

REPUBLIC OF TRINIDAD AND TOBAGO

**IN THE HIGH COURT OF JUSTICE
SAN FERNANDO**

Claim No. CV 2016-01218

BETWEEN

HARRIDATH MAHARAJ

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

AND

POLICE SERVICE COMMISSION

Intervenor

BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR

APPEARANCES

Mrs. Kamla Persad- Bissessar S.C. Mr. Anand Ramlogan S.C. Ms. Jiyanti

Lutchmedial, Mr. A. Pariagsingh, Mr. Bayley for the Claimant

Mr. Douglas Mendes S.C. Mr. Rishi Dass for the Defendant

Mr. Russell Martineau S.C, Ms. Laura Persad for the Intervenor

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Judgement

Background

1. The claimant seeks in relation to the Commissioner of Police and Deputy Commissioner of Police (Selection Process) Order 2015 (“the 2015 Order”), a determination on the following questions: (all emphasis added):-

- i. Whether the Commissioner of Police and Deputy Commissioner of Police (Selection Process) Order 2015 (“the Order”) infringes the **constitutional jurisdiction** of the Police Service Commission (“PSC”) by making the exercise of the PSC’s powers subject to or conditional upon an **instruction from the Minister** of National Security (the Minister) before it can initiate the selection process in relation to the office of Commissioner of Police and Deputy Commissioner of Police;
- ii. Whether the Order is illegal and unconstitutional in so far as it mandates that the PSC ‘**shall**’ act in accordance with Section 20A(1)(c) of the Central (Tenders) Board Act, Chap. 71:91 (“the CTB Act”);
- iii. Whether the Order is an unjustifiable and unlawful fetter and interference with the independence, jurisdiction, power, role and function of the PSC;
- iv. Whether the Order is ultra vires the CTB Act, in that Section 20A(1)(c) is only applicable to the “government” of which the PSC is not a part;
- v. Whether the Order is ultra vires the CTB Act, in that Section 20A (1) (c) is only applicable to “the supply of articles or for the undertaking of works or services in connection therewith”.

2. A declaration is also sought that the Order is unconstitutional.

3. The Commissioner of Police and Deputy Commissioner of Police (Selection Process) Order 2015 (“the 2015 Order”) is, in its material parts set out as follows:

“The selection process for appointment to the offices of Commissioner of Police and Deputy Commissioner of Police shall be conducted in the following manner:

- (a) *the Commission **on request of the Minister of National Security shall, in accordance with section 20A(1)(c) of the Central Tenders Board Act,***

*contract an appropriate local firm (hereinafter referred to as “the Firm”) to conduct a **recruitment** process including inviting applications for the positions;*

- (b) **the Firm shall select**, from the applications received, **the most suitable candidates for the assessment process**;*
- (c) the Firm shall ensure that the candidates **referred to in paragraph (b)** are subjected to the best practice security vetting and recent professional vetting;*
- (d) the Firm shall submit to the Commission–*
 - (i) **the results of its assessment process in the form of a short list of candidates**;*
 - (ii) a report on its assessment of the entire assessment process; and*
 - (iii) in respect of the candidates referred to in subparagraph (i), the following documents:*
 - (A) application of the candidate;*
 - (B) biography or résumé of the candidate;*
 - (C) assessor’s scores;*
 - (D) assessor’s feedback;*
 - (E) medical examination report; and*
 - (F) Security and Professional Vetting Report;*
- (e) the Commission shall then take into account all information on the candidates and thereafter establish an Order of Merit List; and*
- (f) **the Commission shall select the highest graded candidate on the Order of Merit List and submit that candidate’s name to the President in accordance with the procedure set out in section 123 of the Constitution.**”*

Issues

4.

- i. What is the effect of the amendment to the Constitution in 2006 on the Police Service Commission’s independence or autonomy in relation to appointments to the offices of Commissioner of Police and Deputy Commissioner of Police.

- ii. Whether the Order, providing as it does for a role for the Minister in triggering the recruitment process is, in whole or in part, ultra vires the Constitution, as amended by the 2006 Amendment, and therefore unconstitutional.
- iii. Whether the Order, providing as it does, that the PSC shall act in accordance with Section 20A(1)(c) of the Central (Tenders) Board Act, Chap. 71:91(“the CTB Act”) is, in whole or in part ultra vires the Constitution, as amended by the 2006 Amendment, and therefore unconstitutional.
- iv. Whether the Order is otherwise an unjustifiable and unlawful fetter and interference with the independence, jurisdiction, or function of the PSC.
- v. Whether the Order is ultra vires the CTB Act.

Conclusion

5.

- i. The amendment to the Constitution in 2006 did not remove the Police Service Commission’s independence or autonomy **in relation to appointments to the offices of** Commissioner of Police and Deputy Commissioner of Police.
- ii. The Order, providing as it does for a role for the Minister in triggering the recruitment process is, in that respect, ultra vires the Constitution.
- iii. The Order, providing as it does, that the PSC shall act in accordance with Section 20A(1)(c) of the Central (Tenders) Board Act, Chap. 71:91(“the CTB Act”) is, in in that respect, ultra vires the Constitution.
- iv. To the extent that the Order fails to recognise or give effect to the Police Service Commission’s independence and autonomy **in relation to appointments to the offices of** Commissioner of Police and Deputy Commissioner of Police it is in certain respects as set out and identified below, an unjustifiable and unlawful fetter upon and interference with the independence, jurisdiction, and functions of the PSC. To the extent that those aspects of the order are ultra vires the Constitution they must be struck out.
- v. In view of the finding that those aspects of the Order which reference the CTB Act are ultra vires the Constitution, it is not necessary to consider whether they are also ultra vires the CTB Act.

Order

6.

1. Those portions of the 2015 Order are declared to be ultra vires and unconstitutional as are hereinafter set out, and are accordingly struck out.

“The selection process for appointment to the offices of Commissioner of Police and Deputy Commissioner of Police shall be conducted in the following manner:

- (a) the Commission ~~on request of the Minister of National Security~~ shall, ~~in accordance with section 20A(1)(c) of the Central Tenders Board Act,~~ contract an appropriate local firm (hereinafter referred to as “the Firm”) to conduct a **recruitment** process including inviting applications for the positions;*
- (b) ~~the Firm shall select, from the applications received, the most suitable candidates for the assessment process;~~*
- (c) the Firm shall ensure that the candidates ~~referred to in paragraph (b)~~ are subjected to the best practice security vetting and recent professional vetting;*
- (d) the Firm shall submit to the Commission—*
 - (i) ~~the results of its assessment process in the form of a short list of candidates;~~*
 - (ii) a report on its assessment of the entire assessment process; and*
 - (iii) in respect of the candidates referred to in subparagraph (i), the following documents:*
 - (A) application of the candidate;*
 - (B) biography or résumé of the candidate;*
 - (C) assessor’s scores;*
 - (D) assessor’s feedback;*
 - (E) medical examination report; and*
 - (F) Security and Professional Vetting Report;*
- (e) the Commission shall then take into account all information on the candidates and thereafter establish an Order of Merit List; and*

(f) *the Commission shall select the highest graded candidate on the Order of Merit List and submit that candidate's name to the President in accordance with the procedure set out in section 123 of the Constitution."*

2. Following upon the striking out of those portions of the 2015 Order as declared to be ultra vires the Constitution and unconstitutional, in relation to paragraph (d) of the 2015 Order the words **AS MANDATED AND CONTRACTED BY THE COMMISSION** may be implied after the words "assessment process" as this would be consistent with the remaining constitutional portions of the Order and the Constitution as follows:-

The Firm shall submit to the Commission:-

(i) *the results of its assessment process AS MANDATED AND CONTRACTED BY THE COMMISSION in the form of a short list of candidates:-*

3. The Respondent is to pay to the applicant costs certified fit for Senior and Junior Counsel to be assessed by the Register in default of agreement.

Analysis and Reasoning

7. The Claimant challenges the constitutionality and legality of the 2015 Order. His primary ground of challenge is that the 2015 Order is unconstitutional in that it contravenes the constitutional independence of the Police Service Commission as recognised and affirmed on multiple occasions by the Privy Council, specifically in the cases of **Endell Thomas** [1982] A.C. 113, **Cooper & Balbosa v The Director of Public Administration** [2006] UKPC 37, and most recently, **Annisia Webster v The Attorney General** [2015] UKPC 10.

8. It is contended that the Order is unconstitutional, as it allegedly trespasses upon the constitutionally protected jurisdiction and independence of the Police Service Commission (the "PSC") in matters of appointment to and promotion within the Police Service. The 2015 Order was the subject of an unsuccessful motion in the Parliament to

be annulled further to the negative resolution procedure set out in section 123(2) of the Constitution. That procedure is a matter for the legislature. Its success or otherwise is a matter that is dependent on the composition of the Parliament. This is entirely irrelevant however to the objective exercise by the Court of its duty to consider the constitutionality of any provision when it allegedly infringes the provisions of the Constitution. It is obviously a different exercise entirely.

9. The applicant referred to **John Dumas v The Attorney General** CA Civ P. 218/2014 in which the Court of Appeal, per the Honourable Jamadar J.A. explained the Constitutional jurisdiction and the relevant test at para 133:

“In our opinion, barring any specific legislative prohibition, the court in the exercise of its supervisory jurisdiction and as guardian of the Constitution, is entitled to entertain public interest litigation for constitutional review of alleged non-Bill of Rights unlawful constitutional action; provided the litigation is bona fide, arguable with sufficient merit to have a real and not fanciful prospect of success, grounded in a legitimate and concrete public interest, capable of being reasonably and effectively disposed of, and provided further that such actions are not frivolous, vexatious or otherwise an abuse of the court’s process. The approach to be taken to this issue of standing is a flexible and generous approach, bearing in mind all of the circumstances of the case, including in particular the need to exclude busybody litigants and those who have no genuine interest in the issues raised and have not demonstrated credible engagement in relation to them. The public importance of the issues raised and of vindicating the rule of law are significant considerations.”

The court’s jurisdiction cannot therefore be in dispute.

10. The issue therefore is whether, despite the significant changes introduced by the 2006 amendment, the Police Service Commission’s role in the appointment of a Commissioner of Police (and Deputy Commissioner) has been modified or altered, (particularly in the exercise of its powers of **appointment** to those offices), from the position that existed under the 1962 Constitution and the 1976 Constitution (as described

by the Privy Council in both *Thomas* and *Cooper*), such that the 2015 Order falls within its current ambit.

11. This may be analysed by:-

- i. examining whether there have been fundamental incursions by the Executive and Legislature to the pre-existing insulation and autonomy of the Police Service Commission in relation to inter alia:-
 - a. the **composition** of the Police Service Commission,
 - b. the **quarantine** period,
 - c. the **procedure for appointments** to the Police Service Commission,
 - d. the **grounds** for removal from the Police Service Commission - (termination of appointment),
 - e. the **procedure** for removal from the Police Service Commission, such as to justify a conclusion that the principle of constitutional insulation and autonomy of the Police Service Commission no longer applies; and;
- ii. by examining further, if the principle of constitutional insulation and autonomy applies (a). in whole, or (b) in part,
 - (a) whether there has been a constitutionally authorised incursion into the Commission's powers of **appointment** of a Commissioner of Police and Deputy Police Commissioners such that the introduction of a role for the Executive is now permissible .
 - (b) even if so, whether the procedure set out in the 2015 Order falls within the ambit of any such constitutional authorisation.

Constitutional autonomy of the Police Service Commission – the position in 1962

12. The role, function, and constitutional independence of the Police Service Commission established under the 1962 Constitution were considered in great detail in the case of *Thomas v Attorney General of Trinidad and Tobago* [1982] AC 113, (*Thomas*) per Lord Diplock. Although *Thomas* dealt with the 1962 Constitution, the Privy Council per Lord Diplock expressly observed and noted at **120E** that its comments

in relation to constitutionally protected autonomy of that and other Service Commissions were **equally applicable to the 1976 Constitution**. The relevant provisions of the 1962 Constitution are contained within the body of the following extracts from **Thomas**. Because of the submissions, particularly those on behalf of the PSC in relation to whether the principles established in **Thomas** in relation to the 1962 Constitution survive today after the Constitution was amended in 2006, it is absolutely necessary to examine the analysis in that case in great detail, and to set out the relevant extracts therefrom at some length.

13. Lord Diplock at **123G-124G** (All emphasis added):

“Under a party system of government such as exists in Trinidad and Tobago and was expected to exist after independence in other Commonwealth countries whose constitutions followed the Westminster model, dismissal at pleasure would make it possible to operate what in the United States at one time became known as the “spoils” system upon a change of government, and would even enable a government, composed of the leaders of the political party that happened to be in power, to dismiss all members of the public service who were not members of the ruling party and prepared to treat the proper performance of their public duties as subordinate to the furtherance of that party’s political aims. In the case of an armed police force with the potentiality for harassment that such a force possesses, the power of summary dismissal opens up the prospect of converting it into what in effect might function as a private army of the political party that had obtained a majority of the seats in Parliament at the last election. Their Lordships do not suggest that there is any likelihood of any of these extreme consequences of the existence of a legal right of summary dismissal without cause occurring in Trinidad and Tobago; but what has actually happened in some other countries suggests that the possibility of their occurrence was not too far-fetched to justify the constitution-makers in the 1960’s making provision to eliminate any such risk in constitutions which follow the Westminster model.

*The whole purpose of chapter VIII of the Constitution (the 1962 Constitution) ... 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 doing 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. Subject to the approval of the Prime Minister they **may delegate** any of their powers to any of their members or to a person holding some public office (limited in the case of the Police Service Commission to an officer of the police force); but the **right to delegate**, though its exercise requires the approval of the Prime Minister, is **theirs alone** and any power so delegated is **exercised under the control of the commission** and on its behalf and **not on behalf** of the Crown or of any other person or authority.*

*In respect of each of these **autonomous** commissions the Constitution contains provisions to secure its independence from both the executive and the legislature. No member of the legislature may serve on the commission; all members must be appointed for a fixed term of years which must not be less than three or more than five, during which a member may only be **removed** for inability to discharge his function or for misbehaviour. The **quarantine period** imposed by making it a requirement of eligibility that a member **shall not have served in any public office within the last three years** and also making him **ineligible for appointment to any public office for three years after** ceasing to serve as a member of the commission is **clearly intended to avoid any risk of his being influenced in favour of the executive** by considerations of advancement in his own career.'*

*The provisions of chapter VIII of the Constitution that are directly relevant to the legal nature of the plaintiff's tenure of office in the police force are to be found in section 98, which **establishes** the Police Service Commission and **section 99** which confers **its functions** on it. Corresponding provisions, in language that is in all relevant respects identical, are made for the Public Service Commission by sections 92 and 93; for what in 1968 became the Teaching Service Commission by sections 99A and 99C; and, with some modifications appropriate to the nature of the public offices to which it makes appointments, for the Judicial and Legal Service Commission by sections 83 and 84. Sections 98 and 99 of the Constitution read as follows:*

*"98 (1) There **shall be a Police Service Commission** for Trinidad and Tobago which shall consist of a chairman and four other members. (2) (a) The members of the Police Service Commission shall be **appointed by the Governor-General, acting in accordance with the advice of the Prime Minister**. (b) The chairman of the Police Service Commission shall be either the chairman or the deputy chairman of the Public Service Commission. (3) A person shall **not be qualified** to be appointed to or to hold the office of a member of the Police Service Commission **if he is a Senator or a temporary member of the Senate or a member of the House of Representatives or a Minister or a Parliamentary Secretary** or if he holds or is acting in **or has held any public office within the period of three years** immediately preceding such appointment. (4) A person who has held office or acted as a member of the Police Service Commission **shall not, within a period of three years commencing** with the date on which he last so held office or acted, **be eligible for appointment to any public office**. (5) The office of a member of the Police Service Commission shall become vacant at the expiration of five years from the date of his appointment or such shorter period, not being less than three years, as may be specified at the time of his appointment. (6) A member of the Police Service Commission **may be removed from office** by the Governor-General, acting in accordance with the advice of the Prime Minister, **for inability to discharge the functions of his office** (whether arising from*

infirmity of mind or body or any other cause) or for misbehaviour. (7) A member of the Police Service Commission shall not be removed from office except in accordance with the provisions of this section. (8) If the office of a member of the Police Service Commission is vacant or a member is for any reason unable to perform the functions of his office, the Governor-General, acting in accordance with the advice of the Prime Minister, may appoint a person who is qualified for appointment as a member of the commission to act as a member of the commission, and any person so appointed shall, subject to the provisions of subsection (3) of this section, continue to act until his appointment is revoked by the Governor-General, acting in accordance with the advice of the Prime Minister.

*"99 (1) Power to **appoint** persons to **hold** or **act** in offices in the police force (including appointments on promotion and transfer and the confirmation of appointments) and to remove and exercise disciplinary control over persons holding or acting in such offices **shall vest in the Police Service Commission**: provided that the **commission may**, with the approval of the Prime Minister and subject to such conditions as it may think fit, **delegate** any of its powers under this section to any of its members or to the Commissioner of Police or any other officer of the police force.*

*(5) Before the Police Service Commission makes an appointment to the office of Commissioner or Deputy Commissioner of Police it shall consult the Prime Minister, and **a person shall not be appointed to such an office if the Prime Minister signifies to the Police Service Commission his objection to the appointment of that person to such an office.**"*

To "remove" from office in the police force in the context of section 99 (1), in their Lordships' view, embraces every means by which a police officer's contract of employment (not being a contract for a specific period), is terminated against his own free will, by whatever euphemism the termination may be described, as, for example, being required to accept early retirement. Before this Board the

Attorney-General has **not sought to argue** that, after the 1962 Constitution had **vested in the Police Service Commission the power to remove police officers**, the Governor-General acting on behalf of the Crown but on the advice of the Cabinet **retained any concurrent power to dismiss** them either with or without reasonable cause. **Retention of a power in the government to dismiss** police officers without the need for showing any reasonable cause **would enable it to render abortive the exercise also by the commission** of their functions of **appointing**, promoting and transferring members of the police force; since the Governor-General could by this means terminate immediately appointments made by the commission of any persons of whom the government of the day did not approve.

Page 129 --The **functions** of the Police Service Commission fall into two classes: (1) to **appoint** officers to the police service, including their transfer and promotion and **confirmation in appointments** and (2) to remove and exercise disciplinary control over them. It has no power to lay down terms of service for police officers; this is for the legislature and, in respect of any matters not dealt with by legislation, whether primary or subordinate, it is for the executive to deal with in its contract of employment with the individual police officer. Terms of service include such matters as (a) the duration of the contract of employment, e.g., for a fixed period, for a period ending on attaining retiring age, or for a probationary period as is envisaged by the reference to "confirmation of appointments" in section 99 (1); (b) remuneration and pensions; and (c) what their Lordships have called the "code of conduct" that the police officer is under a duty to observe.

Page 130 - Regulations under **section 102** were made in 1966 and **their Lordships will have to consider later whether regulation 74 in particular was ultra vires** the powers conferred in the commission by that section; but the absence of any such post-1962 regulations at the time that the **Police Service Act 1965**, was passed may explain the fact that **some of the matters in respect of which power to make regulations was conferred upon the Governor-General by section 65 of that Act**

were expressed in terms which, unless very restrictively construed, appeared to authorise him to usurp the constitutional functions of the autonomous Police Service Commission:

*"65 (1) The Governor-General may make regulations for carrying out or giving effect to this Act, and in particular for the following matters namely:- (a) for prescribing classifications for officers in the police service, including qualifications, duties and remunerations; (b) for prescribing the procedure for **appointments** from within the police service; (c) for prescribing the probationary **period** on first **appointment** and for the reduction of such period in appropriate cases; (d) for prescribing conditions for the **termination** of first **appointments**; (e) for prescribing the procedure for the recovery of any penalties from a police officer; (f) for regulating the hours of attendance of police officers and the keeping and signing of records of attendance or for prescribing other methods of recording attendance; (g) for regulating the duties to be performed by police officers; (h) for regulating the granting of leave to police officers; (i) for prescribing arrangements and procedures for providing, assisting in or co-ordinating staff developing programmes; (j) the enlistment, training and discipline of the police service; (.....)*

*Their Lordships would mention in passing that paragraphs (b) to (d) appear to deal with promotions and transfers and with appointments and confirmation of appointments, which are exclusive functions of the commission under section 99 (1); but what has been principally relied upon as conferring upon the Governor-General the sole power to create "offences against discipline" is paragraph (j); "the enlistment, training and discipline of the police service."
[1982] A.C. 113 Page 131*

*If "enlistment" were interpreted as including the process of **selection of recruits** to the police service, as distinct from laying down physical and educational qualifications for recruitment, it would to that extent be inconsistent with section*

*99 (1) of the Constitution which vests the function of **selection** exclusively in the commission. Similarly if "discipline" were interpreted as meaning more than a code of conduct for police officers and were treated as embracing also such matters as laying down the procedure for disciplinary proceedings or laying down the penalties for various categories of misconduct it would, for the same reason, to that extent also be inconsistent with section 99 (1). **In the absence of any prior alteration to the Constitution under section 38 (1) - and there had been none - the Police Service Act 1965, and any regulations made or continued in force under section 65 of the Act would to the extent of such inconsistencies be void.***

14. Thomas makes it clear that:-
 - a. Under the 1962 Constitution the Police Service Commission was autonomous.
 - b. Under the 1962 Constitution the Police Service Commission had **exclusive** jurisdiction over appointments. There could be no parallel jurisdiction in the executive, as the exercise of such a parallel jurisdiction (even to dismiss), had the potential to render abortive the exercise **also** of the commission of its power to appoint. In that case it was recognized that a concurrent power to dismiss could render abortive the Commission's power to appoint. Even more so therefore would a concurrent power in the Minister to initiate the appointment process carry the potential to skew the process of appointment by the Police Service Commission.
 - c. Regulations made under the Police Service Act 1965 which were inconsistent with this would be, to the extent of such inconsistency, be void.

The 1976 Constitution in relation to the Police Service Commission

15. Under the 1976 Constitution the relevant provisions were as follows:- (all emphasis added):

'122. (1) There shall be a Police Service Commission for Trinidad and Tobago which shall consist of a Chairman and four other members.

(2) The members of the Police Service Commission shall be appointed by the President, after consultation with the Prime Minister and the Leader of the Opposition.

(3) The Chairman of the Police Service Commission shall be either the Chairman or the Deputy Chairman of the Public Service Commission.

(4) The members of the Police Service Commission shall hold office in accordance with section 126.

123. (1) Power to appoint persons to hold or act in an office in the Police Service established under the Police Service Act, including appointments on promotion and transfer and the confirmation of appointments, and to remove and exercise disciplinary control over persons holding or acting in such offices shall vest in the Police Service Commission.

...

(3) Before the Police Service Commission makes an appointment to the office of Commissioner or Deputy Commissioner of Police, it shall consult the Prime Minister, and a person shall not be appointed to such an office if the Prime Minister signifies to the Police Service Commission his objection to the appointment of that person to such an office.

127. (1) A Service Commission may, with the approval of the Prime Minister and subject to such conditions as it may think fit, delegate any of its functions under this Part other than any power conferred on the Commission by section 129, to any of its members or – (c) in the case of the Police Service Commission, to the Commissioner of Police or a Deputy Commissioner of Police.

...

129. (1) Subject to subsection (3) [which provided that certain matters may not be enquired into in any court], a Service Commission may, with the consent of the Prime Minister, by regulation or otherwise regulate its own procedure,

16. The provisions of 1962 Constitution in relation to the Police Service Commission are in all material respects similar to those under the 1976 Constitution. In addition section 126 under the 1976 Constitution reproduced the provisions under the 1962

Constitution which were designed to secure the independence of the PSC from both the Executive and the Legislature. The observations of Lord Diplock in relation to the PSC were therefore equally applicable to the 1976 Constitution.

17. The principle of constitutional autonomy and insulation of the Police Service Commission under the 1976 Constitution has been recognised in *Thomas* and affirmed in decisions since *Thomas*.

18. In *Cooper & Balbosa v Director of Personnel Administration* [2006] UKPC 37, [2007] 1 WLR 101, at issue was whether the appointment by Cabinet of a Public Service Examination Board to be used by the PSC for examinations for promotion within the Police Service conflicted with the constitutional principle described by Lord Diplock in *Thomas*.

19. In *Cooper* the Privy Council specifically considered the position of the Police Service Commission under the **1976 Constitution**. It affirmed that the reasoning of the Honourable Lord Diplock in relation to constitutional protection of the Police Service Commission and in relation to its powers of **appointment**, promotion and transfer were equally applicable to the 1976 Constitution.

20. In that case the utilisation of an examination board appointed by Cabinet, for the purpose of testing candidates for promotion, was held to only be permissible if the Police Service Commission itself elected to utilise such a board, and that the services of such an examination board could not be imposed upon it. The Commission solely retained the constitutional mandate to **appoint**, promote (and, under the 1976 Constitution, at that time, transfer), persons in the police force (subject to its own ability to delegate these if it wished to the extent permitted under the Constitution.)

21. Extracts from the judgment of Lord Hope relevant to the constitutional status of the PSC are set out hereunder:-

[21]-[29] per Lord Hope of Craighead (all emphasis added):

Para. [11]

Section 122 provides for **the membership and appointment** of the Police Service Commission. Section 123(1) is in these terms:

*"(1) Power to **appoint** persons to hold or act in an office in the Police Service established under the Police Service Act, including **appointments on promotion and transfer** and the **confirmation of appointments**, and to remove and exercise disciplinary control over persons holding or acting in such offices and to enforce standards of conduct on such officers shall vest in the Police Service Commission."*

Section 125 gives power in almost identical terms to appoint persons to hold or act in public offices in the Teaching Service established under the Education Act, except that it is prefaced by the words "Subject to the provisions of this Constitution". Those words do not appear in s 123(1). But **their Lordships consider that, although it does not say so expressly, s 123 read in its context must be taken to be subject to the provisions of the Constitution of which it forms part.**

Paragraph [21]

*On its face, the scope of s 75(1) is very wide. But the Constitution must be read as a whole, and where the terms of employment and security of tenure of members of the public service are in issue s 75 must be read subject to the provisions of Ch 9. In *Thomas v Attorney-General of Trinidad and Tobago* [1982] AC 113, 124, [1981] 3 WLR 601 which was decided under the former Constitution in which the equivalent chapter (although it bore a different headnote) was **Ch VIII**, Lord Diplock said:*

*"The whole purpose of Chapter VIII 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 upon them directly by the government of the day. The **means adopted** for doing 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. Subject to the approval of the Prime Minister they may delegate their powers to any of their members or to a person holding some public office (limited in the case of the Police Service Commission to an officer of the police force); but the right to delegate, although its exercise requires the approval of the Prime Minister, is theirs alone and any power to delegated is exercised under the control of the commission and not on behalf of the Crown or of any other person or authority."*

*The question is **whether, and if so to what extent, the appointment by the Cabinet of the Public Service Examination Board conflicts with the guidance** given in that paragraph.*

WHERE IS THE LINE TO BE DRAWN?

*23. The fact that **no mention** is made **in the Constitution** of the appointment **by the executive** of a body such as the Public Service Examination Board **opens the door to the argument** that in setting up such a body the Cabinet was assuming to itself a power that it did not possess. There is no doubt that **the constitutional principle would be breached** if that body were to be used as an instrument which **enabled** the executive **to interfere directly or even indirectly** with the **appointment and tenure of public offices**. On the other hand, the formulation of policies aimed at uniformity of standards and consistency of practice in the making of appointments to public offices, and at the economic use of limited resources to avoid duplication where this is unnecessary, is a matter of legitimate concern to the executive. It falls within the ambit of the general direction and control of government. Where then is the line to be drawn between the proper exercise by the Cabinet of its powers under **s. 75(1) of the Constitution and the improper exercise of political influence on the making of appointments** by the commissions in general and the Police Service Commission in particular?*

[24] In *(Thomas v Attorney-General of Trinidad and Tobago)* [1982] AC 113, 128 Lord Diplock said:

"The functions of the Police Service Commission fall into two classes: (1) to appoint police officers to the public service, including their transfer and promotion and confirmation in appointments and (2) to remove and exercise disciplinary control over them. It has no power to lay down terms of service for police officers; this is for the legislature and, in respect of any matters not dealt with by legislation, whether primary or subordinate, it is for the executive to deal with in its contract of employment with the individual police officer. Terms of service include such matters as (a) the duration of the contract of employment, eg for a fixed period, for a period ending on attaining retiring age, or for a probationary period as it envisaged by the reference to 'confirmation of appointments' in section 99(1); (b) remuneration and pensions; and (c) what their Lordships have called the 'code of conduct' that the police officer is under a duty to observe."

Mr Dingemans, relying on this passage, submitted that passing a promotion examination was a form of qualification and that it thus fell within the sphere of the functions of the executive. As qualification for promotion was within its sphere, the Cabinet had power to appoint the Public Service Examinations Board.

[26] *Their Lordships consider, with great respect, that this approach is based on a misunderstanding of what Lord Diplock was saying at p 128. Earlier in his judgment, at pp 123-124, he had drawn attention to the risks that exist under a party system of government such as exists in Trinidad and Tobago. A power in the executive to dismiss public servants at pleasure, which is what that case was about, would make it possible for the proper performance of their public duties to be treated as subordinate to the party's political aims. He mentioned the prospect, albeit remote in Trinidad and Tobago, of an armed police force being converted into a private army*

of the majority party at the last election. It is against that background that the passage at p 128 falls to be read.

[27] On the one hand there is the function of **appointing** officers to the police service, including their promotion and transfer. This is a matter **exclusively** for the Police Service Commission. On the other hand there are the terms of service which are to be included in the contract of the individual police officer. The Police Service Commission does not employ the police officer. His contract is with the executive. Terms of service, of which Lord Diplock gave various examples, may be laid down by the legislature. Where they are laid down in that way they must form part of the contract. Where there are gaps because the matters at issue have not been dealt with by the legislature, they may be dealt with by the employer. In the case of police officers, their contract of service is with the executive. So it is open to the executive to fill the gaps. **But this has nothing whatever** to do with the **matters** that lie within the **exclusive preserve of the Police Service Commission. It is for the Commission, and the Commission alone, to appoint and promote police officers.** Terms of service are what each police officer enters into with his employer following the confirmation by the Commission of his appointment to, or his appointment on promotion within, the police service.

[28] The Constitution requires that the powers which it has given to the Public Service Commissions, and **to the Police Service Commission in particular**, to **appoint** persons to hold or act in public offices and to make appointments on promotion must be exercised free from **inference (sic)** or influence of any kind by the executive. There is room in this system for the taking of some initiatives by the Cabinet. **A distinction can be drawn between acts that dictate to the Commissions what they can or cannot do, and the provision of a facility that the Commissions are free to use or not to use as they think fit.** The appointment of a Public Service Examination Board by the Cabinet for the commissions to use if they choose to do so is not in itself objectionable. The advantages of using such a centralised body are obvious, and in practice the commissions may well be content to continue to make use

of them. **The objection** which has given rise to these proceedings **lies in the misapprehension** as to where the **responsibility for choosing that system lies**. In their Lordships' opinion the proposition in the media release of 8 July 2002 that the **sole** responsibility for the conduct of examinations falls under the Public Service Examination Board's purview was based on a **profound misunderstanding of where the line must be drawn between the functions of the commissions and those of the executive**.

[29] There is no doubt that the Police Service Regulations envisage the existence of an examination board. Regulation 15(5) requires that the interview of a police officer who is successful in the promotion examination for promotion to any office in the service must be conducted jointly by, among others, the chairman of the Examination Board. So the appointment of an examination board is an essential part of the whole process. **The Constitution, for its part, does not permit the executive to impose an examination board on the Commission of the executive's own choosing**. It is for the Commission to exercise its **own initiative** in this matter, **free from influence or interference by the executive**. It may, **if it likes**, make use of a Public Service Examination Board appointed by the Cabinet. There may be advantages in its doing so. This no doubt is a service that must be paid for somehow. Where resources are scarce the Commission cannot be criticised if it **chooses** to make use of an existing facility. On the other hand **it cannot be criticised if it chooses not to do so**. **The Constitution requires that it must have the freedom to exercise its own judgment...**

[30] The media release of 8 July 2003 was wrong to say that the sole responsibility for the conduct of examinations for appointment to and promotion within the Police Service lay with the Public Service Examination Board, the management of which was the responsibility of the employer - that is to say, of the executive. **Section 123 of the Constitution declares that the power of appointment of persons to hold office in the Police Service, including appointments on promotion and transfer, is vested in the Police Service Commission. Sole responsibility for the conduct of examinations for the appointment and promotion of police officers lies with the Commission.**

*[31] How the Commission discharges that responsibility is a matter for the Commission itself to determine, in the exercise of its powers under the Police Service Commission Regulations. Regulation 19(1) provides that all examinations in the Police Service shall be set and marked by such Examination Board as may be appointed for this purpose. The regulation does not state in terms by whom that appointment is to be made. But, in the context of the regulations as a whole, and in **the light of Chapter 9 of the Constitution in particular**, it must be understood as reserving the power to do make the appointment **to the Commission and not to the executive**. The Director of Personnel Administration, whose duties extend across the entirety of the public service in Trinidad and Tobago, is responsible for the conduct of the examinations under reg 19(2). But his responsibility extends only to how the examinations that are to be set and marked by the Board **that the Commission has appointed** are to be administered in practice. **It does not detract in any way from the responsibility that rests on the Commission, with which the power of ultimate control lies, to make that appointment.***

*[32] Their Lordships will therefore allow the appeal. They will declare that **it is the sole responsibility of the Police Service Commission to appoint the Examination Board referred to in reg 19(2) of the Police Service Commission Regulations and that the setting and marking of the papers by the Examination Board is subject to the ultimate control of the Police Service Commission.** The Respondents must pay the Appellants' costs before the Board and in the courts below.*

The 2006 Amendment

22. In 2006 the Constitution was amended by Act No. 6 of 2006 (“**the 2006 Act or the 2006 Amendment**”). The issue that directly arises is whether the constitutional insulation and powers of appointment of the Police Service Commission under the 1976 Republican Constitution was altered by the 2006 amendment to the Constitution.

POLICE SERVICE COMMISSION

122. (1) *There shall be a Police Service Commission for Trinidad and Tobago which shall consist of a Chairman and four other members.*

(2) *The members of the Police Service Commission shall be appointed by the President in accordance with this section.*

(3) *The President shall, after consultation with the Prime Minister and Leader of the Opposition nominate persons, who are qualified and experienced in the disciplines of law, finance sociology or management, to be appointed as members of the Police Service Commission.*

(4) *The President shall issue a Notification in respect of each person nominated for appointment under subsection (3) and the Notification shall be subject to affirmative resolution of the House of Representatives.*

(5) *The President shall make an appointment under this section only after the House of Representatives has approved the Notification in respect of the relevant person.*

(6) *The President may in his own discretion appoint a Chairman of the Police Service Commission from among its members.*

(7) *The Members of the Police Service Commission shall hold office in accordance with section 126, other than subsections (4) and (5).*

122A. (1) *The President shall, after consultation with the Prime Minister and the Leader of the Opposition, **terminate** the **appointment** of a member of the Police Service Commission, if the member—*

(a) *fails to attend four consecutive meetings without reasonable cause;*

(b) *is convicted of a criminal offence which carries a penalty of six or more months of imprisonment in any Court;*

(c) *becomes infirm in mind or body;*

(d) *fails to perform his duties in a responsible or timely manner;*

(e) *fails to absent himself from meetings of the Police Service Commission where there is a conflict of interest;*

(f) *demonstrates a lack of competence to perform his duties; or*

(g) misbehaves in office.

(2) The President, in the exercise of his power under subsection (1)(d) to (g), may consider the report of a Joint Select Committee and the Police Service Commission laid in Parliament in furtherance of sections 66A(1)(e) and 66B respectively.

(3) A member of the Police Service Commission shall not be removed from office except in accordance with this section.

123. *(1) The Police Service Commission shall have the power to—*

(a) appoint persons to hold or act in the office of Commissioner and Deputy Commissioner of

Police;

(b) make appointments on promotion and to confirm appointments;

(c) remove from office and exercise disciplinary control over persons holding or acting in the offices specified in paragraph (a);

(d) monitor the efficiency and effectiveness of the discharge of their functions;

(e) prepare an annual performance appraisal report in such form as may be prescribed by the Police Service Commission respecting and for the information of the Commissioner or Deputy Commissioner of Police; and

(f) hear and determine appeals from decisions of the Commissioner of Police, or of any person to whom the powers of the Commissioner of Police have been delegated, in relation to appointments on promotion or as a result of disciplinary proceedings brought against a police officer appointed by the Commissioner of Police. Powers of the Police Service Commission.

*(2) The Police Service Commission shall **nominate** persons for appointment to the offices specified in subsection (1)(a) and section 22(1) of the Police Service Act **in accordance with the criteria and procedure prescribed by Order** of the President, subject to negative resolution of Parliament.*

(3) *The Police Service Commission shall submit to the President a list of the names of the persons **nominated for appointment** to the offices of Commissioner or Deputy Commissioner of Police.*

(4) *The President shall issue a Notification in respect of each person **nominated** under subsection (3) and the Notification shall be **subject to affirmative resolution** of the House of Representatives.*

(5) *The **Police Service Commission** shall **appoint** the Commissioner or Deputy Commissioner of Police only after the House of Representatives **approves the Notification** in respect of the relevant office.*

.....

(8) *The **Police Service Commission** may **terminate** the services of the Commissioner or a Deputy Commissioner of Police on any of the following grounds:*

(a) *-(e)*

(9) *The **procedure** for the termination of the services of the Commissioner or a Deputy Commissioner of Police shall be **prescribed by the Police Service Commission** in accordance with section 129.*

(10) *Notwithstanding section 132, no appeal shall lie to the Public Service Appeal Board in respect of a decision made by the Police Service Commission under this section.*

123A. (1) *Subject to section 123(1), the Commissioner of Police shall have the complete power to manage the Police Service and is required to ensure that the human, financial and material resources available to the Service are used in an efficient and effective manner.*

(2) *The Commissioner of Police shall have the power to —*

(a) *appoint persons to hold or act in an office in the Police Service, other than an officer referred to in section 123(1)(a), including the power to make appointments on promotion and to confirm appointments;*

(b) ***transfer** any police officer; and*

(c) remove from office and exercise disciplinary control over police officers, other than an officer referred to in section 123(1)(a).

(3) The functions of the Commissioner of Police under this section may be exercised by him in person or through any police officer of or above the rank of Superintendent acting under and in accordance with his general or special instructions.

(4) In the performance of his functions under this section the Commissioner of Police shall act in accordance with the Police Service Act and the Regulations made thereunder.

123B. (-)

23. The modifications introduced by the 2006 amendment relate inter alia to:-
- a. The eligibility, appointment, and grounds for removal of the members of the PSC.
 - b. The removal of its jurisdiction in respect of appointment, promotion, and the exercise of disciplinary control over offices **other than** those of the Commissioner and Deputy Commissioner, as well as jurisdiction over transfers, and
 - c. The creation of a procedure for the appointment of the Commissioner and Deputy Commissioners of Police.
24. As Sections 122 and 123 of the Constitution have been amended by Act No. 6 of 2006, the issue that must be examined is whether or not these introduced changes have impacted the constitutional independence and autonomy of the Police Service Commission, and if so, to what extent.

25. Section 122(1) of the Constitution remains unchanged. It provides for the existence of a Police Service Commission. It comprises a chairman and four other members. The amendment however makes changes to:-

- a) the composition/ **qualifications** of that commission, and
- b) the method of appointment of those members.

26. With respect to the **qualifications** of members it now expressly provides that such persons nominated as members be qualified and experienced in the disciplines of law, finance, sociology or management.

Appointments to the PSC

27. With respect **to appointments** it now provides that appointments of members, though still by the President, shall now be **subject to affirmative resolution** of the House of Representatives.

28. It further provides that the President may in his own discretion **appoint** a **chairman** of the PSC from among its members. It leaves unaltered the position that **consultation** is required by the President with the Prime Minister and the Leader of the Opposition in respect of members. However previously such consultation was a pre condition to actual **appointment** by the President without the **additional requirement** for their approval by the House of Representatives.

29. The President's power to **appoint members after consultation** has now been replaced with a power to **nominate after consultation**. Further the power to appoint members is **subject to affirmative resolution**, (effectively a right of veto) by the House of Representatives.

Removal

30. The removal of a member is now addressed by section 122A. It provides that in addition to **removal for inability** to discharge functions of office by reason of inter alia **infirmity** of mind or body or any other cause or for **misbehavior**, (section 126(4) of

1976 Constitution), a member may also be **removed** for reasons set out in section **122 A (1)** (a), (b), (d), (e), (f) as follows:-

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

31. It also provides that the President in the exercise of his power of removal may consider the report of a Joint Select Committee and the Police Service Commission laid in Parliament.

32. Under the 1976 Constitution the President could act in his discretion in relation to termination of appointment of a member. Under the 2006 amendment termination of appointment of a member can occur only after consultation with the Prime Minister and the Leader of the Opposition.

33. The effect of this is to expand to some degree the circumstances in which a member may be removed. Such expansion however clearly relates to:

- a) the diligence with which a member performs his duties as a member (sub sections a, d, f), or
- b) the suitability of the member for membership- (see, for example subsection b, e).

34. The previous grounds for removal are encapsulated and continued in sub sections c and g. However, the Constitution still provides by 122 A (3) that a member of the PSC shall not be removed from office except in accordance with that section.

35. The powers of the PSC under section 123(1) are as follows:-

- (a) **appoint** persons to hold or act in the office of Commissioner and Deputy Commissioner of Police;*
- (b) make **appointments** on promotion and to confirm appointments;*
- (c) remove from office and exercise disciplinary control over persons holding or acting in the offices specified in paragraph (a);*
- (d) monitor the efficiency and effectiveness of the discharge of their functions;*
- (e) prepare an annual performance appraisal report in such form as may be prescribed by the Police Service Commission respecting and for the information of the Commissioner or Deputy Commissioner of Police; and*
- (f) hear and determine appeals from decisions of the Commissioner of Police, or of any person to whom the powers of the Commissioner of Police have been delegated, in relation to appointments on promotion or as a result of disciplinary proceedings brought against a police officer appointed by the Commissioner of Police.*

36. Those powers, like those in previous section 123 (1) of the 1976 Constitution include power to **appoint** persons to hold or act **in the office of the commissioner and deputy commissioner** of police, and the power to make **appointments on promotion** and to **confirm appointments** as well as the power to remove from office and exercise of disciplinary control over persons holding or acting in the offices of Commissioner and Deputy Commissioner of Police.

37. Unlike section 123 (1) of the 1976 Constitution the Commission's powers under s. 123 (1) (a) and (c) are **limited to the offices of Commissioner and Deputy Commissioner of Police**. They do not extend to all persons who hold or act in an office in the Police Service established under the Police Service Act as previously applied.

38. Section 123(1) (f) also provides for jurisdiction in the Commission in respect of appeals from decisions of the Commissioner of Police or any person to whom his powers

have been delegated in relation to appointments on promotion or as the result of disciplinary proceedings.

Procedure and criteria introduced by the 2006 amendment

39. Section 123(2) provides the **procedure** for the appointment of Commissioner and Deputy Commissioners of police.

40. The procedure is set out in sections 122 (2), (3), (4) and (5).

Section 123 (2) provides that:-

*The Police Service Commission shall nominate persons for appointment to the offices specified in subsection 1(a) and s. 22(1) of the Police Service Act in accordance with the **criteria and procedure prescribed by Order of the President**, subject to negative resolution of Parliament.*

*(3) The Police Service Commission shall submit to the President a list of persons **nominated** for appointment to the offices of Commissioner or Deputy Commissioner of Police.*

41. Section 123(4) provides that the President shall issue a Notification of persons nominated which shall be **subject to affirmative resolution** of the House of Representatives. The Commission shall appoint the Commissioner or Deputy Commissioner **only after the House** of Representatives **approves the notification** in respect of the relevant office.

42. The Commission's power to **appoint** persons to hold or act in the office of Commissioner or Deputy Commissioner is therefore subject to:

a. **nomination** of persons for appointment in accordance with **criteria and procedure prescribed by Order of the President**;

b. such **order** is subject to **negative resolution** of Parliament; and

c. persons so nominated in accordance with the criteria and procedure **prescribed by such order** may be appointed by the Commission only after **affirmative resolution** by the House of Representatives of their notifications.

43. The issue therefore is whether, despite the significant changes introduced by the 2006 amendment, the Police Service Commission's role in the appointment of a Commissioner of Police (and Deputy Commissioner) has been modified or altered, (particularly in the exercise of its powers of **appointment** to those offices), from the position that existed under the 1962 Constitution and the 1976 Constitution (as described by the Privy Council in both *Thomas* and *Cooper*), such that the 2015 Order falls within its current ambit.

44. This may be analysed by:-

- (i) examining whether there have been fundamental incursions by the Executive and Legislature to the pre-existing insulation and autonomy of the Police Service Commission in relation to inter alia:-
 - (a) the **composition** of the Police Service Commission,
 - (b) the **quarantine** period,
 - (c) the **procedure for appointments** to the Police Service Commission,
 - (d) the **grounds** for removal from the Police Service Commission - (termination of appointment),
 - (e) the **procedure** for removal from the Police Service Commission,such as to justify a conclusion that the principle of constitutional insulation and autonomy of the Police Service Commission no longer applies; and by examining further, if the principle of constitutional insulation and autonomy applies (a) in whole, or (b) in part,
- (ii) whether there has been a constitutionally authorised incursion into the Commission's powers of **appointment** of a Commissioner of Police and Deputy Police Commissioners such that the introduction of a role for the Executive is now permissible
- (iii) even if so, whether the procedure set out in the 2015 Order falls within the ambit of any such constitutional authorisation.

Post 2006 Constitutional autonomy of the PSC - the effect of the 2006 amendment on the Commission's jurisdiction and independence

45.

a. the **composition** of the **Commission**

Specific qualifications are now prescribed for the members of the **Commission**.

b. the **procedure for appointments** to the **Commission**

Appointment by the President after consultation with the Prime Minister and Leader of the Opposition has been replaced by appointment by the President after approval by the House of Representatives.

c. the **grounds for removal** from the **Commission** - (termination of appointment).

The 2006 amendment now specifies additional grounds for removal.

d. the **procedure for removal** from the **Commission**- While removal is still by the President arguably there has been introduced an additional protection as rather than removal by the President at his own discretion he is now required to consult with the Prime Minister and Leader of the Opposition.

Autonomy

46. The Constitution still contains similar provisions to safeguard the **autonomy** and independence of the PSC as applied in the 1962 Constitution. These relate to its **insulation** from the Legislature and the Executive, such as those which relate to the **quarantine period** both before and after appointment to the PSC, and the **disqualification** from its membership of members of the Legislature.

47. Section 98 of the 1962 Constitution, in relation to which Lord Diplock made the observations, (which for ease of reference are repeated below), is in all material respects, unchanged, even after the 2006 amendment .See section 126(1) - (3), and section 122A(1).

*In respect of each of these **autonomous** commissions the Constitution contains provisions to secure its independence from both the executive and the legislature. No member of the legislature may serve on the commission; all members must be appointed for a fixed term of years which must not be less than*

*three or more than five, during which a member may only be **removed** for inability to discharge his function or for misbehaviour. The **quarantine period** imposed by making it a requirement of eligibility that a member **shall not have served in any public office** within the **last three years** and also making him **ineligible for appointment to any public office for three years** after ceasing to serve as a member of the commission is **clearly intended to avoid any risk of his being influenced in favour of the executive** by considerations of advancement in his own career.'*

Appointment of members

48. It can hardly be contended that the modified procedure described above for their appointment can alter the independence and autonomy of the members of the PSC.

Termination of appointment of members

49. Although the grounds for **removal** have been **extended**, this change **does not affect the autonomy** of the Police Service Commission as it merely creates further examples of inability by a member to discharge functions, or further illustrations of misbehaviour.

Functions of the PSC- Jurisdiction over appointments

50. **Under the 2006 amendment** the position has been modified as follows:-

- i. The power of the Police Service Commission to make appointments is **confined** to those in respect of the offices of **Commissioner** and **Deputy Commissioner of Police**.
- ii. Its jurisdiction no longer includes the power to make **transfers**.
- iii. The **procedure** by which it is to make appointments is now **subject to the criteria and procedure prescribed by Order** by the President.

51. However nothing in the 2006 amendment has altered the basis on which the Commission's **functions** were held to have included **exclusive** jurisdiction over

appointments in respect of the offices of **Commissioner** and **Deputy Commissioner** of Police.

52. Further, nothing in the 2006 Amendment alters the basis under which the Privy Council concluded that the Police Service Commission had **constitutional autonomy**. Therefore even after the 2006 amendment none of the other matters referred to above impact on the independence of the Commission, or its insulation once appointed, from political input in the exercise of its functions.

53. As recently as in *Annissa Webster v Attorney General of Trinidad and Tobago* [2015] UKPC 10, the Privy Council indicated as follows: -

(Paragraph 2)

*When these proceedings were begun in 2003, the Regular Police Force was established under the Police Service Act of 1965 and the Police Service Regulations of 1971 made under it (these have since been replaced by the Police Service Act 2006 and Regulations 2007). The Police Service is also recognised in sections 122-123 of the Constitution, under which the power to **appoint**, promote, discipline and remove RPOs was given to an **independent** Police Service Commission established under the Constitution (under changes made in 2006, these powers have been transferred to the Police Commissioner, but remain **subject to the supervision of the Commission**).*

See [Paragraph 6] per Baroness Hale, citing Thomas:

*This situation was unjust, not only to the officers themselves but also to the people of Trinidad and Tobago. Police officers, including SRPs, have special powers to enforce the law which are not enjoyed by ordinary citizens. It is important that they are **appointed**, disciplined and removed by **independent** authorities who are themselves **insulated from political control**: see *Endell Thomas v Attorney General* [1982] AC 113, 124, per Lord Diplock. It is one thing for a police force to have “specials” who help out from time to time; it is another thing entirely to have a permanent, full-time cadre of police officers who have the powers but not the constitutional status, or the terms and conditions, enjoyed by the RPOs.*

Greatly to its credit, the Government decided to do something to rectify the situation.

54. The importance of the constitutional independence and insulation of the PSC was thereby reaffirmed.

The effect of the 2006 amendment on the commission's exercise of its powers relating to appointment of the Commissioner and Deputy Commissioner

55. Those powers, like those in previous section 123 (1) of the 1976 Constitution include power to **appoint** persons to hold or act in the office of the Commissioner and Deputy Commissioners of Police, and the power to make **appointments** on promotion and to confirm **appointments**, as well as the power to remove from office and exercise disciplinary control over, persons holding or acting in the offices of commissioner and deputy commissioner of police.

56. Unlike section 123 (1) of the 1976 Constitution the Commission's powers under s. 123 (1) (a) and (c) are limited to the offices of Commissioner and Deputy Commissioners of Police. They do not extend to all persons who hold or act in an office in the Police Service established under the Police Service Act as previously applied.

57. Section 123(1) also provides for jurisdiction in the Commission in respect of appeals from decisions of the Commissioner of Police or any person to whom his powers have been delegated in relation to appointments on promotion or as the result of disciplinary proceedings.

58. Clearly therefore under the 2006 amendment the Commission does not retain powers to transfer.

59. Further its jurisdiction has been significantly restricted to the offices of Commissioner and Deputy Commissioners of Police. But it retains the power to *appoint* persons to hold or act in the offices of Commissioner and Deputy Commissioner of Police. However that power to appoint is circumscribed by sections 123 (2) (3) (4) (5).

60. After the 2006 amendment the Commission has a power to **nominate** persons for offices of Commissioner and Deputy Commissioners of Police.

61. The House of Representatives has the power to veto, as approval of appointment is subject to its affirmative resolution. But even under the 1976 Constitution the Prime Minister always had the power to veto. In fact, in relation to the office of Commissioner of Police, the Commission then, as now, in effect had jurisdiction to **nominate** persons **subject to veto**, as under s.123(3) of the 1976 Constitution the Commission was vested with the power to select persons for appointment (subject to that right of veto of the Prime Minister).

62. Under the 2006 amendment the commission is also vested with the power to select persons for appointment, (subject to a right of veto), **but is now constrained within guidelines in selecting persons for appointment to** the offices of Commissioner and Deputy Commissioners of Police. Those guidelines were to be those set out in an order of the President. In fact such Orders were proclaimed in 2007 and 2009. But any such Order must still be subject to the 2006 Constitution as amended.

63. To the extent that any Order of the President, whether 2009 or 2015, seeks to provide a role for any body, apart from the Commission itself, which affects directly or indirectly, the selection of persons as candidates for the positions of Commissioner or Deputy Commissioner, it must be authorised. If it is not authorised or justified under the 2006 Constitutional amendment it is difficult to understand on what other basis it can be.

64. Even in the 2006 Constitution, the power of **appointment** under the Constitution is vested in the Commission by the route of nomination subject to affirmative resolution by the House of Representatives (effectively a veto).

65. There is no role under that Constitution for the Executive to **select** persons for appointment to the offices of Commissioner or Deputy Commissioner.

66. The 2015 Order must be examined to ascertain whether, as contended, it seeks, either directly or indirectly, to provide a role for the Executive in that selection process, and specifically, in the creation of the short list, or even in the long list, of candidates, without the exercise of discretion of the PSC, in whom is still vested the sole constitutional responsibility for **appointment** to the offices of the Commissioner and Deputy Commissioner, subject to veto.

The effect of the 2015 Order on the Police Service Commission's role in the appointment of a Commissioner of Police - Whether the 2015 order is compatible in whole or in part with the Constitution as amended in 2006

67. The 2015 Order purports to be made under section 123(2) of the Constitution. It refers to the '*criteria and procedure*' for the process of **nominating** appointees to the offices of Commissioner and Deputy Commissioner. The 2015 Order revokes and replaces The Commissioner of Police and Deputy Commissioner of Police (Selection Process) Order 2009 (the "**2009 Order**"), previously made under that section.

The 2015 Order

68. (Section 3, emphasis added):

"The selection process for appointment to the offices of Commissioner of Police and Deputy Commissioner of Police shall be conducted in the following manner:

- (a) the Commission on request of the Minister of National Security shall, in accordance with section 20A(1)(c) of the Central Tenders Board Act, contract an appropriate local firm (hereinafter referred to as "the Firm") to conduct a **recruitment** process including inviting applications for the positions;*
- (b) the Firm shall select, from the applications received, the most suitable candidates for the assessment process;*
- (c) the Firm shall ensure that the candidates referred to in paragraph (b) are subjected to the best practice security vetting and recent professional vetting;*
- (d) the Firm shall submit to the Commission—*

- (i) the results of its assessment process in the form of a short list of candidates;
- (ii) a report on its assessment of the entire assessment process; and
- (iii) in respect of the candidates referred to in subparagraph (i), the following documents:
 - (A) application of the candidate;
 - (B) biography or résumé of the candidate;
 - (C) assessor's scores;
 - (D) assessor's feedback;
 - (E) medical examination report; and
 - (F) Security and Professional Vetting Report;
- (e) the Commission shall then take into account all information on the candidates and thereafter establish an Order of Merit List; and
- (f) the Commission shall select the highest graded candidate on the Order of Merit List and submit that candidate's name to the President in accordance with the procedure set out in section 123 of the Constitution."

69. It was submitted that "*The Constitution as amended involves a nuanced scheme which is patently intended to:*

- (a) increase the operational freedom of the Commissioner of Police;
- (b) allow for secondary legislation governing 'criteria and procedure' for appointments to the highest offices of Commissioner and Deputy and Commissioner; **but**
- (c) preserve in respect of those offices the well-established constitutional principle established by Thomas in respect of the protected jurisdiction of the PSC.

70. It is clear from analysis of the Constitutional provisions that this is in fact correct.

71. The constitutional provisions designed to preserve the autonomy of the PSC are unchanged in all material aspects.

72. The delegation to the Commissioner of Police of a large portion of the Commission's powers under the previous 1962 and 1976 Constitutions certainly cannot mean that the PSC has been denuded of its core powers in relation to **appointments** to the offices of Commissioner and Deputy Commissioner of Police. If anything these offices, and that of the Commissioner in particular, assume far greater significance. The Constitution now permits the PSC to focus on these important appointments, to an office with **greatly expanded power and control** over a very large police force, while preserving the provisions which are designed to protect the membership of the PSC from interference by the Legislature and Executive.

73. The requirement, by Order of the President, of criteria and procedures for those appointments, cannot however provide a blanket approval for everything introduced by such subsequent Order. In particular such Order cannot infringe any constitutional autonomy of the PSC in relation to appointments to those offices.

74. The power to appoint to those offices, though now modified to a power to nominate, subject to confirmation by the House of Representatives, remains solely vested in the Police Service Commission, as enshrined in the Constitution.

The 2015 Order- Clause 3(a) -the Commission '*shall*' contract a Firm

75. The 2015 Order provides that the **Commission '*shall*'** contract a Firm .The use of a Firm is mandated. By itself the mandating of the **contracting** of a firm to assist in the recruitment exercise may be permitted. However what needs to be examined is the **role** of such a firm, and in particular, whether the role contemplated and in fact prescribed for the firm usurps or infringes upon the constitutionally prescribed functions of the Police Service Commission.

76. The 2015 Order is subsidiary legislation and must be intra vires the Constitution. If that Order infringes upon the role of the Police Service Commission itself to the extent of removing its discretion, or any part of such discretion to appoint, or select, then it must be ultra vires the Constitution. The Constitution expressly vests the power of

appointment to the offices of Commissioner and Deputy Commissioner of Police (by the mechanism of nomination for appointment subject to approval of the House of Representatives), in the Police Service Commission, as recognised in *Thomas*, and never altered by the 2006 amendment. Such power of appointment necessarily includes the power of the Commission to select for appointment. Limiting the Commission's access to the selection pool is nowhere indicated, contemplated or authorised by the Constitution.

The 2015 Order - Clause 3 (a) -The Minister's role

77. The 2015 Order purports to place initiation of the appointment process into the hands of the Minister of National Security, a Minister of Government and part of the Executive arm of the State. However, there is no role under the Constitution, even as amended in 2006, for the introduction of a member of the Executive arm of the State in the process of appointment of a Commissioner of Police or Deputy Commissioner of Police.

78. In fact the purpose of the creation of the Service Commissions in general and the Police Service Commission in particular, was specifically to insulate the members of the respective services, including the Police Service and Public Service, from the possibility of interference by the Executive. Lord Diplock was quite clear on this point. The Privy Council has repeatedly emphasized this point. There is nothing in the Constitution even now that permits such a role.

79. The argument was raised, on behalf of the Police Service Commission itself, that the 2006 amendment itself, by specifically providing that the process of recruitment was to be subject to, (at that point unspecified) criteria and procedures to be embodied in an Order by the President, permitted the inclusion of the entirety of the matters in the orders made thereunder, and in particular in the 2015 Order.

80. This cannot be correct. The 2006 amendment to the Constitution at no point expressly authorized a role for a member of the Executive to trigger the process of appointment of a Commissioner or Deputy Commissioner. To the extent that the 2015

Order purports to introduce such a role it must be considered to be ultra vires the Constitution.

81. Further there is no reason in logic why an independent Police Service Commission cannot itself trigger the process for recruitment of a Commissioner of Police or Deputy Commissioner of Police.

82. The contention in the affidavit of Seeratan at paragraph 9 that delay in the appointment of a Commissioner of Police has been the subject of criticism ignores the question as to why the Commission cannot itself trigger the process of recruitment.

83. The words “*the Commission on request of the Minister of National Security shall...*” make clear that it is contemplated by the Order that the PSC has no discretion to refuse to act upon the request of the Minister.

84. It is clear also that the ability to influence and in fact control the decision as to whether or not an appointment process should be initiated, carries with it the ability to influence the outcome of that process. An example suggested was of persons not becoming eligible for permanent appointment to the office of Commissioner or Deputy Commissioner because of the process not being triggered by the Minister before their retirement.

85. The argument was raised that the PSC itself, without waiting for a request from the Minister, could itself trigger the process for recruitment. On this interpretation the PSC would not have been deprived of any power it had under the Constitution to trigger the process to appoint persons to those offices of Commissioner and Deputy Commissioner.

86. This fails to address the following:

- a. Why therefore have provided in the 2015 Order any role at all for the Minister if such a role is merely additional to a role already exercisable by the Commission?
- b. The Order itself makes no mention of the Commission itself being able to trigger the recruitment process. How then can the Commission legitimately ignore the

wording of the Order by the President, or read into it words that are simply not there, when the Constitution specifically requires it to act in accordance with the **criteria** and **procedure set out** in such Order. Such order remains in effect until otherwise pronounced by a court.

The 2015 Order - Clause 3(a) - reference to the CTB Act

87. Apart from acting on the request of the Minister under section 3(a) the Commission is required to contract an appropriate local firm. The Firm is to be contracted '*in accordance with section 20A (1) (c)*' of the CTB Act.

88. Clearly the words '*in accordance with section 20A (1) (c)*' of the CTB Act need to be given effect. If not then the commission would simply be required to contract with an appropriate local firm.

89. In giving effect to the words '*in accordance with section 20A (1) (c)*' of the CTB Act section 20A (1) (c) of the CTB Act itself must obviously be examined. That section refers to NIPDEC or a company wholly owned by the State. The logical interpretation of the provision is that the appropriate local firm that the Commission must contract with must, in order to qualify as "appropriate" under that provision, must further be either NIPDEC or a company which is wholly owned by the State.

90. It is not clear whether when the Commission contracts with such company, NIPDEC or the wholly state owned company, that such company in turn must retain an **appropriate** local firm to commence the recruitment process. Counsel expressed differing views on this.

91. Given that it is anticipated that the "Firm" shall be responsible for producing the short list of candidates, which it then supplies to the Commission, any role for a wholly owned **State** company, either as the company which identifies the "Firm", or as the "Firm" itself, would be constitutionally inappropriate.

92. While the Commission is free to select an appropriate firm to assist it in the recruitment exercise it cannot be constrained by the mandate to do so in accordance with section 20 A (1) C of the CTB Act, if that Act provides the possibility of a wholly State owned company being the gate keeper of the pool of eligible candidates.

93. The Commission must, in order to a) retain its constitutionally recognised and mandated independence, and b) retain its constitutionally recognised and mandated power to appoint a Commissioner and Deputy Commissioner, be free to use a firm of its own choosing, or even free not to utilise such a firm if it so chooses.

94. The interposition of constraints by Order in the manner in which the Commission must exercise its constitutionally vested power of appointment to those offices is impermissible, to the extent that it interferes with the Commission's powers of **appointment** which are its alone to exercise, (by its duty to nominate, subject to the right of veto by the House of Representatives).

95. Given that

- a. the reference in the 2015 Order to section 20 A(1)c of the CTB Act involves the incorporation into the recruitment process of Commissioner or Deputy Commissioner of Police of a role or potential role of a company wholly owned by the State, either as the "Firm" or the recruiter of the "Firm", and
- b. that this is an impermissible trespass into the constitutionally vested powers of the PSC to appoint, select for appointment, or nominate for appointment,

it is to this extent void for inconsistency with the Constitution and must be struck down.

96. It is not necessary to further examine the argument that that portion of the 2015 Order it is also ultra vires the CTB Act, save as follows:

Upon examination of section 20 A(1)c of the CTB Act,

- a) the section itself provides for the exception to the applicability of s. 20 (1) of the CTB Act in certain circumstances as described in that section. It simply disapplies the CTB Act and **incorporates a mechanism** established under the CTB Act which applies to permitted exceptions under that Act.

- b) In any event the Commission is still empowered to Act, and not the CTB. The CTB itself is not required to do anything that is outside of its powers under the CTB Act.

The 2015 Clause -3 b “The firm shall select”

97. The 2015 Order purports to grant to a firm, rather than the constitutionally created Police Service Commission, the power to **select** the **most suitable** candidates for the assessment process.

98. A delegation of such magnitude cannot be justified merely on the grounds of convenience. Inherent in the phrase “*the most suitable candidates*” is a value judgment which the Constitution did not contemplate would be removed from the Commission itself. The vesting of this judgement in a Firm, more so when the selection of the Firm itself arguably requires State involvement, even indirectly, would be an impermissible encroachment on the jurisdiction of the PSC to appoint and select candidates for appointment.

99. To remove / restrict the ability of the PSC to select for nomination for appointment is akin to restricting the power to appoint, or the power to nominate for appointment. Such a restriction is not permitted under the Constitution. The Constitution still vests in the PSC, even post 2006, the power to **appoint** and the power to **select** for nomination for appointment. To contend that the power to appoint, or nominate for appointment is not impacted, infringed upon or diminished by the diminution in the ability of the PSC to consider **all** potential candidates, as potentially prescribed by the 2015 Order, cannot be correct.

100. It is clearly a restriction on the PSC’s vested power to appoint or nominate for appointment, if some of the persons from whom it can select for appointment or nomination for appointment, are outside of its control, or even potentially outside of its control, or even knowledge.

101. It makes no difference if the 2009 Order were interpreted, or even applied this way. The PSC cannot be so easily deprived of its core function of conducting its own selection and assessment of candidates for nomination for appointment.

Conclusion

102.

- i. The amendment to the Constitution in 2006 did not remove the Police Service Commission's independence or autonomy **in relation to appointments to the offices of** Commissioner of Police and Deputy Commissioner of Police.
- ii. The Order, providing as it does for a role for the Minister in triggering the recruitment process is, in that respect, ultra vires the Constitution.
- iii. The Order, providing as it does, that the PSC shall act in accordance with Section 20A(1)(c) of the Central (Tenders) Board Act, Chap. 71:91("the CTB Act") is, in that respect, ultra vires the Constitution.
- iv. To the extent that the Order fails to recognise or give effect to the Police Service Commission's independence and autonomy **in relation to appointments to the offices of** Commissioner of Police and Deputy Commissioner of Police it is in certain respects as set out and identified below, an unjustifiable and unlawful fetter upon and interference with the independence, jurisdiction, and functions of the PSC. To the extent that those aspects of the order are ultra vires the Constitution they must be struck out.
- v. In view of the finding that those aspects of the Order which reference the CTB Act are ultra vires the Constitution, it is not necessary to consider whether they are also ultra vires the CTB Act.

103. Following upon the striking out of those portions of the 2015 Order as declared to be ultra vires the Constitution and unconstitutional as identified below, in relation to paragraph 3(d) of the 2015 Order, the words "*AS MANDATED AND CONTRACTED BY THE COMMISSION*" may be implied after the words "*assessment process*" as this would be consistent with the remaining, constitutional, portions of the Order and the Constitution, as set out hereunder. The reading of the above words into the provision:-

a. gives effect to the principle of upholding enactments to the extent possible encapsulated in s. 49 of the Interpretation Act.

b. would be consistent with the Constitution , and would recognise and give effect to the **Commission's** independence, and the vesting in the **Commission** of the power of appointment and nomination for appointment to the offices of Commissioner and Deputy Commissioner of Police.

c. would recognise that, should the Commission contract a firm, as it is free to do, or not to do, as it chooses, it may provide, by its contract with that Firm, the extent of the material it wishes to be supplied to it by that firm. Any such firm can only be a tool of the Commission, and cannot exercise any independent discretion to the exclusion of the Commission, except as expressly authorised, mandated, and contracted by the Commission. Paragraph 3(d) of the 2015 Order could therefore be read, consistently with the Constitution, as follows:-

The Firm shall submit to the Commission—:-

- (ii) *the results of its assessment process AS MANDATED AND CONTRACTED BY THE COMMISSION in the form of a short list of candidates;*

104. In relation to the specific questions for determination the answers are as follows:

(i) Whether the Order infringes the constitutional jurisdiction of the Police Service Commission (“PSC”) by making the exercise of the PSC’s powers subject to or conditional upon an instruction from the Minister of National Security before it can initiate the selection process in relation to the office of Commissioner of Police and Deputy Commissioner of Police;

For the reasons set out above the answer is **yes**.

(ii) Whether the Order is illegal and unconstitutional in so far as it mandates that the PSC ‘*shall*’ act in accordance with **Section 20A(1)(c) of the CTB Act**;

For the reasons set out above the answer is **yes**.

(iii) Whether the Order is an unjustifiable and unlawful fetter and interference with the independence, jurisdiction, power, role and function of the PSC;

For the reasons set out above the answer is Yes.

(iv) Whether the Order is ultra vires the CTB Act, in that Section 20A(1)(c) is only applicable to the “government” of which the PSC is not a part;

For the reasons set out above it is not necessary to determine this issue.

(v) Whether the Order is ultra vires the CTB Act, in that Section 20A (1) (c) is only applicable to “the supply of articles or for the undertaking of works or services in connection therewith”.

For the reasons set out above it is not necessary to determine this issue.

Order

105.

1. Those portions of the 2015 Order are declared to be ultra vires and unconstitutional as are hereinafter set out, and are accordingly struck out.

“The selection process for appointment to the offices of Commissioner of Police and Deputy Commissioner of Police shall be conducted in the following manner:

- (a) *the Commission ~~on request of the Minister of National Security shall, in accordance with section 20A(1)(c) of the Central Tenders Board Act,~~ contract an appropriate local firm (hereinafter referred to as “the Firm”) to conduct a **recruitment** process including inviting applications for the positions;*

- (b) ~~*the Firm shall select, from the applications received, the most suitable candidates for the assessment process;*~~
- (c) *the Firm shall ensure that the candidates referred to in paragraph (b) are subjected to the best practice security vetting and recent professional vetting;*
- (d) *the Firm shall submit to the Commission—*
 - (i) ~~*the results of its assessment process in the form of a short list of candidates;*~~
 - (ii) *a report on its assessment of the entire assessment process; and*
 - (iii) *in respect of the candidates referred to in subparagraph (i), the following documents:*
 - (A) *application of the candidate;*
 - (B) *biography or résumé of the candidate;*
 - (C) *assessor’s scores;*
 - (D) *assessor’s feedback;*
 - (E) *medical examination report; and*
 - (F) *Security and Professional Vetting Report;*
- (e) *the Commission shall then take into account all information on the candidates and thereafter establish an Order of Merit List; and*
- (f) *the Commission shall select the highest graded candidate on the Order of Merit List and submit that candidate’s name to the President in accordance with the procedure set out in section 123 of the Constitution.”*

2. Paragraph 3 d of the 2015 Order may properly be read as though the words **AS MANDATED AND CONTRACTED BY THE COMMISSION** were inserted after the words “assessment process” as follows:-

The Firm shall submit to the Commission—:-

~~*the results of its assessment process AS MANDATED AND CONTRACTED BY THE COMMISSION in the form of a short list of candidates;*~~

3. The Respondent is to pay to the applicant costs certified fit for Senior and Junior Counsel to be assessed by the Register in default of agreement.

Dated the 14th day of July 2016

.....
Judge

The Court is indebted to counsel for the diligence of their research and the thoroughness and detail of their written submissions, from which great assistance was derived, as well as the assistance of Judicial Research Counsel Ms. E. Ali.