

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**Civ. App. No. 10 of 2004**

**IN THE MATTER OF AN APPLICATION BY EUSEBIO COOPER OF NO. 1070 ST. MARY'S VILLAGE VIA BARRACKPORE AND CLIFFORD BALBOSA OF NO 10 JOHN JULES TRACE EXTENSION, GOWER'S WELL ROAD, FYZABAD FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**BETWEEN**

**DIRECTOR OF PERSONNEL ADMINISTRATION**

**First Respondent/Appellant**

**AND**

**THE POLICE SERVICE COMMISSION**

**Second Respondent/Appellant**

**AND**

**EUSEBIO COOPER  
CLIFFORD BALBOSA**

**Applicants/Respondents**

**High Court No. 2015 and 2003 also S-1808 of 2003**

**IN THE MATTER OF AN APPLICATION BY DEREK JUNIOR BIRJAH OF NO. 20 QUARRY ROAD, MORNE DIABLO, PENAL ROCK ROAD, PENAL FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**BETWEEN**

**DIRECTOR OF PERSONNEL ADMINISTRATION**

**First Respondent/Appellant**

**AND**

**THE POLICE SERVICE COMMISSION**

**Second Respondent/Appellant**

**AND**

**DEREK JUNIOR BIRJAH**

**Applicants/Respondents**

**PANEL:**

S. Sharma, C.J.  
R. Nelson, J.A.  
W.N. Kangaloo, J.A.

**APPEARANCES:**

Ms. S. Bridgemohansingh, Mr. B. Primus, Ms. K. Reid and Mr. F. Hosein S.C.  
instructed by Ms. S. Sharma and Ms. N. Moonan for the Appellant  
Dr. F. Ramsahoye S.C. and Mr. A. Ramlogan for the Respondent

**DATE DELIVERED:** 19<sup>th</sup> January 2005

**JUDGMENT**

Delivered by W.N. Kangaloo

1. I have had the privilege of reading in draft the judgment of the Honourable Chief Justice. I agree with the decision to allow these appeals with costs. However I wish to add a few words of my own.
2. The facts giving rise to these appeals and the history of the litigation to date have been carefully and correctly set out in the judgment of the Chief Justice.
3. The issue which is central to the appeal is whether the appointment of the Public Services Examination Board (the Board) by Cabinet is unconstitutional because it offends the doctrine of the separation of powers.
4. Myers J. was of the view that this was the primary issue and he answered the question in the affirmative, holding that the appointment of the Board by Cabinet was unconstitutional because such appointment by the Executive did offend the doctrine of the separation of powers. Because this practice was in existence since 1966 however, the learned judge realized that as a result of his declaration of unconstitutionality, the possibility existed that all appointments which were made in the public service as a consequence of the results of the examinations set by the Board might be called into question. The learned judge therefore applied the '*de facto officer*' principle to save all such appointments which were made. The learned judge was also concerned about the consequences of his declaration upon the validity of the results of the August, 2002 examination which had not yet been released. The judge found that the Police Service Commission (PSC) was the only person or authority responsible for the conduct of promotion examinations for the Police Service and he made certain consequential orders for the examination of August 2002.

5. The learned judge's order is set out in full:

*“In the premises, I order and declare as follows:*

- 1. The appointment of the Public Service Examinations Board by Cabinet is unconstitutional, illegal, null, void and of no effect.*
- 2. The Police Service Commission is the only person or authority responsible for the conduct of promotion examinations for the Police Service, including the setting and marking of examination papers, the timing of examinations, the publication of results and all administrative matters incidental to the examinations.*
- 3. The Police Service Commission is entitled, as the appropriate authority, to vest in the Director of Personnel Administration, the administrative conduct of examinations as provided for in Regulation 19(2). This involves all administrative matters pertaining to the examinations, which have been set by the examiners, including the preparation and dispatch of letters appointing the relevant examiner, and letters to candidates inviting them to write the particular examination, the printing of the examination papers, preparation of registers of candidates, sourcing of supervisors and invigilators to manage the examinations on the dates appointed, organization of venues throughout Trinidad and Tobago for the examination sittings, and the provision of stationery and supplies for the candidates. This arrangement was, and is, lawful.*
- 4. The Police Service Commission shall by 9<sup>th</sup> January 2004, appoint an Examination Board to select and appoint examiners, or shall themselves select and appoint examiners, to review the examination papers sat at the promotion examinations held in August 2002, to ascertain whether those examination papers may be adopted or ratified. The examiners shall complete that review process and decide on whether to adopt or ratify by 30<sup>th</sup> January 2004 and publicly announce their decision. In the event that the examiners decide to adopt or ratify, they shall mark the scripts already submitted by the examinees, and release the results by 31<sup>st</sup> March 2004. In the event that the examiners decide not to adopt or ratify, the examiners shall set a new examination by 28<sup>th</sup> February 2004, and the Director of Personnel Administration shall cause the new examination to be conducted by 31<sup>st</sup> March 2004, and the examiners shall mark the scripts and the Director of Personnel Administration shall publish the results of the examination by 28<sup>th</sup> May 2004.*
- 5. The Police Service Commission and the Director of Personnel Administration shall not be entitled to declare any future promotions to the ranks for which the examination is held before the results of either the*

*August 2002 examination as ratified, or any new examination set, are published and considered, in the making of recommendations for future promotion to those ranks.*

6. *Nothing in this Order shall be taken to prevent the Police Service Commission from appointing the same individuals that comprised the Public Service Examinations Board as members of the Examination Board to appoint examiners for the purposes set out in this Order. Nothing in this Order shall be taken to prevent the Police Service Commission or the Examination Board from appointing the same individuals who had been appointed examiners by the Public Service Examinations Board to set and mark the Promotion Examinations of August 2002.*
7. *The Respondents do pay to Mr. Birjah, Mr. Cooper and Mr. Balbosa their costs of the Consolidated Motions certified fit for Senior and Junior Counsel.*
8. *There shall be a liberty to apply.”*

6. The learned judge at the outset of the judgment had indicated that a secondary issue of delay arose, if he held that the appointment of the Board by Cabinet was constitutional. Having found against the constitutionality of the Board, it was not necessary for him to include in his order any relief in respect of delay which was sought by the respondents in their statement. The learned judge did however make a finding that the delay in the release of the examination results was unreasonable. He did this in the event that he might have been held to be wrong on the question of the constitutionality of the Board. The appellants have not appealed this finding, possibly because it was not part of the learned judge's order.

7. The appellants have appealed paragraphs 1, 4 and 5 only of the judge's order.

8. It therefore is my respectful view that the issue of delay does not arise in this appeal. Further this Court has been told at the conclusion of the appeal that the results of the examination as ordered by the learned judge have been released, albeit late. Except, therefore, to agree with the judge (as apparently the appellants did) that the delay was unreasonable and adding for myself that the delay was reprehensible and scandalous, no further mention will be made of it in this judgment.

9. The learned judge in his exceptionally well-written and crafted judgment, carefully analysed the respective positions of the parties and the relevant principles of law and concluded that the appointment of the Board by Cabinet was unconstitutional. However I must confess that I am unable to agree with his conclusion.

10. It appears that the learned judge was of the view that the conjoint effect of S.75 of the Constitution which vests the general direction and control of the government of Trinidad and Tobago in Cabinet and S.45(2) of the Interpretation Act was that *'prima*

*facie and absent other considerations to the contrary*' the appointment of the Board by Cabinet to ensure the achievement of uniformity of standards in respect of comparable public officers, consistency of practice, economic use of expertise and the avoidance of unnecessary duplication, was permissible. However it appears that he was of the further view that the principle of Executive non-interference to be gleaned from Thomas v. A.G. (1982) AC 113 is '*a consideration to the contrary*' and that it displaced the '*prima facie position that the aims Cabinet sought to achieve by appointing a Public Services Examination Board could conceivably fit within the general control and direction of the government.*' (See paragraphs 42 and 43 of the judgment.)

11. It is my respectful view that this is where the learned judge erred. I say this for two primary reasons. First the oft quoted dictum of Lord Diplock deals with the direct interference by the Executive into the affairs of the PSC and secondly, even if it is possible to bring within the proscription some types of indirect influence, it is my view that there was more than sufficient insulation of the examiners from the Executive, to ensure that the principle of Executive non-interference was adhered to.

12. Lord Diplock said at pg. 124c of the report in Thomas v. A.G.:

*"The whole purpose of Chapter vii of the Constitution which bears the rubric 'The Public Service' is to insulate members of the civil service, the teaching service and the police service in Trinidad and Tobago from political influence exercised directly upon them by the government of day"* (my emphasis).

There is nothing in the evidence in the instant case to suggest any direct interference in the affairs of the PSC by the government. The question remains however whether by Cabinet appointing the Board, there is the **potential** for direct or indirect influence.

13. The evidence revealed that the composition of the Board is drawn from the '*great and good*' to use the judge's words, and also that it is the Board which appoints the examiners who set and mark the scripts of the examination. It is true that the members of the Board have no security of tenure, but as Mr. Hosein submitted, in my view correctly, it is becoming increasingly difficult, as a result of the galloping jurisprudence in judicial review, for public bodies to act whimsically. To suggest therefore that the Board members can be dismissed at the whim of the Cabinet without adverse repercussions to Cabinet, might be stretching the risk of indirect influence too far. The Board then appoints the examiners who are the individuals who actually do the setting and marking of the examination. Again because of the rapidly changing nature of Administrative Law in general, candidates at the examination who think they have not been given their just desserts must have several avenues of recourse open to them, beginning with a request for a re-marking of the papers and possibly ending in litigation.

14. The other reason for considering that the risk of interference by the Executive into the Board's functions is too remote is that there is nothing in the evidence to show that over the period of thirty-six years since the Board has been in existence there has been any attempt by the Executive to exert any influence on the affairs of the Board. In any

event even if that may change, I am of the view that because of the constraints set out above, the risk is really more imaginary than real.

15. Quite apart from my primary reasons for coming to a different conclusion from that of the learned judge viz. the dicta in Thomas v. A.G. and the sufficient insulation of the Board, it is my view that as can be gleaned from Thomas v. A.G. itself, S.65(1)(a) of the Police Service Act provides for the then Governor General to make regulations for prescribing classifications for officers in the police service, including qualifications, duties and remunerations and whereas Lord Diplock had cause to criticize sub-sections (b), (c), and (d), sub-section (a) remained unscathed. Lord Diplock was of the view that the matters contained in (b), (c) and (d) were really within the purview of the PSC and not the Executive (see pg. 130 of the report). Earlier in his judgment Lord Diplock in referring to the powers of the PSC said at pg. 128:

*“It has no power to lay down terms of service for police officers; this is for the legislature and in respect of any matters not dealt with by legislation, whether primary or subordinate, it is for the executive to deal with in its contract of employment with the individual police officer.”*

This dictum additionally demonstrates that it is not correct to say that **any** involvement by the executive in the affairs of the Police Service is unconstitutional as infringing the doctrine of separation of powers. The corollary is that some involvement is permissible.

16. Mr. Hosein has submitted on the basis of Westwood & Lightly and Ors. 543 ALR 673 in Australia and Brown v. Public Service Commission (1975) FC 345 in Canada, that matters such as the terms and conditions of police officers are for the Executive and not for the PSC. This appears to be so. The question remains whether the requirement to sit a promotional examination is a matter of the ‘*qualification*’ of an officer in which case it would be a matter for the Executive or whether as the respondents contend it is part and parcel of the promotion process and therefore falls within the purview of the PSC which has the responsibility to ‘*appoint officers to the police service, including their transfer and promotion*’ pursuant to S.123 of the Constitution.

17. Mr. Hosein relies on the following quotation from Jackett CJ in Brown to suggest that what the PSC is concerned about is assessing the relative merits of applicants who have qualified for promotion, while the actual qualification for promotion process falls outside of its purview:

*“Ordinarily, one would have thought that ‘qualifications’ required to perform the duties of a particular employment and the ‘selection standards’ used.... to assess ‘relative merits of applicants identified as candidates’ because they have been found to meet those ‘qualifications’ would be two distinct things.”*

18. I see much force in that argument. Thus while the qualifications process is not in the hands of the PSC, the selection standards and the assessment of the candidates are. That the selection standards are within the PSC’s power there is no doubt. This is borne

out by Reg. 20 of the PSC regulations. However the regulations are silent on who has to appoint the Examination Board which sets and marks the examinations in Reg. 19(1). If it is, that this was to be the responsibility of the PSC it was so easy for this to be specifically said. The fact that it was not and the persuasive argument of Mr. Hosein, together with the dicta of Brown lead me to conclude that the setting and marking of the promotional examination, is not a matter for the PSC but is part of '*qualifications*' or '*educational requirements*' which are matters for the Executive.

19. Finally on the question of the overlap of the powers of the Executive, the Legislature and the Judiciary in the Constitution, I need only say that there can never be in a Constitution modeled along Westminster lines any complete, distinct and surgically precise delineation of those powers. In respect of the Executive and the Public Service Commission and the PSC one only has to look at Sections 121 and 123 of the Constitution to see the involvement of the Prime Minister in the first instance enjoying a veto power in respect of the appointment by the Public Service Commission of several key personnel and in the second, a similar privilege with respect to the appointment of the Commissioner of Police or his deputy. As Mr. Hosein submitted '*An inflexible and dogmatic application of the doctrine is inimical to an efficacious and workable government*'. With this submission I agree.

20. I also think that the potential for interference must exist once there is this overlap of powers and that at the end of the day it becomes a question of the degree of influence or interference that is permissible in a functioning democratic society with proper regard for the rights of individuals. A proper balance has to be struck between these competing estates of government and once the evidence does not reveal undue influence by one estate over another, any questioned acts ought to pass constitutional muster.

21. For the reasons which I have briefly set out, I too would allow this appeal and set aside the declaration of unconstitutionality made by the learned judge as well as his other ancillary orders appealed against. The respondents must pay to the appellants the taxed costs both here and in the court below fit for Senior and Junior Counsel.

W.N. Kangaloo  
Justice of Appeal