion...What is it then which suggests that there will come a time when that discretion is exhausted and that, whatever the change of circumstances since the sections in question were passed by the Queen in Parliament, the Secretary of State becomes bound to bring the sections into force? I can see nothing in the Act which justifies such an implied restriction on the discretion.

....

Further if the argument of the applicants is right, there must come a time when the Secretary of State comes under a duty to bring the statutory provisions into force and accordingly the court could grant mandamus against the Secretary of State requiring him to do so.

.....

In my judgment it would be most undesirable that, in such circumstances, the court should intervene in the legislative process by requiring an Act of Parliament to be brought into effect. That would be for the courts to tread dangerously close to the area over which Parliament enjoys exclusive jurisdiction, namely the making of legislation. In the absence of clear statutory words imposing a clear statutory duty, in my judgment the court should hesitate long before holding that such a provision as section 171 (1) imposes a legally enforceable statutory duty on the Secretary of State.”

71. Notwithstanding that *Fire Brigades* dealt with primary legislation not yet in force, the learning applies equally to subordinate legislation which has not yet been promulgated. In both instances the issue to be determined is the bringing of legislation into force. It is clear that between 1969 to 1998 the Minister failed in his continuing obligation to consider whether or not to make regulations pursuant to section 22 of the SRP Act. It is well worth remembering that Ministers entrusted with similar powers in Trinidad and Tobago cannot frustrate the legislative will, in effect the will of the people of the Republic of Trinidad and Tobago, by executive inaction, and are indeed under a clear duty to keep under consideration from time to time the question whether or not to make regulations. That is inherent in the power Parliament has entrusted to them. While the judicial arm must be sensitive to the symbiotic relationship among the legislative, executive and judicial arms of the State, it cannot shirk its constitutional duty under the Constitution, the supreme law, to interpret the laws and may very well, if the statutory context warrants it, hold that the power is coupled with a duty to make regulations. The omission to make regulations is therefore not immune from judicial review.

72. Whether a power expressed in merely permissive language is accompanied by a duty to exercise it requires consideration of the whole statutory context in which the power is given. Thus in *Greater London Council v. Secretary of State for the Environment*, Times, December 2, 1983, the facts reveal that the Town and Country Planning Act, 1971, gave the Minister a power to make regulations. However elsewhere in the Act, namely sections 8 (1) and 9 (3) (a), there were statutory obligations that certain consultation procedures be carried out with members of the public wishing to make representations/objections to proposed alterations to structure plans. Such representations in order to be considered had to be made within a prescribed period. “Prescribed” under section 290 meant “prescribed by the Regulations under this Act”. Hodgson J. held that the statutory obligations could only be carried out with the assistance of regulations. He concluded it was therefore the duty of the minister to make appropriate regulations. He stated at page 18:

“There can be no doubt that there may be circumstances in which a discretion, absolute in its terms is, nevertheless, coupled with a duty so that it must be exercised in a certain way. In the case of a statutory power one has to look at the whole statutory context in which the power is given to see whether it is in fact coupled with a duty.”

73. Similarly in *The Registrar to the Integrity Commission v Chandresh Sharma* Civil Appeal No. 60 of 2005, the Integrity Commission had failed to prescribe regulations under section 41 (1) (a) (b) and (c) of the Integrity in Public Life Act, 2000. Section 41 (1) used permissive language, providing that the Minister “may make regulations”. Mendonca JA noted that where such a power is given by an Act, there may be cases in which the power is accompanied by a duty to exercise it. At page 18 he stated:

“There may be a right in the public such as to make it a duty to whom the power is given to exercise that power. It is however not enough that the things empowered to be done should be for the public benefit in order to cast a duty to exercise a power given by the statute. In order to determine whether the power expressed in permissive language is accompanied by a duty to exercise it requires consideration, as Lord Penzance alluded to [in *Julis v Lord Bishop of Oxford* [1880] 5 Appeal Cases 214], to the whole statutory context in which the power is given.”

The Court of Appeal went on to hold, on the issue as to whether without the regulations the Act would be frustrated or the Integrity Commission could not properly function, that the Act contained many provisions to which section 41 (1) (a) (b) and (c) referred, and which enabled the Integrity Commission to function and the Act to work without the regulations. “It seems to be clear in view of the provisions referred to above that the absence of the regulations does not defeat the policy or objects of the Act or that

the regulations are necessary for the proper functioning of the Commission.”: per Mendonca JA at page 25.

(d) Conclusion

74. Returning to the instant case, it becomes important to consider whether the statutory power expressed in permissive language (“The Minister may make Regulations....”) is accompanied by a duty to exercise it. This necessitates a consideration of the entire statutory context in which the power is given. In doing so it is worth bearing in mind that whenever any person or body of persons exercising statutory authority acts beyond the powers conferred upon him or them by statute, such act becomes ultra vires. Moreover subordinate legislation derive their force and effect from the parent legislation. Thus “legislation made under delegated power can be valid only if it conforms exactly to the power granted”: *HWR Wade, Administrative Law* 6th edn 863.

75. In that regard section 22 (2) (e) (f) and (g) gives the Minister the power to make regulations for: (i) the discipline and guidance of the Special Reserve Police; (ii) the setting up of Disciplinary Boards to investigate breaches of discipline and to award punishment, and the powers and duties of the Disciplinary Boards; and (iii) ensuring the compulsory attendance of witnesses and the production of documents before any Disciplinary Boards.

However these regulations, if made, would run the serious risk of being ultra vires, since there is no provision in the Act for the establishment of Disciplinary Boards, and the disciplinary powers under the Act are vested by section 5 of the SRP Act in senior officers and the Commissioner of Police. The powers that the regulations, if made, would give to the Disciplinary Boards may to that extent be inconsistent with section 5 and, I may add, section 12: see *The Commissioner of Police v Charles Mitchell* Civil Appeal No. 1 of 1992 pp 5 to 6.

76. Similarly section 22 (2) (c) seeks to empower the Minister to make regulations for, among other matters, the suspension of members of the Special Reserve Police. However the Court of Appeal in *The Commissioner of Police v Charles Mitchell* supra at page 8 per de la Bastide CJ noted that the SRP Act does not provide for the suspension of members, and that any regulations made by a Minister pursuant to section 22 (2) (c) purporting to deal with suspension of members “would run a very serious risk of being ultra vires, given as I have mentioned, the absence of any provision in the Act of a power to suspend.”

77. In determining whether the power of the Minister is coupled with a duty, the Court can, in addition to considering whether regulations purporting to be made are ultra vires, look at whether the SRP Act itself contains provisions for its proper functioning without the making of regulations. Thus section 22 (4) of the SRP Act (Notwithstanding the repeal of the former sections 12, 20 (2), and 21 (1), (2) and (3), these sections and any rules or regulations shall remain in force and continue to have effect until other provisions are substituted therefor by regulations made under this section”), has the effect of repealing the former sections 12, 20 (2) and 21 (1) (2) and (3) made under the 1950 Special Reserve Police Ordinance (“the SRP Ordinance”) Chapter 11 No. 3, and specifically allows for the sections mentioned therein, and any rules or regulations with regard to the Special Reserve Police, to remain in force until such time as they may be substituted by regulations made under section 22. It therefore becomes necessary to consider these sections in a little more detail.

78. Section 12 of the SRP Ordinance provides for the supply of equipment to members, the cost thereof to be borne by the State.

79. Section 20 (2) of the SRP Ordinance provides for payment to every member when called out for service or attending parades for drills at the rates approved by resolution of the Legislative Council. The question of remuneration is clearly one of policy.

80. Section 21 (1) of the Ordinance provides for the entitlement of a member when he contracts an illness or sustains bodily injury while in the actual discharge of his duties. In the event that section 21 (1) is applicable: (i) he has to be provided with medicines, medical comforts and medical attendance on the written authority of the Commissioner (21 (1) (a)); he shall receive full pay according to his rank during any period of incapacitation, but not exceeding 3 months without a recommendation from a medical board, and in no case exceeding 12 months (s.21 (1) b); he shall receive such compensation from the Reward Fund not exceeding \$25.00 as may be awarded by the Commissioner, or such other sum as may be authorized by the Governor.

With respect to compensation from the Reward Fund referred to in section 21 (1) (c) of the SRP Ordinance, section 16 of the SRP Act complements that provision by establishing a Special Reserve Police Reward Fund. Pursuant to Section 16 (b), the **Minister** has the power to award special compensation for injuries received by members of the Special Reserve Police in the exercise of their duties. As can be clearly seen, the Minister in these circumstances, even absent the promulgation of regulations, can award compensation.

81. Section 21 (2) and (3) of the SRP Ordinance provides for death or permanent disability (either totally or partially) sustained in the actual discharge of his duties. In the case of permanent disability, it shall be lawful, if there is no other law in force regulating the grant of compensation, for a member to be granted a pension or gratuity, the amount of which shall be determined by the Legislative Council. In case of death, it shall be lawful if there is no other law regulating the grant of compensation in such cases, to grant to his dependants a pension or gratuity the amount of which shall be subject to the approval of the Legislative Council.

82. Now even though Act No. 38 of 1967 repealed and re-enacted the provisions aforesaid, the legislature was careful enough to ensure that there was a fallback position for the protection and fair treatment of members to whom the sections apply, by retaining the former section 21 (4) of the Ordinance, which is now section 19 of the SRP Act and

which provided a formula for calculating compensation in respect of permanent disability or death. Section 19 expressly declares that the principles of the Workmen's Compensation Act may be followed in computing compensation granted under the SRP Act in respect of permanent disability or death.

83. It can be seen therefore that the retention of the former sections 20 (2), 21 (1) (2) and (3) had the effect of conferring on members substantial protection for their benefits thereunder with the legislature providing that remuneration for their services, including medical benefits, would essentially be a matter of policy.

84. Moreover having regard to the Act as a whole, it is clear that the Commissioner of Police is given extensive responsibility in the substantive Act over the duties, including parades and drills, (section 4), discipline (section 5), command and superintendence (section 6), numbers and ranking (section 7), and appointment and revocation (sections 9 and 12). Generally therefore and subject to the making of regulations the effective organization of the Special Reserve Police is vested by legislation in the hands of the Commissioner of Police. This corresponds roughly with regulations contemplated by section 20 (2) (c) (d) and (e).

85. It is therefore possible for members of the Special Reserve Police to access all or substantially all the benefits proposed by the unimplemented regulations under the subsisting legislation. For the sake of completeness, it should be noted that ASP Wayne Andrews at para. 30 of his affidavit emphasized that in keeping with the intended purpose underlying their employment, which was basically to provide short-term employment and to assist and supplement the Police Service, any allowances and benefits which were not given to members of the Special Reserve Police as a matter of course were those allowances and benefits designed for the purpose of long-term employment. The evidence reveals among other matters, that:

- (i) members are not entitled to overtime benefits, but receive compensatory time off;

- (ii) full-time members are not entitled to a pension but receive an ex gratia payment, sometimes referred to as “a compassionate gratuity”;
- (iii) full-time members are entitled to bereavement leave;
- (iv) full-time members are entitled to maternity leave;
- (v) full-time members are entitled to a proficiency allowance;
- (vi) subject to approval by the designated authority; members injured in the course of their employment are entitled to injury leave with full pay or part pay;
- (vii) members are eligible to receive the cost of medical attention received as a result of an injury sustained in the course of duty;
- (viii) a compassionate ex gratia payment is also paid out to the legal personal representatives of members who have died in the course of duty.

86. Having regard to the foregoing it is clear that the legislature in its wisdom ensured that, in the absence of regulations being made, the policy or object of the Act is not defeated. The regulations are therefore not necessary for the proper functioning of the SRP Act. It would follow that there is no legally enforceable duty on the Minister to promulgate the regulations within any specific time frame. The non-implementation of regulations cannot therefore provide the basis for the remedies sought. In *Fire Brigades*, Lord Lloyd, in relation to sections of the 1988 Act which were to come into force on a day appointed by the Secretary of State, said at page 570: “The mistake is to treat these sections as if they did not exist. True they do not have statutory force. But that does not mean that they are writ in water. They contain a statement of Parliamentary intention, even though they create no enforceable rights.”

87. The basis of the Applicants’ rights would therefore lie within the four corners of the SRP Act and extant regulations made thereunder. And one thing is pellucidly clear. At all material times the intention of the legislature was to create a distinct class of officers, a new supplemental body, a reserve body of police liable to be called out when

the exigencies of the service required: see para 55 ante. The SRP Act was therefore not premised on the degree of permanency contended for. That would explain why, for example, the Commissioner of Police is endowed with wide discretionary powers of appointment and revocation, making it possible for the Commissioner to appoint and even to revoke the appointment of members **at any point in time**. Significantly, the regulations, even if made by the Minister under section 22, could not purport, for example, to curtail the power of the Commissioner to revoke the appointment of members.

88. No doubt that would also explain why, notwithstanding that members were categorised as full time, part-time or temporary under section 4 (2), the legislature failed to enact provisions granting pensions and/or gratuities to all, or to all full-time, members, but restricted the granting of pensions **or** gratuities to a limited class of members, namely, those who were permanently disabled or killed while in the actual discharge of their duties.

89. It again provides the reason why the executive arm of the State, when it sought to make regulations in 1998, found itself in that conundrum whereby members were being called out on a permanent full-time basis since 1969, necessitating the creation of the absorption scheme referred to at paragraphs 30-33 herein.

90. In my view to undertake a review of the legislation in the manner contended for by the Applicants, including equating the status of members of the Special Reserve Police with that of members of the Police Service and the provision of pensions and/or gratuities, may have the effect of destroying the fundamental underpinnings of the SRP Act. In any event that is a matter for the legislature and not for the courts.

91. In essence the Applicants are clamouring for improved terms and conditions of service similar to that of members of the Police Service. While one may feel a degree of sympathy for their cause, the matter of their terms and conditions of service is one for the State to determine as a matter of policy.

92. In the circumstances, insofar as the Applicants mount a claim for deprivation of their right to the protection of the law on the failure of the Minister to make regulations pursuant to section 22 of the SRP Act, and/or the failure of the executive arm of the State to take the necessary steps to ensure that the Applicants were not denied their right to the protection of the law, for the foregoing reasons I hold that the Applicants have not been deprived of their right to the protection of the law.

93. It is worth mentioning that Mr. Hosein SC, in the course of arguments, submitted that members of the Special Reserve Police have an alternative remedy as they are workers as defined by the Industrial Relations Act, Chapter 88:01 and, therefore, there is nothing which prevents them from seeking representation from a recognized trade union, or forming their own and approaching the Industrial Court for better terms and conditions of employment. However the Applicants have made clear that their case as presented to the Court was that they were denied access to the remedial measures provided for in section 22 of the SRP Act and raised no issue of being denied access to the Industrial Court. In that regard it should be noted that during the course of the submissions, Mr. Maharaj SC conceded that members of the Special Reserve Police are workers as defined under the Industrial Relations Act. That would seem to suggest that the Applicants could have accessed the Industrial Court on questions relating to their terms and conditions of employment. And in any event the Applicants have been able to access this Court for deprivation of their rights under section 14 of the Constitution.

G. Disposition

94. The Applicants' motion is hereby dismissed. Having heard arguments from Attorneys on the date of delivery of this judgment I make no order as to costs.

DATED this 2nd day of April 2008.

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PRKASH MOOSAI
JUDGE