
**Michaelmas Term**
[2024] UKPC 41
**Privy Council Appeal No 0049 of 2024**

# JUDGMENT

# Ravi Balgobin Maharaj (Appellant) *v* The Cabinet of The Republic of Trinidad and Tobago and another (Respondents) No 2 (Trinidad and Tobago)

## From the Court of Appeal of the Republic of Trinidad and Tobago

before

**Lord Hodge**
**Lord Lloyd-Jones**
**Lord Hamblen**
**Lord Stephens**
**Lady Simler**

**JUDGMENT GIVEN ON**
**19 December 2024**

**Heard on 3 October 2024**

*Appellant*
Anand Ramlogan SC
Adam Riley
Mohammud Jaamae Hafeez-Baig
(Instructed by Freedom Law Chambers)

*1st Respondent*
Douglas Mendes SC
Gabrielle Gellineau
(Instructed by Charles Russell Speechlys LLP (London))

*2nd Respondent*
Rishi Dass SC
Vanessa Gopaul
(Instructed by Charles Russell Speechlys LLP (London))

**LADY SIMLER:**

## 1. Introduction

1. This appeal concerns a challenge to the validity of an order extending the period of service of the Commissioner of Police by one year from the date of her compulsory retirement age of 60.

2. Under the Police Service Act No 7 of 2006 ("the 2006 Act") the compulsory retirement age for the Commissioner of Police ("the Commissioner") is 60: section 74(2) of the 2006 Act. However, the President of Trinidad and Tobago has power to extend the service of the Commissioner from that date for a period of one year in the first instance and, thereafter, subject to an annual review, for a maximum of two further periods of one year each, "where he [or she] considers it in the national interest" to do so: section 75(a) of the 2006 Act.

3. On 10 February 2023, Erla Harewood-Christopher was appointed to the office of Commissioner in accordance with section 123 of the Constitution adopted by Trinidad and Tobago in 1976 (as amended in 2006, referred to below as "the Constitution"), with effect from 3 February 2023. There is no challenge to the validity of her appointment.

4. Ms Harewood-Christopher was born on 15 May 1963 and turned 60 on 15 May 2023. On 4 May 2023, the Cabinet determined that it would be in the national interest to extend her service as Commissioner for a year and, accordingly, advised the President to agree to a one-year extension from 15 May 2023. The President accepted the recommendation and the decision extending her service was published by press release dated 9 May 2023 and a notice (number 149 of 2023, published on 12 May 2023) was issued with an order, the Commissioner of Police (Extension of Service) Order 2023 ("the Order"), extending her service for a period of one year with effect from 15 May 2023.

5. The appellant describes himself as a journalist, a social and political activist, and a concerned citizen with an abiding interest in the rule of law who is prepared to intervene in the public interest in appropriate circumstances. He challenges the Order and the underlying decision to extend the Commissioner's period of service beyond compulsory retirement age. He commenced these proceedings for judicial review by a claim form dated 26 June 2023. The relief sought included a declaration that the decision and the Order were unconstitutional, null and void for effecting an appointment which only the Police Service Commission had exclusive jurisdiction to make. He advanced no challenge to the merits or on rationality grounds.

6. On 16 January 2024 Rahim J dismissed the claim. He held that the extension of service of an incumbent Commissioner does not amount to an appointment of the Commissioner. The Police Service Commission has no power to extend the years of service of the Commissioner and section 75(a), in enacting an extension mechanism, could not therefore be said to trespass on its functions. At para 39 of his judgment, Rahim J expressed the view that "the exercise of the power [to extend the years of service] itself does not reside solely with the political directorate as it is subject to Presidential discretion".

7. The appellant appealed against the finding that the decision and the Order were not unconstitutional. In addition, relying on Rahim J's observation about Presidential discretion, the appellant contended that section 75(a) of the 2006 Act, read with section 80(1) of the Constitution, required the President to exercise her own discretion rather than act on the advice of the Cabinet when deciding whether to grant an extension, and this was an additional ground of unlawfulness. By a judgment dated 8 May 2024, the Court of Appeal (Moosai, Mohammed, and Aboud JJA) dismissed the appeal for essentially the reasons given by Rahim J: there is no inconsistency between section 75(a) of the 2006 Act and section 123 of the Constitution because the two provisions address discrete issues and there is no overlap between them. The Court of Appeal also held that section 75(a) does not breach the separation of powers principle or any so-called "insulation principle" derived from it.

8. The Court of Appeal did not agree with Rahim J's observation (at paragraph 39 of his judgment) that section 75(a) of the 2006 Act imposes a discretion on the President that is exercisable independently of Cabinet. It held that there was no clear language disapplying the general rule in section 80(1) of the Constitution that the President should act on the advice of the Cabinet or invoking an exception that required the President to exercise her own independent discretion. Accordingly, the President was obliged to act on the advice of Cabinet in making the decision as to what was in the national interest. This was quintessentially an executive function which the Cabinet was best placed to assess, and for which it was democratically responsible and accountable.

## 2. The issues for the Board

9. Although the focus of the argument in the courts below was on the constitutionality of the extension of the Commissioner's service by the President, that was not the primary focus of the argument before the Board. The main argument advanced by Mr Ramlogan SC, for the appellant, is that section 75(a) of the 2006 Act, read in light of section 80(1) of the Constitution, imposes an obligation on the President to exercise her own independent judgement as to whether to extend the service of the Commissioner beyond compulsory retirement age. Since (as is common ground) the President did not exercise her independent judgement about what was in the national interest, but instead acted on the advice of the Cabinet, the statutory condition for making the Order was not satisfied.

The appellant invites the Board to quash the Order as unlawful on this basis and submits that the Board need not address his other arguments if this one is accepted. Alternatively, Mr Ramlogan submits that an important function of chapter 9 of the Constitution is to insulate the three service commissions (and in consequence, those employed in the relevant service) from political interference by the executive. The President has no power to extend the appointment of the Commissioner, this being the exclusive responsibility of the Police Service Commission, to which the Constitution has given the necessary power. This power has been usurped by section 75(a) of the 2006 Act, which is in substance a power of appointment or removal, allowing the executive to interfere in a way that is inconsistent with section 123 of chapter 9 of the Constitution, and section 75(a) is void to that extent. Even if section 75(a) is not a power of appointment or removal, Mr Ramlogan also submits that the assumption on which chapter 9 of the Constitution is based requires that the independence of the Commissioner be protected, so that section 75(a) (which allows for political interference) is unconstitutional on this basis. The Order is therefore also void and should be quashed. He referred to this as "the insulation principle".

10. Despite the appellant's suggested approach, the Board considers that as a matter of logic the constitutionality of section 75(a) of the 2006 Act and the impugned Order made pursuant to it should be considered first. If the Board is satisfied of their constitutionality, it will consider whether the President exercised her discretion lawfully under section 75(a) by acting on the advice of the Cabinet when deciding to extend the service of the Commissioner in this case.

11. Before addressing these issues, the Board must first set out the relevant constitutional and other legislative provisions.

## 3. The relevant provisions of the Constitution and the 2006 Act

12. The Constitution was enacted by the legislature of Trinidad and Tobago as a schedule to the Constitution of the Republic of Trinidad and Tobago Act 1976. It was amended in 2006.

13. Section 1 of the Constitution provides that the Republic of Trinidad and Tobago shall be a sovereign democratic state. Section 2 provides that the Constitution is the supreme law of Trinidad and Tobago and that any law that is inconsistent with it is void to the extent of the inconsistency. Section 5(1) limits the ability of Parliament to legislate in a way that abrogates, abridges or infringes the rights and freedoms recognised and declared by the Constitution.

14. The other constitutional provisions relevant to this part of the appeal are in chapter 9 of the Constitution which governs appointments to and the tenure of public and other offices. Part I of chapter 9 makes provision for three commissions, a Police Service

Commission, together with a Teaching and a Public Service Commission. Section 123 concerns the Police Service Commission. It provides that, subject to the provisions of the Constitution, power to appoint persons to hold or act in offices to which that section applies, including power to make appointments on promotion and transfer and to confirm appointments, and to remove and exercise disciplinary control over persons holding or acting in such offices and to enforce standards of conduct on such officers, shall vest in the Police Service Commission.

15. The purpose of chapter 9 (or rather its predecessor, chapter 8 of the 1962 Independence Constitution) was described by Lord Diplock for the Board in *Thomas v Attorney General of Trinidad and Tobago* [1982] AC 113 ("*Thomas*") at 124C-D, as being:

> "… 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 the day. The means adopted for doing this was to vest in autonomous commissions, to the exclusion of any other person or authority, power to make appointments to the relevant service, promotions and transfers within the service and power to remove and exercise disciplinary control over members of the service."

See too *Perch v Attorney General of Trinidad and Tobago* [2003] UKPC 17; [2003] 5 LRC 508, where the Board (Lord Bingham of Cornhill) described the three commissions as "composed, structured and regulated as to ensure that they are independent and immune from political pressure, the object being to ensure that civil servants, police officers and teachers are similarly independent and immune" (para 5).

16. There has been a Police Service Commission in Trinidad and Tobago since it was first established by section 98(1) of the 1962 Constitution. It was then vested (by section 99) with exclusive responsibility for the appointment of *all* police officers to hold or act in office, their promotions, transfers, removal and the exercise of disciplinary control (though this was subject to Prime Ministerial veto over the appointment of the Commissioner and Deputy Commissioner).

17. In 2006 there was wide-ranging legislative reform of the processes for the management of the police service and the appointment of the Commissioner. This was undertaken by way of unanimously enacted constitutional amendments to section 123 of the Constitution and the simultaneous unanimous enactment by the legislature of the 2006 Act. The important role of the Police Service Commission as a means of ensuring the

independence and immunity from political pressure of police officers through its power to appoint and remove the Commissioner and Deputy Commissioner was maintained.

18. Section 122 of the Constitution provides for the membership and appointment of the Police Service Commission. Section 123 (as amended) now provides:

> "123. (1) The Police Service Commission shall have the power to—
>
> (a) appoint persons to hold or act in the office of Commissioner and Deputy Commissioner of Police;
>
> (b) make appointments on promotion and to confirm appointments;
>
> (c) remove from office and exercise disciplinary control over persons holding or acting in the offices specified in paragraph (a);
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> (d) monitor the efficiency and effectiveness of the discharge of their functions;
>
> (e) prepare an annual performance appraisal report in such form as may be prescribed by the Police Service Commission respecting and for the information of the Commissioner or Deputy Commissioner of Police …"

19. The process for appointment to the offices of Commissioner and Deputy Commissioner of Police was also amended and is set out in section 123(2) to (5). The Police Service Commission nominates persons for appointment to these offices in accordance with criteria and a procedure prescribed by order (section 123(2)); submits to the President a list of the names of the persons nominated for appointment to these offices (section 123(3)); and appoints, but only after the House of Representatives approves the notification that must be issued by the President in respect of each person nominated to the relevant office (section 123(4) and (5)). As the appellant submits, the changes to this process and the removal of the Prime Minister's power of veto reduced the scope for executive interference in or influence over the appointment of the Commissioner.

20. To enable the Police Service Commission to monitor the efficiency and effectiveness of the discharge of the Commissioner and Deputy Commissioner functions, the Commissioner is required to report to the Police Service Commission on the management of the police service every six months (section 123(6)). The Police Service Commission may, at its own initiative, request a special report from the Commissioner at any time on any matter relating to the management of the police service, and the Commissioner is required to respond to such a request in a timely manner (section 123(7)).

21. Section 123(8) gives the Police Service Commission power to terminate the services of the Commissioner or a Deputy Commissioner of Police on certain specified grounds. The grounds (as amended again in 2007) are as follows:

> "(a) where the officer is absent from duty without leave for seven consecutive days, during which he has failed to notify the Police Service Commission of the cause of his absence, whether he holds a permanent, temporary, or contractual appointment;
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> (b) breach of contract, where the officer is appointed on contract;
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> (c) reported inefficiency based on his performance appraisal reports;
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> (d) on dismissal in consequence of disciplinary proceedings, after giving him an opportunity to be heard;
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> (e) where the officer holds a permanent appointment—
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> (i) on being retired on medical grounds;
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> (ii) on being retired in the public interest; or
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> (iii) on the abolition of office."

22. The powers of appointment, promotion, transfer, removal, and discipline over the rest of the police service were transferred from the Police Service Commission to the Commissioner under a new section 123A. It is unnecessary to set it out in full and sufficient to record that section 123A(1) provides that, subject to section 123(1), the Commissioner "shall have the complete power to manage the Police Service and is required to ensure that the human, financial and material resources available to the Service are used in an efficient and effective manner". The appellant contends that this transfer of powers over the police service from the Police Service Commission to the Commissioner serves to underscore the need for the Commissioner to be independent and immune from political pressure, just as the Police Service Commission must be independent and immune from such pressure.

23. Although since the amendments made in 2006, the Police Service Commission has had exclusive power (subject to negative resolution of the House of Representatives) to appoint, promote, remove from office and exercise disciplinary control over those holding the offices of Commissioner and Deputy Commissioner, it is not, and never has been, charged with responsibility for setting the terms and conditions of appointment under which the Commissioner and Deputy Commissioner serve. Its jurisdiction has never been modified to include establishing a retirement age or any mechanism for extending service beyond that age. While section 123(8) plainly envisages that there may be a contract governing their terms of service, the Constitution does not empower the Police Service

Commission to set terms and conditions of appointment for any officer. Had it done so, one would have expected to find such a power in chapter 9 of the Constitution, where the provisions about the various service commissions and the making of appointments within them are set out. But so far as concerns the Police Service Commission in relation to the Commissioner, this was never made part of its function, and the Constitution makes no provision whatever for either a compulsory retirement age or any procedure for extending the term of office for the Commissioner (or other police officers) beyond retirement age. By contrast, the Constitution makes express provision for the tenure and extension of tenure of certain "special offices" (for example, the Director of Public Prosecutions, the Auditor General, the Solicitor General, and judges) who hold office in accordance with section 136 (see section 136(1) which provides that such office holders shall vacate their office on attaining the age of 65). In the case of a judge, section 136(2) makes express provision for the President, acting on the advice of the Chief Justice, to permit a judge to continue in office after compulsory retirement age to deliver a judgment or deal with proceedings commenced before the judge before compulsory retirement age.

24. Once appointed the Commissioner and Deputy Commissioner enter into a contract of service with the executive (the government of Trinidad and Tobago) on terms and conditions that are primarily fixed by the 2006 Act (which repealed and replaced the former Police Service Act No 30 of 1965 Chap 15.01). Significantly it is the 2006 Act that establishes a compulsory age of retirement and sets the process for extension of service beyond that date for officers (including the Commissioner) in the First Division.

25. Thus, section 74 of the 2006 Act provides so far as material:

> "(2) A police officer in the First Division shall retire from the Police Service on his attaining the age of sixty years, but may–
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> (a) at his option; or
>
> (b) at the instance of the Commissioner,
>
> retire from the Police Service at any time after he has attained the age of fifty-five years. …
>
> (4) The functions of the Commissioner under subsections (2) and (3) shall, in relation to the Commissioner and a Deputy Commissioner, be performed by the Commission."

26. Section 75 of the 2006 Act provides for extensions of service beyond compulsory retirement age as follows:

> "75. Notwithstanding section 74 and any other written law—

(a) the President may in relation to a police officer in the First Division; or

(b) the Commissioner may in relation to a police officer in the Second Division,

where he considers it in the national interest, extend the years of service of the police officer after he has reached the prescribed age of retirement, for a period of one year in the first instance and thereafter, subject to an annual review, for a maximum of two further periods of one year each."

27. The First Division comprises the offices listed in the First Schedule to the 2006 Act and such other offices as the President may by order determine. The First Schedule lists the offices of the Commissioner of Police, Deputy Commissioner, Assistant Commissioner, Senior Superintendent, Superintendent and Assistant Superintendent (see section 7(2) and the First Schedule of the 2006 Act).

**4. The division of functions between the Police Service Commission on the one hand and the executive or legislature on the other**

28. There is no doubt that the exercise by the executive of direct or even indirect power to interfere with the appointment or removal of the Commissioner would breach the important constitutional principle of executive non-interference with the function of the Police Service Commission under the Constitution. On the other hand, the setting of terms of service for police officers, including the Commissioner, is a function that falls properly within the domain of the executive and legislature. The constitutional imperative of avoiding political influence or interference in appointments etc. does not mean that the executive, in its capacity as employer, is excluded from the constitutional or legislative framework governing the police service (or indeed any other constitutionally protected offices). The question is where the line is properly drawn. If by extending the Commissioner's service beyond compulsory retirement age, the executive has interfered with or usurped the Police Service Commission's powers of appointment or removal, that would be unconstitutional. It follows that the first question raised by this part of the appeal is whether section 75(a) of the 2006 Act does interfere with or encroach on the exclusive power of the Police Service Commission under section 123 of the Constitution to appoint or remove the Commissioner and Deputy Commissioner of Police.

29. In the Board's view the answer to this question is plainly no. The power provided by section 75(a) of the 2006 Act and those in section 123 of the Constitution are fundamentally different and involve altogether discrete functions. There is no overlap. Section 123 is confined to the functions specified by it, namely the appointment of certain officers to the police service, including their promotion and removal from office and the

exercise of disciplinary control over them. The role of the executive, as employer, is prescribed by section 75(a). Unlike section 123, section 75(a) does not concern the appointment or removal of the officers concerned. The power it gives to extend service simply lengthens the period of service in the office to which the officeholder has already been appointed. Extension of service and appointment are fundamentally different. Put shortly, section 75(a) has nothing to do with matters that are the exclusive preserve of the Police Service Commission.

30. The Police Service Commission does not employ the Commissioner (or police officers more generally). Their contracts are with the executive. Nor is it given constitutional or other power to set terms of service. That function is vested in the legislature. Where terms of service are set by the legislature, they form part of the officer's contract. Terms of service include terms as to remuneration and in many cases, terms governing the duration of the contract of employment of the officer concerned.

31. In the case of the Commissioner, her appointment under section 123 was for an indefinite period, but as provided by section 74(2) of the 2006 Act, it would come to an end at the latest when she attained compulsory retirement age, subject only to the possibility of one-year extensions if considered in the national interest (up to a maximum of three years) from the date of that compulsory retirement age (section 75(a) of the 2006 Act). In other words, section 75(a), like section 74(2), sets a term of service concerning the duration of an appointment made pursuant to section 123 of the Constitution.

32. The power to extend service under section 75(a) does not come into play until the Commissioner is appointed by the Police Service Commission in accordance with the terms of section 123. A contract, containing terms of service (including as set by legislation), can only be entered into with the executive following a valid appointment. The Police Service Commission has responsibility for making the appointment and its independence in doing so must be respected and assured, but as already stated, it has no responsibility for setting terms of service.

33. If support for this conclusion is necessary, it is to be found in *Thomas* where the Board recognised the clear division of responsibilities between the Police Service Commission on the one hand, and the legislature and executive on the other. As Lord Diplock explained at p. 128 B-D:

> "The functions of the Police Service Commission fall into two classes: (1) to appoint officers to the police service, including their transfer and promotion and confirmation in appointments and (2) to remove and exercise disciplinary control over them. 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. Terms of service include such matters as (a) the duration of the contract of employment, e.g., for a fixed period, for a period ending on attaining retiring age, or for a probationary period as is envisaged by the reference to "confirmation of appointments" in section 99 (1); (b) remuneration and pensions; and (c) what their Lordships have called the "code of conduct" that the police officer is under a duty to observe."

34. This division of responsibilities was again considered by the Board in *Cooper v Director of Personnel Administration* [2006] UKPC 37; [2007] 1 WLR 101. The issue in that case was whether the appointment by the Cabinet of a Public Service Examination Board, to be used by the Police Service Commission for examinations for promotion within the Trinidad and Tobago police service, infringed what might be termed the executive non-interference principle. At para 27, Lord Hope of Craighead, giving judgment on behalf of the Board, said:

> "On the one hand there is the function of appointing officers to the police service, including their promotion and transfer. This is a matter exclusively for the Police Service Commission. On the other hand there are the terms of service which are to be included in the contract of the individual police officer. The Police Service Commission does not employ the police officer. His contract is with the executive. Terms of service, of which Lord Diplock gave various examples, may be laid down by the legislature. Where they are laid down in that way they must form part of the contract. Where there are gaps because the matters at issue have not been dealt with by the legislature, they may be dealt with by the employer. In the case of police officers, their contract of service is with the executive. So it is open to the executive to fill the gaps. But this has nothing whatever to do with the matters that lie within the exclusive preserve of the Police Service Commission. It is for the Commission, and the Commission alone, to appoint and promote police officers. Terms of service are what each police officer enters into with his employer following the confirmation by the Commission of his appointment to, or his appointment on promotion within, the police service."

35. So too here. Where a decision is made to extend the Commissioner's service beyond compulsory retirement age, the original appointment does not end on reaching age sixty and no new or additional appointment is involved. Rather, its duration is

extended. Section 75(a) simply sets the mechanism for making a limited extension (or series of extensions) to the duration of the appointment in prescribed circumstances. It reflects the proper exercise of power vested in the legislature to lay down the terms of service of those officers to whom it applies. It is entirely different to the hypothetical law imagined by the appellant prescribing a retirement age for the Commissioner of age 35, subject to the possibility of one-month extensions at the election of the executive (with no cap on the number of extensions). Such a law would be objectionable as a device to circumvent the appointment process under the guise of extending the retirement age. It would undoubtedly usurp the powers of the Police Service Commission and would be unconstitutional.

36. Mr Ramlogan placed significant emphasis on the statement made by Lord Hope in *Cooper* at para 23 where he observed that "the constitutional principle would be breached if that body [the Public Service Examination Board] were to be used as an instrument which enabled the executive to interfere directly or even indirectly with the appointment and tenure of public offices". In Mr Ramlogan's submission this means that the constitutional principle would be breached if the executive were able to interfere in any way with the "tenure" of the Commissioner, and by empowering the executive to extend the Commissioner's service, the executive is permitted by section 75(a) to interfere with the Commissioner's tenure. The problem with this submission is that properly understood, the word "tenure" as used by Lord Hope, does not refer to extension of service beyond retirement age, but to premature removal from office, as the Court of Appeal observed. The power to extend the service of the Commissioner has no impact on her tenure. She continues to enjoy precisely the same security of tenure during her extended period of service as before, by virtue of the fact that the power of disciplinary control and removal is vested in a body that is independent of her employer. Accordingly, section 75(a) involves no interference with the security of tenure of the Commissioner.

37. Contrary to the appellant's submissions, section 75(a) is not in substance a power to appoint or remove. A decision to extend the service of an incumbent officer involves no consideration of whether the next Commissioner should be "the person currently occupying the office or someone else" as the appellant argued. Section 75(a) does not require the Cabinet to decide who the next Commissioner should be. It simply allows for a decision "in the national interest" whether to extend the service of the incumbent Commissioner. It may be in the national interest to do so for a variety of reasons, but this power does not involve any usurping of the Police Service Commission's exclusive power to appoint the next Commissioner. By the same reasoning, a decision under section 75(a) not to extend the service of an incumbent officer is not a removal from office. An officer whose appointment comes to an end on reaching compulsory retirement age cannot be described as having been removed. The appointment comes to an end automatically at that time. There is neither a statutory nor any contractual right to an extension of service beyond retirement age. Rather, section 75(a) permits the President to extend the officer's service under the existing appointment. If there is no decision to extend, the appointment comes to an end automatically on the officer reaching compulsory retirement age.

38. Mr Ramlogan also submitted that section 75(a) trespasses on the monitoring, appraisal and reporting powers of the Police Service Commission under sections 123(1)(d) and (e) of the Constitution because any second or third year extensions under section 75(a) are expressly stated to be "subject to annual review". This overlap permits indirect or direct executive interference in the Police Service Commission's powers. Again, the Board disagrees. These are entirely different reviews. The annual performance appraisal report prepared by the Police Service Commission has nothing whatever to do with the question whether there should be an extension of service at compulsory retirement age. The Police Service Commission is required to conduct an annual review of the Commissioner's performance in post. No doubt in considering whether to extend, the President will wish to consider any reports prepared by the Police Service Commission under section 123(1) but there is nothing sinister or wrong in that. The requirement of an annual review for further extensions under section 75(a) of the 2006 Act is plainly directed at a different outcome and purpose. It is undertaken by the Cabinet to satisfy itself that it remains in the national interest to extend the incumbent's years of service for a further one-year period. There is no overlap.

39. Mr Ramlogan also relied on the separation of powers and the so-called insulation principle to argue more broadly that section 75(a) is unlawful because executive interference or influence through the process of extending the service of the Commissioner violates that principle.

40. In Trinidad and Tobago, the separation of judicial, legislative and executive power is the product of the Constitution itself. It provides separately for the exercise and functions of the principal institutions of the state. It is uncontroversial to say that it is therefore necessary when construing the Constitution and legislation to do so consistently with that separation and in a manner that is consistent with the boundaries expressly or implicitly drawn by it. But, as the Board has said repeatedly, and most recently in *Chandler v State of Trinidad and Tobago* [2022] UKPC 19; [2023] AC 285: "What is not legitimate is to erect a principle of the separation of powers as a higher legal norm above the Constitution" (para 78). "The separation of powers is not a free-standing, legally enforceable principle that exists independently of and above a Constitution" (para 81).

41. As the Board has explained above, the Constitution does not itself prescribe either the retirement age or the process for extension of service of the Commissioner. This represents a clear constitutional choice. By contrast, such provision is made by section 136 for certain special offices (see para 23 above). These are clear and deliberate constitutional choices that must be respected. The Police Service Commission has no constitutional or other power vested in it to set terms and conditions of service, whether as to duration of the contract or to extend the term of the Commissioner beyond a compulsory retirement age. Again, this deliberate constitutional choice must be respected. In these circumstances it is well within the constitutional mandate of the legislature to enact legislation dealing with a mechanism for extension of service, and to do so by enacting section 75(a) of the 2006 Act which empowers the President to make that

decision. The two provisions with which this appeal is concerned, section 123 and section 75, vest power to act in different arms of the state in respect of different functions, but with neither trespassing impermissibly on the other. Accordingly, the fact that there is executive involvement in the decision to extend the service of the Commissioner cannot by itself violate either principle invoked by Mr Ramlogan. Nor is there anything constitutionally improper in the executive having a role in the extension of service of the Commissioner, particularly when discipline and the power to remove from office remain constitutionally vested in the Police Service Commission. To seek to impose the wider protection for which the appellant contends, is not to uphold the provisions of the Constitution but impermissibly to ignore the deliberate constitutional choices that have been made. Section 75(a) simply does not exceed the proper constitutional or legislative boundaries by intruding into the jurisdiction of the Police Service Commission. For all these reasons this argument also fails.

42. Nonetheless the Board wishes to emphasise the importance of chapter 9 of the Constitution and the role of the Police Service Commission in maintaining the independence of the police, a vital role in the national interest. Section 123 provides an important constitutional safeguard of the independence of the Commissioner, and through her, the independence of police officers more generally. The Police Service Commission must exercise its powers of appointment and removal free from interference or influence of any kind by the executive and the executive must refrain from interfering directly or even indirectly in the exercise of the Police Service Commission's powers of appointment and removal. In the Board's view the Police Service Commission continues to enjoy its exclusive jurisdiction to appoint, promote, remove and exercise disciplinary control. It remains an independent and fully functioning body sufficient to protect the rights and interests of its appointees and to insulate them from political influence or interference: its members are independently appointed by the President after consultation with both the Prime Minister and Leader of the Opposition and are themselves protected from political interference with their appointments (see section 122 of the Constitution). The chapter 9 safeguards remain, and the section 75(a) power does not compromise or undermine them: notwithstanding the exercise of the power to extend the service of the Commissioner, the Police Service Commission retains the power vested in it by section 123, to exercise disciplinary control over the Commissioner and ultimately, to remove her on any of the grounds set out in section 123(8). Moreover, the section 75(a) power is limited and closely circumscribed: it permits extensions of one year at a time subject to a maximum of three years in total and only when the extension is considered to be in the national interest. Finally, a decision to extend would be capable of being challenged on judicial review on rationality grounds.

## 5. The constitutional provisions governing the exercise of the President's functions

43. The Constitution establishes what has been described as a Westminster model constitutional system "in which the head of state is not the effective head of government; in which the effective head of government is a Prime Minister presiding over a cabinet

composed of Ministers over whose appointment and removal he has at least a substantial measure of control; in which the effective executive branch of government is parliamentary inasmuch as Ministers must be members of the legislature; and in which Ministers are collectively and individually responsible to a freely elected and representative legislature." (see S. A. De Smith, "The New Commonwealth and Its Constitutions" (1964) at pages 77-78).

44. Chapter 5 of the Constitution provides the framework for the exercise of executive authority in Trinidad and Tobago. Executive authority is formally vested in the President by section 74(1) of the Constitution which "may be exercised by him either directly or through officers subordinate to him". Section 75(1) establishes the Cabinet which is expressly vested with "the general direction and control of the Government" for which it is collectively responsible to Parliament. Section 75(2) provides that the Cabinet shall consist of the Prime Minister and such other ministers appointed in accordance with the provisions of section 76 as the Prime Minister considers appropriate. The accountability to Parliament is what gives the Cabinet the democratic legitimacy to make determinations, for example, as to what the public interest requires.

45. Although ordinarily powers conferred by legislation are generally exercisable by the grantee of the power, section 80(1) of the Constitution creates a different presumption. It establishes a general rule that the President "shall act in accordance with the advice of the Cabinet… except in cases where other provision is made": see section 80(1) which provides:

> "(1) In the exercise of his functions under this Constitution or any other law, the President shall act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet, except in cases where other provision is made by this Constitution or such other law, and, without prejudice to the generality of this exception, in cases where by this Constitution or such other law he is required to act—
>
> (a) in his discretion;
>
> (b) after consultation with any person or authority other than the Cabinet; or
>
> (c) in accordance with the advice of any person or authority other than the Cabinet.
>
> …
>
> (3) Without prejudice to any other case in which the President is authorised or required to act in his discretion, the President shall act in accordance with his own deliberate judgment in the performance of the following functions:

> (a) in the exercise of the power to appoint the Prime Minister conferred upon him by section 76(1) or (4);
>
> (b) in the exercise of the powers conferred upon him by section 78 (which relates to the performance of the functions of the Prime Minister during absence, illness or suspension) in the circumstances described in the proviso to subsection (2) of that section;
>
> (c) in the exercise of the power to appoint the Leader of the Opposition and to revoke any such appointment conferred upon him by section 83."

46. The general rule in section 80(1) is consistent with the framework of a cabinet charged with the general direction and control of the government and collectively responsible to Parliament.

47. There are exceptions to the general rule. In particular, the rule is disapplied where "other provision is made by this Constitution or such other law" that reserves powers to the President alone or acting on advice from another person or body (section 80(1)). This includes a subset of exceptions (also in section 80(1)) which exemplify the "other provision" that would disapply the general rule, including where the President is "required to act in his discretion", or after consultation with a person other than the Cabinet, or in accordance with the advice of a person other than the Cabinet. The effect of disapplying the general rule is that the Cabinet, vested with the general direction and control of the government, is deprived of decision-making power.

**6. Does section 75(a) disapply the presumption in section 80(1) regarding the exercise of Presidential powers within it?**

48. Mr Ramlogan submits that section 75(a) is "other law" within the meaning of section 80(1) that makes "other provision" which displaces the general rule in section 80(1). In his submission, the words "he considers it in the national interest" make clear that the President is required to form her own judgement as to whether it is in the national interest to exercise the power. If the President acts on the judgement of another person or body (such as the Cabinet), she will not have formed the judgement that section 75(a) requires. Section 75(a) therefore makes other provision disapplying the general rule in section 80(1) of the Constitution.

49. The Board rejects this submission. Like the Court of Appeal, the Board does not consider that the words used in section 75(a) "where he considers it in the national interest" are sufficient to disapply the presumption in section 80(1) of the Constitution.

50. First, in the Board's view clear words disapplying the special constitutional presumption in section 80(1) are necessary to deprive the elected Cabinet of its important decision-making power. There are no such clear words in section 75(a). Section 75(a) does not state that any discretion or judgement to be exercised is to be the President's alone. It merely identifies what the President may do and the threshold for doing it. In other words, it gives the President power to extend service but only where she considers it in the national interest to do so. The mere fact that the power can only be exercised where the President considers it to be in the national interest is insufficient to disapply the general rule. There is nothing in section 75(a) requiring the President to act personally or in her own discretion. It is only where the legislature has expressly identified that the discretion to be exercised is that of the President herself that the general rule that Cabinet is responsible for the general direction and control of government can be found to have been displaced. In other words, something more is required.

51. Secondly, it is clear from certain provisions in the Constitution that recognised statutory formulae are used where it is intended to make the necessary "other provision" displacing the general rule. The clearest example is a requirement for the President to act in her discretion. These words appear in the Constitution in relation to the appointment of independent senators (section 40(2)(c)); in declaring the seat of an independent senator to be vacant (section 43(2)(e)); in removing a member of a Service Commission (section 126(4)). In each case, this form of words makes clear that the general rule in section 80(1) is disapplied. This formula was not used in section 75(a) even though it could have been. In other cases, decision making power is vested in the President in relation to appointment and suspension of a person or member of a Commission or other body, but she is permitted to act only after consultation with some person or authority other than Cabinet: see for example, sections 50(14), 71(3), 88(d), 91(2), 102, 103, 110(3), 117(2), 120(2), 122(3), 124(2), 130(2), 136(11) and 140(1) of the Constitution. There are also many instances where the President is required to act on the advice of someone other than Cabinet.

52. Thirdly, certain Presidential powers are singled out for particular treatment in section 80(3) of the Constitution for the avoidance of doubt. These include the section 76(1)(b) power "where *it appears to him* that [the party which commands the support of the majority of members of that House] does not have an undisputed leader in that House or that no party commands the support of such a majority" to appoint as Prime Minister a member of the House of Representatives who "*in his judgment*" is most likely to command majority support in that House; and the powers in sections 83(2) and 83(4) which depend on a "judgement" of the President. None of these Presidential powers are expressed to be exercisable in her discretion or after consultation with or on the advice of someone other than Cabinet. In those circumstances, and notwithstanding the use of a phrase like "appears to him" and "in his judgement", the framers of the Constitution clearly considered there to be a risk that the general rule in section 80(1) would be regarded as applying if no special provision were made by section 80(3). In other words, those phrases were not considered sufficient on their own to displace the general rule in section 80(1).

53. These and other provisions in the Constitution demonstrate that a power vested in the President which is expressed in such a way as to require the President to be satisfied of the existence of a particular situation is not by itself sufficient to displace the operation of section 80(1). Sections 7 and 8 are further examples. They deal with powers expressed to be exercisable by the President in a state of emergency. They are not listed in section 80(3) and given their content and the framework of accountability, are unlikely to have been intended to disapply the general (or default) rule in section 80(1). The power under section 7(1) is a power vested in the President to make regulations during a period of public emergency with due regard being had to the circumstances of any situation likely to arise or exist during such period, and to issue orders and instructions for the purpose of the exercise of any powers conferred on her or any other person. The President's power under section 8(1) is a power to make a proclamation declaring the existence of a state of public emergency. In both cases, the President is vested with functions which are not expressed to be exercisable in her discretion or after consultation with or on the advice of someone other than the Cabinet. The general rule therefore applies in both cases, and it is (perhaps unsurprisingly) for the Cabinet to make those decisions and for the President to act on the advice of Cabinet in the exercise of those powers. The same is patently true of section 75(a).

54. In other words, something more than the requirement of considering or being satisfied of something is required to displace the general rule in section 80(1). Parliament could have used the form of words clearly regarded by the Constitution as displacing the general rule when formulating section 75(a). It chose not to do so. The President was therefore obliged to act on the advice of Cabinet in deciding whether it was in the national interest to extend the service of the Commissioner by one year beyond her compulsory retirement age, under section 75(a).

55. There is a helpful analogy that supports this conclusion in the Board's judgment in *Teh Cheng Poh v Public Prosecutor, Malaysia* [1980] AC 458. In that case, in relation to a power vested in the head of state to promulgate ordinances "if satisfied that immediate action is required", Lord Diplock said at p 466B-D:

> "Although this, like other powers under the Constitution, is conferred nominally upon the Yang di-Pertuan Agong by virtue of his office as the supreme head of the Federation and is expressed to be exercisable if he is satisfied of a particular matter, his functions are those of a constitutional monarch and, except on certain matters that do not concern the instant appeal, he does not exercise any of his functions under the Constitution on his own initiative but is required by article 40 (1) to act in accordance with the advice of the cabinet. So when one finds in the Constitution itself or in a federal law powers conferred upon the Yang di-Pertuan Agong that are expressed to be exercisable if he is of opinion or is satisfied that a particular

> state of affairs exists or that particular action is necessary, the reference to his opinion or satisfaction is in reality a reference to the collective opinion or satisfaction of the members of the cabinet, or the opinion or satisfaction of a particular minister to whom the cabinet have delegated their authority to give advice upon the matter in question."

56. Article 40 of the Malaysian Constitution is different to the provisions of the Constitution with which this appeal is concerned and does not permit other legislation to disapply the general rule in article 40(1) requiring the head of state to act in accordance with the advice of the cabinet. Nonetheless these general observations about the relationship between the head of state and cabinet are helpful. Both constitutions proceed on the basis that a power vested in the head of state to be exercised "in his discretion" permits him to exercise the power "on his own initiative" and without the need to obtain the advice of the cabinet. It is against that background that Lord Diplock expressed the view that a simple requirement for the head of state to be of the opinion or satisfied that a particular situation exists or that particular action is necessary, is to be read as, in reality, requiring the collective opinion or satisfaction of the members of the cabinet of that particular matter.

57. Finally, the Board's conclusion on this question is not affected or undermined by the fact that section 75(b) of the 2006 Act empowers the Commissioner to extend the term of an officer of the Second Division where he or she considers (without any advice from Cabinet) that it is in the national interest to do so. The obvious differences between the President and the Commissioner are, first, that the Commissioner will have direct familiarity with the police and national security considerations, so that advice from Cabinet might be seen as unnecessary. More significantly, there is no provision in the Constitution or elsewhere, like section 80(1) of the Constitution, which creates the presumption that functions vested in the Commissioner are not to be exercised by her personally but on the advice of Cabinet. Section 75(a) of the 2006 Act was drafted in the knowledge of section 80(1) of the Constitution with the result that Parliament was required to use clear words to indicate an intention that the President is required to act on her own initiative and not on the advice of Cabinet. The Constitution identifies what words will be regarded as doing so and what words will not, and none of the formulations recognised as sufficient to displace the general rule were used in this case.

58. The Board does not consider that there is any ambiguity in the meaning of the words in section 75(a) of the 2006 Act as would justify resort to Hansard in this case.

## 7. Conclusion

59. For all these reasons which are similar to those given by the Court of Appeal, section 75(a) of the 2006 Act is not unconstitutional and there is nothing unlawful in the decision of the President to extend the service of the Commissioner beyond her normal retirement age. The Order is therefore lawful. The Board accordingly dismisses this appeal.