

**EASTERN CARIBBEAN SUPREME COURT  
IN THE COURT OF APPEAL**

**GRENADA**

**GDAHCVAP2015/0013**

**BETWEEN:**

**GEMMA BAIN-THOMAS**

Appellant

and

**[1] THE ATTORNEY GENERAL OF GRENADA  
[2] THE PUBLIC SERVICE COMMISSION**

Respondents

**Before:**

The Hon. Mde. Louise Esther Blenman  
The Hon. Mr. Mario F. Michel  
The Hon. Mr. Paul Webster

Justice of Appeal  
Justice of Appeal  
Justice of Appeal [Ag.]

**Appearances:**

Mr. Rohan Phillip for the Appellant.  
Mr. Dwight Horsford, Solicitor General, and with him, Mrs. Dionne  
Lawrence-Tivotte and Ms. Maurissa Johnson for the Respondents.

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2016: December 8;  
2017: September 22.

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*Civil appeal – Whether transfer of the appellant from Office of the Secretary to the Cabinet lawful – Whether appointment of the appellant by the Public Service Commission to the post of Executive Director of Anti Money Laundering and Counter Terrorism Financing Commission lawful – Whether requirements under section 85(2) of the Constitution of Grenada satisfied – Interpretation of sections 85(1) and 85(2) of the Constitution of Grenada – Whether damages payable to the appellant for breach of section 85(2) – Circumstances in which Court of Appeal may decline to follow a previous decision which is inconsistent with other decisions of this Court and Her Majesty’s Privy Council*

The appellant, Ms. Gemma Bain-Thomas, held the highest office in the public service of Grenada (“PSG”), namely, the Secretary to the Cabinet, for several years. The Head of the Public Service or the Secretary to the Cabinet is a Grade M post within the PSG. She had been confirmed in this post for several years, having previously served at various levels in the public service for numerous years. On 19<sup>th</sup> February 2013, general elections

were held in Grenada following which there was a change of government. The ensuing relationship between Ms. Bain-Thomas and the new Government of Grenada indicated that there was a keen desire to have her removed from the post of Secretary to the Cabinet.

The obvious difficulty the Government of Grenada faced was in finding a suitable Grade M office to which Ms. Bain-Thomas could have been transferred given the fact that she was the highest public officer in the PSG. Ms. Bain-Thomas recognised this and requested that she be retired in the public interest and provided with all of her benefits. This was not accepted.

Ms. Bain-Thomas was offered posts in various ministries within the Government of Grenada; however, they were all below grade M. At various times, Ms. Bain-Thomas was requested to take annual leave/study leave and actually proceeded on leave. The situation heightened with Ms. Bain-Thomas retaining the services of an attorney-at-law. Despite letters from her attorney-at-law to the learned Attorney General, the situation was not resolved.

The Governor General, by instrument dated 6<sup>th</sup> February 2014 and issued on even date, purported to transfer Ms. Bain-Thomas to an office in the PSG at Grade M to be determined by the Public Service Commission ("PSC"). On the same date, the PSC purported to issue Ms. Bain-Thomas with a letter appointing her to the post of Executive Director of the Anti-Money Laundering and Counter-Terrorism Financing Commission ("AML/CTFC").

Having received the two letters referred to above, Ms. Bain-Thomas proceeded to file a constitutional motion on the basis that their cumulative effect offended section 85(2) of the Grenada Constitution which gave exclusive power to the Governor General to appoint, remove or transfer the Secretary to the Cabinet.

Ms. Bain-Thomas sought a number of declarations in relation to the impugned transfer, including declarations that the Governor General acted in breach of section 85(2) of the Constitution in purporting to assign her to an unspecified office albeit in Grade M and that the purported transfer was in fact a demotion having regard to the nature and function of her new post. Ms. Bain-Thomas also sought a declaration that her appointment to the post of Executive Director, AML/CTFC was unlawful. The respondents argued that the Governor General acted lawfully as she clearly acted on the advice of the PSC and confirmed that the post to which Ms. Bain-Thomas was being transferred was in Grade M. They also argued that the Governor General retained no residual discretion and as such Ms. Bain-Thomas' appointment was one which the PSC was allowed to make in any event. They therefore argued that it was lawful for the PSC to appoint Ms. Bain-Thomas to the post of Executive Director, AML/CTFC as it was a Grade M post.

The learned judge granted a declaration that her transfer from the Office of Secretary to the Cabinet within the public service of Grenada to the post of Executive Director, AML/CTFC was unconstitutional and void but refused to grant the other declarations. The learned judge's refusal to grant the other declarations is based exclusively on the fact that

he felt constrained so to do as a consequence of a very early decision of this Court which the High Court was bound to follow.

Ms. Bain-Thomas being dissatisfied with the decision of the learned judge, appealed against it and the Crown also being dissatisfied cross appealed. Ms Bain-Thomas contends that the learned judge ought to have granted all of the declarations that she had sought whereas the Attorney General and the PSC argue that the learned judge erred, as a matter of law, in granting the sole declaration despite the fact that he considered himself bound by previous authority.

**Held:** allowing the appeal to the extent that it is declared that the decision of the PSC to appoint Ms. Bain-Thomas to the post of Executive Director, AML/CTFC with effect from 17<sup>th</sup> February 2014 was a contravention of section 85(2) of the Constitution of Grenada and is therefore unconstitutional, null and void; dismissing the cross appeal; awarding damages to Ms. Bain-Thomas for her unconstitutional removal, such damages to be assessed if not agreed by the parties within 28 days; and awarding costs of the appeal to Ms. Bain-Thomas in the sum of two thirds of the costs of \$7,500.00 awarded by the judge below, that:

1. Section 85(2) of the Constitution stipulates that the Secretary to the Cabinet is to be appointed by the Governor General acting on the advice of the PSC. Based on this, it is evident that the framers of the constitution sought to ensure that the office holder is protected from improper action or unfairness. There is no doubt that the framers of the Constitution were very mindful of the importance and seniority of the office of Secretary to the Cabinet and wished to ensure that another level of protection is in place – the involvement of the highest official in the land, namely the Head of State – who by convention, is required to be independent and by law is mandated to act fairly and objectively. The Governor General alone has the power appoint, transfer or remove the Secretary to the Cabinet and any such removal must be to a public office of Grade M within the PSG.

**Section 85(2) of the Constitution of Grenada applied.**

2. There is no force in the submission that the conjoint effect of the two letters can satisfy the strict constitutional requirement of section 85(2) by which the Governor General alone has the power, to appoint, transfer or remove the particular officer on the advice of the PSC. The Governor General ought to have indicated the public office to which Ms. Bain-Thomas was transferred and her failure to do so renders the purported transfer unconstitutional. The power was hers alone to exercise albeit on the advice of the PSC.

**Section 85(2) of the Constitution of Grenada applied. Endell Thomas v Attorney General (1981) 32 WIR 375 followed; Horace Fraser v Judicial and Legal Services Commission [2008] UKPC 25 followed; Attorney General of Antigua and Barbuda v Lake (1998) 53 WIR 145 followed.**

3. There cannot be two authorities with concurrent power or jurisdiction to make appointments, or promotions or transfers. It is clear that section 85(2) of the Constitution required the act to be done by the Governor General and not by the PSC. Any purported unilateral act by the PSC cannot meet the constitutional requirement. Section 85(2) of the constitution is clear and speaks for itself. In a word, the jurisdiction to transfer, appoint or remove a public officer who holds the rank as indicated therein is vested in the Governor General.
4. It is settled that as a matter of judicial policy, the Court of Appeal should aim to achieve certainty in the law and should abhor confusion. Equally, it has long been widely accepted that one of the chief functions of an appellate court is to correct wrong decisions and to ensure that no judicial precedent that has been wrongly decided be allowed to go uncorrected. Applying the first and second exceptions in **Young v Bristol Aeroplane Co Ltd**, the decision in **Felix Da Silva v Attorney General of Saint Vincent and the Grenadines** is inconsistent with decisions of our Court of Appeal and the Privy Council and is plainly wrong and therefore cannot stand.

**Young v Bristol Aeroplane Co Ltd** [1946] AC 163 applied. **Felix Da Silva v Attorney General of Saint Vincent and the Grenadines** SVGHCVP1997/0017 (delivered 9<sup>th</sup> December 1998, unreported) overruled.

## JUDGMENT

### Introduction

- [1] **BLENMAN JA:** This appeal and cross appeal examine the security of tenure of a very senior public officer serving in the Public Service of Grenada (“PSG”). It is an appeal by Ms. Gemma Bain-Thomas and a cross appeal by the Attorney General of Grenada and the Public Service Commission (“PSC”) against a decision of the learned Mr. Justice Thomas Astaphan, QC [Ag.] in which he granted a declaration that her transfer from the Office of Secretary to the Cabinet within the PSG to the post of Executive Director of the Anti-Money Laundering and Counter Terrorism and Finance Commission (“AML/CTFC”) was unconstitutional and void but refused to grant the other declarations. The learned judge’s refusal to grant the other declarations is based exclusively on the fact that he felt constrained to refuse them as a consequence of a very early decision of this Court in **Felix Da Silva v Attorney General of St. Vincent and the Grenadines**<sup>1</sup> by which he felt the High

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<sup>1</sup> SVGHCVP1997/0017 (delivered 9<sup>th</sup> December 1998, unreported).

Court was bound.

[2] Both parties are dissatisfied with the decision of the learned judge, hence the appeal and cross-appeal. Ms Bain-Thomas contends that the learned judge ought to have granted all of the declarations that she had sought whereas the Attorney General and the PSC argue that the learned judge erred, as a matter of law, in granting declaration no.1 despite the fact that the High Court was bound by the **Da Silva** case.

[3] I will now refer to the factual background in some detail.

### **Background**

[4] Ms. Gemma Bain-Thomas held the highest office in the PSG, namely, the Secretary to the Cabinet and the Head of the PSG, for several years. The Head of the Public Service or the Secretary to the Cabinet is a Grade M post within the PSG. She had been confirmed in this post for several years, having previously served at various levels in the PSG for numerous years.<sup>2</sup> Subsequently, she was transferred from the post of Secretary to the Cabinet by the Governor General and appointed to the post of Executive Director, AML/CTFC by the PSC against her wishes. As a consequence, she challenged the legality of her transfer by way of a constitutional motion and sought redress against the Attorney General in his capacity as the representative of the Crown and the PSC.

[5] It is noteworthy that the post of Secretary to the Cabinet has always been regarded as the head of the PSG. Its official designation occurred subsequently. Ms. Bain-Thomas sought a number of declarations in relation to the impugned transfer. The constitutional motion was heard by learned Mr. Justice Astaphan, QC [Ag.]. There was common ground between the parties that the Governor General by instrument dated 6<sup>th</sup> February 2014 and issued on even date purported to transfer Ms. Bain-Thomas to an office in the PSG at Grade M to be determined

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<sup>2</sup> It seems that at the time of her transfer she had been serving within the PSG for approximately 30 years.

by the PSC. On the same date, the PSC purported to issue Ms. Bain-Thomas with a letter appointing her to the post of Executive Director, AML/CTFC.

[6] Also, it is common ground that on 19<sup>th</sup> February 2013, general elections were held in Grenada following which there was a change of government. The ensuing relationship between Ms. Bain-Thomas and the Government of Grenada, after the elections, indicated that there was a keen desire to have her removed from the post of Secretary to the Cabinet and serve in another post. In fact, several attempts were made to have her transferred to various posts. Also, several meetings were held between the parties but quite unhappily, the uncertainty continued for nearly one year after the elections, despite efforts to find a suitable equivalent office to which Ms. Bain-Thomas could have been transferred.

[7] Chief among the intervening events was the obvious difficulty the Government of Grenada faced in finding a suitable Grade M office to which Ms. Bain-Thomas could have been transferred given the fact that she was the highest public officer in the PSG. Ms. Bain-Thomas, herself, recognising the difficulty which the Government faced appears to have requested that she be retired in the public interest and provided with all of her benefits. This was not accepted.

[8] Ms. Bain-Thomas was offered posts in various ministries within the Government of Grenada; however, they were all below grade M. In fact, some of them were allegedly graded as low as K, which she, quite naturally, did not accept. In all of this, at various times, Ms. Bain-Thomas was requested to take annual leave/study leave and actually proceeded on leave. The situation heightened with Ms. Bain-Thomas retaining the services of an attorney-at-law but despite letters from her attorney-at-law to the learned Attorney General, the situation was not resolved.

[9] On 6<sup>th</sup> February 2014 at about 5:30 p.m., Ms. Bain-Thomas received a letter from the Personal Assistant to Her Excellency the Governor General which indicated that the Governor General, acting in accordance with the advice of the PSC was

pleased to transfer her with effect from 17<sup>th</sup> February 2014 to hold another post in the PSG in Grade M to be determined by the PSC. On the same day Ms. Bain-Thomas also received two letters dated 6<sup>th</sup> February 2014 from the Chief Personnel Officer – one letter granted her administrative leave from 27<sup>th</sup> December 2013 to 14<sup>th</sup> February 2014, while the other letter stated that the PSC had appointed her to the post of Executive Director, AML/CTFC within the Ministry of Legal Affairs.

[10] Having received the first and third letters referred to above, Ms. Bain-Thomas proceeded to file a constitutional motion on the basis that their cumulative effect offended section 85(2) of the **Grenada Constitution Act** (“the Constitution”).<sup>3</sup>

[11] I propose to refer to the case below in order to provide some further context.

#### **Issues in the case below**

[12] The trial of the constitutional motion, quite sensibly, proceeded on agreed facts and issues. In the court below, the issues were recognised by the learned trial judge as:

- (1) Whether the appellant was lawfully removed from the position of Cabinet Secretary and appointed to the position of Executive Director, AML/CTFC;
- (2) If not, whether the motion presents an arguable case for breach of section 84 (8) of the Constitution of Grenada; and
- (3) Whether Ms. Bain-Thomas is entitled to the declarations that she has sought.

#### **The appellant’s case below**

[13] Ms. Bain-Thomas asserted that her removal from the post of Secretary to the Cabinet was “bad on its face”. She also contended that the Governor General abdicated her constitutional responsibilities under section 85 (2) of the Constitution

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<sup>3</sup> Chapter 128A of the Continuous Revised Edition of the Laws of Grenada, 2011.

in so far as the Governor General did not appoint her to any office in the Instrument of Transfer/Appointment but left it up to the PSC to determine which office she would be appointed to, provided it was an office in Grade M. Ms. Bain-Thomas also argued that the decision in **Da Silva** was distinguishable from the case at bar and was therefore not applicable to the factual matrix. She was adamant that the PSC had no power to appoint her to any post in the public service. Rather, that power was the sole preserve of the Governor General who failed in her duty to appoint her to a post.

#### **The Crown's case below**

- [14] The Crown answered Ms. Bain-Thomas' claim by asserting that even though the Governor General did not indicate the office to which Ms. Bain-Thomas was being transferred, the fact that the Governor General stated that she was acting upon the advice of the PSC and she had confirmed that the office to which Ms. Bain-Thomas was being transferred was in Grade M and that there was a simultaneous letter of appointment issued by the PSC of even date with the Governor General's letter of appointment, which indicated that she was appointed to the post of Executive Director at Grade M, conjointly conform to the requirements of section 85 (2) of the Constitution.
- [15] Alternatively, the Crown argued that as Ms. Bain-Thomas' appointment as Executive Director, AML/CTFC was one which could have been done by the PSC acting alone, the appointment was therefore constitutional. The Crown urged the learned judge that, in any event, the High Court was bound to follow the **Da Silva** case and further, the judge was therefore bound to hold that Ms. Bain-Thomas' transfer was constitutional.
- [16] In rebuttal, Ms. Bain-Thomas argued that the transfer from the post of Secretary to the Cabinet to that of Executive Director is not one of equivalency and it is unlawful, since there is no equivalent post in the PSG to that of Head of the Public Service and in any event only the Governor General could have removed her from



that post and transferred her to another Grade M post.

- [17] In so far as much of this appeal turns on the remedies that were provided or not provided at first instance, and in order to provide some further context, I will now indicate the declarations that were sought.

**Remedies sought in the lower court**

- [18] Ms. Bain-Thomas sought five declarations:

- (1) A declaration that when Her Excellency the Governor General, acting in accordance with the advice of the PSC, transferred the claimant with effect from 17<sup>th</sup> February 2014 “to hold another post in the Public Service in Grade M to be determined by the Public Service Commission”, Her Excellency the Governor General acted irrationally and/or unreasonably and/or arbitrarily and/or surrendered and/or abdicated her discretion, each of which circumstances rendered the transfer a contravention of section 85 (2) of the Constitution of Grenada and therefore unconstitutional, null, void and of no effect in law;
- (2) A declaration that the decision of the PSC to approve the appointment of the claimant to the post of Executive Director, AML/CTFC with effect from February 17, 2014 was contrary to or a contravention of section 85 (2) of the Constitution of Grenada and is therefore unconstitutional, null, void and of no effect in law.
- (3) A declaration that the purported transfer of the claimant to the post of Executive Director, AML/CTFC and the circumstances leading up thereto was in reality a termination of the claimant’s appointment of Secretary to the Cabinet to facilitate the reorganisation of her Department, the Office of the Prime Minister, as a consequence of the new administration assuming the government as provided for by

Regulation 46 of the Public Service Commission Regulations 1969 (“PSC Regulations”).<sup>4</sup>

(4) A declaration that the post of Executive Director, AML/CTFC is not a post in the PSG of an equivalent status to that of the Secretary to the Cabinet of Grenada to which the claimant may be transferred pursuant to regulation 46(6) of the PSC Regulations, thus requiring the claimant to retire from the PSG for the re-organisation of her Department, the Office of the Prime Minister, within the meaning of section 84(8) of the Constitution of Grenada.

(5) A declaration that the claimant having been required to retire for the reorganisation of her department, the office of the Prime Minister, she is entitled to be paid pension and retiring benefits as if she had attained the compulsory age as guaranteed by section 84(8) of the Constitution of Grenada.

[19] I shall now indicate the relevant parts of the judgment below.

**The decision below**

[20] The learned judge only granted declaration no.1 namely: that the purported transfer by the Government of Grenada with effect from 17<sup>th</sup> February 2014 to hold another post in the PSC is unconstitutional, null and void and of no effect ab initio. However, the learned judge refused to grant declarations 2, 3, 4 and 5 on the authority of the **Da Silva** case.

[21] At paragraph 102 of the judgment, the learned judge further stated “I am bound to follow this decision, regardless of how difficult it is for me to navigate it, which decision, I were able to do so, I would, like the proverbial “...two worlds in the Yellow Wood ...” diverge from.”

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<sup>4</sup> Statutory Rules & Orders No. 27 of 1969.

[22] In consequence of the above, quite surprisingly, the learned judge held that the net effect is that Ms. Bain-Thomas was and remains the Secretary to the Cabinet on assignment to the post of Executive Director, AML/CTFC with effect from 17<sup>th</sup> February 2014.

[23] Ms. Bain-Thomas being dissatisfied with the learned judge's refusal to grant declarations 2, 3, 4 and 5, has appealed against that refusal. The Attorney General and the PSC are aggrieved by the learned judge's grant of declaration one and they have cross-appealed against it.

[24] I now turn to the grounds of appeal which are as follows:

(a) The learned judge misdirected himself and erred in law by holding that he was bound by the decision in **Da Silva** when in fact it is distinguishable (and was indeed distinguished by the learned judge from the case at bar), and which is a case that was decided upon its own facts and not a principle setting case;

(b) The learned judge erred in law in coming to the conclusion that the net effect of his decision in respect of declarations 1 and 2 is that Ms. Bain-Thomas was, and remains the Secretary to the Cabinet on assignment to the post of Executive Director, AML/CTFC with effect from 17<sup>th</sup> February 2014 because this is inconsistent with his reasoning and order in respect of declaration 1 and Ms. Bain-Thomas as a particular officer could only be assigned by the Governor General in accordance with the advice of the PSC pursuant to section 85 (2) of the Constitution;

(c) The learned judge misconstrued and misapplied the definitions of "transfer" and "appointment" in regulation 2 (1) and regulations 28 and 29 (1) of the PSC Regulations by finding that Ms. Bain-Thomas' appointment was in law a transfer; thereby failing to find and hold that the net effect of her unconstitutional purported transfer from the post of Secretary to the

Cabinet by the Governor General and her appointment to the post of Executive Director, AML/CTFC, with effect from 17<sup>th</sup> February, 2014 by the PSC was a removal from being a particular officer, a demotion or reduction in rank and thus compulsory retirement and reappointment in the PSG.

### **Grounds of cross-appeal**

[25] The grounds of the cross appeal are as follows:

- (a) The learned trial judge erred in law and fact and misdirected himself when he failed to properly consider and evaluate the evidential effect of the two letters dated the 6<sup>th</sup> February, 2014, and issued by the Governor General and the PSC respectively and received by Ms. Bain-Thomas together, there being sufficient material upon the uncontroverted facts adduced before the court from which the judge ought to draw the obvious and inexorable inference that, the two letters were conjointly or simultaneously issued and, that the Governor General was accordingly advised by the PSC of the 'transfer' to the post of Executive Director, AML/CFTC.
- (b) The learned trial judge erred in law and fact and misdirected himself in holding as he did so hold, in effect, that Ms. Bain-Thomas was not liable to be transferred since, as he found, she held the highest office in the service and there was no other post of equal status and rank within the PSG to which Mrs. Bain Thomas could be transferred; there being, on the uncontroverted evidence adduced before the court, no material supportive of such a finding or conclusion.
- (c) The learned trial judge erred in law and misdirected himself completely as a matter of constitutional interpretation when he held that the transfer of Ms. Bain-Thomas (being a person holding an office to which section 85 (2) applies) to be efficacious and lawful, the

Governor General must specify the post to which she was to be transferred; the learned judge failed to appreciate that the Governor General had no power to confer that other office upon Ms. Bain-Thomas, but only the PSC under section 63 (2) of the Proceeds of Crime Act.<sup>5</sup>

- (d) The learned trial judge erred in law and misdirected himself entirely in failing to appreciate, and to hold, that the 'transfer' of Ms. Bain-Thomas in the circumstances was a legal consequence of the conjoint or simultaneous operation of the two letters both dated the 6<sup>th</sup> February, 2014 issued by the Governor General and the PSC respectively.
- (e) The learned trial judge erred in law and completely misdirected himself in his approach to the construction of section 85(2) of the Grenada Constitution in holding, as he did so hold, that the correct construction of that provision is that in the exercise of the powers vested in the Governor General by section 85 (2), the Governor General retains an independent discretion in the matter giving rise to a duty to make a judicial assessment of the advice tendered to her by the PSC for the operation of such powers.
- (f) The learned judge erred in law and misdirected himself entirely in holding, as he did so hold, that upon transfer from one post to another in the public service, the officer being so transferred is entitled to have conferred upon him a position of equivalent status or rank or prestige as opposed to the conferment of a position of equivalent grade.
- (g) The learned trial judge erred in law, misapprehended and misapplied the ratio in **Da Silva** at pages 2–4 of the judgment, when he failed to hold that it was indistinguishable in principle, binding upon him and

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<sup>5</sup> Act No. 6 of 2012, Laws of Grenada.

conclusive of the matter before him namely, the lawfulness of the removal of Ms. Bain-Thomas from a post which required the act of the Governor General on the advice of the PSC and her transfer to a post in the same grade where appointment and removal was effected only by a decision of the PSC.

[26] Against those grounds, the parties provided this Court with an agreed statement of issues which is quite extensive. It is evident that the appeal and cross-appeal address the same issues even though the cross appeal is more elaborate. In my view, the very extensive grounds of appeal and grounds of cross appeal give rise to three principal issues which are as follows:

- (a) Whether the learned trial judge was correct in declaring that the transfer of Ms. Bain-Thomas was unconstitutional and void;
- (b) If so, whether the learned trial judge was correct to hold that the decision of **Felix Da Silva v Attorney General** was binding on the court and militated against him making declarations 2, 3, 4 and 5.
- (c) Alternatively, whether the learned trial judge ought to have granted Ms. Bain-Thomas declarations 2, 3, 4 and 5 which she had sought.

**Submissions on behalf of Ms. Bain-Thomas**

**Issue 1 - Whether the learned trial judge was correct in declaring that the transfer of Ms. Bain-Thomas was unconstitutional and void**

[27] Learned counsel Mr. Phillip submitted that in seeking to resolve the main issue that has arisen for this Court's consideration, the starting point is an analysis of the provisions of Chapter VI of the Constitution<sup>6</sup> which deals with the PSG and in particular, Parts 1 and 2 thereof. Part 2, captioned "The Public Service

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<sup>6</sup> See footnote 3.

Commission” comprises section 83, which provides for the establishment, composition, appointment and removal of the commissioners, and the procedures for the functioning of the commission. He pointed out that section 84 provides for the appointment, exercise of disciplinary control and removal from office of public officers generally in the PSG. Part 2, captioned “Appointments, promotions and transfers” provides inter alia for the appointment, removal, etc. to the offices of, Secretary to the Cabinet, permanent secretaries, head of a department of government and deputy head of a department of government (section 85). He stated that the Constitution creates at least two categories of officers in the PSG. Section 84 creates ‘public officers’ for which the PSC has jurisdiction; while Part 2 and for present purposes particularly section 85 creates ‘particular officers’ for which the Governor General has jurisdiction. Mr. Phillip opined that this latter fact must be significant and its purpose is to remove the ‘particular offices’ from the purview of the PSC and set them apart from the other offices in the PSG. He said that ‘Particular office’ and ‘particular officer’ are also recognised in the PSC Regulations<sup>7</sup> and defined in regulation 2(1) thereof as any office(r) to which section 85 of the Constitution applies.

[28] Accordingly, Mr. Phillip submitted that by regulation 28, ‘particular officers’ are to be transferred by the Governor General acting in accordance with the advice of the PSC, while regulation 29(1) provides for ‘public officers’ other than ‘particular officers’ to be transferred by the PSC by order in writing. Mr. Phillip therefore argued that Ms. Bain-Thomas, being the holder of the office of the Secretary to the Cabinet established by section 68 of the Constitution and a particular officer in the PSG, may only have been transferred by the Governor General to another particular office of the equivalent rank or grade.

[29] In seeking to reinforce the correctness of the above submission, Mr. Phillip opined that it is useful to consider what constitutes a transfer and an appointment in the PSG. Regulation 2(1) defines ‘transfer’ as, ‘the conferment of some public office,

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<sup>7</sup> See footnote 4.

other than that to which the officer was last substantively appointed, not being a promotion' and 'appointment' as 'the conferment of a public office by way of transfer'. Mr. Phillip therefore argued that on the basis of those definitions, an appointment may be by way of a transfer; however, this is not the end of the matter.

[30] Mr. Phillip stated that in the case of a particular officer such as Ms. Bain-Thomas, only the Governor General, acting in accordance with the advice of the PSC pursuant to the clear and unambiguous provisions of section 85(2) of the Constitution and regulation 28, can appoint that particular officer to another definite office of equivalent grade in the PSG. He was adamant that the PSC is not empowered either under section 84(1) of the Constitution nor the PSC Regulations to exercise jurisdiction over particular officers that fall within the purview of section 85(2) of the Constitution. He submitted that in fact, section 84 (3) of the Constitution expressly excludes them from the purview of the PSC and as such it cannot lawfully participate in the transfer and or appointment of a particular officer other than to advise the Governor General. In this regard he relied on **Smith and Others v Attorney General**<sup>8</sup> and **Duncan v Attorney General**.<sup>9</sup>

[31] In seeking to buttress his case, learned counsel Mr. Phillip posited that the Secretary to the Cabinet is manifestly an important post or office in the PSG. He stated that the Secretary of the Cabinet is directly responsible to the Prime Minister for the impartial recording of Cabinet decisions and for the development and administration of Cabinet processes. Mr. Phillip emphasised that section 68 of the Constitution of Grenada created the constitutional post of the Office of the Secretary to the Cabinet with specific functions and a specific status. The Secretary to the Cabinet, he opined, is also responsible to Cabinet as a collective

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<sup>8</sup> [1985] LRC (Const) 1128.

<sup>9</sup> [1998] 3 LRC (Const) 414 esp. pp. 423c – 424b.



for ensuring the confidentiality of Cabinet proceedings and the impartial and effective operation of the Cabinet system.

[32] Accordingly, Mr. Phillip submitted that there is no such other office in the PSG. He opined that the special status and reputation of the holder of the post of Secretary to the Cabinet cannot be seriously doubted. He said it is therefore undeniable that the purported “transfer” of Ms. Bain-Thomas from the post of Secretary to the Cabinet to Executive Director, AML/CTFC involves a substantial if not radical alteration of her status and responsibilities and, constitutes in substance and fact a demotion as its functions are fundamentally different.

[33] In support of this contention he referred the Court to the **Proceeds of Crime Act** which establishes the Anti-Money Laundering Commission, and Ms. Bain-Thomas’ affidavit in support of the constitutional motion. He submitted that according to the **Proceeds of Crime Act**, the AML/CTFC is an advisory body in the Ministry of Finance. He took issue with whether or not it falls within the PSG, and said that there is no indication that it does. He was adamant that the purported “transfer” also seriously affected her status and reputation as a person who has held the Office of Secretary to the Cabinet for several years.

[34] Mr. Phillip argued that it is important to examine the post of Executive Director. He said the nomenclature ‘executive director’ according to the Victorian Public Sector Commission refers to a member of a public entity board who is also an employee of the public entity as compared to a ‘non-executive director’ who is not employed by the entity. A managing director of the entity who is a formal member of an entity’s Board is therefore an executive director. He said that the legal differences between an executive director and a non-executive director were outlined by Dixon J in the case of **Jacques v AIG Australia Ltd.**<sup>10</sup> He pointed out that appointment of an ‘executive director’ can be in an ex officio capacity or by formal appointment. The actual process for appointment is usually detailed in the legislation

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<sup>10</sup> [2014] VSC 269 at p. 4.

establishing the board as was done in the **Proceeds of Crime Act** (by the PSC). An executive director is generally responsible, in accordance with the strategic direction set by the board of directors, for the day to day operation of the organisation. The Board grants authority to the Executive Director to run the organisation/entity. The Executive Director takes instructions from the Board and reports to the Board.

[35] Accordingly, Mr. Phillip said that Ms. Bain-Thomas is not a member of the Board of Directors of the AML/CTFC and therefore could not properly be appointed by the PSC to hold the post of Executive Director. A reporting line to the Board of Directors of the AML/CTFC puts Ms. Bain-Thomas reporting to a body outside the public service. Mr. Phillip pointed out that a reporting line was established for Ms. Bain-Thomas to report to the Attorney General in his capacity as the Chairman of the Board of the AML/CTFC; however, this essentially still puts her outside the mainstream public service and reporting to an officer in a Grade L post which is a lower rank and grade than the Secretary to the Cabinet. The post or office of the Secretary to the Cabinet is therefore not a post or office which is of the same rank or status of the Executive Director, AML/CTFC in the Attorney General's Chambers of the Ministry of Legal Affairs, and this is so regardless of the emoluments.

[36] Learned counsel Mr. Phillip stated that Ms. Bain-Thomas' case is to be distinguished from the case of **Brian Francis v Attorney General of Grenada**.<sup>11</sup> He said that Mr. Brian Francis who was a Permanent Secretary was properly transferred by His Excellency the Governor General acting on the advice of the Prime Minister to another Permanent Secretary post in the PSG. He maintained that the issue of grade, status and prestige could not properly have arisen in that case since according to section 85(2)(a) of the Constitution, on transfer of a Permanent Secretary (particular officer) to another Permanent Secretary (particular officer) post, what matters is the same salary. There is already

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<sup>11</sup> GDAHCV2001/0521 (delivered 25<sup>th</sup> November 2002, unreported).

equivalency in rank (particular office) and grade. He said that Mr. Brian Francis was transferred from one constitutional, pensionable post, on the permanent establishment of the public service to another constitutional, pensionable post on the permanent establishment.

[37] This, Mr. Phillip said, contrasts with Ms. Bain-Thomas who was removed by the Governor-General from a constitutional, particular office, pensionable post, on the permanent establishment and appointed by the PSC to a non-constitutional post created by a simple act of Parliament, non-pensionable, unestablished post, not on the permanent establishment and outside the mainstream public service. Mr. Francis, on transfer, remained a 'particular officer' while Ms. Bain-Thomas' purported transfer resulted in her removal from being a 'particular officer'. Critically, he said, Mr. Francis' removal and subsequent appointments were both effected by the Governor General unlike the case at bar.

[38] Learned counsel Mr. Phillip said that section 85 also draws a distinction between the post of Secretary to the Cabinet and Permanent Secretary. Mr. Phillip stated that the Court is required to consider and give effect to the provisions of sections 68 and 85 of the Constitution in relation to Ms. Bain-Thomas. Mr. Phillip opined that section 85 permits lateral transfers of permanent secretaries but not the transfer of a Secretary to the Cabinet to a post of permanent secretary or lower rank and status. He said that this was a deliberate decision by the drafters of the Constitution. It specifically provided for lateral transfers of permanent secretaries but not for the post of Secretary to the Cabinet. He stated that the inference is that the Constitution recognised there was no possibility of a lateral transfer for the holder of the post of Secretary to the Cabinet. He said that this restriction on any transfer of Ms. Bain-Thomas arises by implication as the appointment to the post of permanent secretary is permissible by transfer but only 'on transfer from another such office'.

[39] Mr. Phillip reminded this Court that it has long been settled law that the purpose of the constitutional provisions establishing the various commissions is to insulate the public service from political direction and control, and that a person may only be removed for cause. In this regard, he referred to **Duncan**<sup>12</sup> where the Court of Appeal applied **Thomas v The Attorney General**.<sup>13</sup> Mr. Phillip further contended that in view of **Thomas, Darnell Shillingford v Attorney General of Dominica**,<sup>14</sup> and **Cooper v Director of Personnel Administration**,<sup>15</sup> Ms. Bain-Thomas has security of tenure in that she could only be removed as Secretary to the Cabinet by the Governor General acting on the advice of the PSC for reasonable cause, and that she was entitled to be informed of the cause or reason being relied on before she could be lawfully removed. He said that this means that the Governor General is required to do more than merely rubber stamp a recommendation from the PSC. He posited that in **Horace Fraser v Judicial and Legal Services Commission et al**,<sup>16</sup> Lord Mance stated that “such a decision can only validly be reached if the Commission at that time of the removal, acting in accordance with a proper procedure concludes that reasonable cause exists for the officer’s removal.”

[40] Learned counsel Mr. Phillip stated that the proper procedure to be followed is detailed in the Constitution and the PSC Regulations. Mr. Phillip advocated that the cases of **Da Silva** and **Willan Thompson v Attorney General**<sup>17</sup> are different. He reminded this Court that the appeal concerns the constitutional office of Secretary to the Cabinet within the context of sections 68 and 85 of the Constitution. The restrictions imposed or implied in section 85 did not apply in any of the other cases, for obvious reasons. Mr. Phillip therefore argued that the learned judge did not err in granting declaration 1 and urged this Court to dismiss the cross appeal against declaration 1.

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<sup>12</sup> See footnote 9 above at page 423 (c) to 424 (b).

<sup>13</sup> [1982] AC 113.

<sup>14</sup> DOMHCVAP1988/0010 (delivered 29<sup>th</sup> April 1991, unreported) at pages 12-14.

<sup>15</sup> [2007] 1 WLR 101 at page 109(d) – 111 (g).

<sup>16</sup> [2008] UKPC 25 at para. 19.

<sup>17</sup> GDAHCV2014/0339;GDAHCV2014/0305 (delivered 28<sup>th</sup> January 2015, unreported).

## Issue 2

**If so, whether the learned trial judge was correct to hold that the decision of Felix Da Silva v Attorney General of St. Vincent and the Grenadines was binding on the High Court and militated against him making declarations 2, 3, 4 and 5**

[41] Learned counsel Mr. Phillip referred to the fact that the learned trial judge held that he was bound by the decision in **Da Silva**. He posited that it is distinguishable from the case at bar and accordingly was not binding on the High Court for the following reasons:

- (a) The letter removing Mr. Da Silva from the post of Superintendent of Airports itself also stated that the Governor General acting on the advice of the Commission had approved his appointment to the post of Assistant Secretary, Ministry of Tourism, Aviation and Culture, and as such may be considered a lawful exercise by the Governor General of the powers given under section 79(2) of the St. Vincent and The Grenadines Constitution. This is in contrast to the case at bar where the letter of purported transfer of Ms. Bain-Thomas by the Governor General<sup>18</sup> said to hold another post in grade M **to be determined by the PSC**, which was accordingly unconstitutional, null, void and of no effect, ab initio. (My emphasis).
- (b) The Court of Appeal in **Da Silva** found that the uncontroverted evidence was that the posts of Superintendent of Airports and Assistant Secretary, Ministry of Tourism, Aviation and Culture were of the same grade. This was in scale 14-10 and in both instances they reported to the Permanent Secretary. While, in Ms. Bain-Thomas' case, the learned trial judge found as a fact that the office of Secretary to the Cabinet is a 'particular office' at the highest grade in the PSG and was not in the same category as the office of the Executive Director, AML/CTFC, which is not a 'particular office'.

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<sup>18</sup> Exhibited to the affidavit of Ms. Bain-Thomas sworn on 24<sup>th</sup> February 2014 and marked BT17.

[42] Accordingly, learned counsel Mr. Phillip stated that an analysis of **Da Silva** shows that what the Court of Appeal addressed was whether the both posts of Superintendent of Airports and Assistant Secretary, Ministry of Tourism, Aviation and Culture were protected under the St. Vincent and the Grenadines Constitution from arbitrary and whimsical executive action; rather than whether the relevant authority (the Governor General) had acted lawfully, which was the issue in Ms. Bain-Thomas' case. Also, he said that in any event, the dictum of the Chief Justice [Ag.] in the **Da Silva** case in respect of the transfer was obiter, because the appealed judgment did not deal with the issues of the transfer of **Da Silva** but rather with his retirement and the damages, if any, payable to him. In seeking to support this argument, he referred the Court to page 8 of the judgment in **Da Silva**. Consequently, Mr. Phillips argued that this dictum could not be binding on the learned trial judge. He therefore urged this Court to grant declaration 2.

### **Issue 3**

#### **Alternatively, whether the learned trial judge ought to have granted declarations 2, 3, 4 and 5**

[43] Mr. Phillip posited that the PSC Regulations do not define assignment. He said that however, Saunders JA opined in **Grenada Technical and Allied Workers' Union & Public Workers' Union v Public Service Commission, Attorney General of Grenada & Grenada Postal Corporation**<sup>19</sup> that 'a transfer can be either on appointment or on temporary assignment. That latter type of transfer is in fact a secondment'. Consequently, Mr. Phillip argued that, because the PSC has no power to transfer Ms. Bain-Thomas, being a particular officer in the post of Secretary to Cabinet, equally it could not and did not have the power to assign Ms. Bain-Thomas to any post in or outside the PSG or even to any post in the PSG. The matter fell within the exclusive purview of the Governor General.

[44] Mr. Phillip maintained that Ms. Bain-Thomas was compulsorily retired from the post of Secretary to the Cabinet and reappointed to the PSG in the post of

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<sup>19</sup> GDAHCVAP2003\0011 (delivered 2<sup>nd</sup> February 2004, unreported) at page 7.

Executive Director, AML/CTFC. Mr. Phillip said that Ms. Bain-Thomas is entitled to be paid gratuity, pension and retirement benefits as if she had attained the compulsory retirement age of sixty (60) years; and damages by reason of her unconstitutional removal or retirement. He purported to rely on **Angela Inniss v Attorney General of Saint Christopher and Nevis**<sup>20</sup> in support of his contention. He said that the learned trial judge erred in concluding that Ms. Bain-Thomas had been transferred on assignment to the post of Executive Director.

[45] Learned counsel Mr. Phillip said that for the very reason that Ms. Bain-Thomas' purported transfer was unlawful, the actions of the Governor-General and the PSC could not equally amount to an assignment as found by the learned trial judge. Indeed, Mr. Phillip submitted that the word "assignment" is a colourable device used for Ms. Bain-Thomas' removal from the post of Secretary to the Cabinet. Further, there are no written policy guidelines relating to assignments and it was not open to the judge to conclude that there was any assignment, in view of earlier finding that the purported transfer was unconstitutional.

[46] Finally, Mr. Phillip urged the Court to allow the appeal and grant the following orders sought in the notice of appeal which are, essentially, the declarations sought in the court below.

#### **Submissions on behalf of the Attorney General of Grenada and the PSC**

##### **Issue 1 - Whether the learned trial judge was correct in declaring that the transfer of Ms. Bain-Thomas was unconstitutional and void**

[47] The learned Solicitor General was adamant that the judge erred in declaring that Ms. Bain-Thomas' transfer was unconstitutional and void. He urged this Court to set aside the learned judge's decision to grant declaration 1.

[48] The learned Solicitor General reminded this Court that the judge held that the Governor General, in purporting to transfer Ms. Bain-Thomas from the office of

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<sup>20</sup> [2008] UKPC 42.

Secretary to the Cabinet, acted in contravention of her section 85(2) duties in acting upon the advice of the PSC to transfer the appellant 'to hold another post in the Public Service in Grade M to be determined by the Public Service Commission'. He acknowledged that the judge determined that the Governor General had no power under section 85(1) to punt the decision as to which post or office Ms. Bain-Thomas was to be appointed back to the PSC. He said that the judge therefore held that the Governor General acted ultra vires the powers given to her by section 85(1) of the Constitution.

[49] The learned Solicitor General pointed out that the learned judge gave the following reasons, among others, for his judgment. He held that the Governor General must be advised by the PSC of the office or post to which the public servant is being transferred. He concluded that the Governor General's instrument of the 6<sup>th</sup> February 2014 did not do this. He found that it purported to transfer the Ms. Bain-Thomas to 'another post in the public service in Grade M to be determined by the Public Service Commission.' He said that the judge held that the Governor General was not, on the face of the instrument of transfer, advised by the PSC as to the post to which the appellant was being transferred. He said that the learned judge found that this lack of specificity means that the Governor General did not advise herself, and indeed could not advise herself that Ms. Bain-Thomas was not being demoted under the guise of a transfer.

[50] The Solicitor General also reminded this Court that the learned judge further held that there was no evidence whatsoever to support any inference that these two letters/instruments were 'conjointly issued' so as to attempt to essay a fusion thereof, and therefore deposit the requisite knowledge in the Governor General, by way of advice from the PSC, as to the office to which Ms. Bain-Thomas was transferred. He stated that the judge concluded that on the evidence before the court, Ms. Bain-Thomas was the most senior public servant in rank; that there is no office higher than hers in the PSG and although there are some of equivalent



grade, they must necessarily rank below hers by virtue of her office being the Head of the PSG.

[51] In his view, the learned judge determined that Ms. Bain-Thomas was ‘primus inter pares’ with respect to all civil servants, just as the Prime Minister is ‘primus inter pares’ among all Cabinet ministers. The Solicitor General said that the judge, on that analysis, held that it must necessarily follow, as night follows day, that there was in fact no post of equivalent status and rank in the PSG to which Ms. Bain-Thomas could have been transferred without infringing the mandate of equality in status and rank – absent just grounds for demotion, which he found was not a factor in this case, or the creation of a new and “equal” post. In the result, she was in effect non-transferrable.

[52] The learned Solicitor General reminded this Court of the well-known principle that the Constitution is founded on the Westminster model. He therefore opined that it has never been interpreted in the manner construed by the learned judge below. He submitted that the Governor General is required to act on the advice tendered to her by any authority designated under the Constitution to so advise her. The Solicitor General submitted that the Governor General retains no independent discretion, or any discretion whatsoever, relative to the advice tendered to her by the PSC. He said that the Governor General must act on the advice of the designated authority except where the Constitution specifically affords her an independent deliberate judgment. The Solicitor General said that section 85(2) of the Constitution contains no language evincing or admitting any discretion in relation to the advice tendered to the Governor General by the PSC. Accordingly, he submitted that the learned judge was therefore wrong to construe section 85(2) of the Constitution in the way he did. He said that the judge read too much into section 85 (2) of the Constitution and as a consequence fell into error.

[53] Regarding the facts, the Solicitor General posited that Ms. Bain-Thomas took the appointment of Cabinet Secretary subject to certain conditions. He said that one of

such conditions is that she was liable to be transferred to any post of equivalent grade in the PSG. He took issue with Ms. Bain-Thomas' contention that she was not liable to be transferred to another grade M post within the PSG.

[54] Next, the Solicitor General said that when the learned judge held that Ms. Bain-Thomas was non-transferable because there was no other position equal in status and rank, he was completely in error. He held that equivalency is not restricted only to pay and emoluments of the Grade M post to which the officer is being transferred; that it must include such factors as responsibility, status, challenges of the post, rank in the public service hierarchy and the like. Again, the Solicitor General submitted that the learned judge fell into error because it has been held in the High Court of Grenada that what an officer is entitled to is equivalency of grade and not status or prestige. In support of this proposition he referred to **Brian Francis v Attorney General**.<sup>21</sup> He also purported to rely on **Willan Thompson**<sup>22</sup> and **Smith v Attorney General**<sup>23</sup> in support of his argument.

[55] The learned Solicitor General therefore submitted that the learned judge misapprehended the law relative to the requirement of equivalency of Grade M on the transfer of officers in the service and fell into error in his analysis of the issue of whether a person, such as Ms. Bain-Thomas, holding the post of Cabinet Secretary is liable to be transferred to another post of equivalent grade there being none in this case.

[56] Next, the Solicitor General reminded this Court that the two letters dated the 6<sup>th</sup> February 2014, one from the Governor General and the other from the PSC were issued on the same date. He said that the letters were simultaneous acts of the Governor General and the PSC and must be viewed as one transaction which effected a transfer of Ms. Bain-Thomas from Cabinet Secretary to Executive Director, AML/CTFC.

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<sup>21</sup> See footnote 11 above.

<sup>22</sup> See footnote 17 above.

<sup>23</sup> See footnote 9 above at para. 56.

[57] The Solicitor General stated that the transaction constituting the transfer must be construed on the assumption that the Governor General intended to do what the Constitution required, that is, to act on the advice of the PSC under section 85(2) of the Constitution and effect a removal of Ms. Bain-Thomas for the purpose making her available to be appointed by the PSC to the post of Executive Director AML/CTFC under section 63(2) of the **Proceeds of Crime Act**. The Solicitor General therefore submitted that the learned judge was then wrong to hold that the two letters could not conjointly issue a transfer that was constitutional and lawful. He submitted that the learned judge also fell into error in holding that there was no evidence before him to support an inference that the letters were conjointly issued evidencing advice by PSC to the Governor General as to the office to which Ms. Bain-Thomas was being transferred. He said that there was indeed ample uncontroverted evidence on Ms. Bain-Thomas' affidavit which the learned judge failed to properly evaluate. The Solicitor General posited that the proper and obvious inference to be drawn from Ms. Bain-Thomas' evidence of receiving the letters bearing even date, delivered to her together with each other, is that they were simultaneously or conjointly issued. He was adamant that the learned judge was wrong to hold otherwise and also about needing affirmative evidence of when the Governor General was advised by the PSC, or even whether the PSC had advised the Governor General at all in the circumstances.

[58] The Solicitor General reiterated that Ms. Bain-Thomas' removal from the post of Cabinet Secretary and her appointment to the position of Executive Director, AML/CTFC was lawfully done. He said that there was no breach of section 85(2) of the Constitution. He reiterated that the Governor General had power to remove Ms. Bain-Thomas on the advice of the PSC pursuant to section 85(2) and the PSC had power to appoint Ms. Bain-Thomas to the position of Executive Director AML/CTFC. The Solicitor General posited that the learned judge should have held that Ms. Bain-Thomas was liable to be transferred to any post of equivalent grade in the service and that the two letters of 6<sup>th</sup> February 2014 conjointly effected a transfer of Ms. Bain-Thomas to the position of Executive Director, AML/CTFC in

which position she continues to receive emoluments in Grade M. He therefore urged this Court to set aside the declaration 1 that was granted by the learned judge.

## **Issue 2**

**If so, whether the learned trial judge was correct to hold that the decision of Felix Da Silva v Attorney General of St. Vincent and the Grenadines was binding on him and militated against him making declarations 2, 3, 4 and 5**

[59] Next, the Solicitor General stated that the learned judge should have held that the removal of Ms. Bain-Thomas from a post protected under section 85(2) of the Constitution which required the Governor General to act on the advice of the PSC and appointment to a post under section 63(2) of the Proceeds of Crime Act where appointment and removal was effected only by a decision of the PSC was not objectionable, but entirely lawful as both provisions require the PSC to act judicially in the discharge of its duty in law. The learned Solicitor General stated that the learned judge was bound to follow **Da Silva**<sup>24</sup> as stated by the Chief Justice [Ag.]. The Solicitor General said that the learned judge made no finding that the PSC acted whimsically or in an arbitrary manner regarding the exercise of power under section 63(2) of the Proceeds of Crime Act. He said that **Da Silva** was therefore indistinguishable on principle and the learned judge was wrong not to apply the decision to the case before the court as binding upon him in relation to the issue of the transfer of Ms. Bain-Thomas in the circumstances.

[60] The Solicitor General next stated that the learned judge in the court below therefore failed to appreciate and to hold that a transfer was the simultaneous removal of Ms. Bain-Thomas from one post and appointment to another. He said had the judge faithfully applied the **Da Silva** case he would have arrived at that conclusion.

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<sup>24</sup> See pages 2-4 of judgment.

[61] In any event, the Solicitor General posited that due to the fact that **Da Silva** was binding on the lower court, the learned judge was correct in refusing to grant declarations 2,3,4 and 5 and Ms. Bain-Thomas' appeal against his refusal should be dismissed.

### **Issue 3**

#### **Alternatively, whether the learned trial judge ought to have granted Ms. Bain-Thomas declarations 2, 3, 4 and 5**

[62] The learned Solicitor General addressed this issue quite shortly when he pointed out that the Constitution does not provide for persons who hold the office of Secretary to the Cabinet to be retired in public interest and therefore the judge was correct to refuse declarations 2, 3, 4 and 5. He said that **Duncan**<sup>25</sup> is clearly distinguishable from the case at bar, in so far as Richard Duncan's office was clearly amenable to retirement in the public interest.

[63] The Solicitor General therefore urged this Court to dismiss Ms. Bain-Thomas' appeal and to allow the Crown's cross appeal.

### **Discussion**

#### **Issue 1 - Whether the learned trial judge was correct in declaring that the transfer of Ms. Bain-Thomas was unconstitutional and void**

[64] Section 106 of the Constitution of Grenada specifically states that it is the supreme law of the land. It is settled that the Constitution is no ordinary legislation. Rather, it is the supreme law of the land and as such it has, for centuries, been read by the courts as one of the principal means of enforcing limits upon the legislative and executive branches of the government. This is regarded as one of the fundamental principles of our societies and so it is in Grenada; indeed the principle of constitutional supremacy is so well settled and known that it needs no repetition.

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<sup>25</sup> See footnote 9 above.

[65] Also, it has long been settled that judicial review under a written Constitution seeks to ensure that public power is controlled and regulated by a superior law namely – the self-same Constitution. This is so in Grenada as it is with other Commonwealth Caribbean countries which similarly have written Constitutions and which are based on the Westminster model. The Constitution provides the yardstick to civil societies to seek to ensure that they are governed in accordance with the written constitution and the laws of the land. Further, modern democratic Constitutions embody a conception of the basic rights and obligations of citizens and establish a judicial process by which the right claims of citizens may be litigated. This much has been settled. Further, judicial review as recognised by the Constitution, enables the court to adjudicate on the constitutional validity of the policies of government officials. It has always been within the exclusive purview of the Executive and Parliament to determine the policies of the government, in accordance with law. This continues to be so. However, in order for them to be lawful, they must pass scrutiny for constitutional validity.

[66] However, it is of utmost importance and it must at once be recognised that members of the PSG are mandated to advise and implement the public policy directives of the Executive.<sup>26</sup>

[67] As a related post, public officers can only be properly removed for reasonable cause by the body that is clothed with the authority to appoint the public officer. In order to protect public officers from improper interference or manipulation by the executive arm of the Government, the framers of the Constitution created autonomous service commissions such as the PSC in Grenada with the expectation that the Commission would execute its functions in an objective, impartial, rational manner and more significantly, would be free of any manipulation or interference from the Executive. In order to achieve this end, no less a document than the Constitution has inscribed its creation and in the case of

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<sup>26</sup> See the scholarly and erudite treatise of the learned author Dr. Francis Alexis: *Changing Caribbean Constitutions* (2nd Edition, Carib Research and Publications 2015) at paras. 20.03 – 20.156 for an excellent exposition on the public sector and public sector commissions.

the new Constitutions their retention so as to guard against any abuses or interference by the political directorate.<sup>27</sup> In Grenada, section 83 of the Constitution specifically addresses the establishment, composition, appointment and removal of the Commissioners. This indicates the special treatment and protection that the framers of the Constitution have provided to the PSC in the expectation that it will execute its functions impartially, fairly, satisfactorily and in accordance with the constitution and the laws of Grenada. Section 84 of the Constitution creates public officers in relation to whom the PSC has jurisdiction to appoint, remove and discipline. Of great importance is the fact that public officers are not dismissible at the pleasure of the Crown or the State.<sup>28</sup> It is noteworthy that the Head of State does not possess any such power in relation to the particular officers who fall within her purview.

[68] The public service has been accepted as meaning the service of the Crown or State in a civil capacity. Recent authority for this proposition can be found in **AG v Smith**.<sup>29</sup> As a general rule, a public officer is a person who holds public office which is an office of emolument in the public service. There are other significant indicia of whether or not a person holds public office, these include whether or not the office is pensionable.<sup>30</sup> It is noteworthy that not every person who is employed by the State, Government or the Crown is in the category of the holder of a public office.<sup>31</sup>

[69] As a general rule, public officers are provided with security of tenure until the prescribed statutory age of retirement and can only be removed for reasonable cause after they have been afforded a hearing.<sup>32</sup>

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<sup>27</sup> Ibid, see paragraph 20.25 – 20.26.

<sup>28</sup> See *Endell Thomas v Attorney General* (1981) 32 WIR 375 for the enlightening pronouncements of Lord Diplock on the insulation of the Police Service Commission from political interference.

<sup>29</sup> (2009) 75 WIR 457.

<sup>30</sup> See footnote 27 at paras. 20.03-20.13.

<sup>31</sup> Ibid at para. 20.05.

<sup>32</sup> The same structures that apply to the Public Service Commission apply with equal force to the Head of State in performing the functions of appointing, removing or transferring particular officers.

- [70] This much has long been settled and was later crystallised in what has come to be regarded as a locus classicus, **Endell Thomas v Attorney General**,<sup>33</sup> where Lord Diplock set out important principles on the security of tenure of public officers where there is a written Constitution which clothes the Commission with the power of appointment and by extension removal from office.
- [71] As indicated earlier, public officers are constitutionally protected from improper interference by the Government. The corollary to that is that public officers are required to be objective, independent, impartial and efficient in their service to the Grenadian public. There are inherent restrictions which are designed to thwart any partisan conduct of public officers.<sup>34</sup>
- [72] Similarly, where the Head of State is clothed with the power to appoint or remove public officers, on the advice of the PSC, this is expected to be done lawfully and removal could only be for cause. The Head of State is not expected to act whimsically or capriciously in removing or appointing public officers.
- [73] I am in total agreement with Mr. Phillip that the creation of the service commissions by the Westminster Constitution was aimed at insulating the public service from political interference or manipulation. In fact, it is not unusual to find a Public Service Commission, Police Service Commission, Judicial and Legal Services Commission and Teaching Service Commission in existence in many Caribbean jurisdictions. Each of those Commissions has the power to appoint, transfer, remove and discipline persons who fall within their respective remit.
- [74] It is common ground that section 85(2) of the Constitution stipulates that the Secretary to the Cabinet is to be appointed by the Governor General acting on the advice of the PSC. Based on this, it is evident that the framers of the Constitution sought to ensure that the office holder, the Secretary to the Cabinet, is even more

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<sup>33</sup> See footnote 28.

<sup>34</sup> See footnote 26 at para. 20.24.



protected from improper actions or unfairness in the PSC by adding another layer of insulation namely the Governor General – who by convention, is required to be independent and by law is mandated to act fairly and objectively.

[75] It is evident that the Governor General, having been introduced by the Constitution, as another level in the appointment and removal process of the Secretary to the Cabinet, is not merely to “rubber stamp” the decisions of the PSC. If that were the case there would have been no need for the framers of the Constitution to have created another layer above the PSC in no less than the highest office in Grenada, namely the Governor General. It seems obvious that the framers of the Constitution wished to ensure that, in relation to the highest level public officer, there was a further safeguard in the nature of the appointment, removal or transfer to be effected by the Governor General who, as I have already stated, by convention is expected to be politically neutral, albeit on the advice of the PSC. They would not have expected the PSC to, by its advice, embarrass the Head of State who is required to act on advice. Neither is it lawful for the PSC to act independently of the Head of State in relation to the appointment or removal of the Secretary to the Cabinet and to simply send the Secretary to the Cabinet somewhere else.

[76] I do not agree with the learned Solicitor General that because the Governor General has no residual discretion in the appointment or transfer of the Secretary to the Cabinet, the same result can be achieved by simply having the PSC appoint the Secretary to the Cabinet to a new post. Had the framers of the Constitution wished for the PSC to execute those functions of appointments and not for the Governor General to do so, they would have so provided as they have done in relation to the other public officers. I do not share the view that because the Governor General does not have any residual discretion in the appointment of the Secretary to the Cabinet, it is for the PSC to simply appoint Ms. Bain-Thomas to an office independent of the Governor General. There is much learning on the

question of who has the power to appoint or transfer a public officer.<sup>35</sup> In addition to the jurisprudence to which I have referred, the scholarly pronouncements of Dr. Alexis<sup>36</sup> are also very instructive in this regard. I can do no more than adopt his very enlightening pronouncements.

[77] The framers of the Constitution sought to ensure that the principles of security of tenure that were enshrined in the Constitutions were immutable. Since then, various strides in constitutional jurisprudence which ensure that the immutable principles of modern Westminster Constitutions are adhered to and if violated would be declared by the courts to be repugnant to the constitutional provisions which they infringe. In this regard, the principles enunciated in **Hinds v R**<sup>37</sup> are very instructive. It is clear to me that the Governor General ought to have indicated the public office to which Ms. Bain-Thomas was to be appointed and not leave it up to the whims of the PSC and that her failure to do so is unconstitutional. In light of this finding, it seems to me that it has become unnecessary for me to address the subsidiary point of whether the judge was correct in concluding that Ms. Bain-Thomas was and remains the Secretary to the Cabinet on assignment to the post of Executive Director, AML/CFTC. In my judgment, that decision must be assailed, in view of the conclusions I have reached above. There simply has been no lawful transfer of Ms. Bain-Thomas in the circumstances at bar and she cannot be said to be holding the office of Secretary to Cabinet when she simply is not. I am fortified in this view by the very helpful pronouncements of Byron CJ in **Duncan** at page 423 and reinforced by the Board in **Attorney General of Antigua and Barbuda v Lake**.<sup>38</sup>

[78] In all the circumstances, I am fortified in my view that there is no force in the submission that the conjoint effect of the two letters can satisfy the constitutional prerequisites for the transfer for the transfer of the Secretary to the Cabinet to the

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<sup>35</sup> See Endell Thomas at footnote 28 above; Horace Fraser v JLSC [2008] UKPC 25; and Attorney General of Antigua and Barbuda v Lake (1998) 53 WIR 145.

<sup>36</sup> Alexis, 'Changing Caribbean Constitutions' 2015 at paras. 20.07-20.12.

<sup>37</sup> (1975) 24 WIR 326.

<sup>38</sup> (1998) 24 WIR 326.

post of Executive Director, AML/CTFC to be lawful. Let it be clear that, in my judgment, the two letters can never satisfy the strict constitutional requirement of section 85(2) by which the Governor General alone has the power, to appoint, transfer or remove the particular officer, in this case the Secretary to the Cabinet, on the advice of the PSC.

[79] The inescapable conclusion to which I have reached is that the purported transfer was a clear infringement of section 85(2) of the Constitution. In my view the learned trial judge comprehensively addressed the point and his decision in this regard cannot be impugned since he simply did not err. While I would refrain from saying as the judge did that the Governor General abdicated her responsibility in the manner in which the purported transfer was effected, in my respectful view, the circumstances do come very close to the line.

[80] Most of the submissions that were launched before this Court are essentially those that were advanced before the judge. In so far as the learned Solicitor General seeks to call in aid PSC Regulations in seeking to validate the appointment by the PSC, in my view, he cannot avail himself of any aspect of the regulations in the face of the superior law, the Constitution, which is very clear in its pronouncement as to the body which has the power to appoint and by extension transfer the Secretary to the Cabinet. The only person who can transfer, appoint or remove Ms. Bain-Thomas from office is the Governor General, albeit acting on the advice of the PSC, and this did not occur.

[81] It is clear from all that I have stated above that the ineluctable conclusion to which I have arrived is that the learned trial judge did not err in concluding that the purported transfer was unconstitutional. In any event, I have no reservation in holding as I hereby do that Ms. Bain-Thomas' transfer by the Governor General and appointment by the PSC was unconstitutional and therefore unlawful. In so far as the Attorney General and the PSC have cross appealed against this aspect of the judgment, their cross appeal is dismissed.

[82] I turn now to the second issue.

**Alternatively, whether the learned trial judge ought to have granted Ms. Bain-Thomas declarations 2, 3, 4 and 5 which she had sought**

[83] The core submissions on the second issue cover very much the same ground on which I have already ruled. Indeed, it is regrettable that the learned trial judge was faced with the dilemma of having to follow the decision of **Da Silva**, by which the High Court was bound based on the well-known principle of stare decisis. Unfortunately, this led the judge to render a judgment which was internally inconsistent when read against his earlier ruling that Ms. Bain-Thomas' transfer was unconstitutional and unlawful. However, for reasons which will become apparent shortly, the judge cannot properly be criticised for applying **Da Silva**.

[84] The case at bar, in my view, presents a unique opportunity for this Court to reaffirm the application of the doctrine of stare-decisis and the concomitant duty of lower courts to follow and apply the decisions of higher courts.

[85] Let me reiterate at the outset that it is plain to me that the learned judge's decision on the unconstitutionality of the transfer of Ms. Bain-Thomas was totally correct; however, it cannot sit peaceably with his other conclusions in relation to the decision of **Da Silva**, which he followed even though, it is clear that he did so with the greatest of reluctance. Contrary to Mr. Phillip's submissions, in my view, the circumstances of **Da Silva** were not distinguishable from those in the case at bar and therefore, the learned judge cannot be properly criticised for failing to distinguish the two cases.

[86] To the contrary, the learned judge was alive to the fact that the factual circumstances and the applicable principles in **Da Silva** were similar to those in the case at bar; his difficulty, however, was having come to the view that **Da Silva** was incorrectly decided, as a first instance judge, he had no option but to apply it.

This much the judge has made very clear in this judgment and for this he cannot be faulted nor criticised.

[87] In so far as the crux of this ground of appeal is whether or not **Da Silva** was correctly decided, I will now treat with it in some detail. Indeed, I have carefully read the judgment in **Da Silva** in which the learned Chief Justice [Ag.] delivered the judgment of the Court. No authority was directly referred to in the judgment for the principles of law stated therein. It seems to me that the Court was not referred to the locus classicus of **Endell Thomas** where the Board made some salutary pronouncements on the issue of appointment, removal and transfer of public officers. The judgment of the learned Chief Justice [Ag.] is inconsistent with the highly persuasive decisions on this point which have been applied consistently by our Court of Appeal<sup>39</sup> and upheld by the Board in several cases.

[88] I will now examine the significance of **Da Silva** which is a judgment from St. Vincent and the Grenadines. Sections 84 and 85 of the Grenada Constitution are in pari materia with sections 78 and 79 of the St. Vincent and the Grenadines Constitution. The facts of the case were that Mr. Da Silva was transferred from the position as Superintendent of Airports to that of Assistant Secretary in the Ministry of Tourism, Aviation and Culture. He protested against his transfer, in various unsuccessful appeals, and did not take up his new appointment. He was retired from the public service in the public interest. The uncontroverted evidence made it clear that he was removed by Governor General acting on the advice of the PSC. Also, the uncontroverted evidence was that he was appointed [to the position of Assistant Secretary] by the PSC. At first instance, the learned judge held that the letter from the PSC purporting to retire him in the public interest was an assertion that he was still a public officer and the suspension of his salary was wrongful. Damages were awarded.

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<sup>39</sup> These decisions include *Endell Thomas v Attorney General*; *Attorney General v Antigua and Barbuda v Lake*; *Horace Fraser and Judicial and Legal Services Commission*; *Angela Innis v Attorney General of St. Kitts and Nevis* and *Richard Duncan v Attorney General of Grenada*.

[89] In **Da Silva**, section 78 of the Constitution addressed the issue of the power to appoint persons generally to hold or act in offices in the public service (including the power to confirm appointment) and subject to the provisions of section 87 of the Constitution, the power to exercise control over persons holding or acting in such offices. The power to remove such persons from office shall rest in the PSC. Section 79(2) of the Constitution specifically conferred the power to appoint/remove persons of Mr. Da Silva's grade in the Governor General acting on the advice of the PSC. This is similar to section 85(2) of the Constitution of Grenada.

[90] On appeal, the learned Chief Justice [Ag.] held that by virtue of section 79(2) only the Governor General could remove Mr. Da Silva acting on advice of the PSC. The learned Chief Justice [Ag.] further held that there was evidence that Mr. Da Silva was removed by the Governor General acting on advice of the PSC. He stated that there was uncontroverted evidence that he was appointed by the PSC and that both posts were of equivalent grade.

The Chief Justice [Ag.] rejected the following submission:

“One of the contentions advanced on behalf of Mr. Da Silva was that since section 79 of the Constitution required the act of the Governor General on the advice of the Public Service Commission, it was a demotion to be transferred to a post under section 78 where appointment and removal was effected only by the decision of the Public Service and removal was effected only by the decision of the Public Service Commission.”

He stated that:

“Both sections provide safeguards against arbitrary and whimsical executive action and they both require the Public Service Commission to act judicially in the discharge of its duty ... in my view the transfer was effected in accordance with the legal and constitutional provisions.” (My emphasis).

[91] The above quotation shows that the learned Chief Justice [Ag.] erred by not treating with the particular office of Mr. Da Silva with the particularity provided by the Constitution. He rejected Mr. Da Silva's argument that he was removed from a

position where his appointment and removal were protected by section 79 of the Constitution and that he could be removed only by a decision of the Head of State (the Governor-General), to one where he could be removed by a decision of the PSC alone. It is clear to me that the decision of the Chief Justice [Ag.] that the removal of Mr. Da Silva by the Governor General and his later appointment to the new post by the PSC, satisfied the constitutional requirements of the Governor General having the power to remove and appoint Mr. Da Silva, runs contrary to the settled principles of law as judicially recognised in **Endell Thomas, Duncan and Attorney General of Antigua and Barbuda v Lake** and thus can be properly impugned.

[92] In my view, the Chief Justice [Ag.] overlooked the fact that the constitutional provision required the appointment and removal of persons of Mr. Da Silva's grade to be made by the Head of State, the Governor General albeit acting on the advice of the PSC. The learned Chief Justice [Ag.] therefore ought to have considered the question: in whom does the power to appoint and remove Mr. Da Silva inhere? Had he done so, the answer he would have received was that the exclusive jurisdiction to appoint and remove lies in the Head of State, that is the Governor General. I am fortified in this view based on the judicial pronouncements of the Board in **Attorney General of Antigua and Barbuda v Lake** at paragraph 48 where it was stated that:

"in appointing a person to, or removing a person from, an appointment to which section 101 applied, the Governor-General must act in accordance with the advice of the Public Service Commission"

This dictum is very instructive on this point. This much was long settled in any event by **Endell Thomas**.

[93] I have no doubt that there cannot be two authorities with concurrent power or jurisdiction to make appointments, promotions or transfers. In the case of Mr. Da Silva the constitution mandated that the appointment (including appointment to another post following transfer/removal) and removal must be done by the

Governor General acting on the advice of the PSC. It is clear that the Constitution required the act to be done by the Governor General and not by the PSC. Any purported unilateral act by the PSC cannot meet the constitutional requirement. This much is clear and to the extent that **Da Silva** evinces a contrary view, it does not reflect the law and in any event it was a judgment that was rendered per incuriam. Section 85(2) of the Constitution is clear and speaks for itself. In a word, the jurisdiction to transfer, appoint or remove a public officer who holds the rank as indicated therein is vested in the Governor General.

[94] Having established that the decision in **Da Silva** is inconsistent with several decisions of this Court of Appeal and of the Privy Council, the question arises how is this conflict to be resolved? In this appeal, this Court sits as an intermediate court. It is settled law that as a general rule an appellate court ought to follow its own decisions. However, in circumstances where there are two or more inconsistent decisions, the appeal court must decide which one is correct and should be followed. It is settled that as a matter of judicial policy, the Court of Appeal should aim to achieve certainty in the law and should abhor confusion. Equally, it has long been widely accepted that one of the chief functions of an appellate court is to correct wrong decisions and to ensure that no judicial precedent that has been wrongly decided be allowed to go uncorrected. **Young v Bristol Aeroplane Co Ltd**<sup>40</sup> has long laid down the three well known exceptions as to the circumstances in which the Court of Appeal can refuse to follow its own decisions.

[95] Based on the analyses and conclusions in relation to the first issue, it is immediately apparent that in view of a long line of authority which is inconsistent with **Da Silva**, this Court has to determine whether to overrule the decision in **Da Silva** and determine which of the two sets of conflicting authorities represents the law under the well-known exceptions in **Young v Bristol Aeroplane**. In **Young v Bristol Aeroplane** it was held that that the Court of Appeal must follow its own

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<sup>40</sup> [1946] AC 163.



previous decisions and decisions of courts of coordinate jurisdiction with three exceptions: (a) it may choose between two conflicting decisions of its own; (b) it must refuse to follow a decision of its own which, though not expressly overruled, is inconsistent with a decision of the House of Lords or Privy Council; or (c) it is not bound to follow a decision of its own given per incuriam. Indeed, the Privy Council applied and approved of these principles in **Attorney General of St. Christopher and Nevis v Reynolds**.<sup>41</sup> Indeed, all three exceptions are engaged in this appeal.

[96] Applying the first and second exceptions in **Young v Bristol Aeroplane**, I find that the decision in **Da Silva** is inconsistent with several decisions of our Court of Appeal and the Privy Council. It does not reflect the law, is plainly wrong and therefore cannot stand. I would therefore respectfully decline to follow **Da Silva** and apply the principles that were enunciated in **Endell Thomas** and applied in **Duncan**. These principles were judicially recognised and followed in the decisions of the Board in **Attorney General of Antigua and Barbuda v Lake** and **Horace Fraser v Judicial and Legal Services Commission**; and **Angela Innis v Attorney General of St. Christopher and Nevis**.

[97] In **Attorney General of Antigua and Barbuda v Lake** paragraphs 49 and 50 contain very helpful pronouncements of the Board on very similar circumstances. In that case, the Board held that if Dr. Lake was appointed by the Governor General he could only have been removed by the Governor General. The Board was clear that Dr. Lake who had been unceremoniously replaced as Medical Superintendent and replaced by another doctor could not be said to be holding the relevant office after his removal. The Board clearly held that even though the relevant acts were unlawful there was no doubt that Dr. Lake had been removed. The arguments that were advanced in **Lake** were very similar to those that were canvassed in the court below and before this Court. Therefore I find support for my conclusion above in the enunciations of the Board in **Lake**.

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<sup>41</sup> (1979) 43 WIR 108.

- [98] In view of the above, I am satisfied that Ms. Bain-Thomas is entitled to the declaration that the decision of the PSC to appoint Ms. Bain-Thomas to the post of Executive Director, AML/CTFC was contrary to or in contravention of section 85 (2) of the Constitution of Grenada and is therefore null and void. Without any hesitation, I so declare.
- [99] For the sake of completeness, I must state that it remains unclear, whether the post of Executive Director, AML/CTFC is an office within the PSG bearing in mind that the Anti-Money Laundering and Counter Terrorism Commission was created by ordinary legislation and it has not been brought to my attention that the legislation has clearly indicated that the unit falls within the PSG. Unfortunately, neither side has been able to provide the required assistance on this aspect of the case in order to enable me to conclude whether or not it is a public office in the PSG, applying the relevant tests for so doing. There is therefore no basis on which I can conclude that the post of Executive Director AML/CTFC is a public office in the PSG. I would therefore refrain from reaching a definitive position on this point since it is unnecessary to do so.
- [100] For what it is worth, it must be placed on record that Ms. Bain-Thomas is a public officer who has more than thirty (30) years' service in Grenada. I have no reservation in stating that it is also egregious that the post of which Ms. Bain-Thomas has been "transferred" has her now reporting to someone of a lower grade to her and in relation to whom she was the functional superior, she having held the highest office in the PSG namely Secretary to the Cabinet and Head of the Public Service. This in my judgment undermines the respectability and security of tenure of the public office of Secretary to the Cabinet and could never have been in the contemplation of the framers of the Constitution. In effect, quite apart from the transfer appearing to be arbitrary and capricious, it amounts to an effective demotion. This is exactly what the learned author Dr. Francis Alexis has cautioned against at paragraph 20.40<sup>42</sup> when he expressed himself thus:

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<sup>42</sup> See footnote 26 above.

“A Public Service Commission may not proceed as if it is transferring an officer, when it is moving her, not laterally to an office truly equivalent to her former post, but rather sliding her down to a post of lesser rank than her previous post. For then the Public Service Commission may really be demoting her and, in effect, dismissing her unwarrantably. If it is transferring an officer against her will, it may be obliged to afford her a hearing on the proposed transfer, an obligation from which it may not escape by lightly raising some such issue as national security.

[101] In my view, the above pronouncements of the learned Dr. Alexis correctly reflect the settled law. Mr. Phillip’s argument that Ms. Bain-Thomas was in effect demoted is very attractive and persuasive even though I do not need to express a concluded view on the point, save as to say that, at the very least, the transfer does appear to be capricious and arbitrary. The learned trial judge, in my view, quite correctly stated that equivalency is not restricted only to the pay and emoluments grade to which the officer is being transferred. It must include such factors as responsibility, status, challenges of the posts, rank in the public service hierarchy and I would add qualification. This view in no way runs counter to the decision in **Willan Thompson** and **Brian Francis** since in those cases the transfer by the relevant service commissions were not arbitrary and capricious and were effected by the constitutionally authorised bodies to recognised and established offices that were no doubt equivalent; this is in contradistinction to Ms. Bain-Thomas’ transfer.

[102] It seems to me that for the reasons given by the learned judge at page 26 of the judgment it was open to him to conclude that the Office of Secretary to the Cabinet is not in the same category as the office of Executive Director, AML/CTFC. The Secretary to the Cabinet is a public officer in the PSG which is clothed with the security of tenure superior to that which other public officers have. Of interest is the fact that the post of Executive Director can, as it was created be abolished by an ordinary Act of Parliament. It is also of some note that the appointment to the post of Executive Director, AML/CTFC and removal is to be effected by the PSC as distinct by the Governor General.

[103] In all of the circumstances, I have no doubt that the learned judge erred in not granting declaration 2. Consequently, this Court hereby declares that the decision of the PSC to appoint Ms. Bain-Thomas to the post of Executive Director, AML/CTFC with effect from 17<sup>th</sup> February 2014 was a contravention to section 85 (2) of the Constitution of Grenada and therefore unconstitutional, null and void.

**Issue 3 - Whether Ms. Bain-Thomas is entitled to the other declarations that she has sought**

[104] Ms. Bain-Thomas sought declarations 3, 4 and 5 all of which contended that her removal from the post of Secretary to Cabinet in the circumstances amounted to her removal from that post and or a demotion in rank, and this amounted to a compulsory retirement from the PSG and an appointment to the post of Executive Director, AML/CTFC. In my view the conclusions to which I have arrived at in relation to declarations 1 and 2 above effectively dispose of this appeal and it is therefore unnecessary to address the third issue. However, in so far as both sides have addressed the third issue and out of respect to their helpful arguments, I will now examine the merits or demerits of their respective positions.

[105] Section 84(3) of the Constitution clearly indicates that the provisions of this section shall not apply in relation to the following offices that is to say (a) any office to which section 85 of this Constitution applies.

[106] Section 84(8) of the Constitution stipulates that :

“Every officer who is required to retire on abolition of his or her office or for the purpose of reorganization of his or her Ministry or Department shall be entitled to pension and retiring benefits as if he or she had attained the compulsory retirement”

[107] It is clear that section 84(8) cannot apply to Ms. Bain-Thomas since she holds office pursuant to section 85 of the Constitution. Accordingly, there is great force in the learned Solicitor General’s argument that Ms. Bain-Thomas could not avail herself of the section 84(8) protection of the Constitution. The constitutional

provision 84(8) is sufficient to dispose of this ground of appeal, in my view. However, in so far as Mr. Phillip has sought to rely on **Duncan** in support of the proposition that the learned judge erred in not granting declaration 3, 4 and 5 on the basis that Ms. Bain-Thomas has been retired in the public interest, I make it clear that the principles that were expounded by the learned Chief Justice [Ag.] in **Duncan** are good law. However, **Duncan** is clearly distinguishable from the facts at bar.

[108] In **Duncan**, the appellant was asked to take indefinite leave after all of his accumulated leave had been exhausted. This was so even though after his vacation leave had eventually expired. He was never asked to resume his duties. The learned Chief Justice Byron, writing on behalf of the court held that the true nature and real effect of what was done to him was permanently to exclude him from the performance of his employment. In other words, he had effectively been retired. Mr. Duncan was clearly a public officer who fell within the parameters of section 84 (8) of the Constitution whereas, as stated earlier, Ms. Bain-Thomas does not fall within section 84 (8).

[109] In all of the circumstances, I would dismiss Ms. Bain-Thomas' appeal against the refusal of the judge to grant declarations 3, 4 and 5.

[110] I now turn to the burning and consequential question of damages or compensation for breach of Ms. Bain-Thomas' constitutional rights.

### **Damages**

[111] At first instance, Ms. Bain-Thomas had sought damages for her unconstitutional and unlawful removal from the office of Secretary to the Cabinet. However, the learned judge refused to award her any damages based his conclusion that 'the net effect' of his finding in relation to declarations 1 and 2 is that Ms. Bain-Thomas was, and remains the Secretary to the Cabinet on assignment to the post of Executive Director, AML/CTFC with effect from 17<sup>th</sup> February 2014. Learned

counsel Mr. Phillip advocated in this Court that Ms. Bain-Thomas should be awarded compensation for breach of her constitutional right.

[112] In so far as this Court has definitively concluded the learned judge erred in not granting declaration 2, it is evident that since Ms. Bain-Thomas was unlawfully removed from the office of Secretary to the Cabinet she is entitled to be compensated for the breach of her constitutional right. I find support for this view in **Angela Inniss v Attorney General of Saint Christopher and Nevis**<sup>43</sup> in which the Board held that it is appropriate for the High Court to grant damages to the appellant for breach of her constitutional rights provided by section 83(3) of the St. Kitts and Nevis Constitution. This provision is in pari materia with section 85(2) of the Grenada Constitution.<sup>44</sup>

[113] Also, I am fortified in the above view by the pronouncements of Lord Nicholls of Birkenhead in **Attorney General of Trinidad and Tobago v Ramanooop**<sup>45</sup> where he stated that 'a declaration will indicate the fact of the violation but in most cases more will be required than words. This is such a case.' I can do no more than accept and apply those enlightening pronouncements. I too am of the view that the case at bar is such a case and would therefore hold that Ms. Bain-Thomas is entitled to damages in the circumstances. In so far as no evidence has been provided to the High Court or this Court upon which the determination of the quantum of damages or compensation can be made, this Court is unable to do so. Therefore, I would order that the damages are to be assessed by the High Court if they are not agreed by the parties, within 28 days of this judgment.

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<sup>43</sup> See footnote 21 above.

<sup>44</sup> See also *Attorney General v Lake* which provides that compensation is available for unconstitutional removal from office.

<sup>45</sup> [2006] AC 328 at para. 18.

### **Costs**

[114] Ms. Bain-Thomas has prevailed in this appeal in relation to two of the three issues and is therefore entitled to two thirds of the costs of \$7,500.00 that were awarded by the judge below against the Attorney General and the PSC.

### **Conclusion**

[115] In view of the foregoing reasons:

- (1) I would allow Ms. Bain-Thomas' appeal only to the extent that this Court grants declaration No. 2 in addition to declaration 1.
- (2) I also order that Ms. Bain-Thomas is awarded damages against the Government of Grenada for her unconstitutional removal from the Office of Secretary to the Cabinet, to be assessed if not agreed by the parties within 28 days of this order.
- (3) The cross appeal of the Attorney General and the PSC is disallowed in its entirety.
- (4) Ms. Bain-Thomas shall have two thirds of the costs of \$7,500.00 that were awarded by the judge below.

[116] I gratefully acknowledge the helpful assistance of all counsel.

I concur.  
**Paul Webster**  
Justice of Appeal [Ag.]

[117] **MICHEL JA:** I have read the judgment of my learned sister, Blenman JA and I agree with her conclusion that the appellant's appeal be allowed to the extent that the decision of the lower court to refuse to grant the second declaration which was sought by Mrs. Gemma Bain-Thomas is overruled and a declaration is hereby granted that the decision of the Public Service Commission to appoint Mrs. Bain-

Thomas to the post of Executive Director of the Anti-Money Laundering and Counter Terrorism Finance Commission from 17<sup>th</sup> February 2014 was unconstitutional, null and void. I also agree with my learned sister that Mrs. Bain-Thomas be awarded damages against the Government of Grenada for her unconstitutional removal from the office of Secretary to the Cabinet, which damages are to be assessed by the High Court if they are not agreed by the parties within 28 days of the date of this judgment. I agree too that the respondents' cross appeal be dismissed and that the appellant be awarded her costs on the appeal.

**By the Court**

**Chief Registrar**