TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2009-01445

BETWEEN

KAMLA JAGESSAR

Claimant

AND

TEACHING SERVICE COMMISSION

Defendant

Before the Honourable Mr. Justice Ventour

Appearances:

Mr. A. Ramlogan instructed by
Ms. Bhagwandeen for the Claimant

Mr. R. Martineau S.C. instructed by
Ms. A. Ramsarran for the Defendant

Mr. D. Mendes S.C., Mr. I. Benjamin
and Mr. R. Heffes-Doon instructed by
Mr. D. Allahar for the Presbyterian Board (an interested party)

Mr. I. khan for the Trinidad Muslim League (an interested party)

JUDGMENT

(1) By a Fixed Date Claim Form filed on the 5th May, 2009 and amended with leave of the Court on the 27th November, 2009 the Claimant sought judicial review as against

the Teaching Service Commission ("the Commission") to challenge its failure and/or refusal to promote the Claimant or to perform its statutory duty under Regulation 133(2) of the Teaching Service Commission Regulations to call upon the Permanent Secretary to ask the Presbyterian Secretary to ask the Presbyterian Board to reconsider its recommendation for the filling of the vacant post of Principal of the Penal Presbyterian School.

(2) In her Fixed Date Claim Form the Claimant seeks from this Court the following relief:

(a) An interim injunction directing the Teaching Service Commission ("TSC") to preserve the vacant office of Principal at the Penal Presbyterian School pending the hearing and determination of this Claim.

(b) An order of mandamus directing the TSC to promote the Claimant or perform its statutory duty under Regulation 133(2) to call upon the Permanent Secretary to ask the Presbyterian Secretary to ask the Presbyterian Board to reconsider its recommendation for the filling of the vacant post of Principal of the Penal Presbyterian School.

(c) A declaration that the Claimant has been treated unfairly contrary to the principles of natural justice and section 20 of the Judicial Review Act.

(d) An order of Certiorari to quash the decision of the Teaching Service Commission to bypass and/or deny the Claimant's appointment as a Principal in the Teaching Service of Trinidad and Tobago.

(e) An order pursuant to section 21 of the Judicial Review Act remitting the matter of the Claimant's entitlement to be considered for appointment as a Principal in the Trinidad and Tobago Teaching Service to the Teaching Service Commission with a directive that it considers same and reach a decision in accordance with the findings of the Court.

(f) A declaration that the Teaching Service Commission can make appointment to assisted schools without the prior approval of the Board.

(g) A declaration that the Board of an assisted school does not have a veto over the appointment of teachers in assisted schools and/or that the approval and/or concurrence of the Board is not a precondition to the appointment of teachers in assisted school.

(h) A declaration that the reference to "with the prior approval of the Board" be severed from Regulation 133(3) and/or declared to be ultra vires and/or illegal and/or unconstitutional.

(i) Costs.

(j) Such further or other orders, directions or writs as the Court considers just and as the circumstances warrant pursuant to section 8(1)(d).

(3) Relief 6, 7 and 8 were added to the Claim Form following an application made by the Claimant and filed on the 27th November, 2009 for leave to amend her fixed date Claim Form. Leave of the Court was granted to the Claimant on the 26th March, 2010.

(4) With the consent of Counsel on both sides the Court directed that all interested parties (ie Boards of all assisted denominational Schools) be served with the amended application of the Claimant.

(5) On the 28th July, 2010 the Court was informed that all Boards of assisted schools were duly served but only two of those Boards were represented by Counsel that is, the Presbyterian Board of Management and the Board of the Trinidad Muslim League. Leave was granted for the filing of affidavit by the Presbyterian Board.

(6) On the 18th August, 2010 an affidavit was filed by Mr. Carlos Lakhan a Retired Public Officer and the General Secretary of the Presbyterian Board of Education. No further affidavits were filed.

(7) Accordingly, the following affidavits were put before the Court for consideration:

: (1) Affidavit of the Claimant filed on the 24th April, 2009;
(2) Affidavit of the Claimant filed on the 3rd May, 2009;
(3) Supplemental affidavit of the Claimant filed on the 15th May, 2009;
(4) Affidavit of the Claimant filed on the 15th May, 2009;
(5) Affidavit of the Defendant filed on the 27th October, 2009;
(6) Affidavit of the Presbyterian Board filed on the 18th May, 2010.

(8) On the 6th October, 2010 directions were given by the Court for the filing of written submissions by all the parties. Written submissions were in fact filed by the Claimant, the Defendant, the Presbyterian Board and the Trinidad Muslim League ("TML").

(9) **The Evidence**

The following undisputed facts form part of the factual matrix in this case:

(i) The Claimant, Kamla Jagessar was appointed on a temporary basis as an Assistant Teacher at the Penal Presbyterian Primary School with effect from the 19th April, 1971. She was thereafter appointed to the position as "Teacher 1" with effect from the 4 September, 1998.

(ii) By letter dated the 10th October, 2006 the Claimant was appointed to act as Vice Principal for the period 20th May, 2005 to the 31st January, 2006 and to act as Principal with effect from the 1st February, 2006.

(iii) By letter dated the 12th February, 2008, the General Secretary of the Presbyterian Primary Schools Board of Education wrote to the Commission submitting

Mr. Dillon Anthony Daniel as the Board's recommendation for the appointment to the substantive post of Principal 1to the Penal Presbyterian Primary School. The Claimant was not among those listed as Applicants for the post and was therefore never interviewed by the Board.

(iv) On the 16th June, 2008 the Claimant attended an interview with the Commission for appointment to the post of Principal. She attained the highest marks among those who were interviewed.

(v) On the 4th July, 2008 the Director of Personnel Administration ("DPA") wrote to the Presbyterian Board stating that the Commission proposed to appoint the Claimant to the post of Principal and requested the Board's comments to its proposal within 14 days.

(vi) However, on the 13th August, 2008 the Claimant's Attorney at Law wrote a pre-action protocol letter to both the Commission and the Permanent Secretary of the Ministry of Education alleging that the Presbyterian Primary Schools Board of Education intended to object to the Claimant's appointment to the post.

(vii) In the pre-action protocol letter the Claimant's attorneys called upon the Commission in accordance with Regulations 133(2) of the Public Service Commission Regulations, Chap. 1:01 ("the Regulations") to instruct the Permanent Secretary to ask the Presbyterian Board to reconsider its recommendation and to provide an explanation if it refuses to do so.

(viii) By letter dated the 22nd August, 2008, the General Secretary of the Presbyterian Board responded to the DPA's letter of the 4th July, 2008 stating that in accordance with paragraph 4 of the Concordat of 1960 it was unable to support the proposal to appoint the Claimant to the post of Principal.

(ix) By letter dated the 17th November, 2008, the DPA responded to the General Secretary of the Presbyterian Board requesting that the Board state specifically the reasons

for not recommending the promotion of the Claimant to the post of Principal.

(x) By letter dated the 22nd October, 2009 the Presbyterian Board replied stating that it did not support the proposal to promote the Claimant on religious or moral grounds in that she was not a communicant in good standing for 15 years as required by the Synod.

The issues are identified

(10) Counsel for the Claimant has identified the following issues for the Court's determination:

(a) Did the Respondent perform its statutory duty under Regulation 133(2) of the Public Service Commission Regulations when considering the Board's recommendation?

(b) Was the Applicant treated unfairly by the actions of the Respondent in all the circumstances of this case?

(c) Can Regulation 133 confer a lawful veto to the Board of an Assisted School over the decision of the Respondent?

I shall deal with each of these issues separately.

Did the Respondent act in accordance with Regulation 133(2) of the Teaching Service Regulations when considering the Board's recommendation.

(11) In order to determine this issue this Court will carefully consider Regulation 133 as it relates to the Board's recommendation. However, before doing so I consider it necessary to look at the constitutional power of the Defendant to appoint officers in the Teaching Service established under the Education Act. The power of the Commission to appoint officers in the Teaching Service is vested in the Commission by section 125 of the Constitution.

(12) Section 125 of the Constitution states:

> **"Subject to the provisions of this Constitution, power to appoint persons to hold or act in public offices in the Teaching Service established under the Education Act, including power to make appointments on promotion and transfer and to confirm 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 Teaching Service Commission".**

(13) The Teaching Service Commission is also empowered by section 129 of the Constitution to make regulations to regulate its own procedure in carrying out its mandate given under section 125 of the Constitution. Section 129(1) of the Constitution states:

> **"Subject to subsection (3), a Service Commission may, with the consent of the Prime Minister, by regulation or otherwise regulate its own procedure, including the procedure for consultation with persons with whom it is required by this Constitution to consult, and confer powers and impose duties on any public officer or, in the case of the holder of an office referred to in section 111(2), a Judge or on any authority of the Government for the purpose of the discharge of its functions."**

Subsection (3) of section 129 has been repealed by Act 43 of 2000 and the provisions of that Act are not relevant for our purposes.

(14) Regulations 129, 132 and 133 of the Teaching Service Commission Regulations govern the appointment and promotion of Teachers within the Teaching Service. I consider it necessary to set out those Regulations hereunder:

> **"129.(1) As soon as it is known that a vacancy will occur in the office of teacher in an assisted school, the Board shall communicate the particulars of the vacancy to the Permanent Secretary in writing with a request that the vacancy be filled.**

129.(2) On receipt of the particulars of a vacant office of teacher under subregulation (1), the Permanent Secretary shall communicate particulars of the vacancy to the Director in writing and shall, by circular memorandum, advertise such vacant office in all public schools……

(5) The Permanent Secretary shall forward all applications made in response to an advertisement under subregulation (2) to the Board for the Board to make its recommendation regarding the filling of the vacancy.

132. Every application made in response to an advertisement under regulation 131 shall be addressed to the Permanent Secretary who shall forward to the Director –

(a) the applications of all eligible applicants for appointment to a Government School;

(b) the applications of all eligible applicants for appointment to an assisted school after submitting such applications to the Board for recommendations to be made by it.

133(1). The Board in making any recommendation for the filling of a vacant office in accordance with regulation 129(5) or of regulation 132, shall apply the principles for selection prescribed by regulation 18 and the Commission shall, subject to subregulation (2), approve the recommendation and make the appointment.

(2) Where the Commission is of the view that the Board had not made a selection in accordance with such principles, the Commission may require the Permanent Secretary to call upon the Board to reconsider its recommendation and make a different recommendation and, in making such request, the Commission shall take into consideration the religious denomination of the school and the religious persuasion of the teacher.

(3) Where the Board under subregulation (2) fails to make a different recommendation within twenty one days of being requested to do so and gives no explanation of its failure to do so, the Commission may appoint to the vacancy –

(a) a teacher of the religious persuasion of the assisted school, with the approval of the teacher and the Board; or

(b) a teacher of a religious persuasion different from that of the assisted school, with the prior approval of the teacher and of the Board."

(15) The evidence before this Court is that the Board never received an application from the Claimant for the post of Principal of the Penal Presbyterian Primary School. As a consequence she was never interviewed by the Board.

(16) After conducting the interviews of all Applicants the Board by letter dated the 12th February, 2008 did recommend to the Defendant Mr. Dillon Anthony Daniel for filling the post of Principal. That recommendation was made pursuant to Regulation 133(1) of the Teaching Service Commission Regulations. It must be assumed therefore (in the absence of evidence to the contrary) that in making such a recommendation the Board did apply the principles for selection prescribed by regulation 18. A fitting case for the application of the maxim **omnia praesumuntur rite et solemniter esse acta** (all things are presumed to be correctly and solemnly done).

(17) In the meanwhile we learnt that the Claimant had attended an interview with the Defendant on the 16th June, 2008 and was the most successful among the interviewees. As a consequence, the Defendant wrote to the Board by letter dated the 4th July, 2008 proposing to promote the Claimant to the post of Principal of the said school and requested the Board's comments on the matter within 14 days of receipt of the correspondence by the Board.

(18) The evidence coming from Ms. Yvette Phillip, the then Acting Executive Director of the Teaching Service Commission is that the Board responded to the Defendant's letter of 4th July, 2008 by letter of the 22nd August, 2008 expressing the view that in accordance with paragraph 4 of the Concordat of 1960 (I shall return to the Concordat later in this judgment) the Board was unable to support the promotion of the Claimant as Principal of the said school. The Board insisted on the recommendation it made in its earlier correspondence to the Commission.

Was Regulation 133(2) triggered?

(19) In view of the exchange of correspondence between the Board and the Defendant on the issue of the promotion of the Claimant, Counsel for the Claimant has submitted that "the Respondent was obliged to perform its statutory duty under Regulation 133(2) by asking the Permanent Secretary to call upon the Board to reconsider its recommendation."

(20) I beg to differ. Regulation 133(2) is, in my respectful view, very clear indeed. The only basis upon which the Commission in the exercise of its discretion, could ask the Permanent Secretary to call upon the Board to reconsider its recommendation is in circumstances where the Commission is of the view that the Board had failed to make a selection in accordance with the principles prescribed by regulation 18 of the Regulations.

(21) The procedure to be followed by the Commission in filling vacancies in an assisted school pursuant to Regulation 133 was explained by the Honourable Justice of Appeal Roger Hamel-Smith in **Civil Appeal No. 157 of 1994 Teaching Service Commission –v- Lynette Maharaj.** The learned Judge said on page 2 of his judgment:

> **"The procedure to fill a vacancy in an assisted school, in this case, the post of Principal, is subject to the Public Service Commission Regulations, Chap.1:01 that were adopted by the Teaching Service Commission with retroactive effect from September 20, 1968. The regulations provide, inter alia, that the post be advertised and all applications received be sent by the Commission to the Board of the particular school. The Board in turn is required to interview the applicants and to recommend one for the post. In making its recommendation to the Commission the Board is guided by certain principles for selection. They are important because if the Commission finds that the Board has failed to apply them before making its recommendation it may reject the recommendation and call on the Board to make a different one. The discretion to do so is a matter solely for the Commission. If the discretion is exercised, should the Board**

fail to make a different recommendation, the Commission in accordance with and subject to regulation 133(3) can appoint a teacher of its own choice."

(22) Counsel for the Claimant has taken issue with the Defendant's failure to perform its statutory duty in accordance with Regulation 133(2). Counsel has argued that the Commission sought "specific reasons" from the Board for its refusal to recommend the Claimant "with no guidance upon adherence to regulation 18."

(23) I have carefully examined regulation 133(2). Nowhere is there a duty placed on the Commission to render "guidance" to the Board to adhere to regulation. 18. It is only where the Commission is of the view that the Board has not made a selection in accordance with the principles prescribed by Regulation 18 that the Commission, in the exercise of its discretion, may direct the Permanent Secretary to call upon the Board to reconsider its recommendation. There is no other duty placed upon the Commission in the context of Regulation 133(2).

(24) I accept the reasoning of Counsel for the Presbyterian Board that the Commission's request for "specific reasons" for the Board's decision is in fact a request for information, nothing more. The Presbyterian Board did not interview the Claimant neither did the Commission make any such request of the Board to interview the Claimant. The request made by the Commission is one for clarification and may be viewed as an attempt to obtain the necessary material in order to decide whether the Board failed to apply the principles set out in regulation 18.

(25) In the circumstances, I have found no legal or factual basis for the Commission to have performed its statutory duty under regulation 133(2) when considering the Board's recommendation in view of the fact that the Commission had not formed the view that the Board had not made a selection in accordance with the principles prescribed under regulation 18. In short, on the evidence adduced before the Court regulation 133(2) was never triggered.

Was the Claimant treated unfairly?

(26) In order to determine whether the Claimant was treated unfairly by the actions of the Commission it would be necessary to examine the relevant terms of the concordat and the relevant provisions of the Education Act, Chap. 39:01 and certain provisions of the Constitution of the Republic of Trinidad and Tobago. First I shall examine the relevant term of the Concordat and the provisions of the Education Act.

The Concordat and the Education Legislation

(27) The document known as the "Concordat of 1960" embodies a number of assurances given by the Government to Denominational Boards of Management for the Preservation and Character of Denominational Schools in Trinidad and Tobago. The said document was approved by Cabinet and duly signed by the then Minister of Education and Culture on the 22nd December, 1960.

(28) By virtue of section 11 of the Education Act, the school system in Trinidad and Tobago is organised into two categories known as public schools and private schools. Public schools are further classified into those schools that are wholly owned by the Government and those that are owned by the Religious bodies but are in receipt of public funds for building or extension or rebuilding or for the equipment and facilities provided for the school. The latter are more commonly referred to as assisted schools.

(29) Through the Education Act, Parliament ensures that there was respect for religious freedom and orientation. This was achieved by section 29(1) of the Education Act (the Conscience Clause) which forbids the imposition of any religious observance as a condition precedent for admission to any public school whether government owned or assisted. Section 29(1) states:

> **"No child shall be required as a condition of admission into, or of continuing in, a public school –**
>
> **(a) To attend or to abstain from attending any Sunday School or any place of religious worship;**
>
> **(b) To attend any religious observance or any institution in religious subject in the school or else where from which observance or instruction**

he may be withdrawn by his parent; or

(c) To attend the school on any day specially set apart for religious observance by the religious body to which the parent belongs.

(30) In its letter of the 22nd August, 2008 the Presbyterian Board of Education did rely on paragraph 4 of the Concordat in support of its position not to support the Defendant's recommendation for Principal of the Penal Primary School.

(31) Paragraph 4 of the Concordat states in part:

"The right of appointment, retention, promotion, transfer and dismissal of teachers in Primary Schools will rest with the Public Service Commission. A teacher shall not be appointed to a school if the denominational board objects to such an appointment on moral or religious grounds….."

(32) Mr. Carlos Lackhan (the General Secretary of the Presbyterian Primary Schools Board of Education) testified that the role of the Presbyterian Church in the selection of a Principal is of prime importance in preserving the integrity and character of a school as a Presbyterian School. The Concordat acknowledges that it is necessary for the denominational Boards to have a decisive role in the appointment of teachers so as to preserve the character of the school as a denominational school.

(33) It has always been the practice of the Government of Trinidad and Tobago, since entering into the Concordat, not to appoint a teacher to a post at the Presbyterian School where the denominational Board objects to that appointment on moral or religious grounds. Since 1960 the tenets of the Concordat have been the guiding principles governing the right of the Church to participate in the way that Presbyterian Schools are managed and administered.

(34) It is reasonable to conclude therefore that a settled practice had developed over the years, prior to the commencement of the Constitution, as to the way in which the administrative discretion relative to the appointment of teachers to assisted schools was

exercised by the government. Clearly a teacher would not be appointed to an assisted school if the Board of Management objected to that appointment on moral or religious grounds.

The Constitution and Regulation 133(3)

(35) Counsel for the Defendant has contended that pursuant to regulation 133(3) the Commission can only appoint the Claimant to the position of Principal with the approval of the Board. If therefore the Board objects to the appointment then in accordance with regulation 133(3) the Commission is not empowered to make the appointment.

(36) Counsel for the Claimant disagrees. Mr. Ramlogan argued that regulation 133(3) is unconstitutional and places an unlawful fetter upon a constitutional **decision making** power. He submits further that section 125 of the Constitution (see paragraph 12 above) grants sole and exclusive jurisdiction to the Commission to hire, promote, transfer and discipline teachers. Therefore the Defendant cannot by procedural regulations in the form of subsidiary legislation contravene or fetter its constitutional jurisdiction.

(37) The procedural regulations referred to by Counsel are as a result of the power vested in the Commission under section 129 of the Constitution to make regulation to regulate its own procedure. Section 129(1) states:

> **"Subject to subsection (3) a Service Commission may, with the consent of the Prime Minister, by regulation or otherwise regulate its own procedure….."**

(38) Mr. Ramlogan contends that to the extent that the Defendant has made a Regulation (ie. Regulation 133(3)) which effectively confers a veto power on the Board over the Commission's decision to promote a teacher, must of necessity be ultra vires, illegal and therefore unconstitutional.

(39) This argument does not find favour with Counsel for the Defendant and also Counsel for the Presbyterian Board. In particular Counsel for the Board have put forward a very interesting and I dare say persuasive argument to the effect that Regulation 133(3) is in fact constitutional. Mr. Martineau agrees with the submission.

(40) It is submitted on behalf of the Board that to begin section 125 of the Constitution with the words “Subject to the provisions of this Constitution” was a deliberate choice of the framers of the Constitution. Thus it could be argued that another provision of the Constitution can validly allow or vest in some other entity or person the power to play a decisive role in the decision to appoint someone to a post in the Teaching Service without being inconsistent with section 125 of the Constitution.

(41) Accordingly, the Constitution assumes that this **decision making** power to appoint persons to the Teaching Service is not exclusive and is subject to other parts of the Constitution. The non exclusivity of the **decision making** power is a principle implicit in provisions relating to other Service Commissions created by the Constitution.

(42) For example, in the case of **Cooper –vs- Director of Personnel Administration [2007] 1WLR 101** the Privy Council was prepared to hold that section 123(1) of the Constitution (relative to the Police Service Commission and comparable to section 125 of the Constitution) is subject to the provisions of the Constitution even though the section does not expressly so provide.

(43) Counsel for the Board submits that the Constitution vests in the Denominational Boards of Management of assisted schools the right to play a decisive role in the decisions to appoint a teacher to the post of Principal in the teaching service because the maintenance and/or preservation of the denomination character of assisted schools is necessary:

(a) to give effect to the rights of parents to provide a school of their own choice for the education of the child, in accordance with section 4(f) of the Constitution;

(b) to give effect to the freedom of conscience and religious belief and observance in accordance with section 4(h) of the Constitution;

(c) to the rights of the Religious Body to the enjoyment of its property (in this case the Presbyterian School) and the right not to be deprived thereof except by due process of law in

accordance with section 4(a) of the Constitution ; and

(d) the right to such procedural provisions as is necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms in accordance with section 5(2)(h) of the Constitution.

(44) This right not to be deprived of such procedural provisions was explained by Lord Keith in the Privy Council decision in the case of the **Attorney General of Trinidad and Tobago –v- Whiteman 39WIR 397.** The Learned Law Lord said:

> **"There are no grounds for giving a restricted meaning to the words "procedural provisions." A procedure is a way of going about things, and a provision is something which lays down what that way is to be. Given that there are some situations where the right to communicate with a legal adviser will not be effective if no provision exists for some procedure to be followed with a view to dealing with these situations, there is a clear necessity that such provision should be made. So section 5(2)(h) gives a right to such provision."**

(45) Their Lordships further consider that by necessary implication, there is a right to have the procedure followed through. A procedure which exists only on paper, and is not put into practice, does not give practical protection.

(46) It seems that the role of the Presbyterian Board in the appointment of a Principal helps to build the denominational character and integrity of assisted schools and gives meaning to the right to true enjoyment of their property, a right which is guaranteed under the Constitution.

(47) The significance of maintaining and preserving the character of the school is captured in paragraph 7 of the affidavit of the Board's General Secretary which was filed on the 18th August, 2010. Mr. Lakhan the deponent states:

> **"The selection and appointment of a principal of a Presbyterian School is of prime importance in the management and administration of that school. The Principal is the key post in the running of the**

school. A school is personified through its principal and he or she is the focal point on which outsiders look at the school. The functional efficiency of a school very much depends on the efficiency and dedication of its principal. Around him or her wheels the tone and temper of the institution. On her depends the continuity of its traditions, the maintenance of discipline and the efficiency of teaching….."

(48) Counsel for the Presbyterian Board have admitted that at the centre of this constitutional debate is the right of a parent to select a school of his or her choice for the education of his or her child. I agree.

The Parent's right to provide a school of choice

(49) The right of a parent to provide a school of choice for the education of his or her child is a fundamental right guaranteed under section 4(f) of the Constitution. Counsel for the Board have submitted that anything done to erode or destroy the denomination character of the assisted schools will in my respectful view, interfere with that fundamental right.

(50) It is principally for this reason that the Concordat acknowledges that it is necessary for the denominational boards to have a decisive role in the appointment of teachers so as to preserve the character of the school as a denomination school. Mr. Lakhan continues in paragraph 9 of his affidavit:

"The absence of input into the selection of a principal adversely affects the Church's ability to preserve the character of a Presbyterian School. If the Church were not able to do so, the Presbyterian Schools would no longer be able to hold themselves out as providing a particular character and standard of education or to represent to parents or guardians that Presbyterian Schools are an appropriate choice for the education of their children.

(51) The right of the parent to choose would be meaningless if there were no alternatives from which the parent could evaluate, or access before deciding the most appropriate school for the education of his or her child. If therefore state power were to

be exercised in a manner which would reduce or eliminate the alternatives then such conduct could amount to an interference with the constitutionally protected freedom enjoyed by the parent under section 4(f) of the Constitution.

(52) Prior to the commencement of the Constitution in 1962 there were two (2) classes of public schools available from which a parent can exercise his or her choice: the government own public schools and the assisted schools. The latter comprised schools of a denominational character. These categories must be the alternatives which the Constitution contemplated when it enshrined a parent's right to select a school of his or her choice for the education of the child.

(53) Counsel for the Presbyterian Board submitted to the Court that the right of the individual to respect for his private and family life and the right to freedom of conscience and religious belief respectively in section 4(c) and 4(h) of the Constitution, must be read and construed with section 4(f). The denominational or religious character of the particular school is clearly an important factor in a parent's evaluation of an appropriate school for the education of the child.

(54) There is an absence of legal authority emanating from our local courts on how this right of the parent is to be construed. Counsel have referred this Court to decisions handed down by the US Courts under the US Constitution. Reliance has also been placed on the European Convention on Human Rights as well as certain aspects of International Human Rights law in the search for guidance on the scope and intendment of section 4(f) of the Constitution.

(55) In the seminal decision of **Brown –v- Board of Education 347 US 483(1954)** the United States Supreme Court described the critical importance of the education of the young citizen in the following terms:

> **"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is**

the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."

(56) It is true that the American Constitution does not contain a provision relating to the rights of parents of a minor in their participation in this compelling state interest. The US Courts have, nevertheless, construed the protection against the deprivation of liberty without due process so as to encompass the fundamental right of a parent to direct the education of the child of the family.

(57) The United States Supreme Court in the case of **Pierce –v- Society of Sisters 268 US 510 (1925)** considered the constitutionality of an Act that required parents and guardians to send their children to public schools. The Society of Sisters was a Roman Catholic private school which provided, inter alia, systematic religious instruction and moral training. The Society alleged that the Act conflicted with the rights of parents to choose where their children will receive appropriate mental and religious training. The Supreme Court agreed and struck down the legislation. Mr. Justice Mc. Reynolds who delivered the opinion of the Court said:

"…… we think it entirely plain that the Act of 1982 <u>unreasonably interfere with the liberty of parents and guardians to direct the upbringing and education of children under their control.</u> As often ……. pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instructions from public teachers only. <u>The child is not the mere creature of the State; those who nurture him and direct his destiny have the right coupled with the high duty, to recognize and prepare him for additional obligations."</u>
(Emphasis added).

(58) The later decision of **Wisconsin -v- Yoder 406 US 205 (1972)** considered that these "additional obligations" must be read to include "the inculcation of moral standards, religious beliefs and elements of good citizenship."

(59) The authorities handed down by the US Courts seem to position the right of the parent in directing the upbringing of his or her child and in directing the child's education in close connection with the fundamental values of freedom of religious expression and respect for family life.

(60) The **Yoder** case referred to earlier describes the decision in **Pierce** as being founded on the principles of:

> **"…….values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society…… Thus a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impringes on fundamental rights and interests……. and the traditional interests of parents with respect to the religious upbringing of their children so long as they in the words of Pierce, 'prepare (them) for additional obligations.'"**

(61) The Court further stated in its opinion that:

> **"The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."**

(62) What can be discerned from the cases is that a parent's' right to liberty under the United States Constitution includes the right to choose where his or her child might be educated and which school or system of education might best conduce to the inculcation of moral standards and religious beliefs.

(63) The European Convention on Human Rights (ECHR) and the European Court of Human Rights all echo similar sentiments on the right of the parent in this regard. Article 2 of the First Protocol to the ECHR states:

> **"No person shall be denied the right to education. In the exercise of any functions which it assumes In relation to education and to teaching, the State shall respect the rights of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."**

(64) In the case of **Konrad & others –v- Germany [2007] ELR 435** the European Court of Human Rights opined that the purpose of Article 2 was to promote the diversity of views and to stand in opposition to a single approach to the education of children. At paragraph 442 of its decision the Court construed the provision as follows:

> **"This provision recognizes the role of the State in Education as well as the rights of parents, who are entitled to respect for their religious and philosophical convictions in the delivery of education and teaching of their children. It aims at safeguarding pluralism in education, which is essential for the preservation of the 'democratic society' as conceived by the Convention."**

(65) The similarities between the Trinidad and Tobago Constitutional provisions and the ECHR can hardly be avoided. Section 4(f) of our Constitution is similar to Trinidad and Tobago's obligation in international human rights law enshrined in the Universal Declaration of Human Rights and the International Covenant on Economic Social and Cultural Rights:

> **"Parents have a prior right to choose the kind of education that shall be given to their children." (UDHR) "The States Parties to the present Convenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions" (International Covenant on Economic, Social and Cultural Rights – Acticle**

13(3).

(66) This Court could find no reason why the right of a parent to direct the education of his children in accordance with his moral and religious beliefs in the United States under the ECHR and in international law should not apply with equal force in Trinidad and Tobago. I accept Counsel's submission that section 4(f) of our Constitution represents the express articulation of the considerations which animated the **Pierce** and **Yoder** decisions.

(67) In our jurisdiction I believe the State has a constitutional duty to protect to preserve and to promote the diversity of choices which currently exist for the benefit of parents for the education of their children, not only on academic matters but also in matters relating to spiritual, religious and moral values. It is therefore important and necessary that the denominational character of assisted schools be preserved in order to give effect and protection to the right of a parent to choose a school for the education of his child.

A Settled practice

(68) Prior to the commencement of the 1962 Constitution there developed a settled practice as to the way in which the government exercised the administrative discretion relative to the appointment of teachers to assisted schools. Paragraph 4 of the Concordat (1960) expressly captures the settled practice to the effect that a teacher would not be appointed to any of the assisted schools if the Board of Management objected to that appointment on moral or religious grounds.

(69) Counsel for the Presbyterian Board have submitted that this settled practice which existed at the commencement of the 1962 Constitution has by the operation of section 4 of the Constitution been converted to a right which is protected by the Constitution. Section 4 of the Constitution provides, inter alia,:

> **"It is hereby recognized and declared that in Trinidad and Tobago there have existed and continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms……."**

(70) The Privy Council, in the case of **Thornhill –v- The Attorney General (1979) 31WIR 498** had occasion to consider sections 1 and 2 of the 1962 Constitution which were in identical terms to sections 4 and 5 of the Republican Constitution. Lord Diplock in tendering the opinion of the Board expounded on the concept of "settled practice" as follows:-

> **"Sections 1 to 3 of the Constitution proceed on the presumption that the human rights and fundamental freedoms that are referred to in sections 1 and 2, were already enjoyed by the people of Trinidad and Tobago under the law in force there at the commencement of the 1962 Constitution. The enacting words of section 1 are that the then existing rights and freedoms that are described in paragraphs (a) to (k) "shall continue to exist." In those paragraphs the rights and freedoms that are declared to have existed on 31st August, 1962, and are to continue to exist, are not described with the particularity that would be appropriate to an ordinary Act of Parliament, nor are they expressed in words that bear precise meanings or terms of legal art. They are statements of principles of great breadth and generality, expressed in the kind of language more commonly associated with political manifestos or international conventions……. Pg. 511.**

(71) On page 513 Lord Diplock continues:

> **"In the context of section 1, the declaration that rights and Freedoms of the kinds described in the section have existed in Trinidad and Tobago, in their Lordships' view, means that they have in fact been enjoyed by the individual citizen, whether their enjoyment by him has been de jure as a legal right or de facto as the result of a settled executive policy of abstention from interference or a settled practice as to the way in which an administrative or judicial discretion has been exercised. The hopes raised by the affirmation in the preamble to the Constitution that the protection of human rights and fundamental freedoms was to be ensured would indeed be betrayed if Chapter 1 did not preserve to the people of Trinidad and Tobago all those human rights and fundamental freedoms that in practice they had hitherto been permitted to enjoy."**

(72) The Board, in the above quoted extracts, noted that the Constitution deals with privileges that the citizens had enjoyed de facto as a settled practice as to the way in which an administrative discretion was exercised. The Board concluded that those privileges were by virtue of section 4 of the Constitution converted into rights and freedoms to be enjoyed ex debito justitiae In other words the settled practice as to the way in which the Commission's administrative discretion was exercised has by virtue of the Thornhill doctrine been converted into a right under the Constitution.

(73) Section 125 of the Constitution which vests the discretion to appoint persons to post in the Teaching Service Commission must be read subject to this right. As a consequence this Court holds that the portion of Regulation 133(3) of the Public Service Commission Regulations which renders the appointment to a post in the service by the Commission subject to the approval of the denominational Board is not ultra vires the Constitution. In other words this Court rules that Regulation 133(3) is neither unconstitutional nor illegal as contended on behalf of the Claimant.

(74) If on the other hand it is found, contrary to the finding of this Court that Regulation 133(3) is ultra vires the Constitution then Counsel for the Presbyterian Board have invited the Court to utilize its very broad powers of modification contained in section 5(1) of the Republican Constitution.

Section 5(1) provides as follows:

> **"Subject to the provisions of this section, the operation of the existing law on and after the appointed day shall not be affected by the revocation of the Order in Council of 1962 but the existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Act."**

(75) This power of modification of any existing law which is found to be inconsistent with the Constitution was analysed by De La Bastide C.J. in the decision of the Court of Appeal in the case of **Roodal –v- The State Cr. App. 64 of 1999** which was later approved by the Privy Council in **Matthew –v- The State [2005] 1 AC 433.**

(76) The learned Chief Justice said at pages 16 to 17 of the report:

> **"It is important to note the close connection between section 2 of the Constitution and section 5(1) of the 1976 Act. What triggers both sections is inconsistency between a law and the Constitution. When such an inconsistency exists, section 2 is quite uncompromising. It provides that the other law is void though only to the extent of the inconsistency. It may be that only part of the law is inconsistent. That part must be treated by the Court as void, but section 5(1) imposes a duty on the Court to try and save the "good" portion of the law by modification. That may involve simply deleting the inconsistent part. It has been held that such deletion is within the scope of section 5(1). But the effect of the deletion may be to create a gap which requires to be filled by something compatible with the Constitution. Alternatively, the inconsistency way arise because of the absence of something needed to bring the law into conformity with the Constitution e.g. access to the Courts in Maximea. The cases show that it is sometimes perfectly legitimate for the Court to fill such gaps by way of modification under section 5(1) provided that in doing so the Court does not arrogate to itself a law making function that should properly be left to the legislature. When may the Court fill the gap and when should it refrain from doing so? We suggest that it depends on whether there is a simple and obvious means of filling the gap in a way that will achieve conformity with the Constitution and is in fact dictated by the Constitution. In such a case the Court may fill the gap by modification. Where however the solution is not so simple, and filling the gap involves the making of a choice or the establishment of a policy, these are matters which the Court should leave to the Legislature."**

(77) This power of modification was used by this Court recently in the case of **Kedar Maharaj –v- The Attorney General of Trinidad and Tobago HCA 00479 of 2009.** See also the case of **Greene Browne –v- The Queen, Privy Council Appeal No. 3 of 1998** where the Privy Council ruled that it was the duty of the Court to decide what

modifications are necessary to be made to the offending provisions to have them conform with the Constitution and not to proceed to strike down the offending provisions.

(78) As the Honourable Chief Justice suggested in the Roodal case the Court should exercise the power of modification where "there is a simple and obvious means of filling the gap in a way that will achieve conformity with the Constitution and is in fact dictated by the Constitution."

(79) In the instant case due regard can be given to the intention to preserve the denominational character of the assisted school, while preserving the primacy of the Commission's exercise of its discretion by modifying and construing the words appearing in Regulation 133(3) "with the prior approval" to be replaced with the words "after consultation with" as suggested by Counsel for the Presbyterian Board.

(80) I have not hesitated to give recognition to the constitutional rights of the Board of Management of the Presbyterian Schools in these proceedings. There are other stake holders, operating within the Teaching Service who also enjoy certain constitutional rights and freedoms. Accordingly, in our day to day living we must show respect for each other and respect for the rule of law if we are to grow as a democracy.

(81) Having said that, within recent times the Country has witnessed a level of disrespect not only by some officials and leaders within the assisted school system but by parents as well. I feel constrained to make the following observation. The citizens of this Country have to learn how to resolve conflicts and disagreements without being disrespectful to each other. If the law sets out a procedure for resolving some of the problems that confront those within the Teaching Service then the procedure should be followed. Alternatively, if the procedure proves to be unsuitable then one should advocate for changing the procedure.

(82) The threat of violence and other forms of misconduct are unacceptable in a civil society. Moreover, those who are affected ought not to take the law into their own hands. As adults we have to set a good example. Our children are looking on very closely. As adults we must think about tomorrow.

The Claimant seeks certain declarations and orders

(83) Certain declarations were added to the Claimant's relief clause following the order of the Court granting leave to amend her Fixed Date Claim Form. The order was made on the 26th March, 2010. The additional relief sought are those mentioned in paragraphs 7, 8 and 9 of the relief clause.

(84) There is evidence before the Court that the Claimant retired from the Teaching Service while the case was being argued before the Court. Her retirement took effect from the 19th April, 2010.

(85) Several of the orders and declarations sought by the Claimant in her Claim Forms originally filed will no longer be relevant, given the Claimant's current status.

(86) The order and declarations sought which the Court will now consider are as follows:

(1) A declaration that the Claimant has been treated unfairly contrary to the principles of natural justice and section 21 of the Judicial Review Act.

(2) A declaration that the Teaching Service Commission can make appointments to assisted schools without the prior approval of the Board.

(3) A declaration that the Board of an assisted school does not have a veto over the appointment of teachers in assisted schools and/or the approval and/or concurrence of the Board is not a pre-condition to the appointment of a teacher in assisted schools.

(4) A declaration that the Reference to "with the prior approval of the Board" be severed from Regulation 133(3) and/or declared to be ultra vires and/or illegal and/or unconstitutional.

(5) Costs.

Are the issues for determination now academic?

(87) Before I consider each of the relief referred to above I want to specifically refer to the submission of Counsel for the Muslim League as of the interested parties who was invited to make written submissions to assist the Court in the determination of the legal issues arising in these proceedings.

(88) Counsel for the Muslim League has sought to persuade the Court to declare to rule upon the constitutionality of regulation 133(3) because the Claimant having retired from the Teaching Service is no longer eligible to be appointed to the post in question. Counsel argued that any such determination is unnecessary, academic and hypothetical.

(89) I respectfully disagree and in doing so I rely upon the authoritative statement made at paragraph 7050 by **Zamir and Woolf, the Declaratory Judgment (Sweet and Maxwell, 2002):**

> **"The Courts have jurisdiction to grant a declaration if there is a need for clarification of the law on an issue of general importance even if the need for a remedy in the particular case has now passed and there is no live issue between the parties. The discretion to hear such disputes, even in public law matters, is to be exercised with caution and the Courts ought not to entertain such cases unless there is a good reason in the public interest in doing so."**

(90) Notwithstanding the fact that the Claimant has retired I am of the view that there is need for clarification of the law on an issue of general public importance. The issue has to do with the constitutionality of regulation 133(3) of the Teaching Service Regulations. The Court has heard arguments on behalf of the Claimant as well as from Senior Counsel for the Defendant and for the Presbyterian Board on the issue.

(91) In the circumstances I do not consider that the dispute is of purely academic importance because the Claimant has retired from the Teaching Service as submitted by Counsel for the Trinidad Muslim League.

The Court determines the issues

Has the Claimant been treated unfairly contrary to the principles of natural justice?

(92) I have accepted the submissions of Counsel for the Defendant and Counsel for the Presbyterian Board that the Defendant acted at all material times in accordance with the law in its treatment of the Claimant. It could hardly be argued that in those circumstances the Claimant was treated unfairly contrary to the principles of natural justice and section 21 of the Judicial Review Act. I cannot in those circumstances grant the declaration sought by Counsel for the Claimant.

Can the Commission make appointment to assisted schools without the prior approval of the Board?

(93) Regulation 133(3) is unambiguously clear. The Commission is mandated by the Rule to make appointments of teachers to assisted schools with the approval of the Board. The power of the Commission to make such appointments is given by section 125 of the Constitution. Section 125 is subject to the provisions of the Constitution and as argued by Counsel for the Board and the Defendant is subject to sections 4 and 5 of the Constitution.

(94) It has been demonstrated that the assisted schools are the property of the respective denominational bodies. These bodies have a constitutionally protected right to the enjoyment of their property. It stands to reason therefore that whoever is appointed to teach in these schools must therefore affect the right of the denominational bodies to the enjoyment of their property. Any such appointment should be made subject to the approval of the owners of the property.

Does the Board of an assisted school have a veto over the appointment of teachers in the assisted schools?

(95) I do not interpret Regulation 133(3) of the Teaching Service Regulations as a veto power of the Board in the appointment of teachers in assisted schools. Regulation 133(3) does not say that a person shall not be appointed to hold an office of teacher in an assisted school if the Board signifies its objection to the appointment of that person to that office. If the intention was to vest such a power in the Board it would have stated so expressly in the Rules.

(96) In any event I have already demonstrated in this judgment that the administrative discretion of the State has, since the Concordat been always exercised subject to the approval of the Board. Such was the settled practice prior to the commencement of the 1962 Constitution. As adumbrated by Lord Diplock in the Thornhill case the **settled practice** was converted into a Constitutional right.

Should reference to "with the prior approval of the Board" be severed from Regulation 133(3) and/or declared to be ultra vires and/or illegal and/or unconstitutional?

(97) It has been argued by Counsel for the Defendant and the Board and accepted by this Court that Regulation 133(3) is neither ultra vires, illegal nor unconstitutional. As such there could be no severance of the phrase "with the prior approval of the Board" from Regulation 133(3). But even if Regulation 133(3) is found to be unconstitutional I have accepted Counsel's invitation to use the Court's power of modification given under section 5(1) of the Constitution.

(98) In conclusion I will like to thank Counsel on all sides for the tremendous amount of research that has gone into their written submissions. I appreciate greatly the assistance I have received from Counsel on all sides. On the issue of costs, I believe justice will best be served by ordering all parties to bear their own costs. Thanks is also extended to my research officer.

Dated this 25th day of January, 2012

Sebastain Ventour,
Judge.