

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

NO. 3181 of 2000

BETWEEN

**IN THE MATTER OF THE CONSTITUTION OF TRINIDAD AND
TOBAGO BEING THE SCHEDULE TO THE CONSTITUTION OF
THE REPUBLIC OF TRINIDAD AND TOBAGO ACT 1976**

AND

**IN THE MATTER OF THE GUARANTEES OF FUNDAMENTAL
HUMAN RIGHTS AND FREEDOMS IN CHAPTER 1 OF THE SAID
CONSTITUTION**

AND

**IN THE MATTER OF THE ACTION OF THE COMMISSIONER
OF POLICE AND/OR POLICE OFFICERS OF THE TRINIDAD
AND TOBAGO POLICE SERVICE TRANSFERRING THE
APPLICANT FROM THE ORGANIZED CRIME AND
NARCOTIC UNIT TO THE NORTHERN
DIVISION OF THE SERVICE**

AND

**IN THE ACTION AND/OR CONDUCT OF OFFICERS OF THE
TRINIDAD AND TOBAGO POLICE SERVICE IN SERVING
THE APPLICANT WITH WARNING NOTICES PURSUANT TO
REGULATION 81 OF THE POLICE SERVICE COMMISSION
REGULATIONS CHAPTER 1:01 AND INVESTIGATING HIM ON
ALLEGATION THAT HE HAD COMMITTED DISCIPLINARY
OFFENCES CONTRARY TO THE SAID REGULATIONS**

AND

**IN THE MATTER OF THE APPLICATION OF POLICE CONSTABLE
NUMBER 11817 DANE GIBBS THAT IN RELATION TO HIM THE
PROVISIONS OF CHAPTER 1 OF THE SAID CONSTITUTION
HAVE BEEN AND/OR ARE BEING CONTRAVENED AND IN
RESPECT OF THE SAID AND/OR ANY CONTRAVENTIONS
REDRESS IN ACCORDANCE WITH SECTION 14 OF THE
SAID CONSTITUTION AND ORDER 55 OF THE RULE
OF THE SUPREME COURT**

BETWEEN

DANE GIBBS

APPLICANT

AND

**THE ATTORNEY GENERAL
OF TRINIDAD AND TOBAGO**

RESPONDENT

Before the Honourable Mr. Justice P. Moosai

Appearances:

Mr. K. Thompson for the Applicant
Mr. B. Busby and Mr. A. Darmanie for the Respondent

JUDGMENT

The Applicant's claim is for constitutional relief. He claims, inter alia, to be entitled to the following relief and/or redress:

- (a) A declaration that the action and/or conduct of the Commissioner of Police the servant or agent of the Respondent in transferring the Applicant from the Organised Crime and Narcotics Unit (OCNU) of the Police Service to the

Northern Division thereof effective the 3rd day of January 2000 contravened the Applicant's right to the protection of the law and equality of treatment from a public authority in the exercise of a public function as guaranteed by sections 4 (b) and 4 (d) of the Constitution of Trinidad and Tobago.

- (b) A declaration that the transfer of the Applicant from OCNU to the Northern Division thereof by the Commissioner of Police the servant or agent of the Respondent effective the 3rd day of January 2000 is and continues to be illegal and unconstitutional.
- (c) A declaration that the service of two warning notices dated the 27th day of April 2000 pursuant to Regulation 81 of the Police Service Commission Regulations Chapter 1: 01 (“the Regulations”) upon the Applicant for alleged disciplinary offences and the conduct of an investigation into the same by police officers being the servant or agents of the Respondent violated the Applicant's rights to the protection of the law and equality of treatment from a public authority, in the discharge of a public function as guaranteed by sections 4 (b) and 4 (d) of the Constitution of Trinidad and Tobago.
- (d) A declaration that the service of the said warning notices upon the Applicant and the conduct of the said investigation by police officers being servant or agents of the respondent are and continues to be illegal and unconstitutional.
- (e) An order for monetary compensation, including aggravated and exemplary damages, in favour of the Applicant for the loss and damage he has suffered as a direct consequence of the said transfer, the service upon him of the warning notices and the conduct of the investigation.
- (f) An order rescinding the said transfer.

- (g) An order requiring Corporal George and/or other officers of the police service to cease the said investigation.
- (h) All such further orders directions and inquiries as appear just and appropriate for the purpose of enforcing the fundamental rights and freedoms of the Applicant under the Constitution

The grounds upon which he bases his claim are as follows:

1. The Applicant is and at all material times was a constable in the Trinidad and Tobago Police Service having enlisted in the service on the 15th day of August 1983.
2. After serving in various Branches and Divisions of the service the Applicant was transferred from the Guard and Emergency Branch to OCNU on the 2nd day of August 1989.
3. In the month of September 1999 the Applicant was granted accumulated vacation leave from the 1st October 1999 to 7th April 2000, with the express written permission of the Commissioner of Police to proceed to the United States of America. Before the Applicant proceeded on vacation leave he supplied his Senior Officer with the address at which he had intended to stay in that country so that he may be contacted if required. The Applicant was also issued with a leave pass.
4. By Departmental Order No 08 dated 12th January 2000, whilst the Applicant was still on vacation leave out of the jurisdiction, the Commissioner of Police transferred the Applicant from OCNU to the Northern Division of the Service effective 3rd January 2000, without giving him the 14-day period of notice as required by Regulation 28 of the Regulations.

5. Prior and subsequent to the 3rd January 2000, the Commissioner of Police and/or the Deputy Commissioner of Police transferred other members of the Service from OCNU to other Branches and Divisions of the Service and in doing so complied with the Regulations by giving those officers the prescribed 14-day period of notice.
6. On 27th April, 2000 the Applicant was served with two warning notices pursuant to Regulation 81 of the Regulations alleging that he had committed two disciplinary offences.
7. One of the alleged offences is Disobedience to Orders by failing to attend Court Orderly Room on 17th November 1999. The other is Absence from Duty without leave by failing to attend the Siparia Magistrates' Court on 17th November 1999 in the case against Kaimraj Rampersad for possession of cocaine for the purpose of trafficking.
8. Following upon the service of the warning notices an investigation was conducted into the alleged offences by Corporal George of the Mounted Branch, he having been appointed by Senior Officers of the Service to do so. During the investigation the Applicant and other police officers were questioned and asked to provide the investigator with statements.
9. The warning notice in respect of the alleged offence of Disobedience to Orders stated that the Applicant had contravened Departmental Order 79 paragraph 11 (ii) as amended by Departmental Order Number 28/82 paragraph 2. These two Departmental Orders apply where a Police Prosecutor has conduct of a prosecution. In the instant case, however, a State Attorney namely, Miss Leslie Ann Banfield, had conduct of the prosecution in question.
10. Moreover, the Applicant, as he was required to do, furnished his Senior Officers with a list of all the cases pending in the Courts of Trinidad and

Tobago in which he was a witness/Complainant and the dates to which they were adjourned, prior to going off on his leave.

11. The Applicant departed Trinidad and Tobago on 22nd October, 1999 and returned on 11th January, 2000. He was never officially informed of the transfer.
12. Police Officers who receive the express permission of the Commissioner of Police to proceed out of the country whilst on vacation leave are never served with warning notices for failing to attend Court or Court Orderly Room in respect of any day falling within the period of their leave.
13. The usual practice is for the police prosecution or State Attorney to inform the Court of the absence of the officers from the jurisdiction and to seek an adjournment. The instant case is unprecedented.
14. There is no basis in law for the transfer of the Applicant without giving him the statutory 14-day period of notice, for serving him with the two warning notices and for conducting an investigation into the disciplinary offences alleged therein.
15. The conduct of the servants or agents of the Respondent is unconstitutional illegal and wholly unjustifiable.
16. The Applicant has been deprived of his rights to the protection of the law, and equality of treatment from a public authority in the exercise of a public function which deprivation amounts to a contravention of his rights as guaranteed by section 4 (b) and 4 (d) of the Constitution of Trinidad and Tobago.

The parties elected not to cross-examine any of the deponents.

The Applicant has been a police constable for about 18 years. The Applicant enlisted in the police service on 15th August, 1983 and, after a period of training at the Police Training College, graduated. He was then posted to the Guard & Emergency Branch on 24th May, 1984. On 27th July, 1989 he was transferred to the Northern Division. On the 2nd August, 1989 the Applicant was transferred from Guard & Emergency Branch to OCNU. OCNU officers are essentially required to undergo specialist training in the detection of narcotic offences. **As is immediately apparent, the Applicant would have been transferred on a few occasions prior to the transfer which forms part of the subject matter of his complaint.**

It is not in dispute that the Commissioner of Police has the authority to transfer a police officer from one Division or Branch to another. By the Police Service Commission (Delegation of Powers) Order, Chapter 1: 01, the Police Service Commission delegated to the Commissioner of Police, inter alia, the "power to transfer police officers from one division or branch in the Police Service, specified in a notice published under the Police Service Regulations, to another such division or branch."

Regulation 28 of the Regulations provides:

“28.(1) “Where the Commission proposes to transfer a police officer, the Commission shall, except where the exigencies of the service do not permit, make an order of transfer in writing and shall give not less than fourteen days notice to the officer who is to be transferred.

(2) In considering the transfer of a police officer the Commission shall take into account any hardship that such transfer may occasion to the officer.

(3) Sub Regulation (2) shall not apply where a transfer is ordered as a penalty imposed for an offence under these Regulations.”

Acting Inspector Anthony Andrews set out in his affidavit of 21st September, 2001 some of the reasons for a transfer:

"6.... The transfer of officers is a very common occurrence in the police service and is absolutely necessary for the effective administration of the service. There are many reasons why officers may be transferred which include the following: it could be on request, one Division may be over-strength while another may be under strength so officers may be transferred to equate the divisions/branches, it could be as a result of some other form of administrative policy, it may be as a result of exigencies of the police service. This list is not intended to be exhaustive.

7. The Commissioner of Police is charged with the responsibility of administering the Police Service. In this regard he transfers personnel as he sees necessary for the efficient working of the police service. Any officer in the police service can be transferred if the Commissioner is of the view that it is to the benefit of the police service to transfer the officer. No officer has any right not to be transferred. The Police Service would be totally dysfunctional if the Commissioner could not transfer officers."

Andrews also set out the procedure to be adopted for the transfer of an officer:

"10. When the Commissioner decides to transfer an officer, that information is passed on by means of the Departmental Order. The Departmental Order is sent to the various divisions and branches and is displayed at the division and branches inclusive of the one to which the officer being transferred is attached. The Departmental Order would come to the attention of the officer concerned and his head of department. In addition to the Departmental Order officers are usually informed of their transfer by means of a telephone call to their division or branch.

11. There are occasions when an officer, who is on leave, may be transferred. There is no hard and fast rule, but in most instances efforts are made to notify the officer about his transfer by communicating with the officer directly via the telephone or by leaving a message at his home. **However when an officer is out of the jurisdiction or, for whatever reason no prior message is left at the officer's residence, on his return to work he would be notified or at least become aware that he was transferred. The officer would be informed of his transfer by the Sergeant or Inspector of the Department, or by the officer reading the Departmental Order when he returns to work/duty. Due to the nature of the police service, the exigencies of the service and for reasons which at times makes it impractical to do so officers may not always get 14 days notice when they are being transferred. At times, before the Departmental Order is printed and sent to the various divisions and branches, the head of the Division or Branch and the officer concerned are informed of the transfer."** [Emphasis Added.]

In September 1999 the Applicant was granted accumulated vacation leave from 1st October, 1999 to 7th April 2000. The Commissioner of Police also granted permission to the Applicant to proceed on vacation leave out of the jurisdiction, namely, to the United States of America, for the said period. This formed part of the subject matter of Departmental Order No 170 dated 17th September 1999.

Again Andrews set out the procedure to be followed for leave at paragraphs 14 and 15.

“14. A police officer wishing to go on leave would apply in writing to the head of his division through his immediate senior officer. The senior officer will forward the application to the head of the division. When the officer intends to spend his vacation abroad he must indicate this. He must also indicate the period he would be abroad and the address (es)

where he can be located whilst abroad and the period during which he will be at that address.

15. If the officer wishing to go on leave has pending magisterial and High Court matters he must notify his senior officer of this. The officer may still be granted permission to proceed on vacation leave out of the jurisdiction even though he may have pending Court matters. **However the officer has the responsibility to inform the Court Prosecutor or State Attorney prosecuting in the matter in which he is involved of his proceeding on leave out of the country. This is to allow the prosecutor to make the Court aware of the unavailability or whereabouts of the officer. If it is necessary for the officer to attend Court even though he is on vacation leave abroad he must return for those days. Thus even if an officer is abroad on vacation leave with the express written permission of the Commissioner of Police, once his attendance at Court is required he must return.** [Emphasis Added.]

The Applicant provided his Senior Officer with the address at which he intended to stay in the United States of America so that he could have been contacted if required.

Prior to his departure for the United States of America the Applicant, by document dated and signed by him on 19th October 1999, submitted, as he was required to do, to the Superintendent in charge of the Court & Process Branch a list of cases pending in court in which he was either the complainant or a witness. Among the cases listed by the Applicant was the case of Kaimraj Rampersad "for Possession of cocaine for the purpose of trafficking to be heard on 29. 10. 99 at the Siparia Magistrate Court." It is clear therefore that by his document of 19th October 1999, the Applicant knew that the matter against Kaimraj Rampersad, in respect of which he was the complainant, was adjourned the 29th October, 1999. **However the Applicant at paragraph 4 of his affidavit of 5th December 2001 denied knowing that the case was adjourned to 29th October, 1999. This of course would affect his credibility.**

The Applicant left Trinidad for the United States of America on 22nd October, 1999 and returned on 11th January, 2000. On 17th November, 1999 the Magistrate dismissed the case against Kaimraj Rampersad as Miss Banfield was unable to put in the Certificate of Analysis due to the Applicant's absence.

By Departmental Order number 08 dated 12th January, 2000, the Applicant was one of 8 officers transferred from OCNU by the Commissioner of Police to various Divisions throughout Trinidad and Tobago with effect from 3rd January, 2000.

The Applicant returned to Trinidad on 11th January, 2000. On 7th March, 2000 the Applicant applied for a transfer from the Northern Division to the Mounted Branch setting out his reasons therefor. His transfer to Mounted Branch was approved by the Commissioner of Police. At present the Applicant is still attached to Mounted Branch. Pausing there it is to be noted that prior to and by the said application of 7th March, 2000, the Applicant made no complaints about of his transfer, it's illegality or otherwise, from OCNU to Mounted Branch. **The complaint about his transfer is made for the first time in this Motion filed on 18th December, 2000, approximately one year after his return from the United States of America.**

In his Affidavit of 18th December, 2000 the Applicant complains that as a direct result of his transfer to the Northern Division he has suffered and continues to suffer the loss of his commuted overtime allowance, his detective allowance, plain clothes allowance and narcotics allowance, all of which were paid on a monthly basis. Essentially the Applicant's first complaint is that he was transferred whilst he was still on vacation leave in the United States of America without being given the 14-day period of notice as required by Regulation 28 of the Police Service Commission Regulations Chapter 1: 01. A similar issue was raised in **Harikissoon v AG** [1980] A.C. 265 [PC]. Harikissoon's complainant was that at a time when he was a member of the Teaching Service and serving in the post of a class 1 teacher at Penal Government Primary School, he had been

unlawfully transferred by the Teaching Service Commission to a similar post at Palo Seco Government Primary School.

At page 268 Lord Diplock stated:

"The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6 (1), the mere allegation that a human right or fundamental freedom of the Applicant has been or is likely to be contravened is not of itself sufficient to entitle the Applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.

The instant case concerns and concerns only the right of the holder of a public office not to be transferred against his will from one place to another. In their Lordships' view it is manifest that this is not included among the human rights and fundamental freedoms specified in Chapter 1 of the Constitution."

In **Harikissoon** the procedure for transfer was dealt with under Regulations made by the Teaching Service Commission. The Regulations permitted representation to the Commission to be made by a teacher who was aggrieved by the order of transfer for a review of the order. In the instant case there are no regulations governing the review of an order of transfer made by the Commissioner of Police. **But it cannot be disputed that the transfer made by the Commissioner of Police was an administrative act.** The Applicant ought therefore to have availed himself of the appropriate judicial remedy for unlawful administrative action namely, an application for certiorari to quash the order made by the Commissioner of Police. It was therefore an abuse of the process of the court for the Applicant to make an application to the Court on this ground. Further the right of the police officer not to be transferred against his will from one place to another is not included among the human rights and fundamental freedoms set out in Chapter 1 of the Constitution.

In **Thakur Persad Jaroo v Attorney General** Privy Council Appeal No. 54 of 2000, the Privy Council emphasized that the right to apply to the High Court under Section 14(1) of the Constitution should only be exercised in exceptional circumstances where there is a parallel remedy. The instant case is not an exceptional case.

But the Applicant's case is not fought on that basis alone. The Applicant also contends that he was transferred by the Commissioner of Police in contravention of Regulation 28 which is mandatory in nature, and in circumstances where his right to the protection of the law under section 4 (b), and his right to equality of treatment from a public authority in the exercise of a public function under section 4 (d) of the Constitution have been contravened.

EQUALITY

Section 4 (a) (b) and (d) of the Constitution provides:

"4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely -

- (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
- (b) the right of the individual to equality before the law and the protection of the law;
- (c) the right of the individual to equality of treatment from any public authority in the exercise of any functions."

As indicated earlier no police officer has a constitutional right not to be transferred. Therefore the question as to whether regulation 28 was mandatory or directory in nature thereby requiring the Commissioner of Police to comply strictly with the requirement as to time is a matter that ought to have been pursued by the Applicant in judicial review proceedings. The Privy Council in **Herbert Charles v The Judicial & Legal Service Commission** Privy Council Appeal No 26 of 2001 had cause to examine the effect of failures to observe time limits laid down by Regulations dealing with discipline and misconduct in the public service. Their Lordships cited **Wang v Commissioner of Inland Revenue** [1994] 1 WLR 1286 where Lord Slynn said at page 1296:

"... their Lordships consider that when a question like the present one arises -- **an alleged failure to comply with a time provision** -- it is simpler and better to avoid these two words 'mandatory' and 'directory' and to ask two questions. The first is whether the legislature intended the person making the determination to comply with the time provision, whether a fixed time or a reasonable time. Secondly, if so, did the legislature intend that a failure to comply with such a

time provision would deprive the decision maker of jurisdiction and render any decision which it purported to make null and void?" [Emphasis Added].

In **London and Clydesdale Estates Ltd v Aberdeen** [1988] 1 WLR 182 Lord Hailsham examined the court's position in determining what should be the legal consequences of non-compliance with statutory or regulatory provisions. In considering the spectrum of possibilities his Lordship said at page 189:

"At one end of the spectrum there may be cases in which a **fundamental obligation** may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences upon himself. In such a case if the defaulting authority seeks to rely on its action it may be that the subject is entitled to use the defect in procedure simply as a shield or defence without having taken any positive action of its own. At the other end of the spectrum the defect in procedure may be so **nugatory or trifling** that the authority can safely proceed without remedial action, confident that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint." [Emphasis Added]

Commenting on what Lord Hailsham said in **London and Clydesdale Estates Ltd**, the Right Honourable Justice Tipping in **Herbert Charles** concluded his analysis of regulation 90 of the Public Service Commission Regulations by saying:

"His Lordship [Lord Bingham] added that most cases will fall somewhere in the middle and will be for the courts to assess. **If a complaint is made about the non-fulfilment of a time limit the giving of relief will usually be discretionary.** This discretionary element to which Lord Hailsham referred underlines the fact that problems arising from breach of time limits and other like procedural flaws are not generally susceptible of rigid classification or black and white a priori rules. With this in mind their Lordships note that in the present case the

delays were in good faith, they were not lengthy and they were entirely understandable. The appellant suffered no material prejudice; no fair trial considerations were or could have been raised, and no fundamental human rights are in issue.

Bearing in mind the relevant aspects of regulation 90 and its regulatory environment, and the other relevant circumstances of the case, including the lack of significant impact of the time defaults on the appellant, their Lordships came to the clear view that the regulations cannot have been framed with the intention that breaches of the kind in issue would deprive the Commission of jurisdiction to act as it thought fit on the investigating officer's report and thereby fulfil its public responsibilities.

De Smith, Woolf and Jowell, Judicial Review of Administrative Action, 5th edition, in looking at the tangle created by the law relating to the effect of failure to comply with statutory requirements states at paragraphs 5 -- 060:

"A second reason for the tangle in this area is the use of the terms "mandatory", and "directory"; the latter term is especially misleading. All statutory requirements are prima facie mandatory. However, in some situations the violation of the provision will, in the context of the statute as a whole and the circumstances of the particular decision, not violate the objects and purpose of the statute. Condoning such a breach does not, however render the statutory provision directory or discretionary. The breach of the particular provision is treated in the circumstances as not involving a breach of the statute taken as a whole. Furthermore, logically, a provision cannot be mandatory if a court has a discretion not to enforce it.

The matter is thus better conceived in terms of inferences drawn from the language used and the context of the legislation, and by acknowledging

the fact that courts may in their discretion decide not to strike down or otherwise provide a remedy in relation to a failure to observe a required statutory provision.

In order to decide whether a presumption that a provision is mandatory is in fact rebutted, the whole scope and purpose of the enactment must be considered, and one must assess "the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act." Howard v Bodington (1877) 2 Probate Division 203, 211.] **It is necessary to assess the importance of the provision, particular regard being given to its significance as a protection of individual rights, the relative value that is normally attached to the rights that may be adversely affected by the decision, and the importance of the procedural requirement in the overall administrative scheme established by the statute.** The breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature, or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced. But the requirement will be treated as "fundamental" and of "central importance" if members of the public might suffer for its breach. Another factor influencing the categorisation is whether there may be another opportunity to rectify the situation; of putting right the failure to observe the requirement." [Emphasis Added]

A police officer has no constitutional right not to be transferred, so that compliance with the time frame involves no fundamental human rights and freedoms. When one looks at regulation 28 in the context of the administrative scheme, Regulation 28 is but part of an administrative scheme allowing the Commissioner of Police to properly manage and administer the police service. It will be noted that pursuant to the Police Service Commission (Delegation of Powers) Order Chapter 1:01, the powers delegated to the Commissioner of Police by the Police Service Commission include the power to appoint

police officers in the Second Division of the Police Service below the office of Police Inspector, the power of the Commissioner of Police to transfer police officers from one division or branch in the Police Service to another such division or branch, the power to suspend a police officer, the power to certify the eligibility of a police officer below the rank of Inspector for an annual increment, resignations in respect of a police officer in an office in the Second Division of the Police Service below the office of Inspector, the power to exercise disciplinary control in respect of certain offences. The delegation of powers by the Police Service Commission certainly seems to suggest that the Police Service Commission wished to give the Commissioner of Police greater autonomy in managing and/or micro-managing at least the greater part of the Second Division of the Police Service, thereby obviating the need for the Police Service Commission to do same. Obviously that must have been on the basis that the Commissioner of Police would be in the best position to understand the day to day functioning of the police service and certainly to reinforce the authority of the Commissioner of Police to govern the rank and file.

There may be many reasons why a Commissioner of Police would wish to transfer officers at short notice. In that case statutory sanction is provided by allowing the Commissioner of Police to resort to the statutory exception namely, “except where the exigencies of the service do not permit.”

Exigencies is defined in Black's Law Dictionary 5th Edition as:

“Demand, want, need, imperativeness. Something arising suddenly out of the current of events, any event or occasional combination of circumstances calling for immediate action or remedy; a pressing necessity; a sudden and unexpected happening or an unforeseen occurrence or condition. **Los Angeles County v Payne**, 8 Cal. 2d 563, 66 P. 2d 658, 663. State of being urgent or exigent; pressing need or demand; also, case requiring immediate attention, assistance, or remedy; critical period or condition, pressing necessity. **State v Rubion**, Tex. Civil Appeal 292, S.W. 2d & 650, 657”

In the context of a regulatory framework which provides for a 14-day period of notice when an officer is being transferred “except where the exigencies of the service do not permit,” “exigencies” connotes urgency, a pressing necessity. We are not told in the instant case that the Applicant was transferred because of the exigencies of the service, otherwise that would have been deposed to in the Respondent's affidavits. I am prepared to deal with this issue on the basis that the Applicant was transferred as part of an administrative arrangement (see para. 7 of Andrews affidavit of September 21, 2000). The Commissioner of Police himself said in his affidavit of September 21, 2000 that the transfer of the Applicant was purely an administrative one, and not as a result of any allegation of misconduct. But it by no means follows where the Commissioner of Police transfers an officer without giving him the statutory 14-day period of notice, that automatically results in the Applicant being provided with a remedy as a result of the failure to comply the provision as to time.

Reverting to the question posed in Wang's case (supra), it does not seem to me that the legislature intended that a failure to comply with the 14-day period of notice would deprive the Commissioner of Police of jurisdiction and render his decision to transfer the Applicant null and void. Having had delegated to him the responsibility of managing and micro-managing a large part of the police service, it would seem to me that it would not be in the interest of good administration if every transfer made without complying with the statutory period was liable to be set aside. The Regulations were introduced for the better working of the police service and not to find a technicality to inhibit the efficient functioning of the police service.

I am of the view that the 14-day period of notice is a directory requirement with the consequence that if there is non-compliance with the requirement as to time, that does not invalidate the transfer. The Applicant is complaining of the loss of his monthly commuted overtime allowance, his detective's allowance, plain clothes allowance and narcotic allowance. That in effect is a claim for some kind of monetary hardship flowing from his being in the OCNU. It seems to me there is no right to remain a detective,

narcotics or otherwise. The Commissioner of Police by Regulation 28(2) also has to take hardship into account when considering the question of a transfer. The Commissioner of Police in his affidavit stated that where a transfer causes hardship, a police officer has the option of applying for a hardship allowance, but that the Applicant never applied for one at the relevant time.

There is some additional complaint about the Applicant moving from a non-uniformed officer to an officer in uniform. That clearly has no merit. There is no right to a non-uniformed post. The Applicant also claims to have suffered emotional distress and embarrassment as a result of the said transfer, in that some police officers believed that he was transferred because he took a bribe from Kaimraj Rampersad to have the case dismissed. Suffice it to say that there is nothing to suggest that that was the reason for the Applicant's transfer. Further the investigator found there was insufficient evidence to support any breaches of discipline. A fortiori there is nothing to suggest that the Applicant took a bribe from Kaimraj Rampersad.

Again I make the point that the Applicant has for the first time set out the details of his complaint in his affidavit of 18th December 2000 and 5th December 2001. Further he applied for a transfer from Northern Division to Mounted Branch and accepted same without asking for any remedy or compensation. It therefore seems to me that the Applicant is challenging not simply the fact that he was not given the 14-day period of notice, but the transfer per se. All of these issues could have been dealt with by seeking the appropriate remedy in judicial review proceedings.

In considering the Applicant's written submissions namely, that contrary to section 4 (b) and (d) of the Constitution, he was denied the right to equality before the law and the protection of the law, the Applicant contends that prior and subsequent to the Applicant being transferred from OCNU, the Commissioner of Police transferred other members from OCNU to other Branches and Divisions of the Police Service and, in so doing, complied with the Regulations by giving them the 14-day period of notice. He further submits that the circumstances of those officers were similar to those of the Applicant in

that they were all attached to a Specialist Unit where they were required to be in plain clothes rather than Police uniform, were paid commuted overtime and other allowances not payable to uniformed officers, and were all specially trained.

The Applicant also seeks to establish mala fides by establishing that the transfer of the Applicant was **preceded** by a memorandum from the DPP to the Assistant Commissioner with responsibility for crime dated 1st March, 2000.

In **Basu's Commentary on the Constitution of India**, sixth edition Volume B at pp 7 and 8, the author succinctly defines equality before the law:

"Equality before the law does not mean an absolute equality of men, which is a physical impossibility, but the *denial of any special privilege* by reason of birth, creed or the like in favour of any individual and also the equal subjection of all individuals and classes to the *ordinary law* of the land administered by the ordinary law Courts." [Italics supplied.]

Jennings, Law of the Constitution, 5th Edition pp 50 defines the principle of equality before the Law:

"Equality before the law means that among equals the law should be equal and should be equally administered, that like should be treated alike."

In **Smith and another v LJ Williams Limited** (1980) 32 WIR 395 at 407 to 408, Bernard J (as he then was) adopted what was said by **Basu in Basu's Shorter Constitution of India (1976) 7th Edition Vol. 1 page 47** on the question of the denial of equal protection in the administration of the law:

"1. Equal protection may be denied not only by legislation but also by the administration of a law. The principles to be applied when an administrative act is challenged should not be confused with those

which are to be applied when the law itself under which the administrative act is purported to be done is challenged.

2. When the statute itself is not discriminatory and the charge of violation of equal protection is only against the official who is entrusted with the duty of carrying it into operation the charge will fail if the power has been exercised in good faith within the limitation imposed by the Act and for the achievement of the objects the enactment had in view; if however the person who alleges discrimination succeeds in establishing that the step was taken intentionally for the purpose of injuring him, or in other words that it was a hostile act directed against him, the executive act complained of must be annulled even though the statute itself be not discriminatory. In short, if the Act is fair and good, the authority who has to administer it will be generally protected. To this rule, however, there is an exception which comes into play when there is evidence of mala fides in the application of the Act: **State of West Bengal v Anwar Ali Sarkar** [1952]SCR 284.

- (a) In short, when a law is challenged as discriminatory the relevant consideration is the effect of the law and the intention of the legislature. But when a law is itself non-discriminatory but its administration is challenged as discriminatory the question of the intention of the administrative authority becomes material; in such a case the administrative action cannot be said to offend against article 14 unless it was mala fide or actuated by a hostile intention as distinguished from mere oversight: **Ramnath v State of Rajasthan** [1967] SCR 603 at page 608, **Pannalal v Union of India** [1957] SCR 233. In the result, mere violation of a law by the executive does not amount to a violation of equal protection.

- (b) Such mala fide administration is never presumed, but has to be proved. On the other hand the presumption is that public officials will discharge their duties honestly and in accordance with rules of law: **Pannalal v Union of India**, supra. This presumption is heightened when the law vests a discretion in high officials or authorities as distinguished from minor officials or in the Government itself.

- (c) If, however, the executive exercises its power in disregard of the policy indicated by the legislature then the exercise of the power by the executive can be annulled as discriminatory and being in contravention of article 14: **Ramnina v State of Samrashtra Supreme Court** [1952]SCR 435."

In *Smith's case* Bernard J at pp 410, 411 succinctly stated the principles applicable to equality:

"In my opinion section 4 (b) transcends two basic concepts: (1) equality before the law; and (2) the protection of the law; both of which philosophies may be said to (and can) arise in a particular case, although for the purpose of an alleged contravention of the enshrined guarantee this need not necessarily be so.

In my opinion section 4 (b) applies both to legislation as such as well as to administrative acts of officials. In so far as legislation is concerned, the right to reasonable legislative classification is not under Chapter 1 denied to the State. Further there is a presumption of the constitutionality of legislation. In consequence, the burden is upon the aggrieved party to show that the enactment is violative of the Republican Constitution.

In so far as official acts are concerned, the nub of the matter is, in my view, that the section both guarantees and is intended to ensure that where parties are similarly placed under the law they are entitled to like treatment under the law. However, there is a presumption of regularity in the acts and conduct of officials. Consequently, the burden of proof is upon the aggrieved party to establish mala fides in the administration of the enactment. Of course, mala fides particularly in cases of this sort is not normally expressed. However, it can be and is usually to be implied from overt acts. In this connection it is not necessary, in my view, to prove "an evil eye" although I do not doubt that in some cases the evidence may be such that the act complained about can be seen to transcend both the concept of the "unequal hand" and an "evil eye" at the end of the day. In my opinion, so long as it can be shown that the act was a hostile act or an intentional and irresponsible act, i.e. an act done deliberately and without justification, that will be enough evidence to rebut the presumption of regularity."

In the instant case, the Applicant complains of discrimination, not on the basis that the regulation was discriminatory, but on the basis of the administration of the regulation. Again I make the point that the regulation in question is merely directory, not mandatory in nature.

Looked at from the standpoint of equality before the law, and equality of treatment, the Applicant's assertion **that officers who were transferred from OCNU** prior and subsequent to the Applicant were given the 14-day notice was put in issue by the Respondent. Save for the three officers referred to by the Applicant, he has not condescended to particulars nor sought to cross-examine, even though Andrews has set out in detail the procedure that is followed when **officers, and not only OCNU officers, are being transferred.** That when the Commissioner decides to transfer an officer, the information is passed on by means of the Departmental Order which is sent to the various divisions and branches and is displayed there. That Departmental Order comes to the attention of the officer concerned or his head of department. In addition officers are

usually informed of their transfer by means of a telephone call to their Division or branch. However when an officer is out of the jurisdiction or, for whatever reason, no prior message is left at the officer's residence, on his return to work the officer would be notified or at least become aware that he has been transferred either by the Sergeant or Inspector bringing it to his attention or by him reading the Departmental Order. Andrews goes on that due to the nature of the Police service, the exigencies of the service and for reasons which at times makes it impractical to do so, officers may not always get 14 days' notice before they are being transferred. At times before the Departmental Order is printed and sent to the various divisions and branches, the head of the Division or Branch and the officer concerned are informed of the transfer. There is no hard and fast rule when officers on leave are being transferred, but in most instances efforts are made to contact the officer directly via telephone or by leaving a message at his home.

The onus was therefore on the Applicant to establish that prior and subsequent to the Applicant being transferred from OCNU, the Commissioner of Police transferred other members from OCNU to other branches and divisions by giving them the 14-day notice. This he has failed to do. I am therefore of the view that the procedure adopted in effecting the transfer of Police officers is as set out by Andrews on behalf of the Respondent. That in itself suggests that from a practical point of view every effort is made to notify an officer who is on leave out of the jurisdiction. Equality of treatment suggests that like should be treated alike. In the instant case the Applicant has failed to establish that OCNU officers were treated differently from other police officers and has also failed to establish that he was treated differently from other OCNU officers.

The Applicant also attempts to draw an analogy with his case and all the other officers from OCNU in showing that their circumstances were similar. However in looking at his comparison with the other officers who were transferred pursuant to the same Departmental Order, and even with all OCNU officers transferred prior to and subsequent to that date, the conclusion can be drawn that the Applicant is in a very different position from the others in that he was out of the jurisdiction. The Applicant has not established to the contrary and it could not reasonably be suggested that every other OCNU officer

who has ever been transferred was out of the jurisdiction at the time. That immediately sets the Applicant apart.

In so far as his **oral submission** that the other officers from OCNU who were transferred pursuant to the same Departmental Order were given the 14-day notice, I have perused the affidavits and found nothing there to suggest that these officers were given the 14-day notice. It is clear in the instant case that the Applicant was one of eight officers transferred from OCNU by the Commissioner in an administrative arrangement. The Commissioner of Police in his Affidavit stated that on or about 24th December, 1999 he gave directions that the Applicant be transferred from OCNU to the Northern Division effective 3rd January, 2000, which directions were published in Departmental Order No 8 dated 12th January 2000. Further that "the decision to transfer the Applicant was purely an administrative one and not as a result of any allegation of misconduct by the Applicant while he was serving at the Organised Crime and Narcotic Unit."

As evidence of mala fides, the Applicant relies on the fact that the transfer was **preceded** by a memorandum from the DPP to establish mala fides on the part of the Commissioner of Police. But as is obvious from the correspondence itself, that memorandum is dated 1st March, 2000. The transfer was effected before that date namely, on 3rd January 2000. The Commissioner clearly did not have notice that any allegation was being made against the Applicant until some two months after the transfer was effected. And the Commissioner stated categorically that the transfer was purely an administrative one and not as a result of any misconduct by the Applicant. It is manifestly clear that there is no evidence of mala fides on the part of the Commissioner of Police.

In the instant case the Applicant has not set out with sufficient particularity the time when he received the notice of transfer. Again that is of fundamental importance. The Applicant returned to Trinidad on 11th January 2000 and requested a transfer on 7th March 2000. The Court therefore finds itself in some difficulty in determining the exact time the Applicant received notice of his transfer even though it seems the more probable

date would have been on 11th January 2000, the date of his return to Trinidad and Tobago.

WARNING NOTICES

The Applicant then sought to link his transfer with the service of the warning notices upon him to suggest that there had been some deliberate or intentional act on the part of the Commissioner of Police and therefore mala fides. But in my view there is no clear, cogent and compelling evidence produced by the Applicant, on whom the onus lies, to suggest any nexus between the transfer and the service of the Warning Notices. It is manifestly clear that the transfer was effected before the Commissioner of Police received the memorandum from the DPP complaining of the Applicant's conduct. The Warning Notices therefore are to be considered separately.

Miss Banfield, in a report of 24th November, 1999 to the DPP, set out the history of the matter. This revealed that on 23rd August, 1999 Defence Counsel objected to the tendering of the Certificate of Analysis in relation to a quantity of narcotics into evidence by the prosecution as the exhibit was not before the Court. The Applicant was present on that date. The matter was then adjourned to 10th September, 1999 for the Magistrate to give his decision. On 10th September, 1999 the Magistrate overruled the objection of Defence Counsel and ruled that the Certificate of Analysis was admissible without the presence of the narcotics. The Applicant was once again present on that date but, as the court had no time to hear the matter, the matter was adjourned to 27th September 1999.

When the matter was recalled on 27th September, the Applicant failed to show and sent no explanation for his absence. Miss Banfield sought an adjournment, which was granted, to 29th October, 1999. During the week of 27 September Miss Banfield called OCNU at the Woodbrook Police Station and left an official message for the Applicant informing him of the adjourned date. Miss Banfield then went on vacation from 4th October to 18th October, 1999.

I should point out again that even though the Applicant in his affidavit denied knowing that the matter was adjourned to 29th October, 1999, his document dated 19th October 1999 and submitted to the Superintendent in charge of the Court and Process Branch makes clear that he knew of that adjourned date. The Applicant has yet to provide a reason for his absence from Court on September 27th and his failure to inform Miss Banfield of the reason for same.

Miss Banfield appeared in Court on 29th October 1999 but the Applicant did not appear and the matter was adjourned to 17th November, 1999. It should be pointed out that the Applicant left Trinidad on 22nd October, 1999 to go to the USA.

On 15th November Miss Banfield called the Woodbrook Police Station to leave an official message for the Applicant. She was then informed that the Applicant had taken vacation since 1st October 1999 and was due to return on 7th April, 2000, and, further, that the Applicant was out of the jurisdiction.

On 17th November, 1999, the Applicant failed to appear at court. Miss Banfield then informed the Magistrate that the Applicant was out of the jurisdiction until 7th April, 2000 and sought an adjournment. The Magistrate informed her that he was not willing to grant another adjournment, and discharged Kaimraj Rampersad.

Miss Banfield set out in her report that the exhibit itself namely, 404.89 g of cocaine, was deemed inadmissible by the Court due to the fact that when the exhibit was offered in court, it did not match the description provided by the Applicant. Attempts were then made to get Miss Grannum but to no avail. The Applicant was then made aware of the importance of his giving evidence namely, his presence was necessary to tender the Certificate of Analysis into evidence as he had collected same from Miss Grannum. Without the Certificate of Analysis being tendered, Miss Banfield could not proceed any further in the case. The Applicant at no time informed her of his intention to go on vacation.

These were therefore **the allegations** being made by Miss Banfield. Having regard to the allegations made, the DPP by memorandum dated 1st March, 2000, wrote the Assistant Commissioner of Police "Crime" concerning the absence of the Applicant from court in the case against Kaimraj Singh, thereby resulting in the drug trafficking charge being dismissed. The DPP also set out that the Applicant was aware of the adjourned date of the matter and was also aware of the significance of his evidence, but still proceeded on vacation leave out of the country. The DPP also complained that a connected restraint order with respect to Singh's assets had to be discharged because of the termination of the criminal prosecution. The DPP requested that there be an urgent departmental investigation into the matter and attached a copy of Miss Banfield's report to the said memorandum.

Having regard to the allegations made, the Applicant was served with 2 Warning Notices dated 27th April, 2000, the first concerned an allegation that the Applicant failed to attend Court Orderly Room as complainant in the case against Kaimraj Singh, the second concerned an allegation that the Applicant, without reasonable excuse, was absent from duty from the said Magistrate's Court as complainant in the said case as against Kaimraj Singh. The 2 warning notices were served on the Applicant pursuant to Regulation 81 (1) of the Regulations. Regulation 81 (1) provides:

"81. (1) Where a report or an allegation that a police officer has committed an offence to which this regulation applies has been made, the officer making the report or allegation shall warn the police officer concerned in writing of the report or allegation and shall forthwith refer the matter to the Head of Division who may institute disciplinary proceedings against the officer."

The Applicant submitted that there was nothing improper in the DPP calling for a departmental investigation. **The Applicant went so far as to say that it was the duty of the DPP to call for such an investigation having regard to the contents of Miss Banfield's report.** However the Applicant went on to submit that the Police Service reacted to the DPP's memorandum with undue haste and transferred him from OCNU

whilst he was on vacation leave out of the jurisdiction. Once again the Applicant mistakenly links the transfer with the service of the 2 warning notices. It is clear the transfer was effected before the Commissioner received the DPP's memorandum.

During the course of his oral submissions the Applicant conceded that the allegations made by Miss Banfield warranted some kind of investigation, but suggested that there should have been some kind of "cursory inquiry." On being asked to explain what was the nature of that "cursory inquiry", Mr Thompson went on to submit a cursory inquiry to ascertain whether there was any reasonable cause for the Applicant's absence. To ascertain whether he had been granted vacation leave with permission to proceed out of the jurisdiction. And to ascertain whether in fact he had so proceeded. That that could have been done by contacting the Applicant's seniors and determining whether he had been granted leave. Mr Thompson also conceded that it would have been necessary, to ensure fairness, to contact the Applicant himself and tell him of the allegations against him and give him an opportunity to respond.

Chapter VIII of the Regulations, of which Regulation 81 forms part, sets out in an exhaustive and comprehensive manner the procedure to be followed where it is sought to make a police officer liable to disciplinary proceedings. It seems to me that the Commissioner of Police may very well find himself running afoul of the prescribed procedure if he were to begin to embark on some kind of "cursory inquiry" which seems to be more in the nature of some kind of private or informal investigation. It does not seem to me that the Regulations contemplate such an inquiry where the allegations are of the kind made here.

However the question as to whether or not the Commissioner of Police adopted the correct procedure in the investigation of the allegations against the Applicant raises no constitutional issue based on the Applicant's right to equality before the law. The Applicant could have sought to challenge the decision by way of judicial review proceedings. Moreover the Applicant may very well not be entitled to any relief whatsoever as the officer appointed to investigate the offences against discipline namely,

disobedience to orders and absence from duty, found that there was insufficient evidence to support any breach of discipline.

PROTECTION OF THE LAW

In Attorney General of Trinidad and Tobago v Mc Leod [1984] 1 All E.R. 694 at 701 Lord Diplock opined as to what amounts to the protection of the law.

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

In the instant case there is nothing to suggest that the Applicant was impeded in any way from approaching a Court of Law for the appropriate judicial remedy.

The Applicant’s Motion is therefore dismissed. The taxed costs of the Motion are to be paid by the Applicant to the Respondent.

Dated this 8th day of October 2002.

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PRAKASH MOOSAI
JUDGE