

SAINT LUCIA

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. SLUHCV 2010/0497

BETWEEN:

AUSBERT REGIS, COMMISSIONER OF POLICE

CLAIMANT

AND

ATTORNEY GENERAL OF SAINT LUCIA

DEFENDANT

Appearances:

Mr. Anthony Astaphan S.C and with him Mr. Peter I. Foster and Ms. Renée St. Rose for the Claimant.

Mr. Reginald Armour S.C and with him Ms. Nika Watson instructed by Mr. Deale Lee for the Defendant.

2011: January: 5th, 6th, 7th,

November: 21st.

JUDGMENT

[1] WILKINSON J.: The Claimant filed an originating motion on June 10th 2010, pursuant to section 105 of the Constitution¹ and therein sought the following relief:

1. A declaration that the Cabinet of Saint Lucia has no authority to decide to recommend or decide that the Claimant should be transferred or removed from the office of Commissioner of Police of the State of Saint Lucia and therefore the decision of Cabinet is unlawful.

¹ Cap. 1.01 Revised Laws of Saint Lucia.

2. A declaration that the decision of the Cabinet of Saint Lucia is arbitrary, oppressive and manifestly unlawful and usurps the functions and powers of the Public Service Commission conferred by Section 94 of the Constitution.
3. An order that the purported transfer of the Claimant from the office of Commissioner of Police by Her Excellency, the Governor-General purportedly on the advice of the Public Service Commission is unlawful in that:
 - i. There can be no proper or lawful transfer of a Commissioner of Police to some other post in the Office of Prime Minister.
 - ii. The purported transfer contravenes provisions of Section 94 of the Constitution and the basic principles of fairness.
 - iii. The decision was premised solely or substantially on a decision of the Cabinet.
 - iv. The purported transfer is in substance and effect an unlawful removal contrary to the provisions of Section 94 of the Constitution.
4. A declaration that the purported recommendation of the Public Service Commission to Her Excellency, the Governor-General is null and void in that:
 - i. The Public Service Commission failed to properly exercise its discretion, fettered its discretion by considering the decision of Cabinet and/or took irrelevant considerations into account.
 - ii. The Public Service Commission acted under the dictates of the Cabinet;
 - iii. The Public Service Commission failed to act in accordance with basic principles of fairness;
 - iv. The Public Service Commission failed to act independently and impartially and in accordance with the provisions of the Constitution and the rule of law;
 - v. The Public Service Commission purported to transfer the Claimant from the Office of Commissioner of Police well knowing there is no equivalent post to which the Claimant could in any event be lawfully transferred.
 - vi. The purported transfer is in substance and effect an unlawful removal.

5. A declaration that the purported decision and recommendation of the Public Service Commission are arbitrary, oppressive and manifestly unfair.
6. An order that the Claimant has been unlawfully and unjustifiably deprived of the constitutional protection and security of tenure granted him by the Constitution and Laws of Saint Lucia.
7. An order or declaration that the Public Service Commission acted unreasonably and/or fettered its discretion and/ or failed to exercise its discretion in accordance with the law and, as a result the advice or recommendation given to the Governor-General is unlawful and null and void.
8. An order that the Claimant continues to be Commissioner of Police and is entitled to all emoluments, perquisites, styles and titles attaching to the office of Commissioner of Police.
9. Damages on the footing of aggravated damages.
10. Such further or other relief as the Honourable Court may deem fit.
11. Costs.

Issues

1. Whether pursuant to section 94 of the Constitution the power to remove a Commissioner of Police (hereinafter the "COP") includes the power to transfer him to some other position within the Public Service at the identical grade, grade 20.
2. If it were possible to remove by transfer the Claimant to some other position within the Public Service, whether he had a right to be heard before the Public Service Commission (hereinafter "the PSC").
3. Whether the Defendant has fulfilled its obligation by the production of sufficient evidence to show that the decision to transfer the Claimant from COP to Director of Special Initiatives (hereinafter "DSI") was based on grounds of national security and as such the Claimant was not entitled to be heard.

The evidence

- [2] According to a report compiled by the Ministry of Home Affairs and National Security the statistics on crime for the period January 2010 to June 2010, show all types of crimes were on the increase at Saint Lucia. At the weekend of May 22nd

2010, there were four (4) homicides. Following the spate of homicides, there was according to the witnesses public outcry at the state of crime at Saint Lucia.

[3] From the uncontested evidence of the four (4) witnesses, a useful chronology of some factual events at 2010 is made and follows:

- Wednesday March 10th 2010 – Committee of Permanent Secretaries meeting to which the Claimant was invited, he attended and he made recommendations on matters necessary to curb the rise of crime at Saint Lucia and these recommendations were included in the Committee's brief.
- Thursday March 18th 2010 – Committee of Permanent Secretaries sent a brief on crime to the Prime Minister. The Minister to Home Affairs and National Security subsequently laid the brief before Cabinet on May 6th 2010. The brief was titled "National Security Issues". It stated that while only the homicides seem to grab media headlines that all types of crimes had increased causing fear in the population. It was causing social, economic and other negative consequences such as a negative impact on tourism. The Committee asked for national security issues to be accorded the highest priority by Government. There were requests for such matters as a review of processes and procedures to assess vulnerability and risk exposure, for resources to be made available to take such initiatives as the installation of cctv and alarm systems, an audit be undertaken of the Ministries as to their own arrangements either with private security firms or through direct employment of personnel as some had no security, introduction of a command structure similar to that at Barbados, review of the accessibility to certain Government buildings, installation of security lighting and cameras at appropriate locations, and for there to be an overarching strategic policy under the leadership of the Prime Minister. The brief also called for preparation of a national plan, cooperation between all Government ministries and agencies because a factor had been the administrative boundaries that exist between them, and recognition that there was an interdependence of policies and so forth. The Committee expressed concern about the deficiencies faced by the Police Force in the area of a reliable communication system, requested resources to be allocated for a fingerprinting system and asked for the reallocation of vehicles for the Police, as there had been no new fleet since 2006.
- Tuesday May 4th 2010 – Memo to Cabinet from the Minister in the Ministry of Home Affairs and National Security requesting the creation of a 2nd Deputy Commissioner of Police (hereinafter "DCOP") grade 19 position, so there

would be two (2) DCOPs – one (1) with responsibility for operations and one (1) with responsibility for corporate services/administration.

- Thursday May 6th 2010 – Cabinet meeting was held and passed conclusion 382 of 2010. It read:

“382. REQUEST FOR CREATION OF THE POST OF DEPUTY COMMISSIONER OF POLICE WITHIN THE ROYAL SAINT LUCIA POLICE FORCE

Cabinet considered a Memorandum dated 04th May 2010 submitted by the Ministry of Home Affairs and National Security and approved the following within the organization structure of the Royal Saint Lucia Police Force, Ministry of Home Affairs and National Security:

1. The abolition of one post of Assistant Commissioner of Police, Grade 18; and
2. The creation and activation of one post of Deputy Commissioner of Police, Grade 19.”

- Friday May 7th – Friday 21st May 2010 – No events.
- Saturday May 22nd – Sunday 23rd May 2010 – four (4) homicides occurred over this weekend.
- Sunday May 23rd 2010 – The Prime Minister is absent from the State and the acting Prime Minister is the Minister for the Public Service and Human Resource Development, Social Transformation, Youth and Sports.
- Monday May 24th 2010 – The Acting Prime Minister convened an urgent meeting with the Minister of Home Affairs and National Security, the Claimant as COP, and other persons.
- Tuesday May 25th 2010 – The Prime Minister convened a meeting at his official residence. Present were the Prime Minister, Minister and Permanent Secretary of the Ministry of Home Affairs and National Security, the Cabinet Secretary, the Claimant, ACP Francois, ACP Charles, ACP Albert (Ag.), the Director of Finance and others.
- Wednesday May 26th 2010 – Special Cabinet Meeting convened – Committee of Permanent Secretaries memorandum and brief dated 18th March 2010 laid before Cabinet again, (it was before Cabinet on May 6th 2010). Certain Conclusions 204 and 205 were made. Cabinet conclusion 204 states that the Cabinet considered a submission and agreed to the following within the structure of the Prime Minister’s Office:

"204. CREATION AND ABOLITION OF POST

Cabinet considered a submission and agreed to the following within the structure of the Office of the Prime Minister.

1. The creation and activation of the post of Director, Special Initiatives at Grade 20, with immediate effect;
and
2. The abolition of one (1) post of Programme Manager at Grade 19, with effect from 01st July 2010.

205 MINISTERIAL TASKFORCE ON CRIME

Cabinet approved the following:

1. The creation of a Ministerial Taskforce on crime and security comprising the following:
 - a) Prime Minister (Chairman)
 - b) Minister for Social Transformation
 - c) Minister for Home Affairs and National Security
 - d) Minister for Tourism and Civil Aviation
 - e) Attorney General and Minister for Justice
 - f) Minister for Physical Development and the Environment
2. The immediate re-organisation of the Police Force in order to enhance its effectiveness including the re-introduction of the Cadetship Programme;
3. Endorsement and immediate implementation of the Patrol Strategy prepared and submitted by the management of the Royal Saint Lucia Police Force;
4. That the Minister of Finance makes an appropriate allocation to immediately recommence the Hope Programme;
5. That the Minister for Finance should approach the National Insurance Corporation with a request that the organization make a onetime allocation towards assisting in addressing the key social challenges including provision of employment in inner city communities;
6. That the opening of the Police Sub-station at Rodney Bay be expedited;
7. That the Attorney General's Chambers take steps to enhance, update and strengthen the relevant legislation to support the law enforcement programme. A report to be submitted to Cabinet within two (2) weeks;
8. That the Minister for the Public Service and Human Resources Development, Social Transformation, Youth and Sports expedite the appointment of Social Transformation Officers for deployment to serve the inner city communities in the Castries area;
9. That the Ministerial Task force engage all social partners including the political organizations as part of the national strategy to address the crime issue. "

- Thursday May 27th 2010 – The Permanent Secretary in the Ministry of the Public Service and Human Resource Development, Social Transformation, Youth and Sports (hereinafter the “Ministry of the Public Service) wrote to the Secretary of the PSC as follows:

“The Royal Saint Lucia Police Force (RSLPF) has expanded significantly over the years. A major restructuring exercise was undertaken in 2003. One of the main objectives was to provide for the more effective and efficient management of the police force. As a result, the revised structure of the RSLPF included the strengthening of the top management with the creation of the post of Deputy Commissioner of Police. It has become increasingly evident that there is need to further strengthen the top management of the RSLPF. In keeping with the foregoing, Cabinet at its meeting of 06th May 2010, approved the following within the organizational structure of the RSLPF:

- The abolition of one post of Assistant Commissioner of Police, Grade 18, and
- The creation and activation of an additional post of Deputy Commissioner of Police, Grade 19.

There will be a Deputy Commissioner of Police responsible for Administration ...

In light of the escalation in crime more recently, there is extreme urgency in strengthening the management and leadership of the RSLPF. Subsequent discussions with the Office of the Prime Minister and the Ministry of Home Affairs and National Security, the following recommendations are submitted:

1. Mr. Ausbert Regis, the Commissioner of Police, is to be transferred to the post of Director of Special Initiatives (Grade 20) in the Office of the Prime Minister, with effect from May 27, 2010. Mr. Regis was appointed as the Commissioner of Police on January 01st, 2004. (Please see attached copy of memorandum from the Cabinet Secretary dated May 26th, 2010).
2. The acting appointment of Mr. Vernon Francois, Assistant Commissioner of Police to the post of Commissioner of Police (Grade 20), with effect from May 27, 2010 to November 27, 2010. Mr. Francois was appointed to the post of Assistant Commissioner of Police from June 01st, 2007. A copy of Mr. Francois’ recent performance appraisal is attached for information.

3. The acting appointment of Mr. Moses Charles, Assistant Commissioner of Police to the post of Deputy Commissioner of Police with effect from May 27, 2010 to November 27, 2010.
4. The appointment of Mr. Pancras Albert as Assistant Commissioner of Police with effect from May 27, 2010. Mr. Pancras Albert, Superintendent of Police has acted in the post of Assistant Commissioner of Police from September 01, 2009. His most recent acting appointment is for the period March 01, 2010 to August 31, 2010. A copy of Mr. Albert's most recent performance appraisal is attached for information.
5. The acting appointment of Mr. Pancras Albert as Deputy Commissioner of Police, with effect from May 27, 2010 to November 27, 2010.

I would be grateful for your consideration of the above recommendations.

(Signed)

Philip Dalsou

PERMANENT SECRETARY .

- Friday May 28th 2010 – “Special/Emergency Meeting” of the PSC where according to the minutes the decisions were:

“A. TRANSFER/APPOINTMENT

A1. Mr. Ausbert Regis

Based on the job description presented by the Ministry of Public Service & Human Resource Development for the position of Director of Special Initiatives, the Public Service Commission designated the post as being that of “an Office of a Chief Professional Advisor” pursuant to Section 87(1) of the Saint Lucia Constitution Order 1978.

The Public Service Commission agreed to tender advice to Her Excellency, the Governor General with respect to the transfer of Mr. Ausbert Regis, Commissioner of Police, Ministry of Home Affairs and National Security to the post of Director of Special Initiatives, Office of the Prime Minister with effect from May 27, 2010.

B. APPOINTMENT

B1. Mr. Pancras Albert

...

C ACTING APPOINTMENTS

C1. Mr. Vernon Francois

The Public Service Commission agreed to tender advice to Her Excellency, the Governor General with respect to the acting appointment of Mr. Vernon Francois, Assistant Commissioner of Police, Ministry of Home Affairs and National Security to the post of Commissioner of Police with effect from May 27, 2010 to November 27, 2010.

C2. Mr. Moses Charles

..."

- Friday May 28th 2010 – Several letters were issued:
 - (i) the PSC wrote a letter to the Prime Minister informing him of its recommendation to “transfer” the Claimant from the post of COP to the position of DSI and that the post of DSI was in accordance with section 87(1) of the Constitution and that the post was designated that of a Chief Professional Advisor;
 - (ii) the Prime Minister replied that in accordance with section 87(2) he had no objection to the “appointment/transfer” of the Claimant from the post of COP to DSI;
 - (iii) the PSC then wrote to the Governor-General informing her that in accordance with section 87 of the Constitution the PSC wished to advise her that the PSC was in favour of her approval of the transfer of the Claimant from the post of COP to the post of DSI and that the Prime Minister had been consulted and he had signified that he had no objection to the “appointment/transfer”. There was enclosed a draft letter addressed to the Claimant for use by the Governor-General informing him of the “appointment/transfer”. The Governor-General was informed that if the draft letter met her approval then it should be forwarded to the Claimant.
 - (iv) The Governor-General issued a letter addressed to the Claimant informing him that pursuant to Section 87 of the Constitution, and in accordance with the advice of the PSC she “hereby transfer” him from the post of COP to the post of DSI with effect from May 27th 2010.
- Saturday May 29th 2010 – There was delivered to the Claimant’s home the Governor-General’s letter dated May 28th 2010. It was identical to the form of the PSC’s draft.

- Sunday May 30th 2010 – PSC wrote to the Governor-General that in accordance with sections 87(2) and 94(1) of the Constitution, the PSC wished to advise the Governor-General that the PSC was in favour of her approval of the transfer of the Claimant from the post of COP to the post of DSI and that the Prime Minister had been consulted and he had signified that he had no objection to the “appointment/transfer”. There was enclosed a draft letter addressed to the Claimant informing him of the “appointment/transfer. The Governor-General was informed that if the draft letter met with her approval then it should be forwarded to the Claimant. The letter stated that it superseded the letter of May 28th 2010.
- Sunday May 30th 2010 – The Prime Minister addressed the Nation. A transcript was provided. Therein he stated

“...At an emergency Cabinet meeting, convened on Wednesday, May 26, 2010, the following decisions were taken and agreed for immediate implementation:

1. The creation of a Cabinet Task Force on Crime and Security to be chaired by the Prime Minister...
2. ...
3. ...
4. The immediate re-organisation of the Police Force in order to enhance effectiveness, efficiency and mobility, including the re-introduction of the Cadetship programme to facilitate succession planning. I will say more on this re-organisation later...

I spoke earlier about the need to restore confidence and pursue a re-organisation of the Police Force to enhance its effectiveness. In any organization, leadership and the ability to inspire, to motivate others, is a pre-requisite for the successful discharge of its functions. It is clear from the comments both in the wider society and from within the force itself, that there has been an erosion of confidence in the current leadership. Therefore, government has decided that it is time to revisit the current leadership of the Royal Saint Lucia Police Force, in preparation for a new beginning.

Consequently, upon the recommendations of the Public Service Commission I have accepted the proposals for the restructuring of the Royal Saint Lucia Police Force, to take effect on Monday 31st May 2010.

Here are the recommendations:

- Mr. Ausbert Regis has been transferred from the position of Commissioner of Police to the position of Director of Special Initiatives, Office of the Prime Minister;

- Mr. Vernon Francois Assistant Commissioner of Police, has been appointed to act in the position of Commissioner of Police, effective Thursday 27th May 2010..."
- Monday May 31st 2010, the Minister of Home Affairs and National Security held a press conference. A transcript was provided to the Court. There he was asked by Mr. Timothy Poleon:

"Why Mr. Regis was sent on leave in the first place was because of certain inefficiencies, the Prime Minister may have made reference to this. Is it a case where somebody is passing the buck"?

The Minister answered:

"The Prime Minister in his address last evening said that he would be reviewing and making changes in the Police Force to improve on the performance of the Police Force. And he you know indicated that restructuring was going to take place... Am it was felt and the Prime Minister did mention that it was a cabinet decision to do the restructuring and in the first instance to put new management in the Police Force and that is what we have sought to do to hopefully, to get an improvement in the performance of the Police Force, and as I said in my opening comments that structure is there on a trial basis for six months and then it will be reviewed and then Cabinet will decide where to go from there."

Male reporter:

"...How come we have two Deputy Commissioners now but during Regis' time we had none?"

The Minister:

"Let me answer you this way. Again, we are looking at ways of improving on the management of the Force and the expanded role of the management of the Police Force. And it was felt that with the new approach to getting things done, the new approach to dealing with the situation on hand, would be to have the change at the top but in that change to give more support to the person who has taken over as Commissioner. With the crime situation the way it is we felt that to deal with the operational part of the Force to show that it is being dealt with at the highest level that we would appoint a Deputy Commissioner in charge of operations and responsibility must be taken seriously to deal with crime..."

- Monday May 31st 2010 – PSC wrote to the Governor-General that in accordance with sections 94(1) and 87(2) of the Constitution, the PSC wished to advise the Governor-General that the PSC was in favour of her approval of the transfer of

the Claimant from the post of COP to the post of DSI and that the Prime Minister had been consulted and he had signified that he had no objection to the "appointment/transfer". There was enclosed a draft letter addressed to the Claimant informing him of the "appointment/transfer. The Governor-General was informed that if the draft letter met with her approval then the letter should be forwarded to the Claimant. The letter said that it superseded the letter of May 30th 2010.

- Wednesday June 2nd 2010 – There was delivered to the Claimant' home the Governor-General's letter dated June 1st 2010, and therein he was informed that pursuant to sections 94(1) and 87(2) of the Constitution and acting in accordance with advice of the PSC the Governor-General transferred him from the post of COP to the post of DSI effective May 27th 2010. It was stated that the letter superseded the letter dated May 28th 2010.

[4] The Claimant a former certified teacher joined the Police Force on August 2nd 1983. He opted for a change in career notwithstanding that at the time when he joined the Police Force he was to receive less remuneration than that as a certified teacher. Between August 2nd 1983 and January 1st 2004, the Claimant was promoted from a Cadet Officer, through several positions including Officer in Charge of Police Training, Officer in Charge of Central Police Station, Officer in Charge of Research and Development, Assistant Superintendent, was seconded to the Regional Security Systems Central Office at Barbados January 12th 1993, to July 9th 1993, Assistant Staff Officer with responsibility for training and plans, Officer in Charge of the Special Services Unit, Superintendent, and Divisional Officer with responsibility for the Northern Division of Dennery, La Caye, Canaries, Anse La Raye, Marigot, Central and the Gros Islet Police Stations, and Assistant to the Commissioner of Police in operations, crime, training and community policing. In April 2003, he was appointed Acting COP, and at December 30th 2003, he was appointed COP with effect from January 1st 2004.

[5] Over the years, the Claimant attended several training courses internationally, regionally and locally which included training in arson detection, natural disasters, counter-terrorism, and he in turn provided training both locally and regionally. The most recent courses were at 2007 in preparation for World Cup Cricket in the Caribbean.

- [6] At May 29th 2010, he received the first of the Governor-General's letters and at June 2nd 2010, he received a second letter. The Claimant has never taken up the appointment of DSI.
- [7] Prior to May 26th 2010, the Claimant said he attended several Cabinet meetings and meetings with the Committee of Permanent Secretaries whereat was discussed the upsurge in crime, and he had made representations and presented a strategy plan to assist in fighting crime. Requests were for additional resources of all kinds from additional officers, an automated fingerprinting system, close circuit television for Castries, upgrading of the wireless communication systems, vessels to patrol the coasts, twenty five (25) motor vehicles to replace approximately forty (40) decommissioned vehicles, all matters included in the Committee's brief to Cabinet. The last additions of vehicles were a donation of five (5) vehicles from the Taiwanese Government in April 2010. He also added that in 2010, there were only sixty (60) recruits but prior to that, the previous recruits were in 2007. On an average approximately twenty (20) persons had left the force per year and the post of DCOP had remained vacant in excess of two (2) years.
- [8] Under cross-examination the Claimant when referred to Committee of Permanent Secretaries' brief, he agreed that there had been a spate of crimes at the beginning of 2010, that the meeting dealt with the need to prioritize resources, that the abatement of crime and national security ought to be afforded the highest priority by Government and such priority must be supported by the allocation of resources to support law enforcement and other initiatives to abate crime. He agreed that the Police Force was an important agent of national security and said that it was he who showed how to improve the interdependence of all the agencies having to deal with national security. He also agreed that overall the Office of the Prime Minister might have a role to play in combating crime and that it was not solely the province of the Police. He did not agree that a ministerial taskforce would be best in resolving the crime situation, and expressed the view that there was a need to cut the political divide in addressing crime and a ministerial taskforce might not bridge that divide. He did agree that the ministerial taskforce could benefit from his technical input. He

did not accept that per the job description for the post of DSI that in principle the person holding that job could assist the Prime Minister as chairman of the taskforce.

[9] He admitted that there were a number of systematic impediments that hampered Government's ability to co-ordinate. As to the Committee's recommendation that the Government should reallocate certain vehicles for Police use based on priorities, he did not support this recommendation as the Police required new motor vehicles and not used and broken down motor vehicles. He agreed that the Committee relied on his contribution in making their assessment and that the Committee's brief included the overall concerns of the Police.

[10] The Claimant under cross-examination said that he relied on principally four (4) matters to show that the Cabinet had influenced the PSC's decision to appoint him to the post of DSI. They were (i) the statements cited above made in the Prime Minister's address to the Nation on May 30th 2010, (ii) statements cited above made by the Minister of Home Affairs and National Security on May 31st 2010, (iii) the fact that of the meeting between Mr. Phillip Dalsou and Mr. Cosmos Richardson to discuss the most suitable candidate for the post of DSI there was no record or minutes, and so from this he inferred that Mr. Dalsou transmitted to the PSC the instructions of the Prime Minister to remove him from the post of COP, and (iv) he said that he was left with the impression that the PSC followed the dictates of Cabinet when he read Mr. Dalsou's memorandum dated May 27th 2010, to the Secretary of the PSC which said:

"In light of the escalation in crime.... Subsequent to discussions with the Office of the Prime Minister and the Ministry of Home Affairs and National Security, the following recommendations are submitted:

1. Mr. Aubert Regis, the Commissioner of Police to be transferred to the post of Director of Special Initiatives ..."

and the minutes from the PSC of Friday May 28th 2010, which said

"A, Transfer/Appointment

A1 Mr. Ausbert Regis

Based on the job description presented by the Ministry of the Public

Service & Human Resource Development for the position of Director of Special Initiatives...The Public Service Commission agreed to tender advice to Her Excellency, the Governor General with respect to the transfer of Mr. Ausbert Regis, Commissioner of Police, ... to the post of Director of Special Initiatives, Office of the Prime Minister...."

- [11] Matters deposed to by Mr. Cosmos Richardson and put to him and upon which he agreed were that there was an upsurge in crime, there was a spate of crime over the weekend of 22nd - 23rd May 2010, and in principle, the situation required urgent attention. He said however, during the month of May 2010, whilst the situation was serious, it was not the first time there had been three (3) murders over a weekend and so the situation was not a crisis. The Police Force had prepared a strategy to deal with serious crime.
- [12] Evidence for the Defendant was received from 3 witnesses, Mr. Cosmos Richardson, Cabinet Secretary, Mr. Philip Dalsou, Permanent Secretary in the Ministry of Public Service and Human Resource Development (hereinafter "the Ministry of the Public Service") and Ms. Verena Calderon, secretary to the PSC.
- [13] Mr. Philip Dalsou has been Permanent Secretary in his Ministry since February 2008. He said that pursuant to Section 69 of the Constitution, his duties include amongst other matters, supervision of all business and matters arising under the purview of the Ministry and this included receipt of correspondence and memoranda from other departments of Government, and transmission of it to the PSC where and when required. The correspondence and memoranda could include recommendations for appointment or transfer or confirmation or promotion or removal of public officers.
- [14] As a Permanent Secretary, he sits on the Committee of Permanent Secretaries. The Committee advises the Government on policy issues particularly as it relates to the effective functioning of Government departments, implementation of proposals by Government be they budgetary or otherwise, and determines deployment of all Government resources with a view to securing maximum efficiency standards.

- [15] On March 18th 2010, the Committee of Permanent Secretaries met, deliberated and submitted through its chairman, the Cabinet Secretary, to the Prime Minister, a memorandum together with a brief. The submissions made in respect of the Police Force were made given increasing concerns over the heightened state of criminal activity.
- [16] He was aware that since 2003, there has been a major restructuring exercise undertaken by the Government to improve the functioning of the RSLPF. This was an ongoing exercise. A main objective of the exercise was to provide for the efficient and effective management of the RSLPF and in particular, its top management as new developments, challenges and objective conditions require.
- [17] In keeping with the ongoing restructuring exercise, Cabinet at its meeting of May 6th 2010, arrived at the matters laid out in Cabinet Conclusion 382 of 2010. He received a copy of Cabinet Conclusion 382 of 2010 from the Office of the Prime Minister for implementation and a memorandum from the Cabinet Secretary, Mr. Cosmos Richardson advising approval and creation of the second DCOP post.
- [18] He was aware that the first post of DCOP had been vacant for some time notwithstanding that there had been several applications received.
- [19] Because of the four (4) murders the weekend prior to May 26th 2010, it was felt that the restructuring exercise to strengthen the RSLPF had to respond speedily and with appropriate urgency to address an imminent crisis.
- [20] On May 25th 2010, he received a memorandum of even date from the Permanent Secretary in the Ministry of Home Affairs and National Security requesting implementation of Cabinet Conclusion 382 of 2010 and requesting that both posts of DCOP be filled. The memorandum recommended two (2) names to fill the two (2) positions and they were Mr. Vernon Francois, and Mr. Pancras Albert. Also provided was a statement of their qualifications.
- [21] On May 26th 2010, he received a memorandum from the Cabinet Secretary, Mr. Cosmos Richardson advising that Cabinet had held a special meeting on the same

day and of the contents of Conclusions 204 and 205. He thereafter prepared and sent to the Secretary of the PSC on May 27th 2010, a memorandum detailing the recommendations from the Ministry for appointment to the positions and which recommendations were (a) the Claimant be transferred to the post of DSI with effect from May 27th 2010, (b) Mr. Vernon Francois to the post of COP with effect from May 27th 2010, (c) Mr. Moses Charles to the position of DCOP with effect from May 27th 2010, (d) Mr. Pancras Albert to the post of ACOP, and (e) Mr. Pancras Albert be appointed to act as DCOP with effect from May 27th 2010.

- [22] He said that the Claimant was recommended for the post of DSI having regard to the job description for the post of DSI and the extensive experience of the Claimant with the Regional Security Services.
- [23] Following submission of his memorandum to the Secretary of the PSC, he contacted the PSC's Chairman, Mr. Egbert Lionel and asked for consideration of the matters expeditiously given the escalating crime situation and in light of events the prior weekend.
- [24] On May 28th 2010, he appeared before a specially convened meeting of the PSC at the request of the Chairman to provide information and clarification on the recommendations made by his Ministry. He was asked several questions about the post of the DSI. He was also asked why it was that the Claimant was recommended for the post of DSI. Similar inquiries were made of him about Mr. Francois and Mr. Charles. He also told the PSC that in regards to the recommendations for appointments to the posts of DCOP, that the recommendations were in the nature of acting appointments within the context of an urgent plan to abate the crime wave and therefore he didn't believe that the acting appointments would compromise the normal process of advertising the posts and that the PSC should consider itself still at liberty if it so desired to consider other applicants for the post of DCOP.

- [25] He was required to provide and did provide a copy of the job description for the post of DSI. He left the meeting to acquire a copy and returned. He was questioned on the job description and then excused from the meeting.
- [26] Under cross-examination, he said that there was a meeting on May 26th 2010, and whereat only Mr. Cosmos Richardson and he were present to discuss the matter of the Cabinet Conclusions of May 26th 2010. They focused on implementation. In relation to the post of DSI there were the three (3) candidates including the Claimant. The Claimant it was agreed between them was the most capable, suitable and knowledgeable person for security chief advisor. There were no minutes or other notes made of this meeting. He agreed that his affidavit did not refer to the meeting. The job description for the post of DSI was drafted in the Office of the Prime Minister by person/s unknown to him.
- [27] Mr. Dalsou agreed that the Committee of Permanent Secretaries' brief to Cabinet did not contain the recommendation of a DSI for security in the Office of the Prime Minister.
- [28] He also agreed that the Claimant had contributed to the policy framework on crime and that there was nothing to stop the Prime Minister, or a Minister or the Cabinet or the Committee of Permanent Secretaries from calling the Claimant as COP to seek advice.
- [29] Mr. Cosmos Richard has been the Permanent Secretary in the Office of the Prime Minister and Cabinet Secretary since March 2007. As Cabinet Secretary his duties he said included being in charge of the Cabinet Office, responsibility for instructions given by the Prime Minister for arranging the business of and keeping of minutes of Cabinet, and conveying decisions of the Cabinet to appropriate persons or authorities and such other functions as the Prime Minister directed.
- [30] He too said that there had been an upsurge in crime including homicides. During 2010, the issue of escalating crime had been a focus of the Government. Statistics from the Ministry of Home Affairs and National Security showed that despite the

efforts of the Government serious crime was continuing to increase and there was the view that 2010 would be the most violent.

- [31] On a number of occasions, senior ranking officers of the RSLPF had been invited to Cabinet meetings and other meetings with the Prime Minister to discuss the growing crime trend and the urgent need to find solutions. The senior officers made representations and Cabinet would at each of those meetings express concern over the crime situation and the need for greater police presence and visibility to instill confidence in the public about the ability of the RSLPF. In every case, he said the resources requested by the senior officers were made available including at April 10th 2010, five (5) vehicles were provided and approval was given for the hiring of one hundred (100) new recruits.
- [32] The Minister of Home Affairs and National Security convened monthly round table discussions at his Ministry and the participants included the Claimant or his representative. The Minister would apprise Cabinet of these meetings.
- [33] As Secretary to Cabinet, he chaired the Committee of Permanent Secretaries. The Committee advised Government as necessary on priorities on policy matters, and implementation of proposals by Government of all kinds. At the Committee meeting throughout 2010, (reference could only be had to July 14th 2010, the date the affidavit sworn) there was expressed concern about the growing crime situation. To that end, on March 10th 2010, the Claimant was invited to a meeting of the Committee to discuss the escalating crime. Further to that discussion, and based on recommendations of the Committee, the Committee submitted a memorandum together with a brief to the Prime Minister outlining the Committee's concerns and recommendations.
- [34] The Committee met again at May 6th 2010², as was customary. One matter discussed was the creation of a second DCOP. The Ministry of Home Affairs and National Security submitted to Cabinet a memorandum dated May 4th 2010,

² This date appears incorrect as the memorandum from the Ministry of Home Affairs and National Security to Cabinet is dated May 4th 2010.

outlining what the Ministry considered would be the benefits of a second DCOP to improve the organization within the RSLPF. Cabinet considered the memorandum and approved it by way of Cabinet Conclusion 382 of 2010, the abolition of the post of ACP grade 18, and the creation of a second DCOP, grade 19.

- [35] Despite the continuing efforts of the RSLPF and various arms of Government, crime levels continued to rise. On the weekend of May 23rd - 24th May 2010, four (4) homicides caused disquiet and outrage. The Prime Minister was out of State and the Minister for Public Service was the acting Prime Minister. He convened a special meeting with the Minister for Home Affairs and National Security, the Claimant, and other persons. The RSLPF was asked to prepare as strategic plan in the form of a Patrol Strategy aimed at tackling the problem.
- [35] The Prime Minister returned to the State on May 25th 2010, and he convened a meeting at his official residence. Attendees included the Prime Minister, the Minister and the Permanent Secretary for the Ministry of Home Affairs and National Security, the Claimant, Mr. Vernon Francois as ACP, Mr. Moses Charles as ACP, Mr. Pancras Albert as ACP (Ag), the Director of Finance, himself and others. The purpose of the meeting was to discuss the escalating crime situation. The Patrol Strategy designed by the RSLPF was presented.
- [36] On May 25th 2010, Mr. Richardson said he prepared and dispatched a memorandum to the Permanent Secretary of the Ministry of Public Service. He copied the memorandum to the Permanent Secretary in the Ministry of Home Affairs and National Security. By this memorandum, he advised that Cabinet at its meeting of May 6th 2010, had approved the creation of an additional DCOP.
- [37] A Special Cabinet meeting was convened on May 26th 2010. At the meeting, Cabinet considered again the memorandum from the Committee of Permanent Secretaries dated March 18th 2010, together with its attached brief and thereafter Cabinet conclusions 204 and 205 were made.

- [38] Following the meeting, Mr. Richardson said that he then dispatched a memorandum dated May 26th 2010, to Mr. Phillip Dalsou advising the contents of Cabinet conclusion 204.
- [39] Under cross-examination, Mr. Richardson said that the person who was COP was responsible for combating crime, responsible for the police force, responsible for matters of security, and maybe responsible for policy. He agreed that the COP could be available at any time for a meeting with the Prime Minister and or the Cabinet. He did recall attending one (1) Committee of Permanent Secretaries meeting where the Claimant attended and one (1) meeting of the Ministers where the Claimant attended.
- [40] He agreed that neither the Permanent Secretary for Home Affairs and National Security nor the Committee of Permanent Secretaries ever recommended the transfer of the Claimant but added that this was not within the mandate of the Committee of Permanent Secretaries.
- [41] He said that he could not point to any authority in law that someone could be transferred from the position of COP to some other position in the public service. He admitted to not knowing the exact experience of the Claimant and admitted that the Claimant was not invited to a meeting with Mr. Dalsou and himself before his name was furnished to the PSC. He was of the view that the move would be a lateral transfer without reduction in status.
- [42] As to the matters that the Claimant said the RSLPF had demanded to assist with its efficiency, he agreed that it had been over one (1) year since there had been a request for certain items and they had not been provided for example the fingerprinting system, a modern communication system, and the vacant DCOP position. He admitted that the Government of Taiwan had donated vehicles, although he was unclear as to the number.
- [43] He agreed it was not expressed the need to create of post of DSI, not even at the meeting called by the Prime Minister at his official residence on May 25th 2010, the day before the Special Cabinet meeting. The Prime Minister did accept at that

meeting the strategy plan put forward by the RSLPF. He agreed that the Minister of Home Affairs and National Security had never said in his presence that he had no confidence in the Claimant. He also agreed that Budget 2010, delivered just one (1) month prior had also included the strategy put forward by the Claimant.

- [44] Finally, he also agreed that he had not made any inquiries of the Claimant about his ability to perform the duties of DSI.
- [45] Ms. Verena Calderon, Secretary to the PSC was appointed to the post on April 19th 2010, but she had acted in the post September 12th 2006 – February 2007.
- [46] She said that when the PSC was exercising its power to advise and or to appoint members of the public service to certain posts, it was the general practice that recommendations came from the Ministry of the Public Service.
- [47] On May 27th 2010, she receive a package from that Ministry which included for urgent consideration recommendations (i) that the Claimant be transferred from COP to the post of DSI, grade 20, in the Office of the Prime Minister, (ii) an acting appointment for Mr. Vernon Francois, ACP to the post of COP, grade 20, with effect from May 27th 2010 to November 27th 2010, (iii) recommendation for acting appointment for Mr. Moses Charles, ACP for the post of DCOP with effect from May 27th 2010 to November 27th 2010, and so forth. The package also contained: (i) a memorandum dated May 26th 2010, from the Cabinet Secretary to the Permanent Secretary in the Ministry of the Public Service informing of the improved structure of the Office of the Prime Minister,(ii) a memorandum dated May 25th 2010, from the Cabinet Secretary to the Permanent Secretary in the Ministry of Public Service informing of the creation of the post of DCOP, (iii) a memorandum dated May 25th 2010, from the Permanent Secretary in the Ministry of Home Affairs and National Security to the Permanent Secretary of the Ministry of Public Service (iv) a performance appraisal for Mr. Vernon Francois, (v) a performance appraisal for Mr. Pancras Albert, and (vi) a curriculum vitae for Mr. Pancras Albert.

- [48] To her knowledge Mr. Egbert Lionel, Chairman of the PSC reviewed the contents of the package. Following instructions, she contacted all the members of the PSC via telephone and asked them to attend a special/emergency meeting the following morning, May 28th 2010.
- [49] The special/emergency meeting was convened at 9.15 a.m. on May 28th 2010. All the members of the PSC were present including the Legal Officer of the PSC and herself. Each member was given a copy of the contents of the package that she had received upon their arrival. There was no agenda. The PSC proceeded to consider and act upon the recommendations listed.
- [50] The first matter considered by the PSC was the recommendation to transfer the Claimant. At that juncture to her knowledge, the Chairman excused himself from the meeting and contacted Mr. Dalsou who then joined the meeting at 10.15 a.m. Mr. Dalsou was questioned by members of the PSC about the post of DSI and asked why the Claimant was recommended. In addition, who else was qualified for the post? He was also asked questions about the other recommendations. He was asked to obtain a copy of the job description. He left the meeting for a short period and then returned with a copy that was circulated to all the members. He was questioned about the job description. During the meeting, she made available to the members the personnel files of all the persons who were being considered for acting appointments. The PSC took the decision to accept the recommendation to transfer the Claimant from COP to DSI and tender advice to the Governor-General to transfer the Claimant from the post of COP to the post of DSI. The other recommendations were also considered and accepted.
- [51] Following the PSC meeting, the Legal Officer of the PSC prepared a letter dated May 28th 2010, of concurrence to the Prime Minister in respect of the appointment/transfer of the Claimant to the post of DSI. The Prime Minister responded by letter the same day stating that he had no objection to the appointment/transfer of the Claimant. Following receipt of the letter from the Prime Minister, the Chairman of the PSC dispatched a draft instrument of transfer for the Claimant with a cover letter to the Governor-General.

[52] Subsequently, it became apparent to the PSC that the incorrect sections of the Constitution had been cited and the Chairman dispatched a replacement draft instrument of transfer and cover letter.

[53] Under cross-examination, Ms. Calderon said that there were no electronic or other recordings of the meeting. Her minutes she said only included decisions but no discussions of things said at the meeting. Further, there were times when she departed the meeting for one reason or another and during those times, no one recorded any matters for her subsequent incorporation into the minutes.

[54] She said that the details of the discussions recorded in her affidavit were drawn from her memory of events at the meeting.

Law

[55] Pursuant to section 105 of the Saint Lucia Constitution Order 1978, it is beyond doubt that the Claimant had a right to proceed before the Court in the manner that he did. Section 105 provides:

"105. – (1) Subject to the provisions of sections 22(2), 37(6), 41(11), 58(7), 117(8), 121(3) and 124(10) of this Constitution, any person who alleges that any provision of this Constitution (other than a provision Chapter I thereof) has been or is being contravened may, if he has a relevant interest, apply to the High Court for a declaration and for relief under this section....

(5) A person shall be regarded as having a relevant interest for the purpose of an application under this section only if the contravention of this Constitution alleged by him is such as to affect his interests.

(6) The right conferred on a person by this section to apply for a declaration and relief in respect of an alleged contravention of this Constitution shall be in addition to any other action in respect of the same matter that may be available to that person under any other law.

[56] In construing section 96 of the Constitution of Saint Vincent and the Grenadines in **Russell (Randolph) and Others v. Attorney General of St. Vincent and the Grenadines**³ Sir Vincent Floissac, CJ said:

³ (1995) 50 WIR 127 at p.135.

" (2) Section 96 of the Constitution

The jurisdiction conferred upon the High Court by section 96 of the Constitution is available and exercisable whenever an applicant who has locus standi by way of a relevant interest alleges that a constitution provision (other than one in relation to a fundamental right or freedom or to membership of the House of Assembly) has been or is being contravened. The jurisdiction is in the nature of a judicial review of the justiciable decisions and actions of public authorities where those decisions or actions contravene those residual provisions of the Constitution."

See also Grenada Civil Appeal No.9/1998 **Allan Michael Benjamin v. Public Service Commission**.

[57] There has been complaint about the Defendant's failure to fully disclose all relevant matters in its control. The authorities are clear that there is a duty on the Defendant to grant full and frank disclosure. In **Richard Alfred Crane v. Clinton Bernard, Chief Justice of Trinidad and Tobago and Chairman of the Judicial and Legal Services Commission et al**⁴ Davis J.A. said:

"Further, it is now the clear duty of a public authority to assist the Court by bringing forward, in judicial review proceedings, and I would think in constitutional matters also, all facts and matters which are relevant to the determination of the issues. It is not that the Appellant has a right to have disclosed to him all information relevant to the decision of a public authority which he is seeking to impugn, but rather that the Court is entitled to have this information divulged to it so that it may do justice between the parties. This doctrine has been affirmed by Sir John Donaldson, M.R. in *R .v. Lancashire C.C.Ex.p. Huddleston*.⁵"

[58] In **R.v. Lancashire C.C. Ex.p Huddleston**⁶ Sir John Donaldson said:

"First, she says that it is for the applicant to make out his case for judicial review and that is not for the respondent authority to do it for him. This, in my judgment is only partially correct. Certainly it is for the applicant to satisfy the court of his entitlement to judicial review and it is for the respondent to resist his application, if it considers it to be unjustified. But it is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands."

⁴ Republic of Trinidad & Tobago Civil Appeal No.58 of 1991 p.11

⁵ (1986) All E.R. 941 at p.945 letter b

⁶ Ibid

[59] Whilst the Court is aware that there is no requirement for the PSC to state its reasons it would have been helpful no doubt if there could have been avoided some of the issues that arose on cross-examination as Ms. Calderon attempted from memory to fill the gaps in the minutes. The Court notes the principles laid down in Denis O’Keefe v. An Bord Pleanála and Francis O’Brien and The Attorney General⁷ which held that the decision of the Board was procedurally bad and therefore void by reason of (i) the failure of the Board to state adequate reasons for its decision, and (ii) the failure of the Board to keep minutes of the deliberations leading to its decision.

[60] The Constitution provides:

85.-(1) There shall be a Public Service Commission for Saint Lucia (hereinafter in this section referred to as the Commission) which shall consist of a chairman and not less than two nor more than four other members, who shall be appointed by the Governor-General, acting in accordance with the advice of the Prime Minister: ...

(12) The Commission shall, in the exercise of its function under this Constitution, not be subject to the direction or control of any other person or authority. (My emphasis)

(13) The Commission may by regulation or otherwise regulate its own procedure and, with the consent of the Prime Minister, may confer powers or impose duties on any public officer or on any authority of the Government for the purpose of the exercise of its functions.

86.-(1) The power to appoint persons to hold or act in offices in the public service (including the power to confirm appointments), and, subject to the provisions of section 96 of this Constitution, the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office shall vest in the Public Service Commission.

(2)

(3) The provisions of this section shall not apply in relation to the following offices, that is to say-

(a) any office to which section 87 of this Constitution applies:

(b) the office of the Chief Elections Officer;

⁷ [1993] IR 39

- (c) the office of the Director of Public Prosecutions;
 - (d) the office of Director of Audit;
 - (e) any office to which section 91, 93 or 94 of this Constitution applies.
- (4)....

87.-(1) This section applies to the offices of Secretary to the Cabinet, permanent secretary, head of a department of government, deputy head of a department of government, any office for the time being designated by the Public Service Commission as an office of a chief professional adviser to a department of government and any office for the time being designated by the Commission, after consultation with the Prime Minister, as an office the holders of which are required to reside outside Saint Lucia for the proper discharge of their functions or as an office in Saint Lucia whose functions relate to external affairs.

(2) The power to appoint persons to hold or to act in offices to which this section applies (including the power to confirm appointments) and, subject to the provisions of section 96 of this Constitution, the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office shall vest in the Governor General, acting in accordance with the advice of the Public Service Commission:

Provided that –

- (a) the power to appoint a person to hold or act in an office of permanent secretary on transfer from another such office carrying the same salary shall vest in the Governor-General, acting in accordance with the advice of the Prime Minister;
 - (b) before the Public Service Commission tenders advice to the Governor-General with respect to the appointment of any person to hold an office to which this section applies (other than an appointment to the office of permanent secretary on transfer from another such office carrying the same salary) it shall consult with the Prime Minister and if the Prime Minister signifies his objection to the appointment of any person to the office, the Commission shall not advise the Governor-General to appoint that person,...
- (3)"

[61] A major consideration for the Court was whether the PSC acted independently as it was duty bound to do or whether it was influenced as alleged by the Prime Minister or the Cabinet. In SLUHCV 2005/0301 **Antonia Martial v. The Public Service Commission** Shanks J. reminded us as to the legal position of the PSC. He said:

"This is well established. Under the Constitution the Commission has sole power to discipline and remove civil servants (section 86(1)). The Commission is meant to be independent of both the executive and the legislature. The purpose of this arrangement is to insulate civil servants from the political influence of the Government of the day. The Commission is responsible for regulating its own procedure and (save to a limited extent in the case of the Court) must not be subject to the direction or control by any other person or authority (see sections 85(12), 85(13) and 124(11)) of the Constitution). The Commission must, however, only act for reasonable cause, not act whimsically or arbitrarily, apply the constitutional provisions and its own rules and act fairly and in accordance with the principles of natural justice (see *Duncan v. the Attorney General* [1998] 3 LRC 414 at 423). The duty to act fairly includes a duty of disclosure and a duty not to pre-judge (per Byron CJ in *Philbert Bertrand v. PSC* CA 27.3.00 paras.[10] –[18])."

[62] As the Court understands the authorities, the principle is that the PSC is entitled to take advice and or even if someone tells the PSC who to transfer or appoint, the PSC at the end of the day must exercise its own initiative. Indeed Ms. Calderon said that it was usual for the PSC to receive names of individuals and recommendations for consideration for appointments and so forth. This to the Court's mind this appears to be reasonable given that the general makeup of a Commission would be persons called upon to serve who are often unfamiliar with the individuals about whom they are called upon to make decisions. The Court feels fortified in this position by **(1) Eusebio Cooper (2) Clifford Balbosa v. (1) Director of Personnel Administration (2) The Police Service Commission**⁸. Here Lord Hope of Craighead said:

"5. Two main issues were debated before Myers J. The first was whether the appointment of the Public Service Examination Board by the Cabinet was unconstitutional... Before the Board however the constitutionality of its appointment was no longer the focus of the argument. Attention was directed instead to the constitutional relationship between the Police Service Commission and the executive and where responsibility lay for the conduct of examinations for appointment to and promotion within the Police Service..."

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

⁸ Privy Council Appeal No.47 of 2005.

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... But this has nothing 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...

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 the inference 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' use if they choose to do so is not in itself objectionable. The advantages of using such centralized 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 examination 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 Commission 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. It must be free to decline to use the services of the Public Service Examination Board if it suspects that the executive is seeking to use the Board as a means of influencing or

interfering, whether directly or indirectly, with appointments to or promotions within the Police Service. Those are matters that lie exclusively within the Police Service. Those are matters that lie exclusively within the Police Service 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 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 Part 9 of the Constitution in particular, it must be understood as reserving the power to make the appointment to the Commission and not to the executive," (My emphasis)

[63] The provision of the Constitution providing for appointment and removal of the COP is section 94. It states:

"94.-(1) The power to appoint a person to hold or act in the office Commissioner of Police and, subject to the provisions of section 96 of this Constitution, the power to remove the Commissioner from office shall vest in the Governor General, acting in accordance with the advice of the Public Service Commission.

Provided that before the Commission tenders advice to the Governor-General with respect to the appointment of any person to hold the office of Commissioner the Commission shall consult with the Prime Minister and if the Prime Minister signifies his objection to the appointment of any person to the office the Commission shall not advise the Governor-General to appoint that person.

(2) ...

(3)"

[64] The Parties are at polar opposites as to the meaning of "remove" in section 94 of the Constitution and each asks the Court to adopt one meaning over the next. There is no provision for "transfer".

[65] A perusal of section 86 of the Constitution which provides for the appointment to and removal of other persons in the Public Service finds it is equally as silent on the issue of "transfer". Yet, transfers occur with regularity between the Ministries.

[66] While the provision is silent on “transfer” it is equally clear on those that it does not apply to for example the Chief Elections Officer the Director of Public Prosecutions and the Director of Audit.

[67] When the Court looks at the provisions for the Chief Elections Officer, the Director of Public Prosecutions and the Director of Audit, the differences and protections in particular against transfer are immediately apparent when compared with those for the COP under section 94. Sections 88, 89 and 90 provide:

“88.-(1) The Chief Elections Officer (hereinafter in this section referred to as the Officer) shall be appointed by the Governor-General, acting after consultation with the Electoral Commission...

(5) Subject to the provisions of subsection (6) of this section, the Officer shall vacate his office when he attains the prescribed age.

(6) A person holding the office of the Officer may be removed from office only for inability to exercise the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehavior and shall not be so removed except in accordance with the provisions of this section.

(7) ...

89.-(1) The Director of Public Prosecutions shall be appointed by the Governor-General, acting in accordance with the advice of the Judicial and Legal Services Commission.

(2)...

(7) A person holding the office of Director of Public Prosecutions may be removed from office only for inability to exercise the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehavior and shall not be so removed except in accordance with the provisions of this section.

(8)...

90.-(1) The Director of Audit shall be appointed by the Governor-General acting in accordance with the advice of the Public Service Commission.

(2)...

(5) Subject to the provisions of subsection (7) of this section the Director of Audit shall vacate his office when he attains the prescribed age.

(6) A person holding the office of Director of Audit may be removed from office only for inability to exercise the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehavior and shall not be removed except in accordance with the provisions of this section.

(7)..."

[68] Immediately observed is that these persons can only be removed for inability to exercise their functions in office or misbehavior. It is also noteworthy that there is also fixed the retirement ages. None of these features are attached to the appointment or removal of the COP. The Court is always called upon to interpret the Constitution purposively and not in a narrow technical sense⁹.

[69] The word "removal" is a noun. According to the New Oxford Thesaurus of English¹⁰, it means taking away, moving, carrying away, shifting, transfer, transporting, and confiscation. Therefore, on the simple interpretation of the word "removal" it would appear to the Court that the word removal could include a transfer.

[70] The Claimant has stated that having regard to all the circumstances he ought to have been given an opportunity to be heard before the PSC. On this issue, Lord Mustill's statement in **R v. Secretary of State for the Home Department, ex Parte Doody**¹¹ assist. He said

"What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application of decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be

⁹ See *Minister of Home Affairs v. Fisher* [1980] AC 319 and *Whiteman v. Attorney General of Trinidad & Tobago* (1991) 39 WIR 397.

¹⁰ Oxford Press 2000.

¹¹ [1994] 1 AC 531,560

taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view of producing a favourable result: or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interest fairness will very often require that he is informed of the gist of the case which he has to answer.”

[71] In rebuttal, the Defendant said that due to issues of national security arising that they had to act with urgency and this did not permit the giving of the Claimant a hearing before he was appointed DSI. The plea of national security is not novel. In **Council of Civil Service Unions v. Minister for Civil Service**¹² where the Minister without consultation gave instructions for the immediate variation of the terms and conditions of service of staff with effect that they would no longer be permitted to belong to national trade unions and pleaded national security, Lord Fraser of Tullybelton¹³ had this to say:

“The issue here is not whether the minister’s instruction was proper or fair or justifiable on its merits. These matters are not for the Court to determine. The sole issue is whether the decision on which the instruction was based was reached by a process that was fair to the staff at GCHQ. As my noble friend Lord Brightman said in *Chief Constable of the North Wales Police v. Evans* [1982] 1 W.L.R. 1155, 1173: “Judicial review is concerned, not with the decision, but with the decision-making process.

I have already explained my reasons for hold that, if no question of national security arose, the decision-making process in this case would have been unfair. The respondent’s case is that she deliberately made the decision without prior consultation because prior consultation “would involve a real risk that it would occasion the very kind of disruption [at GCHQ] which was a threat to national security and which it was intended to avoid.”...The question is one of evidence. The decision on whether the requirements of national security outweigh the duty of fairness in any particular case is for the Government and not for the courts; the Government alone has access to the necessary information, and in any event the judicial process is unsuitable for reaching decisions on national security. But if the decision is successfully challenged on the ground that it

¹² [1985] 1 A.C.374

¹³ Ibid p. 401 - 402

has been reached by a process which is unfair, then the Government is under an obligation to produce evidence that the decision was in fact based on the grounds of national security. Authority for both these points is found in *The Zamora* [1916] 2 A.C. 77. The former point is dealt with in the well known passage from the advice of the Judicial Committee delivered by Lord Parker of Waddington, at p.107:

'Those who are responsible for the national security must be the sole judges of what the national security requires. it would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.' "

Lord Scarman¹⁴:

"My Lords, I conclude, therefore, that where a question as to the interest of national interest arises in judicial proceedings the court has to act on evidence. In some cases a judge or jury is required by law to be satisfied that the interest is proved to exist: in others, the interest is a factor to be considered in the review of the exercise of an executive discretionary power. Once the factual basis is established by evidence so that the court is satisfied that the interest of national security is a relevant factor to be considered in the determination of the case, the court will accept the opinion of the Crown or its responsible officer as to what is required to meet it, unless it is possible to show that the opinion was one which no reasonable minister advising the Crown could in the circumstances have held. There is no abdication of the judicial function, but there is a common sense limitation recognized by the judges as to what is justiciable: and the limitation is entirely consistent with the general development of the modern case law of judicial review."

Lord Diplock¹⁵:

"The reason why the Minister for the Civil Service decided on 22 December 1983 to withdraw this benefit was in the interest of national security. National security is the responsibility of the executive government; what action is needed to protect its interests is, as the cases cited by my friend Lord Roskill, establish and common sense itself dictates, a matter upon which those upon whom the responsibility rests, and not the courts of justice, must have the last word. It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves....

There was ample evidence to which reference is made by others of your Lordships that this was indeed a real risk; so the crucial point of law in this case is whether procedural propriety must give way to national security

¹⁴ Ibid. p.406 to p.407

¹⁵ Ibid p.412

when there is conflict between (1) on the one hand, the prima facie rule of "procedural propriety" in public law, applicable to a case of legitimate expectations that a benefit ought not to be withdrawn until the reason for its proposed withdrawal has been communicated to the person who has theretofore enjoyed that benefit and that person has been given an opportunity to comment on the reason, and (2) on the other hand, action that is needed to be taken in the interests of national security, for which the executive government bears the responsibility and alone has access to sources of information that qualify it to judge what the necessary action is. To that there can, in my opinion, be only one sensible answer. That answer is "Yes". (My emphasis)

[72] Clive Lewis in *Judicial Remedies in Public Law*¹⁶ said:

"Security issues

4-081 An exercise of power based on considerations of national security has been described as raising "par excellence a non-justiciable issue. The courts will not review assessment of the responsible public body as to what action is required to protect national security. The courts will, however, require evidence that the particular decision under review was in fact based on national security grounds and will require evidence that a genuine issue of national security is in issue. The evidential threshold is unclear but does not seem a difficult one for the executive to cross. It is important that the courts do not allow ritual incantations of the words "national security" to bar judicial review. In the G.C.H.Q¹⁷ case, a decision was taken not to consult relevant trade unions before altering conditions of service for civil servants employed at a government security installation by removing the entitlement to join a union. The basis for this decision was alleged to be fear of disruption of the monitoring facilities at G.C.H.Q. and the consequent prejudice to national security. The House of Lords required evidence that the decision was based on national security but held, once it was shown that the decision has been based on such considerations, the substance of the decision to be non-justiciable. Similarly, in R v. Secretary of State for the Home Department Ex.p.McAvoy¹⁸, Webster J. refused to review the Home Secretary's assessment of the operational and security reasons for transferring a prisoner to a more secure prison. A decision may be reviewable if it does not involve operation consideration or genuine security issues. (My emphasis)

¹⁶ Sweet & Maxwell 2004, London, p.175

¹⁷ Council of Civil Service Unions v. Minister for the Civil Service [1985] A.C. 374

¹⁸ [1984]1 W.L.R. 1408

Findings

- [73] There is no denying that the position of COP is one of great stature and eminence within our small society. With the position goes great responsibility and that includes preservation of peace, protection of citizens and their property, maintenance of law and order, prevention and detection of crime, and enforcement of all laws amongst many others.
- [74] In respect to the first issue, the Court finds that a COP, the Claimant in this instance can be removed from his post to some other post within the Public Service. As shown, his post is not protected against removal in the same way as that of the Chief Elections Officer, the Director of Public Prosecutions and the Director of Audit.
- [75] As the Court has indicated, given the state of the PSC's minutes, it being only conclusions recorded, it is difficult to know the details of the discussions. To the Court's mind, it makes it difficult therefore for the Claimant to assert that the PSC was influenced by the Cabinet to make the decision that it did to remove him as COP. The Court is not minded to draw inferences as the Claimant has sought to do from the four (4) instances highlighted before the Court, and feels grounded in this position by the authority of **Eusoblo Cooper & Anr. v. Director of Personnel Administration & Anr.**¹⁹
- [76] The Court having found that it was possible to remove the Claimant from the post of COP this brings us to the second issue of whether the Claimant ought to have been given a hearing before a decision was made to transfer him to the post of DSI. In this regard, the Defendant has thrown up the defence or shield of national security. As the authorities have shown, when the defence of national security is put up, it cannot be a mere bald statement without more, there must be evidence before the Court to support it.

¹⁹ Ibid.

- [77] The Court has looked at the evidence before it and it is undoubted that crime is a major issue. It is common knowledge that it is a matter of growing concern in all the Eastern Caribbean States and the Court dares say the wider Caribbean.
- [78] The decision to create the post of DSI seems to have come from nowhere because up until May 25th 2010, the day before the Special Cabinet meeting, it was not under discussion by any of the Permanent Secretaries and it was not a recommendation at the meetings chaired by either the Prime Minister or the Acting Prime Minister immediately after that fateful weekend.
- [79] It is clear from the evidence that the Claimant was involved in discussions and recommendations made to deal with the crime situation up to hours before the Cabinet meeting which created the post of DSI. There was nothing particularly illuminating in the Cabinet minutes, the PSC minutes or evidence of Mr. Cosmos Richardson, Mr. Phillip Dalsou, or Ms. Verena Calderon to suggest that the Claimant was himself in some way a threat to national security or that he failed to appreciate that rising crime was a threat to Saint Lucia, and national security. Further the Claimant was a participant in the brief laid before Cabinet and used to add a DCOP in the first instance, his proposals and strategy were part of Budget 2010, and as to his posting as DSI, the Court was told that the Claimant was to become "security chief advisor" and "a specialist advisor" to the Prime Minister on matters of national security, and the taskforce which was to be chaired by the Prime Minister. Such a post would suggest that he would have to be highly trusted and he would have an important role as part of the solution to rising crime of the State. It all therefore seems contrary to say, he is to be part of the hub dealing with national security but at the same time for reasons of national security we say that we did not give him a hearing before transferring him from COP to DSI. These days connection is a single telephone call or email away.
- [80] The need to act with urgency or to avert the "imminent crisis" as Mr. Dalsou put it was part of the defence of national security pleaded. Nothing of this nature was laid before the Court and the evidence is that the Claimant had not up to the date of trial, some seven (7) months after appointment taken up the post of DSI. The

Court was not informed of any alternative urgent measures that had been taken to cover his absence from the post of DSI.

[81] The Court is not convinced that the threshold to demonstrate national security or the urgency of the situation has been achieved. Through the stroke of the PSC's "pen" the Claimant's police career was ending, this would have large implications for the Claimant and so this too had to be part of the equation to give or not give the Claimant a hearing. Between the two (2) performances appraisals laid before the Court the Claimant was rated as hardworking, committed to the task, conscientious and promotions recommended. There was therefore nothing before the Court that lead the Court to believe that there were any complaints by anyone about the Claimant's performance as COP.

[82] For these reasons, the Court finds that the Defendant has failed on its defence of national security and that the Claimant ought to have been given a hearing before the PSC.

[83] Finally, the Court thanks Counsel for their assistance. The Court apologizes to the Parties for the delay in delivering this decision. This was due in part to the transcript not being received until mid-April 2011.

The Court's order:

1. The decision to transfer and appoint the Claimant as Director of Special Initiatives is null and void.
2. The Claimant is entitled to and continues to be the Commissioner of Police entitled to all emoluments, perquisites, styles and titles attached to the Office of Commissioner of Police.
3. Costs to the Claimant to be agreed or application to be made for an order of the Court.

Rosalyn E. Wilkinson
High Court Judge